



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2023-06, FAR Case 2021-012, Item III; Docket No. FAR-2021-0012; Sequence No. 1]

RIN 9000-AO29

Federal Acquisition Regulation: 8(a) Program

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration to update and clarify requirements associated with the 8(a) program.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202-803-3188 or by email at dana.bowman@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755

or *GSARegSec@gsa.gov*. Please cite FAC 2023-06, FAR Case 2021-012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 87 FR 76598 on December 15, 2022, to implement regulatory changes made by the Small Business Administration (SBA), in its final rule published in the *Federal Register* at 85 FR 66146 on October 16, 2020. SBA initiated a review of its regulations in response to the prior administration's Governmentwide regulatory reform initiative. As a result, SBA revised the 8(a) program regulations to more clearly articulate SBA's intent with regard to certain aspects of the 8(a) program to eliminate confusion and decrease burdens on procuring activities and 8(a) participants.

One respondent submitted comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule; however, no changes were made as a result of the public comments received. A discussion of the comments received is provided as follows:

A. Summary of Significant Changes

There are no significant changes from the proposed rule.

B. *Analysis of Public Comments*

1. Support for the rule.

Comment: The respondent expressed support for the rule.

Response: The Councils acknowledge the respondent's support for the rule.

2. Negative impacts of the rule.

Comment: The respondent indicated that moving contracts from the 8(a) Program inflicts harm on small businesses that are dependent upon those contracts for their growth and viability. The respondent indicated that it has had its contracts moved out of the 8(a) program into "new" contracts or limited competition contract vehicles, not available to all 8(a) program participants. The respondent indicated further that it is not always aware that a contract was to be moved to a limited competition contract, and if it was not a contract holder on that contract, then it could not pursue the opportunity. The respondent indicated that this can cause serious harm to small businesses that are counting on that revenue. The respondent stated that requiring notification to the SBA that a contract is being removed from the 8(a) Program is a positive step, but that it does not decrease the harm being done to a small business that is losing the contract. The respondent concluded that, overall, the proposed revisions are positive, but removing contracts from the 8(a) Program is detrimental to small businesses that are the backbone of the defense industrial base.

Response: The Councils acknowledge the respondent's concerns regarding the impact of moving contracts out of the 8(a) Program. This rule implements SBA's regulatory changes made in its final rule published at 85 FR 66146 on October 16, 2020, that clarified certain aspects of the 8(a) Program. To ensure procurements are not removed from the 8(a) Program without SBA consent, this rule adds a requirement for contracting officers to notify SBA of follow-on, non-8(a) procurements, and specifies that contracting officers should notify SBA when a mandatory source will be utilized for a follow-on to an 8(a) contract. This rule also clarifies that SBA may appeal a contracting officer's decision that an acquisition previously procured under the 8(a) Program is a new requirement not subject to the release requirements. However, and as stated in SBA's preamble, these changes do not modify existing 8(a) Program requirements; instead, they emphasize the requirement for SBA to agree to release a requirement from the 8(a) Program.

C. Other changes.

Minor editorial changes to the proposed rule were made at FAR 19.815(d), (e), and (f).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items or for Commercial Services

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses.

IV. Expected Impact of the Rule

This rule updates and clarifies requirements associated with the 8(a) program to eliminate confusion among 8(a) concerns and procuring activities. Contracting officers are required to submit blanket purchase agreements (BPAs) issued under FAR part 13 and FAR part 13 BPA orders in the 8(a) Program to SBA for acceptance. Contracting officers are also required to notify SBA of follow-on, non-8(a) procurements, and should notify SBA when a mandatory source will be utilized for a follow-on to an 8(a) contract. Additionally, the SBA certificate of competency program does not apply to 8(a) sole-source awards; therefore, contracting officers will no longer be required to submit these actions to SBA. The impact of these changes is expected to be beneficial to the Government, contractors, and offerors as 8(a) program requirements are clarified, and ambiguities are reduced for small business entities and procuring activities. Any cost to the Government is not expected to be significant.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to

select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

The Congressional Review Act (5 U.S.C. 801-808) requires interim and final rules to be submitted to Congress before the rule takes effect. DoD, GSA, and NASA will send this rule to each House of the Congress and to the Comptroller General of the United States. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601-612. The FRFA is summarized as follows:

DoD, GSA, and NASA are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration (SBA) to the 8(a) Program in its final rule dated October 16, 2020 (85 FR 66146). SBA revised its 8(a) program regulations to eliminate confusion among small businesses and procuring activities. The final rule clarifies that the certificate of competency program is not applicable to 8(a) sole-source

awards. Additionally, the final rule adds a requirement for the contracting officer to submit an offering letter for blanket purchase agreements (BPAs) and orders placed under BPAs under the 8(a) Program to SBA, and for SBA to accept such offers. The rule also clarifies an 8(a) concern's eligibility for two-step design build acquisitions and sole-source awards made under the 8(a) program. The rule also requires the procuring activity to submit a notification to SBA when a contracting officer determines that a procurement, previously procured under the 8(a) program, is a new requirement that is not subject to SBA release requirements. The rule also requires a notification when the procuring activity intends to procure a follow-on to an 8(a) procurement using an existing limited competition contract vehicle, not available to all 8(a) program participants, when the current or previous 8(a) contract was available to all 8(a) participants. This rule also specifies that SBA reserves the right to appeal these decisions.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

This final rule will impact 8(a) Program participants and the Government by clarifying the 8(a) Program regulations and ensuring follow-on requirements to 8(a) procurements remain in the 8(a) Program when appropriate. Based on data in the System for Award Management, the estimated number of 8(a) small businesses is 5,217, and the estimated number of 8(a) joint ventures is 384. Therefore, the estimated number of total small entities to which the rule applies is 5,601. According to the Federal Procurement Data System, 7,473 8(a) sole-source awards and 1,088 competitive 8(a) awards were made in FY 2020, and 6,369 8(a) sole-source awards and 1,251 competitive 8(a) awards were made in FY 2021, and 5,752 8(a) sole-source awards and 1,056 competitive 8(a) awards were made in FY 2022. This averages out to 6,531 8(a) sole-source awards and 1,132 competitive 8(a) awards made in the last three fiscal years.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known significant alternative approaches that would accomplish the stated objectives.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

List of Subjects in 48 CFR Part 19

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

1. The authority citation for 48 CFR part 19 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

19.601 [Amended]

2. Amend section 19.601 by—

a. Removing from paragraph (b) the phrase "Small Business Administration (SBA)" and adding "SBA" in its place; and

b. Removing from the first sentence of paragraph (c) the phrase "Government acquisitions" and adding "Government acquisitions except for 8(a) sole-source awards" in its place and removing from the second sentence of paragraph (c) the word "also".

3. Revise section 19.804-5 to read as follows:

19.804-5 Basic ordering agreements and blanket purchase agreements.

(a) The contracting office shall submit an offering letter for, and SBA must accept, each order under a basic ordering agreement (BOA) or a blanket purchase agreement (BPA) issued under part 13 (see 13.303), in addition to the agency offering and SBA accepting the BOA or BPA itself.

(b) SBA will not accept for award on a sole-source basis any order that would cause the total dollar amount of orders issued under a specific BOA or BPA to exceed the competitive threshold amount in 19.805-1.

(c) Once an 8(a) participant's program term expires, the participant otherwise exits the 8(a) program, or becomes other than small for the NAICS code assigned under the BOA or the BPA, SBA will not accept new orders under the BOA or BPA for the participant.

4. Amend section 19.805-2 by-

a. Revising the second sentence in paragraph (b) introductory text;

b. Redesignating paragraph (b) (2) as paragraph (b) (3); and

c. Adding a new paragraph (b) (2).

The revision and addition read as follows:

19.805-2 Procedures.

* * * * *

(b) * * * Eligibility is based on section 8(a) program criteria (see 13 CFR 124.501(g) and 19.816(c)). *

* *

(2) For a two-step design-build procurement, an 8(a) participant must be eligible for award under the 8(a) program on the initial date for receipt of phase one offers specified in the solicitation (see 13 CFR 124.507(d) (3)).

* * * * *

5. Amend section 19.808-1 by—

a. Redesignating paragraph (e) as paragraph (f);

b. Adding a new paragraph (e); and

c. Removing from the newly redesignated paragraph (f) the phrase "sole source award" and adding "sole-source award" in its place.

The addition reads as follows:

19.808-1 Sole source.

* * * * *

(e) A concern must be a current participant in the 8(a) program at the time of an 8(a) sole-source award.

* * * * *

6. Revise section 19.808-2 to read as follows:

19.808-2 Competitive.

In competitive 8(a) acquisitions, including follow-on 8(a) acquisitions, subject to part 15, the contracting officer conducts negotiations directly with the competing 8(a) participants. Conducting competitive negotiations among eligible 8(a) participants prior to SBA's formal acceptance of the acquisition for the 8(a) program may be grounds for the SBA's not accepting the acquisition for the 8(a) program.

7. Amend section 19.810 by adding paragraph (a)(4) to read as follows:

19.810 SBA appeals.

(a) * * *

(4) A contracting officer's decision that an acquisition previously procured under the 8(a) program is a new requirement not subject to the release requirements at 13 CFR 124.504(d)(1) (see 19.815(a) and (d)(1)).

* * * * *

8. Amend section 19.815 by-

- a. Revising the section heading and paragraph (a);
- b. Removing from paragraph (b) the phrase "a non-8(a) procurement" and adding "a follow-on, non-8(a) procurement," in its place; and
- c. Adding paragraphs (d) through (f).

The revisions and additions read as follows:

19.815 Release and notification requirements for non-8(a) procurement.

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements (see definition at 13 CFR 124.3) shall remain in the 8(a) program unless-

(1) SBA agrees to release the requirement from the 8(a) program for a follow-on, non-8(a) procurement in accordance with 13 CFR 124.504(d) (see paragraph (b) of this section); or

(2) There is a mandatory source (see 8.002 or 8.003; also see paragraph (f) of this section).

* * * * *

(d) (1) When a contracting officer decides that a requirement previously procured under the 8(a) program is a new requirement and not a follow-on requirement to an 8(a) contract(s), the contracting officer shall coordinate with and submit a written notice to the SBA District Office servicing the 8(a) incumbent firm and to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) indicating that the agency intends to procure the requirement outside the 8(a) program (see 19.810(a)(4)).

(2) The written notice shall include a copy of the acquisition plan, if available; the performance work statement (PWS), statement of work (SOW), or statement of

objectives (SOO) for the new contract requirement; and the values of the existing 8(a) contract(s) and the new contract requirement.

(e)(1) When a contracting officer decides to procure a follow-on requirement to an 8(a) contract using an existing, limited competition contracting vehicle that is not available to all 8(a) participants, and the current or previous 8(a) contract was available to all 8(a) participants, the contracting officer shall coordinate with and submit a written notice to the SBA District Office servicing the 8(a) incumbent firm and to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) indicating the intent to do so.

(2) The written notice shall include a copy of the acquisition plan, if available; the PWS, SOW, or SOO for the new contract requirement; and the values of both contracts.

(f)(1) When a mandatory source will be used for a follow-on requirement to an 8(a) contract, the contracting officer should submit a written notice to the SBA Associate Administrator for Business Development of the intent to do so at least 30 days prior to the end of the contract or order in accordance with 13 CFR 124.504(d)(4)(ii).

(2) The written notice should include a written determination that a mandatory source will be used to fulfill the requirement.

19.816 [Amended]

9. Amend section 19.816 by removing from paragraph (c) the word "criteria" and adding "criteria (see 13 CFR 124.507(d))" in its place.

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