



**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 16**

[FAR Case 2024-007, Docket No. FAR-2024-0007, Sequence No. 1]

**RIN 9000-AO76**

**Federal Acquisition Regulation: Protests of Orders Under Certain Multiple-Award Contracts**

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

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to clarify protest rights for orders set aside under certain multiple-award contracts.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2024-007 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case

2024-007". Select the link "Comment Now" that corresponds with "FAR Case 2024-007". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2024-007" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

*Instructions:* Please submit comments only and cite "FAR Case 2024-007" in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Carrie Moore, Procurement Analyst, at 571-300-5917 or by email at [carrie.moore@gsa.gov](mailto:carrie.moore@gsa.gov). For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the

Regulatory Secretariat Division at 202-501-4755 or  
*GSARegSec@gsa.gov*. Please cite FAR Case 2024-007.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are proposing to revise the FAR to clarify protest rights, in accordance with existing statute and regulations, when an order is or is not set aside. This includes whether the action was taken in accordance with the policy proposed in FAR Case 2023-011, Small Business Participation on Certain Multiple-Award Contracts, published at XX FR XXX, on January XX, 2025.

To increase small business opportunities and maximize their participation on multiple-award contracts, FAR Case 2023-011 proposes guidance for contracting officers regarding how to exercise the statutory grant of discretion to set aside an order for a small business under a multiple-award contract. Under that proposed rule, if the contracting officer determines that there is a reasonable expectation of obtaining offers from two or more responsible small business awardees that are competitive in terms of various criteria under the applicable multiple-award contract, then the order should be set aside for small business. This proposed rule for FAR Case 2024-007 clarifies that the proposed rule for FAR Case 2023-011 does not alter the existing statutory grant of discretion to agencies as to whether or not to set aside an order. The

proposed rule for FAR Case 2023-011, if finalized, cannot alter the existing protest rights in connection with the issuance or proposed issuance of an order under a multiple-award contract. (See FAR 16.505(a)(10), 41 U.S.C. 4106, and 10 U.S.C. 3406.)

## **II. Discussion and Analysis**

This proposed rule adds clarifying text to FAR part 16 to specify that a contracting officer's decision to set aside or not set aside an order under a multiple-award contract is not grounds for protest.

Specifically, under 15 U.S.C. 644(r), Federal agencies, and contracting officers acting on behalf of those agencies, are granted discretion as to whether to set aside an order under a multiple-award contract for small businesses. This statutory grant of discretion means that agencies are not required to set aside orders; it is a choice. To the extent a bid protest challenges an agency's decision to set aside or not set aside an order for small business, that protest challenges a discretionary act statutorily committed to agency decision-making, and therefore cannot form the basis for a protest seeking to compel an agency to make a different choice.

This issue has not been clearly understood and has been subject to litigation, which is why FAR Case 2023-011 proposes to clarify guidance for agencies and this FAR Case 2024-007 proposes to clarify protest rights. On the one

hand, in a series of decisions, the U.S. Government Accountability Office (GAO) has determined that 15 U.S.C. 644(r) "clearly provides for granting agency officials discretion in deciding whether to set aside orders under multiple-award contracts." Aldevra, B-411752 (Oct. 16, 2015), 2015 CPD ¶ 339. In a separate decision, GAO discussed 15 U.S.C. 644(r) and the regulations implementing that provision in the FAR and issued by the SBA, and concluded that, "we think it is beyond debate that these regulations, by their plain language, grant discretion to a contracting officer about whether to set aside for small business participation task orders placed under multiple-award contracts." See FAR 19.502-4 and 16.505(b)(2)(i)(F). Edmond Scientific Co., B-410179 (Nov. 12, 2014), 2014 CPD ¶ 336. On the other hand, the U.S. Court of Federal Claims, in Tolliver Group, Inc. v. United States, 151 Fed. Cl. 70 (2020), held that an agency is required to apply the Rule of Two prior to deciding to utilize a given multiple-award contract, and that, if the Rule of Two is satisfied, the agency is required to set the contract aside for small business. The Court rejected the position that 15 U.S.C. 644(r) provides agencies with discretion to utilize a multiple-award contract and then decide whether to set the order aside for small business.

Through the proposed rule for FAR case 2023-011, as well as this proposed rule, DoD, GSA, and NASA seek to

address the confusion and disagreement regarding the discretion that is provided to agencies by clarifying the guidance previously issued under 15 U.S.C. 644(r). DoD, GSA, and NASA agree with, and adopts, GAO's conclusion that "the statutory grant of discretion does not require application of the Rule of Two prior to issuing an order, unless the multiple-award contract or task order solicitation expressly anticipated the use of the Rule of Two." ITility, LLC, B-419167 (Dec. 23, 2020), 2020 CPD ¶ 412. Furthermore, as GAO explained in this decision, the discretion provided by the statute necessarily means that an agency decision as to whether to set aside an order, or not to set it aside, under a multiple-award contract, is not a decision that can be challenged via a bid protest: "Where Congress has enunciated a clear policy granting contracting officials discretion, and the Executive Branch's regulatory implementation similarly emphasizes the statutory grant of discretion, our Office cannot substitute the parties' or our own judgments on the matter." Id.

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

#### **IV. Expected Impact of the Rule**

This proposed rule is expected to impact contractors and the Government by clarifying that the proposed policies of FAR Case 2023-011 and the existing statutory grant of discretion to agencies as to whether or not to set aside an order do not alter the existing protest rights in connection with the issuance or proposed issuance of an order under a multiple-award contract. As such, this clarification is expected to deter contractors from submitting protests of decisions to set aside or not set aside orders placed against multiple-award contracts, thereby saving contractors and the Government time and resources.

This savings in time and resources is expected to expedite the award of such orders and preclude delays in meeting mission needs. This rule is also expected to provide clarity for all parties in the protest process.

#### **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 (as amended by E.O. 14094) and 13563 direct agencies to assess the 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 under section 3(f)(1) of E.O. 12866 and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **VI. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this proposed rule, if finalized, to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612, because this rule only clarifies protest statute and regulations for contractors and the Government. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to specify that the policy of FAR Case 2023-011, which proposes guidance for contracting officers regarding how to exercise the existing statutory grant of discretion to agencies as to whether or not to set aside an order, does not alter the existing protest rights in connection with the issuance or proposed issuance of an order under a multiple-award contract.

The objective of this rule is to clarify protest regulations in the FAR regarding the set-aside of certain orders under multiple-award contracts. Promulgation of FAR regulations is authorized by 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.

This proposed rule will impact small business contract holders under certain multiple-award contracts. Specifically, small entities will have clear guidance regarding when an order under a multiple-award contract may be protested. The impacts of this rule cannot be quantified, as there is no reliable way to estimate the number of protests that would have occurred without this proposed rule; therefore, there is no data with which to accurately reflect the number of small entities to which this rule will apply. Instead, this rule has the potential to benefit any small entity looking to do business with the Government under certain multiple-award contracts. According to data from the System for Award Management

(SAM), there are approximately 384,100 small entities currently registered in SAM to do business with the Government. This proposed rule has the potential to impact any number of these small entities, depending on several factors, including: the primary industry of the entity; the Government's future needs for products and services; and the entity's submission of proposals and offers for orders to be placed against multiple-award contracts.

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities. The proposed rule does not duplicate or conflict with any other Federal rules. This rule is related to and overlaps with the proposed rule for FAR Case 2023-011.

There are no known significant alternative approaches to the proposed rule that would accomplish the stated objectives of the rule and further minimize any significant economic impact of this proposed rule on small entities, as the economic impact is not anticipated to be significant.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2024-007), in correspondence.

## **VII. 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 16**

Government procurement.

**William F. Clark,**  
Director,  
Office of Government-wide  
Acquisition Policy,  
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Therefore, DoD, GSA, and NASA propose amending 48 CFR part 16 as set forth below:

### **PART 16—TYPES OF CONTRACTS**

1. The authority citation for 48 CFR part 16 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.

2. Amend section 16.505 by adding paragraph (a)(10)(iv) to read as follows:

#### **16.505 Ordering.**

(a) \* \* \*

(10) \* \* \*

(iv) In accordance with 15 U.S.C. 644(r), a contracting officer's decision to set aside or not set

aside an order for small business concerns is an exercise of discretion granted to agencies and not a basis for protest. However, this does not preclude the filing of a protest of such an order if such a protest would otherwise be authorized on a separate basis recognized in accordance with paragraph (a)(10)(i) of this section.

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