

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 6, 15, and 19**

[FAC 2005–58; FAR Case 2009–038; Item III; Docket 2010–0095, Sequence 1]

RIN 9000–AL55

**Federal Acquisition Regulation;
Justification and Approval of Sole-
Source 8(a) Contracts**

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 adopting as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2010. This section requires the head of an agency to execute and make public prior to award, the justification for an 8(a) sole-source contract in an amount exceeding \$20 million.

DATES: *Effective Date:* April 18, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at 202–501–2364, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–58, FAR Case 2009–038.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 76 FR 14559 on March 16, 2011, to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010 (NDAA for FY 2010) (Pub. L. 111–84). Section 811 prohibits the award of a sole-source contract in an amount over \$20 million under the 8(a) Business Development Program authority (15 U.S.C. 637(a)) without first obtaining a written Justification and Approval (J&A) approved by an appropriate official and making public the J&A and related information. Section 811 does not institute any requirement for J&As for sole-source 8(a) contracts less than or equal to \$20 million. Nine respondents submitted comments on the interim 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. A discussion of the comments is provided as follows:

A. Summary of Significant Changes

There were no changes made to the FAR as a result of the public comments received.

B. Analysis of Public Comments**1. General Support for the Rule as Written**

Comment: A majority of the respondents were supportive of the rule as written and recommended there be no substantial changes to the interim rule.

Response: The Councils acknowledge receipt of these comments in support of the rule.

2. Statutory Basis for the Rule

Comment: A number of respondents commented that there is no statutory basis for the new language at FAR 19.808–1(a), which states that the Small Business Administration (SBA) may not accept a sole-source 8(a) contract in excess of \$20 million for negotiation, unless the requesting agency has completed a J&A in accordance with FAR 6.303. The respondents recommended amending this language in the final rule to clarify that the J&A is only required to be developed and executed prior to award and after coordinating and negotiating with the SBA (or the 8(a) participant where SBA has delegated its authority to the procuring agency).

Response: The law stipulates that the head of the agency may not award a sole-source contract that exceeds \$20 million under the 8(a) program unless the contracting officer justifies the use of a sole-source contract in writing and the justification is approved by the appropriate official. However, the law does not specify the precise stage in the contract award process when the J&A must be executed. The language that was added to FAR 19.808–1 ensures that the J&A is executed prior to contract negotiation, a critical juncture in the contract award continuum. Contract negotiation, with rare exception, occurs before the contract is awarded; therefore there is no conflict with the law.

Execution of the J&A prior to the SBA's initiation of contract negotiations adheres to the established procedures in the FAR that require (1) at FAR 6.303–1, the contracting officer to justify the

use of a sole-source contract in writing prior to negotiations; and (2) at FAR 19.804–2, the agency, if appropriate, to request in its offering letter to the SBA, that a requirement with a contract value over the applicable competitive threshold be awarded as a sole-source contract under the 8(a) program. The language that was added at FAR 19.808–1 does not pre-empt the obligation of agencies to cooperate with the SBA in determining the extent to which a requirement should be offered in support of the 8(a) program, nor does it impact SBA's acceptance of the requirement into the 8(a) program. It does not affect the timing of SBA's eligibility determination.

3. Including the Value of Options in Contract Value

Comment: Several respondents recommended that the \$20 million threshold be applicable to the base year only, rather than including options in the total contract value.

Response: The standard contract action valuation practice is outlined in FAR 1.108(c), which provides that the final anticipated dollar value of an action include the dollar value of all options. Section 811 does not provide a basis to diverge from this standard.

4. Cross Reference at FAR 6.204(b)

Comment: One respondent recommended striking the parenthetical text at FAR 6.204(b), which references the requirements for a separate justification to support the use of 8(a) sole-source awards in FAR subpart 6.3, because it was unnecessary and potentially confusing.

Response: The Councils considered the comment, but find that the cross reference adds clarity to the FAR text.

5. Content of Justification

Comment: A number of respondents recommended that the language at FAR 6.303–2(d)(5) be amended in the final rule to clarify the other matters the head of the agency should consider when justifying and approving the award of a sole-source 8(a) contract in excess of \$20 million. These considerations should include Native American economic development and meeting agency small business goals.

Response: FAR 6.303–2(d)(5), as currently written, requires agency heads to address “Such other matters as the head of the agency concerned shall specify for purposes of this section.” This gives agency heads the discretion to consider Native American economic development and meeting agency small business goals, as well as other relevant

matters when justifying and approving the award of a sole-source 8(a) contract.

6. Potential Impact on Native American-Owned Firms

Comment: Several respondents expressed concern regarding the possible impact facing Native American-owned enterprises. The respondents pointed out that the 8(a) program has undergone considerable reform over the last two years and has experienced overwhelming success in achieving its goals. The respondents also emphasized that the vast majority of Native American-owned enterprises have consistently provided high value support to their Government customers. In view of these considerations, the respondents requested that each executive agency send a policy directive to their contracting officers to outline the benefits of the SBA 8(a) program and the positive impact this program has had for Native participants.

Response: The benefits of SBA's 8(a) program and the positive impact this program has had for Native participants are promoted by SBA and the Office of Small and Disadvantaged Business Utilization (OSDBU) on a consistent basis throughout the Government. Each Federal agency with contracting authority has established an OSDBU. The OSDBU advocates for small, small disadvantaged (including the 8(a) program), veteran, service-disabled veteran-owned, HUBZone, and women-owned businesses. The OSDBU is charged with promoting increased access for small businesses to procurement opportunities, conducting outreach efforts, and providing liaison support for small and disadvantaged businesses. In addition, the OSDBU works closely with program officers and contracting officers to assist in the accomplishment of the annual Governmentwide 5 percent procurement goals for small disadvantaged businesses.

III. 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 a significant regulatory action and, therefore, was subject to review under section 6(b) of

E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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, *et seq.*, because the rule does not impose any additional requirements on the majority of small businesses. The rule implements the statutory requirements mandated by section 811, Justification and Approval of Sole-Source Contracts, of the National Defense Authorization Act for Fiscal Year 2010. It is recognized that a very small number of businesses that have been awarded 8(a) contracts over the \$20 million threshold may be impacted. However, the rule does not limit the number of contracts or dollars awarded to these businesses. The rule may also indirectly benefit the 8,833 currently certified section 8(a) firms by improving their likelihood of a contract award through increased competition, but this impact is similarly considered not significant.

V. Paperwork Reduction Act

The final 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. chapter 35).

List of Subjects in 48 CFR Parts 6, 15, and 19

Government procurement.

Dated: April 11, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 6, 15, and 19, which was published in the **Federal Register** at 76 FR 14559 on March 16, 2011, is adopted as a final rule without change.

[FR Doc. 2012-9204 Filed 4-17-12; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1 and 52

[FAC 2005-58; Item IV; Docket 2012-0079; Sequence 2]

Federal Acquisition Regulation; Technical Amendments

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

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes.

DATES: *Effective Date:* April 18, 2012.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat, 1275 First Street NE., 7th Floor, Washington, DC 20417, 202-501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-58, Technical Amendments.

SUPPLEMENTARY INFORMATION: In order to update certain elements in 48 CFR parts 1 and 52, this document makes editorial changes to the FAR.

List of Subjects in 48 CFR Parts 1 and 52

Government procurement.

Dated: April 11, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. Amend section 1.201-1 by revising paragraph (c) to read as follows:

1.201-1 The two councils.

* * * * *

(c) The Director of the DAR Council shall be the representative of the Secretary of Defense. The operation of the DAR Council will be as prescribed by the Secretary of Defense.