

Dated: April 24, 2018.

Shay D. Assad,

Director, Defense Pricing/Defense Procurement and Acquisition Policy.

Dated: April 23, 2018.

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Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: April 24, 2018.

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Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005-98; FAR Case 2017-007; Item I; Docket No. 2017-0007, Sequence No. 1]

RIN 9000-AN41

Federal Acquisition Regulation: Task- and Delivery-Order Protests

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 a section of the National Defense Authorization Act for Fiscal Year 2017 to raise the threshold for task- and delivery-order protests from \$10 million to \$25 million (applicable to DoD, NASA, and the Coast Guard) and to repeal the sunset date for the authority to protest the placement of an order (for the other civilian agencies), which was also previously repealed by the GAO Civilian Task and Delivery Order Protest Authority Act of 2016.

DATES: *Effective:* May 31, 2018.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Gray, Procurement Analyst, at 703-795-6328, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-98, FAR Case 2017-007.

SUPPLEMENTARY INFORMATION:

I. Background

Section 835 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) was enacted December 23, 2016. Section 835(a) amended 10 U.S.C. 2304c(e)(1)(B) to raise the threshold for task- and delivery-order protests from \$10 million to \$25 million (applicable to DoD, NASA, and the Coast Guard). Section 835(b) amended 41 U.S.C. 4106(f) to repeal the sunset date of September 30, 2016, of the authority to protest the placement of an order (for the other civilian agencies). The sunset date was already repealed on December 14, 2016, by the GAO Civilian Task and Delivery Order Protest Authority Act of 2016 (Pub. L. 114-260).

II. Discussion and Analysis

This final rule amends FAR 16.505(a)(10) to raise the threshold for DoD, NASA, and the Coast Guard from \$10 million to \$25 million and remove the sunset date for the other civilian agencies.

III. Expected Cost Savings

The rule is administrative in nature—it follows the statute exactly, raising a threshold and removing a sunset date.

Currently, FAR 16.505(a)(10)(i) prohibits any protest in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract; or the order is valued in excess of \$10 million. This FAR change implements section 835 of the National Defense Authorization Act for Fiscal Year 2017 to—

- Raise the threshold at which a protest may be filed at the Government Accountability Office (GAO) for task or delivery orders from \$10 million to \$25 million, applicable only to DoD, NASA, and the Coast Guard; and
- Remove the sunset date (September 30, 2016) for the authority to protest the placement of an order for agencies other than DoD, NASA, and the Coast Guard. Although, according to GAO, there are fewer than 10 protests per year of procurements between \$10 million and \$25 million, the higher threshold for protests of task or delivery orders for DoD, NASA, and the Coast Guard will result in savings for GAO and the affected Executive branch agencies, because there will no longer be protests of orders valued between \$10 million and \$25 million based on dollar value. While it is difficult to quantify, the lost benefit to interested parties who will

lose the right to protest as a result of this rule is likely de minimis, given the historical data from GAO indicating a small number of protests in the affected dollar range. Further, there are some benefits to offerors or contractors who win awards and will no longer need to expend resources defending challenges to the award. Therefore, the net burden of this rule is estimated as less than zero, though the FAR Council is not able to monetize cost savings.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new solicitation provisions or clauses, or impact any existing provisions or clauses.

V. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is the Office of Federal Procurement Policy statute (codified at Title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it follows the statute exactly, raising a threshold and removing a sunset date.

VI. 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. This

rule is not a major rule under 5 U.S.C. 804.

VII. Executive Order 13771

Pursuant to E.O. 13771, this rule is a deregulatory action. Information on the expected cost savings of this action can be found in section III of the preamble.

VIII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section V. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

IX. Paperwork Reduction Act

The 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 Part 16

Government procurement.

Dated: April 25, 2018.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR part 16 as set forth below:

PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for part 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

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

16.505 Ordering.

(a) * * *

(10)(i) No protest under subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except—

(A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(B)(1) For agencies other than DoD, NASA, and the Coast Guard, a protest of an order valued in excess of \$10 million (41 U.S.C. 4106(f)); or

(2) For DoD, NASA, or the Coast Guard, a protest of an order valued in excess of \$25 million (10 U.S.C. 2304c(e)).

(ii) Protests of orders in excess of the thresholds stated in 16.505(a)(10)(i)(B) may only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005-98; FAR Case 2017-008: Item II; Docket No. 2017-0008; Sequence No. 1]

RIN 9000-AN36

Federal Acquisition Regulation: Duties of Office of Small and Disadvantaged Business Utilization

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 reflect sections of the National Defense Authorization Act for Fiscal Year 2017, which amend section 15(k) of the Small Business Act to provide additional duties for agencies' Office of Small and Disadvantaged Business Utilization (OSDBU), and for DoD's Office of Small Business Programs (OSBP).

DATES: *Effective:* May 31, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Janet Fry, Procurement Analyst, at 703-605-3167 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-98, FAR Case 2017-008.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are amending the FAR to reflect sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), which amend the Small Business Act to provide additional duties for OSDBUs. By operation of 10 U.S.C. 144(b), these additional duties also apply to OSBPs. Section 1812, paragraph (a) of section 1813, and paragraph (b) of section 1821 of the NDAA for FY 2017 amend section 15(k)

of the Small Business Act to add duties for OSDBUs and OSBPs.

Section 1812 of the NDAA for FY 2017 amends the Small Business Act to specifically reference the existing duties of OSDBUs and OSBPs with respect to the various small business programs and consolidation of contract requirements. Section 1812 also requires that OSDBUs and OSBPs review summary purchase card data for acquisitions above the micro-purchase threshold (*e.g.*, \$3,500), but below the simplified acquisition threshold (*e.g.*, \$150,000), to ensure these acquisitions are compliant with the Small Business Act and have been properly recorded in the Federal Procurement Data System (FPDS). The revision to the FAR reflecting section 1812 of the NDAA includes flexibility for each OSDBU or OSBP to identify the best purchase card data available to their agency when implementing the statutory requirement.

Paragraph (a) of section 1813 requires OSDBUs and OSBPs to provide assistance to a small business prime contractor or subcontractor in finding resources for education and training on compliance with the FAR after award of their contract or subcontract.

Paragraph (b) of section 1821 requires OSDBUs and OSBPs to review all required small business subcontracting plans to ensure that they provide maximum practicable opportunity for small business concerns to participate as subcontractors.

Currently, acquisition-related duties of OSDBUs and OSBPs are found in FAR 19.201, General policy. The duties found in FAR 19.201 are based on the duties found in section 15(k) of the Small Business Act (15 U.S.C. 644(k)). Additional OSDBU and OSBP acquisition-related duties enacted before the NDAA for FY 2017 listed at 15 U.S.C. 644(k), which were not previously updated in the FAR, are also included in this rule.

Additionally, this rule revises the OSDBU and OSBP duty at FAR 19.201(c)(5), which relates to increasing small business participation in solicitations that involve bundling. This revision reflects that OSDBUs and OSBPs perform much broader functions under those scenarios than what is currently listed in the FAR.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy,