

classified information) or create other security risks.

\* \* \* \* \*

(5) *Decision documentation for orders.* (i) The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.

(ii) The contract file shall also identify the basis for using an exception to the fair opportunity process (*see* paragraph (b)(2)).

\* \* \* \* \*

## PART 18—EMERGENCY ACQUISITIONS

### 18.105 [Amended]

■ 15. Amend section 18.105 by removing “(See 8.405–3(a)(4))” and adding “(see 8.405–3(a)(6))” in its place.

## PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

■ 16. Amend section 38.101 by revising the second sentence in paragraph (e) to read as follows:

### 38.101 General.

\* \* \* \* \*

(e) \* \* \* The requirements of parts 5, 6, and 19 apply at the acquisition planning stage prior to issuing the schedule solicitation and, generally, do not apply to orders and BPAs placed under resulting schedule contracts (except *see* 8.404).

[FR Doc. 2011–5553 Filed 3–15–11; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 6, 15, and 19

[FAC 2005–50; 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

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

**ACTION:** Interim rule.

**SUMMARY:** DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010. This FAR change encourages agencies to maximize the effective use of competition by making certain that the proper Justification and Approval (J&A) is obtained prior to award of 8(a) sole-source contracts over \$20 million, as required by section 811.

**DATES:** *Effective Date:* March 16, 2011.

*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–50, FAR Case 2009–038, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–038” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009–038.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–038” on your attached document.

- *Fax:* (202) 501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

*Instructions:* Please submit comments only and cite FAC 2005–50, FAR Case 2009–038, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Anthony Robinson, Procurement Analyst, at (202) 501–2658, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2009–038.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA are issuing an interim rule amending the FAR, to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), enacted October 28, 2009. Section 811 requires

a J&A prior to awarding a sole-source contract in an amount over \$20 million under the 8(a) program (15 U.S.C. 637(a)). This written J&A must be approved by an appropriate official and, after award, made public. Authorized by 15 U.S.C. 637(a), the 8(a) program enables contract awards to be made to small business concerns determined eligible for the 8(a) program by the Small Business Administration (SBA).

The requirement for a J&A is not a ceiling or a “cap” on sole-source awards over \$20 million for 8(a) contractors. The statute requires execution of a J&A documenting the reasons for making the award on a sole-source basis rather than competing among the small businesses in the 8(a) program. Prior to the enactment of section 811, a sole-source award of a new contract made using the 8(a) contracting authority did not require a J&A, regardless of the dollar value, and the new statute does not institute any requirement for a J&A for sole-source 8(a) awards that are less than or equal to \$20 million.

##### II. Discussion and Analysis

Section 811 became effective on the date of enactment, October 28, 2009. Section 811 addresses requirements for the J&A of sole-source contracts over \$20 million under the 8(a) small-business development program.

The Federal Acquisition Regulatory Council (FAR Council) held three Tribal consultation and outreach meetings to discuss rulemaking associated with section 811.

The meetings took place during October 2010 in Washington, DC; Albuquerque, New Mexico; and Fairbanks, Alaska (*see* the meeting notice that was published in the **Federal Register** on August 31, 2010 at 75 FR 53269). Transcripts of the meetings are available at [http://www.acq.osd.mil/dpap/dars/section811\\_docs.html](http://www.acq.osd.mil/dpap/dars/section811_docs.html).

After the meetings, DoD, GSA, and NASA weighed the costs and benefits of publishing this rule as proposed or interim. The rule is being published as interim, rather than proposed, because the rule is implementing a statutory mandate, and the statutory date for issuance of regulations has already passed. Because this is an interim rule, the public will have another opportunity to comment. These additional comments could result in further changes in the final rule.

A frequently heard comment at the October meetings was a request that the FAR not use the 12 elements currently required at FAR 6.303–2 for J&As for less than full-and-open competition, but instead limit the elements to be addressed to the five elements listed in

section 811(b), which are set forth as follows:

(1) A description of the needs of the agency concerned for the matters covered by the contract;

(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract;

(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned;

(4) A determination that the anticipated cost of the contract will be fair and reasonable; and

(5) Such other matters as the head of the agency concerned shall specify.

DoD, GSA, and NASA have drafted the interim FAR rule to adopt only these five elements. DoD, GSA, and NASA did not adopt the suggestions raised in the October meetings (1) not to include the fair and reasonable price determination and (2) not to allow agency heads to address any matter, without specific limits (the fifth element set out in section 811). A determination that the anticipated cost of a contract will be fair and reasonable is a universal requirement in Federal contracting; including the requirement in the J&A would be sensible, even if it were not specifically required by section 811.

A common issue raised in the meetings was that the fifth element, "Such other matters as the head of the agency concerned shall specify," was too broad. DoD, GSA, and NASA determined that it made sense to allow agency heads to identify other factors supporting the decision to make a sole-source 8(a) award. By retaining the wording from the statute, agency heads retain the discretion to consider such factors as Indian economic development or meeting agency small business contracting goals—both factors that participants in the October meetings offered as legitimate reasons to make a sole-source award.

Commenters at the meetings and in the written comments also requested that the "over \$20 million" threshold for requiring a J&A be applied only to the base year of a contract. For example, if a requirement was for \$75 million, with a base year estimate of \$15 million and four one-year \$15 million options, commenters stated their belief that the requirement should not need a J&A because the base-year amount was not over \$20 million. DoD, GSA, and NASA have declined to use the base year amount as the basis for determining the applicability of the J&A requirement. The FAR (1.108(c)) establishes the following rule:

• *Dollar thresholds.* Unless otherwise specified, a specific dollar threshold for the

purpose of applicability is the final anticipated dollar value of the action, including the dollar value of all options. If the action establishes a maximum quantity of supplies or services to be acquired or establishes a ceiling price or establishes the final price to be based on future events, the final anticipated dollar value must be the highest final priced alternative to the Government, including the dollar value of all options.

Unless there is a specific reason, such as a statutory requirement to establish the dollar value of a procurement using a different method, agencies will not deviate from this FAR convention.

Commenters also requested that the requirement for the agency head to approve the J&A be delegated down to a much lower level, such as the contracting officer. FAR 1.108(b) states the following:

• *Delegation of authority.* Each authority is delegable unless specifically stated otherwise. \* \* \*

J&As are delegable, but there are limits on the redelegation authority based on the dollar value of the procurement; these are stated at FAR 6.304. The competition advocate for the procuring activity and the head of the procuring activity are included in the approval authorities to ensure the J&A is prepared and coordinated properly within the agency. Unless there is a specific reason, agencies will not deviate from the FAR convention at FAR 6.304.

A commenter was concerned about whether "fair and reasonable price" equates to "fair market price." The FAR provides various provisions to address the commenter's concern. The various techniques that contracting officers may use to determine that a price is fair and reasonable are described at FAR 15.404–1, Proposal analysis techniques. With regard to 8(a) contracts, FAR 19.202–6(b) states that contracting officers shall follow the procedures at FAR 19.807, which reads in pertinent part as follows:

Estimating fair market price.

• The contracting officer shall estimate the fair market price of the work to be performed by the 8(a) contractor.

• In estimating the fair market price for an acquisition other than those covered in paragraph (c) of this section, the contracting officer shall use cost or price analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including certified cost or pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency.

As required by the FAR, agencies will continue to use the existing regulations to evaluate prices offered for 8(a) contracts over \$20 million.

The changes made by the interim rule are summarized as follows:

(1) Cross references to the requirement for a J&A when the procurement is a sole-source 8(a) over \$20 million are added at FAR 6.204, entitled "Section 8(a) competition," FAR 6.302–5, entitled "Authorized or required by statute," and in 19.808–1, entitled "Sole source".

(2) FAR 6.302–5, which sets forth the situations in which other than full-and-open competition is authorized or required by statute, has been modified to clarify that, while 8(a) sole-source awards are still authorized, they now must be supported by a J&A prior to award when the total estimated contract amount is over \$20 million.

(3) Circumstances requiring a J&A for other than full-and-open competition have been expanded to include a new FAR 6.303–1(b) that includes the section 811(a) prohibition against awarding a sole-source 8(a) contract over \$20 million unless a written J&A is approved by the appropriate official and made public after award.

(4) FAR 6.303–2, Content, (of the J&A) has a new paragraph that lists the five required elements for the sole-source 8(a) J&A from section 811.

(5) FAR 19.808–1(a), Sole source, was revised to inform the contracting officer that the SBA may not accept for negotiation a sole-source 8(a) contract over \$20 million unless the requesting agency has completed a J&A in accordance with the requirements at FAR 6.303.

Other requirements of section 811 were reviewed by DoD, GSA, and NASA and determined to be fully covered by the existing FAR. The specific areas reviewed included—

(1) *The definition of a "covered procurement" at section 811(c)(1).* Review determined that covered procurements, for the purposes of section 811, are those made under the SBA's Section 8(a) program. Therefore, it was not necessary to define and use the term "covered procurement" in this rule.

(2) *The definition of "head of an agency" at section 811(c)(2).* Review of the statutory references in this section determined that the FAR-wide definition of this term at FAR 2.101 could be used.

(3) *The definition of "appropriate official" at section 811(c)(3).* The statutory references provided in this section equate to those currently in FAR 6.304, Approval of the Justification.

(4) *Requirement for synopses of proposed procurement actions.* The existing FAR synopsis requirements at subpart 5.2, Synopses of Proposed

Contract Actions, were reviewed. No change is proposed to FAR 5.202, Exceptions, or FAR 5.205, Special situations, because the statute did not modify the existing 8(a) synopsis requirements.

(5) Requirement at section 811(a)(3) to make the J&A and related information available to the public. This statutory requirement matches the J&A publication requirements added by the National Defense Authorization Act for Fiscal Year 2008, section 844, entitled "Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts" (FAR Case 2008-003). The latter FAR case added the requirement to FAR 6.305, Availability of the Justification. Any J&A issued for an 8(a) sole-source contract award over \$20 million will require posting in accordance with FAR 6.305, but no further change to that section is necessary.

Various commenters at the public meetings questioned whether contracting officers will be trained on the content of this rule implementing section 811. DoD, GSA, and NASA have prepared and submitted documentation to the Defense Acquisition University and the Federal Acquisition Institute to coordinate the appropriate changes in training curricula.

### III. Executive Order 12866

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 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

DoD, GSA, and NASA do not expect this interim rule to have a significant negative 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 requirements on the majority of small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. 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 9,165, 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.

Also, the FAR Council has limited flexibility in this case as the rule

implements in the FAR statutory requirements mandated by section 811, Justification and Approval of Sole-Source Contracts, of the National Defense Authorization Act for Fiscal Year 2010.

DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this 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, (FAC 2005-50, FAR Case 2009-038) in correspondence.

### V. Paperwork Reduction Act

The interim rule implements section 811, which prohibits the award of a sole-source contract in an amount over \$20 million under the 8(a) program authority (15 U.S.C. 637(a)) without the contracting officer first obtaining a written J&A approved by an appropriate official and making public the J&A and related information. This additional paperwork requirement is internal to the Government and 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).

### VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) was enacted on October 28, 2009. Section 811 required the FAR to be revised no later than 180 days after enactment, or April 26, 2010. Absent implementation of this interim rule, section 811 will not be implemented in the FAR and agencies will not be compliant with this provision. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

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

Government procurement.

Dated: March 4, 2011.

**Millisa Gary,**

*Acting Director, Office of Governmentwide Acquisition Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 6, 15, and 19 as set forth below:

■ 1. The authority citation for 48 CFR parts 6, 15, and 19 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 6—COMPETITION REQUIREMENTS

■ 2. Amend section 6.204 by adding a sentence to the end of paragraph (b) to read as follows:

#### 6.204 Section 8(a) competition.

\* \* \* \* \*

(b) \* \* \* (But see 6.302-5 and 6.303-1 for sole source 8(a) awards over \$20 million.)

■ 3. Amend section 6.302-5 by revising paragraphs (b)(4) and (c)(2) to read as follows:

#### 6.302-5 Authorized or required by statute.

\* \* \* \* \*

(b) \* \* \*

(4) Sole source awards under the 8(a) Program (15 U.S.C. 637), but see 6.303 for requirements for justification and approval of sole-source 8(a) awards over \$20 million. (See subpart 19.8.)

\* \* \* \* \*

(c) \* \* \*

(2) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304, except for—

(i) Contracts awarded under (a)(2)(ii) or (b)(2) of this subsection;

(ii) Contracts awarded under (a)(2)(i) of this subsection when the statute expressly requires that the procurement be made from a specified source. (Justification and approval requirements apply when the statute authorizes, but does not require, that the procurement be made from a specified source); or

(iii) Contracts less than or equal to \$20 million awarded under (b)(4) of this subsection.

\* \* \* \* \*

■ 4. Amend section 6.303-1 by redesignating paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e), respectively; and adding a new paragraph (b) to read as follows:

**6.303-1 Requirements.**

\* \* \* \* \*

(b) The contracting officer shall not award a sole-source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding \$20 million unless—

(1) The contracting officer justifies the use of a sole-source contract in writing in accordance with 6.303-2;

(2) The justification is approved by the appropriate official designated at 6.304; and

(3) The justification and related information are made public after award in accordance with 6.305.

\* \* \* \* \*

■ 5. Amend section 6.303-2 by—

■ a. Redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively;

■ b. Adding a new paragraph (a);

■ c. Revising newly redesignated paragraph (b) introductory text; and

■ d. Adding a new paragraph (d).

The added and revised text reads as follows:

**6.303-2 Content.**

(a) Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited.

(b) As a minimum, each justification, except those for sole-source 8(a) contracts over \$20 million (*see* paragraph (d) of this section), shall include the following information:

\* \* \* \* \*

(d) As a minimum, each justification for a sole-source 8(a) contract over \$20 million shall include the following information:

(1) A description of the needs of the agency concerned for the matters covered by the contract.

(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract (*see* 19.805-1).

(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

(4) A determination that the anticipated cost of the contract will be fair and reasonable.

(5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

**6.304 [Amended]**

■ 6. Amend section 6.304 by removing from paragraph (a)(1) “6.303-2(a)(12)” and adding “6.303-2(b)(12)” in its place.

**PART 15—CONTRACTING BY NEGOTIATION**

**15.607 [Amended]**

■ 7. Amend section 15.607 by removing from paragraph (b)(2) “6.303-2(b)” and adding “6.303-2(c)” in its place.

**PART 19—SMALL BUSINESS PROGRAMS**

■ 8. Amend section 19.808-1 by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively; and adding a new paragraph (a) to read as follows:

**19.808-1 Sole source.**

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds \$20 million unless the requesting agency has completed a justification in accordance with the requirements of 6.303.

\* \* \* \* \*

[FR Doc. 2011-5554 Filed 3-15-11; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 10, 16, 44, and 52**

[FAC 2005-50; FAR Case 2008-007; Item IV; Docket 2010-0086, Sequence 1]

RIN 9000-AL50

**Federal Acquisition Regulation; Additional Requirements for Market Research**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 826, Market Research, of the National Defense Authorization Act for Fiscal Year 2008. Section 826 requires the head of an agency to take appropriate steps to ensure that any prime contractor of a contract (or task order or delivery order) in an amount in excess of \$5 million for the procurement of items other than commercial items engages in market research as necessary before making purchases.

**DATES:** *Effective Date:* April 15, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-50, FAR Case 2008-007.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 34277 on June 16, 2010, to implement section 826, Market Research, of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 826 establishes additional requirements in subsection (c) of 10 U.S.C. 2377. As a matter of policy, these requirements are extended to all executive agencies. Specifically, the head of the agency must conduct market research before issuing an indefinite-delivery indefinite-quantity task or delivery order for a noncommercial item in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold for or on behalf of the Government. Three respondents submitted 16 comments on the interim rule.

**II. Discussion/Analysis**

*Public Comments:* A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

*A. Purpose*

1. *Comment:* One respondent stated that the guidance does not appear to explain the end purpose of the market research. Another respondent, however, concluded that the FAR states the purpose of the market research twice, in FAR 44.402(b) and 10.001(a)(3). The second respondent stated that the purpose for conducting market research is “clearly described in Part 10 and there is no reason to repeat that same language elsewhere in the FAR.”

*Response:* The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) agree with the second respondent. FAR part 10 “prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services” (FAR 10.000). FAR 10.001(a)(3) lists the ways in which the