

A. Background

While indicating that performance specifications are the preferred method for describing the Government's needs, this final rule permits the use of brand name or equal purchase descriptions. The rule clarifies how brand name or equal purchase descriptions are structured, *i.e.*, salient functional, physical, or performance characteristics must be part of the description.

The Councils published a proposed rule in the **Federal Register** at 63 FR 63778, November 16, 1998, and considered all comments in the development of this final rule.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may 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 affects how purchase descriptions may be written for competitive procurements. The Final Regulatory Flexibility Analysis (FRFA) for this rule is summarized as follows:

The objective of the final rule is to provide more comprehensive, uniform FAR guidance on the appropriate use of brand name purchase descriptions. Application of the guidance supports consistent use of such purchase descriptions in Federal acquisitions. The rule will apply to all large and small entities that offer supplies to the Government that are brand name items or are comparable to such items. We anticipate that the selected approach will be the most advantageous to small entities, while achieving the objective of the rule because this approach best enables the Government to express its requirements clearly and describe the degree of flexibility with which offered supplies or services will be evaluated as "equal."

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy of the FRFA from the FAR Secretariat. We invite comments. The Councils will consider comments from small entities concerning the affected FAR subpart in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 97-12, FAR case 96-018), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the

FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 11 and 52

Government procurement.

Dated: June 9, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 11 and 52 as set forth below:

1. The authority citation for 48 CFR parts 11 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 11—DESCRIBING AGENCY NEEDS

2. Redesignate sections 11.104 and 11.105 as sections 11.105 and 11.106, respectively; and add new sections 11.104 and 11.107 to read as follows:

11.104 Use of brand name or equal purchase descriptions.

(a) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances.

(b) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements.

11.107 Solicitation provision.

The contracting officer must insert the provision at 52.211-6, Brand Name or Equal, when brand name or equal purchase descriptions are included in a solicitation.

11.105 [Amended]

2a. Amend the introductory paragraph and paragraph (a) of newly redesignated section 11.105 by removing "brand-name" and adding "brand name" in its place.

PART 37—SERVICE CONTRACTING

37.602-1 [Amended]

3. Amend section 37.602-1 in the second sentence of paragraph (a) by removing "(see 11.105)" and adding "(see 11.106)" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 52.211-6 to read as follows:

52.211-6 Brand Name or Equal.

As prescribed in 11.107, insert the following provision:

Brand Name or Equal (Aug 1999)

(a) If an item in this solicitation is identified as "brand name or equal," the purchase description reflects the characteristics and level of quality that will satisfy the Government's needs. The salient physical, functional, or performance characteristics that "equal" products must meet are specified in the solicitation.

(b) To be considered for award, offers of "equal" products, including "equal" products of the brand name manufacturer, must—

(1) Meet the salient physical, functional, or performance characteristic specified in this solicitation;

(2) Clearly identify the item by—

(i) Brand name, if any; and

(ii) Make or model number;

(3) Include descriptive literature such as illustrations, drawings, or a clear reference to previously furnished descriptive data or information available to the Contracting Officer; and

(4) Clearly describe any modifications the offeror plans to make in a product to make it conform to the solicitation requirements. Mark any descriptive material to clearly show the modifications.

(c) The Contracting Officer will evaluate "equal" products on the basis of information furnished by the offeror or identified in the offer and reasonably available to the Contracting Officer. The Contracting Officer is not responsible for locating or obtaining any information not identified in the offer.

(d) Unless the offeror clearly indicates in its offer that the product being offered is an "equal" product, the offeror shall provide the brand name product referenced in the solicitation.

(End of provision)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 19, and 52

[FAC 97-12; FAR Case 98-011; Item III]

RIN 9000-A133

Federal Acquisition Regulation; SBA's 8(a) Business Development Program

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement revisions made to Small Business Administration (SBA) regulations pertaining to its 8(a) Business Development (8(a)BD) Program.

DATES: Effective June 17, 1999.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before August 16, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405. Address e-mail comments submitted via the Internet to: farcase.98-011@gsa.gov. Please cite FAC 97-12, FAR case 98-011 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 97-12, FAR case 98-011.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends FAR parts 12, 19, and 52 to conform to recent amendments made by the Small Business Administration (SBA) to their regulations pertaining to the 8(a)BD Program. The SBA published a final rule in the **Federal Register** on June 30, 1998 (63 FR 35726). The SBA rule amended the eligibility procedures for admission to the 8(a)BD and contractual assistance programs. These changes involve administrative matters concerning requirement offerings, contract execution, contract administration, and SBA appeals.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect the interim rule 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, *et seq.*, because the rule merely addresses changes made by the Small Business Administration (SBA) to 13 CFR parts 121, 124, and 134. The SBA has certified that the changes set forth in its rule will not have a significant economic impact on a substantial number of small entities because the changes do not increase the net number of current 8(a) certified small businesses or the net number of current 8(a) participants by more than 500 to 800 businesses, or less than 1 percent of all small businesses seeking Government contracts. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAR case 98-011), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. 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 to conform the Federal Acquisition Regulation to revisions made in 13 CFR parts 121, 124, and 134 pertaining to the Small Business Administration (SBA) 8(a)BD Program. The SBA final rule became effective on June 30, 1998. However, pursuant to Pub. L. 98-577 and FAR 1.501, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council 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 12, 19, and 52

Government procurement.

Dated: June 9, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 19, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. In section 12.102, amend paragraph (d)(3) by removing “or”; in (d)(4) by removing the period and adding “; or”; and add (d)(5) to read as follows:

12.102 Applicability.

* * * * *

(d) * * *

(5) Directly from another Federal agency.

PART 19—SMALL BUSINESS PROGRAMS

3. In section 19.101, amend paragraph (g)(2) by revising the paragraph heading and the first sentence, and adding a sentence to the end of the paragraph to read as follows:

19.101 Explanation of terms.

* * * * *

(g) * * *

(2) *Joint venture—acquisition and property sale assistance.* Concerns bidding on a particular acquisition or property sale as joint ventures are considered as affiliated and controlling or having the power to control each other with regard to performance of the contract. * * * The rules governing 8(a) Program joint ventures are described in 13 CFR 124.513.

* * * * *

4. Revise section 19.302(a) to read as follows:

19.302 Protesting a small business representation.

(a) An offeror, the SBA, or another interested party may protest the small business representation of an offeror in a specific offer. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA.

* * * * *

5. In section 19.800, redesignate paragraph (d) as (e); and add new paragraphs (d) and (f) to read as follows:

19.800 General.

* * * * *

(d) The SBA refers to this program as the 8(a) Business Development (BD) Program.

* * * * *

(f) When SBA has delegated its 8(a) Program contract execution authority to an agency, the contracting officer must refer to its agency supplement or other policy directives for appropriate guidance.

19.802 [Amended]

6. Amend section 19.802 by revising the citation "13 CFR 124.101-113" to read "13 CFR 124.101-112".

7. In section 19.804-2, revise paragraphs (a)(5), (a)(8), (a)(9), and (a)(12) through (a)(14); redesignate paragraph (a)(15) as (a)(16), and add a new paragraph (a)(15) to read as follows:

19.804-2 Agency offering.

(a) * * *

(5) Any special restrictions or geographical limitations on the requirement (for construction, include the location of the work to be performed).

* * * * *

(8) The acquisition history, if any, of the requirement, including the names and addresses of any small business contractors that have performed this requirement during the previous 24 months.

(9) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business or HUBZone set-aside and that no other public communication (such as a notice in the Commerce Business Daily) has been made showing the contracting agency's clear intention to set-aside the acquisition for small business or HUBZone small business concerns.

* * * * *

(12) Identification of all known 8(a) concerns, including HUBZone 8(a) concerns, that have expressed an interest in being considered for the specific requirement.

(13) Identification of all SBA field offices that have asked for the acquisition for the 8(a) Program.

(14) A request, if appropriate, that a requirement with an estimated contract value under the applicable competitive threshold be awarded as an 8(a) competitive contract (see 19.805-1(d)).

(15) A request, if appropriate, that a requirement with a contract value over the applicable competitive threshold be awarded as a sole source contract (see 19.805-1(b)).

* * * * *

8. Amend section 19.804-3 by revising paragraph (a); and adding paragraphs (c) and (d) to read as follows:

19.804-3 SBA acceptance.

(a) Upon receipt of the contracting agency's offer, the SBA will determine whether to accept the requirement for the 8(a) Program. The SBA's decision whether to accept the requirement will be transmitted to the contracting agency in writing within 10 working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold and within 2 days of receipt if the contract is at or below the simplified acquisition threshold. The contracting agency may grant an extension of these time periods. If SBA does not respond to an offering letter within 10 days, the contracting activity may seek SBA's acceptance through the Associate Administrator (AA)/8(a)BD.

* * * * *

(c) For acquisitions not exceeding the simplified acquisition threshold, when the contracting activity makes an offer to the 8(a) Program on behalf of a specific 8(a) firm and does not receive a reply to its offer within 2 days, the contracting activity may assume the offer is accepted and proceed with award of an 8(a) contract.

(d) As part of the acceptance process, SBA will review the appropriateness of the SIC code designation assigned to the requirement by the contracting activity.

(1) SBA will not challenge the SIC code assigned to the requirement by the contracting activity if it is reasonable, even though other SIC codes may also be reasonable.

(2) If SBA and the contracting activity are unable to agree on a SIC code designation for the requirement, SBA may refuse to accept the requirement for the 8(a) Program, appeal the contracting officer's determination to the head of the agency pursuant to 19.810, or appeal the SIC code designation to the SBA Office of Hearings and Appeals under subpart C of 13 CFR part 134.

9. Revise section 19.804-4 to read as follows:

19.804-4 Repetitive acquisitions.

In order for repetitive acquisitions to be awarded through the 8(a) Program, there must be separate offers and acceptances. This allows the SBA to determine—

(a) Whether the requirement should be a competitive 8(a) award;

(b) A nominated firm's eligibility, whether or not it is the same firm that performed the previous contract;

(c) The effect that contract award would have on the equitable distribution of 8(a) contracts; and

(d) Whether the requirement should continue under the 8(a) Program.

10. Add sections 19.804-5 and 19.804-6 to read as follows:

19.804-5 Basic ordering agreements.

(a) The contracting activity must offer, and SBA must accept, each order under a basic ordering agreement (BOA) in addition to offering and accepting the BOA 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 to exceed the competitive threshold amount in 19.805-1.

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

19.804-6 Multiple award and Federal Supply Schedule contracts.

(a) Separate offers and acceptances must not be made for individual orders under multiple award or Federal Supply Schedule (FSS) contracts. SBA's acceptance of the original multiple award or FSS contract is valid for the term of the contract.

(b) The requirements of 19.805-1 do not apply to individual orders that exceed the competitive threshold as long as the original contract was completed.

(c) An 8(a) concern may continue to accept new orders under a multiple award or FSS contract even after a concern's program term expires, the concern otherwise exits the 8(a) Program, or the concern becomes other than small for the SIC code assigned under the contract.

11. Amend section 19.805-1 in paragraph (a)(2) by removing "award price" and adding "total value" in its place; and revise paragraphs (b)(2) and (d) to read as follows:

19.805-1 General.

* * * * *

(b) * * *

(2) SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaska Native Corporation.

* * * * *

(d) The SBA Associate Administrator for 8(a) Business Development (AA/8(a)BD) may approve an agency request for a competitive 8(a) award below the competitive thresholds. Such requests will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) firms are available for competition. In determining whether a request to compete below the threshold will be approved, the AA/8(a)BD will, in part, consider the extent to which the requesting agency is supporting the 8(a)

Program on a noncompetitive basis. The agency may include recommendations for competition below the threshold in the offering letter or by separate correspondence to the AA/8(a)BD.

19.805-2 [Amended]

12. Amend section 19.805-2 as follows:

- a. Remove paragraph (a);
- b. Redesignate paragraphs (b) through (e) as (a) through (d), respectively;
- c. In new redesignated paragraph (a), remove the words "the SBA instructions provided under"; and
- d. In new redesignated paragraph (d), revise "13 CFR 124.111(c)" to read "13 CFR 124.517".

19.806 [Amended]

13. In section 19.806, amend paragraph (c) by adding "within 10 working days" after the word "price."

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

19.808-2 Competitive.

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

15. Revise section 19.809 to read as follows:

19.809 Preaward considerations.

The contracting officer should request a preaward survey of the 8(a) contractor whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the firm's ability to perform, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under subpart 19.6.

16. Amend section 19.810 by revising paragraphs (a) and (b) to read as follows:

19.810 SBA appeals.

(a) The SBA Administrator may submit the following matters for determination to the agency head if the SBA and the contracting officer fail to agree on them:

- (1) The decision not to make a particular acquisition available for award under the 8(a) Program.
- (2) A contracting officer's decision to reject a specific 8(a) firm for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) Program.
- (3) The terms and conditions of a proposed 8(a) contract, including the contracting activity's SIC code

designation and estimate of the fair market price.

(b) Notification of a proposed appeal to the agency head by the SBA must be received by the contracting officer within 5 working days after the SBA is formally notified of the contracting officer's decision. The SBA will provide the agency Director for Small and Disadvantaged Business Utilization a copy of this notification of the intent to appeal. The SBA must send the written appeal to the head of the contracting activity within 15 working days of SBA's notification of intent to appeal or the contracting activity may consider the appeal withdrawn. Pending issuance of a decision by the agency head, the contracting officer must suspend action on the acquisition. The contracting officer need not suspend action on the acquisition if the contracting officer makes a written determination that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision.

* * * * *

17. In section 19.811-1, revise the last sentence in the introductory text of paragraph (c); and add paragraph (d) to read as follows:

19.811-1 Sole source.

* * * * *

(c) * * * Appropriate blocks on the Standard Form (SF) 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

* * * * *

(d) For acquisitions not exceeding the simplified acquisition threshold, the contracting officer may use the alternative procedures in paragraph (c) of this subsection with the appropriate simplified acquisition forms.

19.811-2 [Amended]

18. Amend the introductory text of section 19.811-2(a) by adding "as a tripartite agreement" after the word "appended".

19. Amend section 19.812 by revising paragraph (d) to read as follows:

19.812 Contract administration.

* * * * *

(d) An 8(a) contract, whether in the base or an option year, must be terminated for convenience if the 8(a) concern to which it was awarded transfers ownership or control of the firm or if the contract is transferred or novated for any reason to another firm, unless the Administrator of the SBA waives the requirement for contract termination (13 CFR 124.515). The Administrator may waive the

termination requirement only if certain conditions exist. Moreover, a waiver of the requirement for termination is permitted only if the 8(a) firm's request for waiver is made to the SBA prior to the actual relinquishment of ownership or control, except in the case of death or incapacity where the waiver must be submitted within 60 days after such an occurrence. The clauses in the contract entitled "Special 8(a) Contract Conditions" and "Special 8(a) Subcontract Conditions" require the SBA and the 8(a) subcontractor to notify the contracting officer when ownership of the firm is being transferred. When the contracting officer receives information that an 8(a) contractor is planning to transfer ownership or control to another firm, the contracting officer must take action immediately to preserve the option of waiving the termination requirement. The contracting officer should determine the timing of the proposed transfer and its effect on contract performance and mission support. If the contracting officer determines that the SBA does not intend to waive the termination requirement, and termination of the contract would severely impair attainment of the agency's program objectives or mission, the contracting officer should immediately notify the SBA in writing that the agency is requesting a waiver. Within 15 business days thereafter, or such longer period as agreed to by the agency and the SBA, the agency head must either confirm or withdraw the request for waiver. Unless a waiver is approved by the SBA, the contracting officer must terminate the contract for convenience upon receipt of a written request by the SBA. This requirement for a convenience termination does not affect the Government's right to terminate for default if the cause for termination of an 8(a) contract is other than the transfer of ownership or control.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.219-18 [Amended]

20. Amend section 52.219-18 by revising the date of the clause to read "(JUNE 1999)"; by removing paragraph (a)(1) of the clause; and redesignating paragraphs (a)(2) and (a)(3) as (a)(1) and (a)(2), respectively.

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