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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 18, 19 and 52

[FAC 2005-95; FAR Case 2012-022; Item IV; Docket No. 2012-0022, Sequence No. 1]

RIN 9000-AM68

Federal Acquisition Regulation; Contracts Under the Small Business Administration 8(a) Program

AGENCIES: 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 regulatory clarifications made by the Small Business Administration regarding the 8(a) program.

DATES: Effective: **[Insert date of publication in the FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703-605-2868, or by email at mahruba.uddowla@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-95, FAR Case 2012-022.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 79 FR 6135 on February 3, 2014, soliciting public comments regarding the implementation of regulatory clarifications made by the Small Business Administration (SBA) under section 8(a) of the Small Business Act (15 U.S.C. 637(a)). The proposed rule provided additional guidance for the evaluation, offering, and acceptance process; procedures for releasing a requirement for non-8(a) procurement; and information on the effect exiting the 8(a) program will have on its current contractual obligations and the firm's ability to receive new 8(a) requirements. Six respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments is provided.

A. Summary of significant changes

The final rule contains revisions to the language at FAR 19.804-6(a) to clarify that offers and acceptances are required for individual orders under multiple-award

contracts that were not set aside for competition among 8(a) contractors. The final rule also revises the language at FAR 19.814(a) to indicate that the SBA Inspector General can request a formal size determination. In addition, the final rule revises the language at FAR 19.815 regarding the release of requirements from the 8(a) program. Language has been added to clarify that any follow-on 8(a) requirement shall remain in the 8(a) program unless there is a mandatory source for the requirement pursuant to FAR 8.002 or 8.003 or SBA agrees to release the requirement for procurement outside the 8(a) program.

B. Analysis of public comments

1. Support proposed changes.

Comment: One respondent stated support for the changes made in the proposed rule.

Response: The Councils acknowledge receipt of this comment.

2. Potential conflict with other statutorily mandated socioeconomic programs.

Comment: Two respondents expressed concern that the proposed language at FAR 19.815 appeared to be in conflict with other socioeconomic programs, such as the Javits-Wagner-O'Day (JWOD) Act (now codified at 41 U.S.C. chapter 85). The proposed rule at FAR section 19.815, Release for

non-8(a) procurement, implies that the SBA Associate Administrator for Business Development will only consider releasing requirements from the 8(a) program when there are assurances that the requirement will be procured under another small business program. However, the proposed rule does not mention that another reason a requirement must be released is when it can be procured under a statutory authority other than the Small Business Act. For example, if the requirement has been placed on the Procurement List by the Committee for Purchase from People Who are Blind or Severely Disabled (AbilityOne), it must, by law, be procured under JWOD, using the procedures at FAR subpart 8.7. These respondents asked for further clarification of this point in the FAR.

Response: The purpose of FAR 19.815 is to clarify that the contracting officer must submit a formal request to the SBA Associate Administrator for the release of a requirement that is currently accepted into the 8(a) program, if he or she intends to procure the item from a non-8(a) source. It further clarifies the factors SBA will take into consideration when determining whether to release the requirement from the 8(a) program.

This clarification does not conflict or eliminate an agency's obligation to follow the procedures at FAR 8.002,

Priorities for use of mandatory Government sources, and FAR 8.003, Use of other mandatory sources. As stated in these sections of the FAR, an agency may consider satisfying its requirement(s) through a commercial source, such as a small business, only after it has exhausted the possibility of fulfilling its requirement through one of the mandatory sources identified in FAR 8.002 or 8.003. However, new language has been added at FAR 19.815(a) and (b), to clarify that a requirement accepted into the 8(a) program shall remain in the 8(a) program unless the requirement can be satisfied through one of the mandatory sources listed at FAR 8.002 or 8.003 or the SBA Associate Administrator for Business Development agrees to release it.

3. The rule gives preference to 8(a) program participants over other small businesses or other small business socioeconomic programs.

Comment: One respondent remarked that FAR 19.800(d) appears to give preferential treatment to 8(a) awards over other small business or other socioeconomic goals. FAR 19.800(d) of the proposed rule states the following: "the contracting officer shall consider 8(a) set-asides or sole source awards before considering small business set-asides..." This respondent stated that each agency should have autonomy in achieving its own socioeconomic goals.

Response: The language in question already existed in the FAR as 19.800(e), but was renumbered as 19.800(d) by the proposed rule. The intent of the language at FAR 19.800(d) of the proposed rule is to further convey the policy established at FAR 19.203(c), i.e., for acquisitions above the simplified acquisition threshold (SAT), the contracting officer shall first consider small business socioeconomic contracting programs, such as the HUBZone program, the service-disabled veteran-owned small business (SDVOSB) program, the women-owned small business program (WOSB), and the 8(a) program, before considering a small business set-aside, thus allowing agencies to independently tailor acquisition strategies based on their small business and small business socioeconomic goaling achievements. Similar language appears in FAR subparts 19.13, 19.14, and 19.15, though it is adapted to suit the specific socioeconomic program under discussion, i.e., HUBZone, SDVOSB program, or the WOSB program. For further information on the socioeconomic parity rules within the small business programs, refer to the final rule for FAR case 2011-004, Socioeconomic Program Parity, published in the Federal Register at 77 FR 12930 on March 2, 2012.

4. Further clarification of 8(a) offer and acceptance procedures is needed.

Comment: A respondent recommended that the language at FAR 19.804-3(c)(2), which discusses sole source awards where the contracting officer has not nominated a specific 8(a) participant, be amended to allow the contracting officer to have input in the selection process and the opportunity to concur with SBA's selection.

Response: The guidance provided in the FAR for "open" sole source requirements is consistent with SBA's regulations at 13 CFR part 124. In open sole source requirements, the agency provides input into the selection through its offering letter, including such criteria as the special capabilities or disciplines needed for contract performance. Concurrence with SBA's selection is evidenced by the contracting officer's signature on the tripartite agreement or, where SBA has delegated 8(a) contract execution functions to an agency, the contracting officer's signature on the contract award document.

Comment: One respondent requested additional guidance to clarify when the contracting office may assume SBA's acceptance of a requirement valued below the SAT that is not offered on behalf of a specific 8(a) participant. For acquisitions at or below the SAT, FAR 19.804-3(a)(2) states that the contracting office may assume SBA's acceptance has occurred within two working days when the offer was made on

behalf of a specific 8(a) participant; however, the FAR is silent regarding when the contracting officer may assume SBA's acceptance of a requirement that was not offered on behalf of a specific 8(a) participant.

Response: Although the proposed rule contained minor editorial revisions in this paragraph, the basic guidance was not changed because it is consistent with SBA's regulations. In order for SBA to make the decision to accept an offer of a requirement into the 8(a) program, it must have reasonable assurance that an eligible 8(a) participant is available.

In the case of a sole source requirement at or below the SAT, when the contracting officer has identified a specific 8(a) participant, SBA will normally respond within two working days. This quick turnaround is attributed to the fact that SBA will usually accept the requirement on behalf of the 8(a) program in support of the specific participant nominated in the offering letter. However, when a contracting officer submits an open requirement to SBA, i.e., does not identify a specific participant for the performance of the sole source requirement, the matching process is more complicated, and SBA will require variable amounts of time to pair the offered requirement with an 8(a) participant possessing the competencies needed for

successful performance. For this reason, a definitive time frame for assuming SBA's acceptance of an open requirement below the SAT is not provided in the FAR.

5. Editorial recommendations.

Comment: One respondent recommended the inclusion of a definitions section, rather than defining all the terms at FAR 19.800(a). This respondent suggested that the new Definitions section should define the terms "offering letter" and "competitive threshold."

Response: The intent of the rule is to provide needed clarification of certain aspects of the 8(a) program relating to Federal procurement. In its present format, the definitions of certain terms such as "offering letter" and "competitive threshold" occur in the FAR section where the phrase is introduced and the primary discussion of these subjects takes place. For example, the meaning of the term "offering letter" is explained in FAR 19.804-2, Agency offering, which is the area where the subject matter is introduced and where the primary discussion of offering letters is located. Similarly, the discussion of "competitive threshold" occurs in two back-to-back sections of FAR subpart 19.8, where the term is defined and its primary discussion takes place.

Comment: One respondent stated that the language at FAR 19.816(a) pertaining to an 8(a) contractor's eligibility to receive contracts after exiting the 8(a) program requires further explanation, since it appears to conflict with FAR 19.804-6 as well as section 19.816(c). This respondent suggested that the verbiage "except as provided in FAR 19.804-6 and paragraph 19.816(c)..." be added to ensure these exceptions are made clear.

Response: FAR 19.816(a) has been revised to add "[e]xcept as provided in 19.816(c)..." However, FAR 19.804-6 addresses different subject matter. FAR 19.804-6 discusses the conditions by which an 8(a) prime contractor may continue to accept new orders under its existing multiple-award, indefinite-delivery, indefinite-quantity contract. On the other hand, FAR 19.816 discusses the contractual obligations upon exiting the 8(a) program.

Comment: One respondent stated that the language at FAR 19.816(c) pertaining to a contractor's eligibility to receive contracts after exiting the program should be further clarified. Based on the assumption that an 8(a) contractor would necessarily have new North American Industry Classification System (NAICS) code applicability upon exiting the program, the respondent recommended that additional language be added to stipulate that the

contractor must have been eligible for contract award in the specific NAICS code(s) identified in the contract on the initial date specified for receipt of offers.

Response: The recommended change is unnecessary since 8(a) program eligibility is already addressed in FAR sections 19.802, 19.803, and 19.805 of the rule.

Comment: Two respondents suggested a few minor editorial changes.

Response: All suggested minor editorial changes have been incorporated.

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

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule amends the FAR to implement regulatory changes that SBA made to the 8(a) program. The final rule clarifies procedures and requirements used when agencies are contracting under the 8(a) Program. Among other issues, these changes include clarification of the evaluation, offering, and acceptance process; procedures for acquiring SBA's consent to procure an 8(a) requirement outside the 8(a) program; and the impact of exiting the 8(a) program in terms of the firm's ability to receive future 8(a) requirements and its current contractual commitments. These revisions do not place any new requirements, financial or otherwise, on small entities, and serve mainly to provide more explicit guidance to Federal contracting officials.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

Currently, the 8(a) Program has approximately 6,885 active Participants, and of these, approximately 1,289 are owned by Native Americans. These entities may be economically impacted by the changes addressed in this final rule.

This rule does not impose any new information collection requirements on small businesses. The rule will have no direct negative impact on any small business concern, since it merely provides clarification of existing procedures and requirements used by agencies when contracting under the 8(a) Program.

There are no alternative approaches that will accomplish the stated objectives of the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to

the Chief Counsel for Advocacy of the Small Business Administration.

V. 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 Parts 5, 6, 18, 19 and 52.

Government procurement.

Dated: December 21, 2016.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 6, 18, 19 and 52 as set forth below:

1. The authority citation for 48 CFR parts 5, 6, 18, 19 and 52 continues to read as follows:

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

PART 5—PUBLICIZING CONTRACT ACTIONS

2. Amend section 5.205 by revising paragraph (f) to read as follows:

5.205 Special situations.

* * * * *

(f) Section 8(a) competitive acquisition. When a national buy requirement is being considered for competitive acquisition limited to eligible 8(a) participants under subpart 19.8, the contracting officer must transmit a synopsis of the proposed contract action to the GPE. The synopsis may be transmitted to the GPE concurrent with submission of the agency offering (see 19.804-2) to the Small Business Administration (SBA). The synopsis should also include information—

(1) Advising that the acquisition is being offered for competition limited to eligible 8(a) participants;

(2) Specifying the North American Industry Classification System (NAICS) code;

(3) Advising that eligibility to participate may be restricted to 8(a) participants in either the developmental stage or the developmental and transitional stages; and

(4) Encouraging interested 8(a) participants to request a copy of the solicitation as expeditiously as possible since the solicitation will be issued without further notice upon SBA acceptance of the requirement for the section 8(a) program.

* * * * *

PART 6—COMPETITION REQUIREMENTS

3. Revise section 6.204 to read as follows:

6.204 Section 8(a) competition.

(a) To fulfill statutory requirements relating to section 8(a) of the Small Business Act, as amended by Public Law 100-656, contracting officers may limit competition to eligible 8(a) participants (see subpart 19.8).

(b) No separate justification or determination and findings is required under this part to limit competition to eligible 8(a) participants. (But see 6.302-5 and 6.303-1 for sole source 8(a) awards over \$22 million.)

PART 18—EMERGENCY ACQUISITIONS

18.114 [Amended]

4. Amend section 18.114 by removing "firms" and adding "participants" in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.000 [Amended]

5. Amend section 19.000 by removing from paragraph (a) (3) "business development".

6. Revise section 19.800 to read as follows:

19.800 General.

(a) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and award subcontracts for performing those contracts to firms eligible for program participation. This program is the "8(a) Business Development Program," commonly referred to as the "8(a) program." A small business that is accepted into the 8(a) program is known as a "participant." SBA's subcontractors are referred to as "8(a) contractors." As used in this subpart, an 8(a) contractor is an 8(a) participant that is currently performing on a Federal contract or order that was set aside for 8(a) participants.

(b) Contracts may be awarded to the SBA for performance by eligible 8(a) participants on either a sole source or competitive basis.

(c) Acting under the authority of the program, the SBA certifies to an agency that SBA is competent and responsible to perform a specific contract. The contracting officer has the discretion to award the contract to the SBA based upon mutually agreeable terms and conditions.

(d) The contracting officer shall comply with 19.203 before deciding to offer an acquisition to a small business concern under the 8(a) program. For acquisitions above the simplified acquisition threshold, the contracting officer shall consider 8(a) set-asides or sole source awards before considering small business set-asides.

(e) 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.

7. Revise section 19.802 to read as follows:

19.802 Determining eligibility for the 8(a) program.

Determining the eligibility of a small business to be a participant in the 8(a) program is the responsibility of the SBA. SBA's regulations on eligibility requirements for participation in the 8(a) program are found at 13 CFR 124.101 through 124.112.

8. Revise section 19.803 to read as follows:

19.803 Selecting acquisitions for the 8(a) program.

Through their cooperative efforts, the SBA and an agency match the agency's requirements with the capabilities of 8(a) participants to establish a basis for the agency to contract with the SBA under the program. Selection is initiated in one of three ways:

(a) The SBA advises the contracting activity of an 8(a) participant's capabilities through a search letter and requests the contracting activity to identify acquisitions to support the participant's business plans. In these instances, the SBA will provide at a minimum the following information in order to enable the contracting activity to match an acquisition to the participant's capabilities:

- (1) Identification of the participant and its owners.
- (2) Background information on the participant, including any and all information pertaining to the participant's technical ability and capacity to perform.
- (3) The participant's present production capacity and related facilities.
- (4) The extent to which contracting assistance is needed in the present and the future, described in terms that will enable the agency to relate the participant's plans to present and future agency requirements.

(5) If construction is involved, the request shall also include the following:

(i) A participant's capabilities in and qualifications for accomplishing various categories of construction work typically found in North American Industrial Category System subsector 236 (construction of buildings), subsector 237 (heavy and civil engineering construction), or subsector 238 (specialty trade contractors).

(ii) The participant's capacity in each construction category in terms of estimated dollar value (e.g., electrical, up to \$100,000).

(b) The SBA identifies a specific requirement for one or more 8(a) participant(s) and sends a requirements letter to the agency's Office of Small and Disadvantaged Business Utilization, or for the Department of Defense, Office of Small Business Programs, requesting the contracting office offer the acquisition to the 8(a) program. In these instances, in addition to the information in paragraph (a) of this section, the SBA will provide—

(1) A clear identification of the acquisition sought; e.g., project name or number;

(2) A statement as to how the required equipment and real property will be provided in order to ensure that

the participant will be fully capable of satisfying the agency's requirements;

(3) If construction, information as to the bonding capability of the participant(s); and

(4) Either—

(i) If a sole source request—

(A) The reasons why the participant is considered suitable for this particular acquisition; e.g., previous contracts for the same or similar supply or service; and

(B) A statement that the participant is eligible in terms of its small business size status relative to the assigned NAICS code, business support levels, and business activity targets; or

(ii) If competitive, a statement that at least two 8(a) participants are considered capable of satisfying the agency's requirements and a statement that the participants are also eligible in terms of their small business size status relative to the assigned NAICS code, business support levels, and business activity targets. If requested by the contracting office, SBA will identify at least two such participants and provide information concerning the participants' capabilities.

(c) Agencies may also review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA. Where agencies independently, or through the self marketing efforts of an 8(a) participant, identify a requirement for the 8(a) program, they may offer on behalf of a specific 8(a) participant, for the 8(a) program in general, or for 8(a) competition.

9. Revise section 19.804-1 to read as follows:

19.804-1 Agency evaluation.

In determining the extent to which a requirement should be offered in support of the 8(a) program, the agency should evaluate-

(a) Current and future plans to acquire the specific items or work that 8(a) participants are seeking to provide, identified in terms of-

(1) Estimated quantities of the supplies or services required or the estimated number of construction projects planned; and

(2) Performance or delivery requirements, including-

(i) Required monthly production rates, when applicable; and

(ii) For construction, the geographical location where work is to be performed;

(b) The impact of any delay in delivery;

(c) Whether the items or work have previously been acquired using small business set-asides, and the date the items or work were acquired;

(d) Problems encountered in previous acquisitions of the items or work from the 8(a) participants or other contractors; and

(e) Any other pertinent information about known 8(a) participants, the items, or the work. This includes any information concerning the participants' products or capabilities. When necessary, the contracting agency shall make an independent review of the factors in 19.803(a) and other aspects of the participants' capabilities which would ensure the satisfactory performance of the requirement being considered for commitment to the 8(a) program.

10. Amend section 19.804-2 by-

a. Revising paragraphs (a) introductory text and (a) (10);

b. Redesignating paragraphs (a) (12) through (15) as paragraphs (a) (13) through (16), respectively;

c. Adding a new paragraph (a) (12);

d. Removing from the newly redesignated paragraph (a) (13) "Program" and adding "program" in its place;

e. Removing from paragraph (b) (3) "firm" and adding "8(a) participant" in its place (twice).

The revisions and addition read as follows:

19.804-2 Agency offering.

(a) After completing its evaluation, the contracting office shall notify the SBA of the extent of its plans to place 8(a) contracts with the SBA for specific quantities of items or work. The notification, referred to as an offering letter, shall identify the time frames within which resulting 8(a) awards must be completed in order for the agency to meet its responsibilities. The offering letter shall also contain the following information applicable to each prospective contract:

* * * * *

(10) Identification of any particular 8(a) participant designated for consideration, including a brief justification, such as-

(i) The 8(a) participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated 8(a) participant is the incumbent.

* * * * *

(12) Identification of all 8(a) participants which have expressed an interest in being considered for the acquisition.

* * * * *

11. Revise section 19.804-3 to read as follows:

19.804-3 SBA acceptance.

(a) Upon receipt of the contracting office's offering letter, SBA will determine whether to accept the requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the contracting office in writing within 10 working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold and within two working days of receipt if the contract is at or below the simplified acquisition threshold. The contracting office may grant an extension of these time periods, if requested by SBA.

(1) For acquisitions exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within ten working days, the contracting

office may seek SBA's acceptance through the Associate Administrator for Business Development. The contracting office may assume that SBA has accepted the requirement into the 8(a) program if it does not receive a reply from the Associate Administrator for Business Development within five calendar days of receipt of the contracting office's request.

(2) For acquisitions not exceeding the simplified acquisition threshold, when the contracting office makes an offer to the 8(a) program on behalf of a specific 8(a) participant and does not receive a reply to its offering letter within two working days, the contracting office may assume the offer is accepted and proceed with award of an 8(a) contract.

(b) As part of the acceptance process, SBA will review the appropriateness of the NAICS code designation assigned to the requirement by the contracting officer.

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

(2) If SBA and the contracting officer are unable to agree on a NAICS 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 NAICS code designation to the SBA Office of Hearings and Appeals under subpart C of 13 CFR part 134.

(c) Sole source 8(a) awards. If an appropriate match exists, SBA will advise the contracting officer whether it will participate in contract negotiations or whether SBA will authorize the contracting officer to negotiate directly with the identified 8(a) participant. Where SBA has delegated its contract execution functions to a contracting agency, SBA will also identify that delegation in its acceptance letter.

(1) Sole source award where the contracting officer nominates a specific 8(a) participant. SBA will determine whether an appropriate match exists where the contracting officer identifies a particular participant for a sole source award.

(i) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the 8(a) participant recommended by the contracting officer, provided that the 8(a) participant complies with the requirements of 13 CFR 124.503(c)(1).

(ii) If an appropriate match does not exist, SBA will notify the 8(a) participant and the contracting officer, and may then nominate an alternate 8(a) participant.

(2) Sole source award where the contracting officer does not nominate a specific 8(a) participant. When a contracting officer does not nominate an 8(a) participant for performance of a sole source 8(a) contract, SBA will select an 8(a) participant for possible award from among two or more eligible and qualified 8(a) participants. The selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts. (For construction requirements see 13 CFR 124.503(d)(1)).

12. Amend section 19.804-4-

a. Removing from the introductory text "Program" and adding "program" in its place;

b. Revising paragraph (b); and

c. Removing from paragraph (d) "Program" and adding "program" in its place.

The revision reads as follows:

19.804-4 Repetitive acquisitions.

* * * * *

(b) A nominated 8(a) participant's eligibility, and whether or not it is the same 8(a) participant that performed the previous contract;

* * * * *

13. Amend section 19.804-5 by revising paragraphs (a) and (c) to read as follows:

19.804-5 Basic ordering agreements.

(a) The contracting office shall submit an offering letter for, and SBA must accept, each order under a basic ordering agreement (BOA) in addition to the agency offering and SBA accepting the BOA itself.

* * * * *

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

14. Revise section 19.804-6 to read as follows:

19.804-6 Indefinite-delivery contracts.

(a) Separate offers and acceptances are not required for individual orders under multiple-award contracts (including the Federal Supply Schedules managed by GSA,

multi-agency contracts or Governmentwide acquisition contracts, or indefinite-delivery, indefinite-quantity (IDIQ) contracts) that have been set aside for exclusive competition among 8(a) contractors. SBA's acceptance of the original contract is valid for the term of the contract. Offers and acceptances are required for individual orders under multiple-award contracts that have not been set aside for exclusive competition among 8(a) contractors.

(b) An 8(a) contractor may continue to accept new orders under the contract, even if it exits the 8(a) program, or becomes other than small for the NAICS code assigned to the contract.

(c) Agencies may continue to take credit toward their prime contracting small disadvantaged business or small business goals for orders awarded to 8(a) participants, even after the contractor's 8(a) program term expires, the contractor otherwise exits the 8(a) program, or the contractor becomes other than small for the NAICS code assigned under the 8(a) contract. However, if an 8(a) contractor rerepresents that it is other than small for the NAICS code assigned under the contract in accordance with 19.301-2 or, where ownership or control of the 8(a) contractor has changed and SBA has granted a waiver to

allow the contractor to continue performance (see 13 CFR 124.515), the agency may not credit any subsequent orders awarded to the contractor towards its small disadvantaged business or small business goals.

15. Amend section 19.805-1 by-

- a. Revising paragraph (a) introductory text;
- b. Removing from paragraph (a)(1) "firms" and adding "participants" in its place;
- c. Revising paragraph (b) introductory text;
- d. Removing from paragraph (b)(1) "firms" and adding "participants" in its place; and
- e. Revising paragraph (d).

The revisions read as follows:

19.805-1 General.

(a) Except as provided in paragraph (b) of this section, an acquisition offered to the SBA under the 8(a) program shall be awarded on the basis of competition limited to eligible 8(a) participants when-

* * * * *

(b) Where an acquisition exceeds the competitive threshold (see paragraph (a)(2) of this section), the SBA may accept the requirement for a sole source 8(a) award if-

* * * * *

(d) The SBA Associate Administrator for Business Development may approve a contracting office's 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) participants are available for competition. In determining whether a request to compete below the threshold will be approved, the SBA Associate Administrator for Business Development will, in part, consider the extent to which the contracting activity 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 SBA Associate Administrator for Business Development.

16. Revise section 19.805-2 to read as follows:

19.805-2 Procedures.

(a) Offers shall be solicited from those sources identified in accordance with 19.804-3.

(b) The SBA will determine the eligibility of the participants for award of the contract. Eligibility will be determined by the SBA as of the time of submission of initial offers which include price. Eligibility is based on Section 8(a) program criteria. An 8(a) participant must

represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

(1) In either negotiated or sealed bid competitive 8(a) acquisitions SBA will determine the eligibility of the apparent successful offeror and advise the contracting office within 5 working days after receipt of the contracting office's request for an eligibility determination.

(i) If SBA determines that the apparent successful offeror is ineligible, the contracting office will then send to SBA the identity of the next highest evaluated offeror for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.

(ii) If the contracting officer believes that the apparent successful offeror (or the offeror SBA has determined eligible for award) is not responsible to perform the contract, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under subpart 19.6.

(2) In any case in which an 8(a) participant is determined to be ineligible, SBA will notify the 8(a) participant of that determination.

(c) Any party with information questioning the eligibility of an 8(a) participant to continue participation in the 8(a) program or for the purposes of a specific 8(a) award may submit such information to the SBA in accordance with 13 CFR 124.112(c).

17. Amend section 19.808-1 by removing from paragraph (c) "activity" and "contractor" and adding "officer" and "participant" in their places, respectively, and adding paragraphs (d) and (e) to read as follows:

19.808-1 Sole source.

* * * * *

(d) An 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

(e) An 8(a) participant owned by an Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation may not receive an 8(a) sole source award that is a follow-on contract to an 8(a) contract, if the predecessor contract was performed by another 8(a) participant (or former 8(a) participant) owned by the same Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation (See 13 CFR 124.109 through 124.111).

18. 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) participants. Conducting competitive negotiations among 8(a) participants 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.

19. Revise section 19.809 to read as follows.

19.809 Preaward considerations.

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

20. Amend section 19.810 by—

a. Removing from paragraph (a)(2) "firm" and "Program" and adding "participant" and "program" in their places, respectively;

b. Removing from paragraph (a)(3) "activity's" and adding "officer's" in its place;

c. Revising paragraph (b); and

d. Removing from paragraph (c) "firm" and adding "participant" in its place.

The revision reads as follows:

19.810 SBA appeals.

* * * * *

(b) (1) Notification by SBA of an intent to appeal to the agency head—

(i) Must be received by the contracting officer within 5 working days after SBA is formally notified of the contracting officer's decision; and

(ii) Must be provided to the contracting agency Director for Small and Disadvantaged Business Utilization or, for the Department of Defense, the Director of Small Business Programs.

(2) SBA must send the written appeal to the agency head within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn.

Pending issuance of a decision by the agency head, the contracting officer shall 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.

* * * * *

21. Amend section 19.811-1 by revising paragraph (b) introductory text to read as follows:

19.811-1 Sole source.

* * * * *

(b) The contracting officer shall prepare the contract that the SBA will award to the 8(a) participant in accordance with agency procedures, as if awarding the contract directly to the 8(a) participant, except for the following:

* * * * *

19.811-3 [Amended]

22. Amend section 19.811-3 by—

a. Removing from paragraph (d) introductory text “Concerns” and adding “Participants” in its place; and

b. Removing from paragraphs (d)(1) and (e) “concerns” and adding “participants” in its place, respectively.

23. Amend section 19.812 by removing from paragraph (b) “firm” and adding “8(a) contractor” in its place and 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) contractor 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) contractor'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 calendar 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 shall take action immediately to preserve the option of waiving the termination requirement. The contracting officer shall 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 shall 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.

24. Add sections 19.813 through 19.816 to read as follows:

Sec.

19.813 Protesting an 8(a) participant's eligibility or size status.

19.814 Requesting a formal size determination (8(a) sole source requirements).

19.815 Release for non-8(a) procurement.

19.816 Exiting the 8(a) program.

19.813 Protesting an 8(a) participant's eligibility or size status.

(a) The eligibility of an 8(a) participant for a sole source or competitive 8(a) requirement may not be challenged by another 8(a) participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest (see 13 CFR 124.517).

(b) The size status of an 8(a) participant nominated for an 8(a) sole source contract may not be protested by another 8(a) participant or any other party.

(c) The size status of the apparent successful offeror for competitive 8(a) awards may be protested. The filing of a size status protest is limited to—

(1) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(2) The contracting officer; or

(3) The SBA District Director in either the district office serving the geographical area in which the contracting activity is located or the district office that services the apparent successful offeror, or the Associate Administrator for Business Development.

(d) Protests of competitive 8(a) awards shall follow the procedures at 19.302. For additional information, refer to 13 CFR 121.1001.

19.814 Requesting a formal size determination (8(a) sole source requirements).

(a) If the size status of an 8(a) participant nominated for award of an 8(a) sole source contract is called into question, a request for a formal size determination may be submitted to SBA pursuant to 13 CFR 121.1001(b) (2) (ii) by-

(1) The 8(a) participant nominated for award of the particular sole source contract;

(2) The contracting officer who has been delegated SBA's 8(a) contract execution functions, where applicable, or the SBA program official with authority to execute the 8(a) contract;

(3) The SBA District Director in the district office that services the 8(a) participant or the Associate Administrator for Business Development; or

(4) The SBA Inspector General.

(b) SBA's Government Contracting Area Director will issue a formal size determination within 15 business days, if possible, after SBA receives the request for a formal size determination.

(c) An appeal of an SBA size determination shall follow the procedures at 19.302.

19.815 Release for non-8(a) procurement.

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless there is a mandatory source (see 8.002 or 8.003) or SBA agrees to release the requirement from the 8(a) program in accordance with 13 CFR 124.504(d).

(b) To obtain release of a requirement for a non-8(a) procurement (other than a mandatory source listed at 8.002 or 8.003), the contracting officer shall make a written request to, and receive concurrence from, the SBA Associate Administrator for Business Development.

(c)(1) The written request to the SBA Associate Administrator for Business Development shall indicate—

(i) Whether the agency has achieved its small disadvantaged business goal;

(ii) Whether the agency has achieved its HUBZone, SDVOSB, WOSB, or small business goal(s); and

(iii) Whether the requirement is critical to the business development of the 8(a) contractor that is currently performing the requirement.

(2) Generally, a requirement that was previously accepted into the 8(a) program will only be released for

procurements outside the 8(a) program when the contracting activity agency agrees to set aside the requirement under the small business, HUBZone, SDVOSB, or WOSB programs.

(3) The requirement that a follow-on procurement must be released from the 8(a) program in order for it to be fulfilled outside the 8(a) program does not apply to task or delivery orders offered to and accepted into the 8(a) program, where the basic contract was not accepted into the 8(a) program.

19.816 Exiting the 8(a) program.

(a) Except as provided in paragraph (c) of this section, when a contractor exits the 8(a) program, it is no longer eligible to receive new 8(a) contracts. However, the contractor remains under contractual obligation to complete existing contracts, and any priced options that may be exercised.

(b) If an 8(a) contractor is suspended from the program (see 13 CFR 124.305), it may not receive any new 8(a) contracts unless the head of the contracting agency makes a determination that it is in the best interest of the Government to issue the award and SBA adopts that determination.

(c) A contractor that has completed its term of participation in the 8(a) program may be awarded a

competitive 8(a) contract if it was an 8(a) participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation, and if the contractor continues to meet all other applicable eligibility criteria.

(d) SBA's regulations on exiting the 8(a) program are found at 13 CFR 124.301 through 124.305, and 13 CFR 124.507(d).

19.1304 [Amended]

25. Amend section 19.1304 by removing from paragraph (d) "Program" and adding "program" in its place (twice).

19.1404 [Amended]

26. Amend section 19.1404 by removing from paragraph (d) "Program" and adding "program" in its place (twice).

27. Amend section 19.1504 by revising paragraph (a) to read as follows:

19.1504 Exclusions.

* * * * *

(a) Requirements that an 8(a) contractor is currently performing under the 8(a) program or that SBA has accepted for performance under the authority of the 8(a) program, unless SBA has consented to release the requirements from the 8(a) program;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

28. Amend section 52.212-5 by revising the date of the clause and paragraph (b) (19) to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(b) * * *

(19) 52.219-14, Limitations on Subcontracting ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER]) (15 U.S.C. 637(a) (14)).

* * * * *

29. Amend section 52.219-11 by revising the date of the clause and removing from paragraph (c) “and advance payments” to read as follows:

52.219-11 Special 8(a) Contract Conditions.

* * * * *

SPECIAL 8(A) CONTRACT CONDITIONS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

30. Amend section 52.219-12 by revising the date of the clause and paragraph (b) (2) to read as follows:

52.219-12 Special 8(a) Subcontract Conditions.

* * * * *

SPECIAL 8(A) SUBCONTRACT CONDITIONS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(b) * * *

(2) That the SBA has delegated responsibility, except for novation agreements, for the administration of this subcontract to the _____ [insert name of contracting agency] with complete authority to take any action on behalf of the Government under the terms and conditions of this subcontract.

* * * * *

31. Amend section 52.219-14 by revising the date of the clause and removing from paragraphs (b)(1), (2), and (3) "8(a) concerns" and adding "8(a) participants" in its place to read as follows:

52.219-14 Limitations on Subcontracting.

* * * * *

LIMITATIONS ON SUBCONTRACTING ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

32. Amend section 52.219-17 by revising the date of the clause and removing from paragraph (a)(2) "and advance payments" to read as follows:

52.219-17 Section 8(a) Award.

* * * * *

SECTION 8(A) AWARD ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

33. Amend section 52.219-18 by-

a. Revising the section and clause headings; and

b. In Alternate I, revising the date of the

alternate and removing "concerns" and adding "participants" in its place.

The revisions read as follows:

52.219-18 Notification of Competition Limited to Eligible 8(a) Participants.

* * * * *

NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8 (A) PARTICIPANTS
([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

Alternate I ([Insert Abbreviated Month and Year of Date of Publication in the Federal Register]) * * *

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