



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206 and 219

[Docket DARS-2020-0016]

RIN 0750-AK93

Defense Federal Acquisition Regulation Supplement:

Justification and Approval Threshold for 8(a) Contracts (DFARS Case 2020-D006)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020.

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

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 823 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY)

2020 (Pub. L. 116-92). Section 823 increases the threshold for requiring a justification and approval to award a sole source contract to a participant in the 8(a) program to actions exceeding \$100 million. The current threshold is \$22 million. Section 823 also designates the head of the procuring activity as the approval authority. To implement section 823, the revised threshold is added in a new DFARS section 206.303-1, Requirements, and the new approval authority is added in DFARS 206.304, Approval of the justification. Corresponding revisions to indicate the new threshold are also included at DFARS 206.303-2, Content, and 219.808-1, Sole source.

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

This rule does not create or revise any solicitation provisions or contract clauses. This rule amends DFARS 206.303 to increase the threshold for requiring a sole source justification and approval for contracts to 8(a) program participants exceeding \$100 million. The rule also designates the appropriate approval authority.

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

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is Office of Federal Procurement

Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it affects DoD internal operating procedures pertaining to sole source justifications for 8(a) procurements and the designated approval authority. The increased threshold and assignment of approval authority does not have a significant effect beyond the internal operating procedures of the agency issuing the policy. There is no additional cost or administrative impact on contractors or offerors.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and E.O. 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563

emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

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

VII. 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 206 and 219

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 206 and 219 are amended as follows:

1. The authority citation for 48 CFR parts 206 and 219 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 206—COMPETITION REQUIREMENTS

2. Add section 206.303-1 to read as follows:

206.303-1 Requirements.

(a) In accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), no justification and approval is required for a sole-source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount not exceeding \$100 million.

(b) In lieu of FAR 6.303-1(b), in accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), contracting officers shall not award a sole source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding \$100 million unless—

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

(2) The justification is approved in accordance with 206.304(a) (S-71); and

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

3. Amend section 206.303-2 by redesignating paragraph (b) (i) as (b) (ii) and adding a new paragraph (b) (i) and paragraph (d) to read as follows:

206.303-2 Content.

(b) (i) In lieu of the threshold at FAR 6.303-2(b), each justification shall include the information at FAR 6.303-2(b), except for sole-source 8(a) contracts over \$100 million (see paragraph (d) of this section).

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(d) In lieu of the threshold at FAR 6.303-2(d), each justification for a sole-source 8(a) contract over \$100 million shall include the information at FAR 6.303-2(d).

4. Amend section 206.304 by adding paragraph (a) (S-71) to read as follows:

206.304 Approval of the justification.

(a) * * *

(S-71) In accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), the head of the procuring activity is the approval authority for a proposed sole-source 8(a) contract exceeding \$100 million.

This authority may only be delegated to an officer or employee who—

(1) If a member of the armed forces, is serving in a rank above brigadier general or rear admiral (lower half); or

(2) If a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of major general or rear admiral.

PART 219—SMALL BUSINESS PROGRAMS

5. Amend section 219.808-1 by adding paragraph (a) to read as follows:

219.808-1 Sole source.

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(a) In lieu of the threshold at FAR 19.808-1(a), the SBA may not accept for negotiation a DoD sole-source 8(a) contract exceeding \$100 million unless DoD has completed a justification in accordance with FAR 6.303 and 206.303-1(b).

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