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Penny Lassiter,

Director, Sector Policy and Programs Division.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19, 49, and 52

[FAR Case 2019-008; Docket No. 2019-0008, Sequence No. 1]

RIN 9000-AN91

Federal Acquisition Regulation: Small Business Program Amendments

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to

implement several changes to the Small Business Administration (SBA) regulations.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before April 25, 2022 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019-008 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case 2019-008". Select the link "Comment Now" that corresponds with "FAR Case 2019-008". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2019-008" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR Case 2019-008" in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 703-605-2815, or by email at malissa.jones@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite FAR Case 2019-008.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement several revisions that the Small Business Administration (SBA) made to its regulations in its final rule published on November 29, 2019, at 84 FR 65647. SBA provided an explanation of the changes in its final rule preamble. The revisions address the following topics:

- The point in the procurement process at which small business size status is determined for offers for multiple-award contracts.
- A new ground for a socioeconomic status protest.
- The eligibility requirements for 8(a) participants under long-term contracts (i.e., contracts with a duration of more than 5 years).

- The small business size standard for information technology value-added resellers under North American Industry Classification System (NAICS) code 541519.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. Small Business Size Standards

Part 19 is proposed to be revised to clarify SBA policy concerning size standards in three areas. First, while SBA generally determines small business size standards at the time of initial offer including price, for a multiple-award contract that does not require offers for the contract to include price, SBA will determine size as of the date of the initial offer for the multiple-award contract, whether or not the offer includes price or the price is evaluated; changes are made at FAR 19.102 and 19.301-1. This proposed rule merely informs contracting officers of SBA's policy on determinations of size status; it does not include guidance for contracting officers regarding solicitations that do not include price as an evaluation factor for multiple-award contracts. FAR case 2017-010, Evaluation Factors for Multiple-Award Contracts, and FAR case 2018-014, Increasing Task-order Level Competition, provide this guidance.

Second, an information technology value-added reseller under NAICS code 541519, proposing to furnish an end product it did not manufacture (i.e., a "nonmanufacturer"), is a small business if it has no more than 150 employees. This size standard is implemented at FAR 19.505; FAR 52.204-8, Annual Representations and Certifications and its Alternate I; FAR 52.212-1, Instructions to Offerors—Commercial Items; FAR 52.219-1, Small Business Program Representations and its Alternate II; and FAR 52.219-28, Post-Award Small Business Program Rerepresentation.

Third, adding new grounds for a socioeconomic status protest based on an allegation that a contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract (the "ostensible subcontractor rule"). Changes are made at FAR 19.306 to 19.308.

B. Setting Aside Orders Under Multiple-Award Contracts That Were Set Aside for Small Business

FAR 19.504 is proposed to be revised to clarify that, if a multiple-award

contract was totally set aside for small business, contracting officers may set aside orders under that contract for any of the small business socioeconomic programs. This subpart further clarifies that for these orders to be set aside, the rule of two and the specific socioeconomic program eligibility requirements must be met.

C. Determining Eligibility for the 8(a) Program

Subpart 19.8 is proposed to be revised to specify that SBA designates concerns as 8(a) participants in the Dynamic Small Business Search (DSBS) at https://web.sba.gov/pro-net/search/dsp_dsbs.cfm and that SBA's designation also appears in the System for Award Management (SAM). In addition, for 8(a) contracts exceeding 5 years, including options, contracting officers are required to verify in DSBS or SAM that the concern is an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the concern is not an SBA-certified 8(a) participant at that time, contracting officers shall not exercise the option.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), or for Commercial Services

This rule proposes to amend several clauses. However, this proposed rule does not impose any new requirements on contracts at or below the SAT, for commercial products including commercially available off-the-shelf (COTS) items, or for commercial services. The clauses continue to apply to acquisitions at or below the SAT, to acquisitions for commercial products including commercially available off-the-shelf (COTS) items, and to acquisitions for commercial services.

IV. Expected Impact of the Rule

This proposed rule will impact the operations of the Government and contractors as described in this section.

This proposed rule will impact contracting officers for long-term 8(a) contracts. These contracting officers will not be able to exercise options past the fifth year of long-term 8(a) contracts if the 8(a) contractor no longer qualifies for the 8(a) program.

Contractors who are 8(a) participants with long-term contracts may find that the Government cannot exercise an option on that contract, if the contractor is no longer eligible for the 8(a) program.

Offerors who are information technology value-added resellers should be able to understand more easily the size standard that applies to them.

This proposed rule is not expected to result in any costs to contractors or offerors.

The “ostensible subcontractor rule” is implemented in this proposed rule as a new ground for protest. Small business contractors must not be overly reliant on non-similarly situated small business subcontractors or have such a subcontractor perform primary and vital requirements of the contract. This means the contractor must have the necessary expertise within its own organization.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This proposed rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

The change 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. 601–612. The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement several revisions made to the SBA regulations in SBA's final rule published on November 29, 2019 (84 FR 65647). The revisions address the point in the procurement process at which small

business size status is determined for offers for multiple-award contracts. SBA generally determines size status at the time of initial offer including price. However, for a solicitation for a multiple-award contract that does not require offers to include price, SBA will determine size as of the date of initial offer, whether or not the offer includes price or the price is evaluated. The revisions also address the eligibility requirements for 8(a) participants under long-term contracts (*i.e.*, with a duration of more than five years including option periods). For long-term 8(a) contracts, contracting officers will be required to verify in the Dynamic Small Business Search (DSBS) or the System for Award Management (SAM) that the contractor is still an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the contractor is no longer an SBA-certified 8(a) participant, the contracting officer shall not exercise the option. In addition, SBA's revisions specified that the size standard for information technology value-added resellers under North American Industry Classification System (NAICS) code 541519 is 150 employees. The revisions also address SBA's new grounds for a socioeconomic status protest based on an allegation that a contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract (the “ostensible subcontractor rule”). This proposed FAR rule includes all of these revisions.

The objective of this proposed rule is to implement SBA's regulatory revisions in the FAR. The legal basis for this rule is 41 U.S.C. 1303 and the SBA regulatory changes at 13 CFR 121.103(h), 13 CFR 121.404, 13 CFR 121.406, 13 CFR 124.521(e), and 13 CFR 125.2(e).

This proposed rule will apply to small entities that do business with the Federal Government. According to the data in SAM, 320,622 of the active entity registrations are for entities that are small business concerns for at least one NAICS code. The proposed FAR changes, regarding the point at which SBA determines size status and SBA's new grounds for a socioeconomic protest, will provide these entities with straightforward guidance that will reduce confusion and uncertainty.

The proposed changes regarding long-term 8(a) contracts will impact 8(a) participants who are Federal contractors with contracts that have a duration of more than five years, including options. An analysis of the data in the Federal Procurement Data System (FPDS) indicates that, for fiscal years 2017 through 2019, an average of 257 long-term contracts (greater than five years) were awarded to 227 unique entities each year under the 8(a) program. The proposed change may serve to reduce the number of long-term contracts awarded to 8(a) participants by agencies that are concerned about having a contract in place beyond the fifth year. Contracts outside the 8(a) program will not have such obstacles to continued performance.

The proposed change regarding the size standard for information technology value-added resellers will affect such resellers who

do business with the Federal Government. An analysis of the data in FPDS shows that, for fiscal years 2017 through 2019, an average of 727 unique large business entities and 1,347 unique small business concerns were awarded contracts each year under NAICS code 541519.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. 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 (FAR Case 2019–008), in correspondence.

VIII. Paperwork Reduction Act

This proposed 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. 3501–3521).

List of Subjects in 48 CFR Parts 19, 49, and 52

Government procurement.

William F. Clark,

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

Therefore, DoD, GSA, and NASA propose to amend 48 CFR parts 19, 49, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 49, 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 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.102 by—

■ a. Revising the last sentence of paragraph (a)(1); and

■ b. Adding paragraphs (a)(3) and (4).

The revision and additions read as follows:

19.102 Small business size standards and North American Industry Classification System codes.

(a) * * *

(1) * * * They are also available at <https://www.sba.gov/document/support-table-size-standards>.

* * * * *

(3) SBA determines the size status of a concern, including its affiliates, as of the date the concern represents that it is small to the contracting officer as part of its initial offer, which includes price.

(4) When an agency uses a solicitation for a multiple-award contract that does not require offers for the contract to include price, SBA determines size as of the date of initial offer for the multiple-award contract, whether or not the offer includes price or the price is evaluated. (See 13 CFR 121.404(a)(1)(iv).)

* * * * *

19.301–1 [Amended]

■ 3. Amend section 19.301–1 by—

■ a. Removing from paragraph (b) introductory text the phrase “initial offer” and adding “initial offer, (whether or not the offer includes price or the price is evaluated)” in its place; and

■ b. Removing from paragraph (e)(1) the phrase “offer for the contract” and adding “offer for the contract (whether or not the offer includes price or the price is evaluated (see 13 CFR 121.404(a)(1)(iv)),” in its place.

■ 4. Amend section 19.306 by—

■ a. Removing from the end of paragraph (d)(1)(ii) the word “or”;

■ b. Removing from the end of paragraph (d)(1)(iii) the period and adding “; or” in its place; and

■ c. Adding paragraph (d)(1)(iv).

The addition reads as follows:

19.306 Protesting a firm’s status as a HUBZone small business concern.

* * * * *

(d) * * *

(1) * * *

(iv) For HUBZone set-aside or sole-source service contracts, a HUBZone prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the “ostensible subcontractor rule”).

* * * * *

■ 5. Amend section 19.307 by—

■ a. Removing from paragraph (d)(1) introductory text the phrase “service

disabled” and adding “service-disabled” in its place;

■ b. Removing from paragraph (d)(1)(i) the text “service disabled” and “125.8; or” and adding “service-disabled” and “125.11;” in their places, respectively;

■ c. Removing from paragraph (d)(1)(ii) the period at the end and adding “; or” in its place; and

■ d. Adding paragraph (d)(1)(iii).

The addition reads as follows:

19.307 Protesting a firm’s status as a service-disabled veteran-owned small business concern.

* * * * *

(d) * * *

(1) * * *

(iii) For set-aside or sole-source service contract ostensible subcontractor protests, the protester presents credible evidence of the alleged undue reliance on a small, non-similarly situated entity subcontractor, or credible evidence that the small non-similarly situated entity is performing the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the “ostensible subcontractor rule”).

* * * * *

■ 6. Amend section 19.308 by—

■ a. Removing from the end of paragraph (d)(1)(i) the word “or”;

■ b. Removing from the end of paragraph (d)(1)(ii) the period and adding “; or” in its place; and

■ c. Adding paragraph (d)(1)(iii).

The addition reads as follows:

19.308 Protesting a firm’s status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

* * * * *

(d) * * *

(1) * * *

(iii) For WOSB or EDWOSB set-aside or sole-source service contracts, the protest presents evidence that the prime contractor is unusually reliant on a small, non-similarly situated entity subcontractor, as defined in 13 CFR 125.1, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set-aside or sole-source WOSB or EDWOSB contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the “ostensible subcontractor rule”).

* * * * *

- 7. Amend section 19.504 by—
- a. Removing from paragraph (b) heading the word “*partial*”;
- b. Redesignating paragraphs (b)(1) and (b)(2) as paragraphs (b)(2)(i) and (b)(2)(ii), respectively;
- c. Adding a new paragraph (b)(1); and
- d. Adding a heading for newly redesignated paragraph (b)(2).

The additions read as follows:

19.504 Orders under multiple-award contracts.

* * * * *

(b) * * *—(1) *Orders under total set-aside contracts.* Under a total small business set-aside, contracting officers may at their discretion set aside orders for any of the small business socioeconomic concerns identified in 19.000(a)(3) provided that the requirements at paragraph (a) of this section, 19.502–2(b), and the specific program eligibility requirements are met.

(2) *Orders under partial set-aside contracts.* * * *

* * * * *

19.505 [Amended]

- 8. Amend section 19.505 by removing from paragraphs (c)(1)(ii) and (c)(2)(i) the phrase “500 employees” and adding “500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519” in its place.
- 9. Amend section 19.802 by adding two sentences at the end to read as follows:

19.802 Determining eligibility for the 8(a) program.

* * * SBA designates the concern as an 8(a) participant in the Dynamic Small Business Search (DSBS) at <https://web.sba.gov/pro-net/search/dsp-dsbs.cfm>. SBA’s designation also appears in the System for Award Management (SAM).

- 10. Amend section 19.804–1 by—
- a. Removing from the end of paragraph (a)(1) the word “and”;
- b. Redesignating paragraph (a)(2) as paragraph (a)(3); and
- c. Adding a new paragraph (a)(2).

The addition reads as follows:

19.804–1 Agency evaluation.

(a) * * *

(2) Length of contract, including option periods (see 19.812(d)); and

* * * * *

- 11. Amend section 19.812 by—
- a. Redesignating paragraph (d) as paragraph (e); and
- b. Adding a new paragraph (d).

The addition reads as follows:

19.812 Contract administration.

* * * * *

(d) For 8(a) contracts exceeding 5 years including options, the contracting officer shall verify in DSBS or SAM that the concern is an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the concern is not an SBA-certified 8(a) participant, the contracting officer shall not exercise the option (see 13 CFR 124.521(e)(2)).

* * * * *

PART 49—TERMINATION OF CONTRACTS

49.402–3 [Amended]

- 12. Amend section 49.402–3 by removing from paragraph (e)(4) the phrase “Small Business Administration Regional” and adding “Small Business Administration Area” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 13. Amend section 52.204–8 by—
- a. Revising the date of the provision;
- b. Removing from paragraph (a)(3) introductory text the phrase “500 employees” and adding “500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,” in its place;
- c. In Alternate I:
 - i. Revising the date of Alternate I; and
 - ii. Removing from paragraph (a)(2) introductory text the phrase “500 employees” and adding “500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,” in its place.

The revisions read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (DATE)

* * * * *

Alternate I (DATE). * * *

* * * * *

- 13. Amend section 52.212–1 by—
- a. Revising the date of the provision; and
- b. Removing from paragraph (a) introductory text the phrase “500 employees” and adding “500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,” in its place.

The revision reads as follows:

52.212–1 Instructions to Offerors—Commercial Products and Commercial Services.

* * * * *

Instructions to Offerors—Commercial Products and Commercial Services (DATE)

* * * * *

- 14. Amend section 52.212–5 by—
- a. Revising the date of the provision; and
- b. Removing from paragraph (b)(2)(i) the date “(SEP 2021)” and adding “(DATE)” in its place.

The revision reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (DATE)

* * * * *

- 15. Amend section 52.219–1 by—
- a. Revising the date of the provision;
- b. Removing from paragraph (b)(3) introductory text the phrase “500 employees” and adding “500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,” in its place;
- c. In Alternate II:
 - i. Revising the date of Alternate II; and
 - ii. Removing from paragraph (b)(2) introductory text the phrase “500 employees” and adding “500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,” in its place.

The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (DATE)

* * * * *

Alternate II (DATE) * * *

* * * * *

- 16. Amend section 52.219–18 by—
- a. Revising the date of Alternate I; and
- b. Removing from paragraph (a)(3) of Alternate I the phrase “*Regional Office(s)*” and adding “*Area Office(s)*” in its place.

The revision reads as follows:

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

* * * * *

Alternate I (DATE) * * *

* * * * *

- 17. Amend section 52.219–28 by—
- a. Revising the date of the provision; and

■ b. Removing from paragraph (e) introductory text the phrase “500 employees” and adding “500 employees, or 150 employees for information technology value-added

resellers under NAICS code 541519,” in its place.

The revision reads as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (DATE)

* * * * *

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