

SBA and FAR Council Issue Three New Rules Affecting Small Business Contractors

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On March 16, 2011, the Small Business Administration (SBA) and the Federal Acquisition Regulation (FAR) Council issued three new rules affecting small business government contractors. In short, the new rules (1) require federal agencies to issue a Justification and Approval (J&A) prior to the award of 8(a) sole source contracts over \$20 million, (2) clarify a contracting officer's ability to use discretion when determining whether an acquisition will be restricted to small businesses participating in the 8(a), HUBZone or service-disabled veteran-owned small business (SDVOSB) programs, and (3) increase the small business size standards for dozens of service industries. The first two rules were issued as interim rules and are effective immediately; the third is a proposed rule.

J&As for 8(a) Sole-Source Awards Above \$20M

The FAR Council issued an interim rule implementing Section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84), which requires federal agencies to issue a J&A prior to awarding a sole-source contract over \$20 million under the 8(a) program. The J&A must be approved by an appropriate official (as currently defined by FAR 6.304) and made public after award of the contract. Prior to the enactment of section 811, a sole-source award of a new contract made using the 8(a) contracting authority did not require a J&A, regardless of the dollar value. Under the interim rule, the J&A must document the reasons for making a sole-source award rather than a competitive award under the 8(a) program. The rule institutes no new requirements for sole-source 8(a) awards less than or equal to \$20 million.

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Practice Areas

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Parity Among 8(a), HUBZone, or SDVOSB Programs

The FAR Council issued an interim rule implementing Section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111-240) and clarifying that there is parity when a contracting officer selects among small businesses participating in the 8(a), HUBZone and SDVOSB programs. Under the interim rule, contracting officers will have the discretion to determine whether an acquisition will be restricted to one of these three programs.

Additionally, the rule clarifies that:

- Although there is no order of precedence among the three programs, if a requirement has been accepted by SBA under the 8(a) program, it must remain in the 8(a) program unless SBA agrees to release it;
- For acquisitions exceeding the simplified acquisition threshold (\$150,000), contracting officers must consider a set-aside or sole source award to a small business under the 8(a), HUBZone, or SDVOSB programs before proceeding with a small business set-aside; and
- The small business set-aside requirement under FAR 19.502-2(a) does not preclude award of a contract to a participant in the 8(a), HUBZone, or SDVOSB programs. SBA regulations give contracting officers the authority to use these programs at dollar levels above the micro-purchase threshold and at or below the simplified acquisition threshold.

The interim rule does not address Women-Owned Small Businesses (WOSB). The WOSB program will be addressed as a separate interim rule under FAR Case 2010-015 and implement the SBA's WOSB Federal Contract Program final rule (75 FR 62258, October 7, 2010). The SBA rule provides for parity between WOSBs and other small business contracting programs.

Service Industries Size Standards

The SBA issued a proposed rule increasing the small business size standards for 35 industries and one sub-industry in North American Industry Classification System (NAICS) Sector 54, Professional, Scientific and Technical Services, and one industry in NAICS Sector 81, Other Services. Many of the size standards would increase significantly under the proposed rule. For example, several of the Sector 54 size standards will increase from \$4.5M or \$7M, to \$14M or \$19M. The SBA will accept public comments through May 16, 2011.

Wiley Rein will continue to evaluate the interim and proposed rules and monitor their developments.