

[Federal Register: July 2, 2010 (Volume 75, Number 127)]
[Rules and Regulations]
[Page 38687-38689]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr02jy10-21]

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005-43; FAR Case 2008-023; Item IV; Docket 2009-0017, Sequence 1]
RIN 9000-AL29

Federal Acquisition Regulation; FAR Case 2008-023, Clarification
of Criteria for Sole Source Awards to Service-Disabled Veteran-Owned
Small Business Concerns

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense
Acquisition Regulations Council (Councils) are issuing a final rule to
amend the Federal Acquisition Regulation (FAR) to clarify the criteria
that need to be met in order to conduct a sole source Service-disabled
Veteran-owned Small Business (SDVOSB) concern acquisition.

DATES: Effective Date: August 2, 2010

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact
Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. For information
pertaining to status or publication schedules, contact the Regulatory
Secretariat at (202) 501-4755. Please cite FAC 2005-43, FAR Case 2008-
023.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published a proposed rule in the Federal Register at
74 FR 23373 on May 19, 2009, to revise the language in FAR
19.1406(a)(1) to clarify the criteria that need to be met in order to
conduct a sole source SDVOSB concern acquisition. The final rule
contains language that more closely mirrors the Veterans Benefit Act of
2003 (15 U.S.C. 657f). The final rule revises the language in FAR
19.1306(a)(1), which deals with sole source awards to Historically
Underutilized Business Zone (HUBZone) small business concerns based on

15 U.S.C. 657a(b), to match the language in FAR 19.1406(a)(1) to alleviate confusion on the appropriate use of the criteria needed to conduct a sole source SDVOSB concern acquisition.

[[Page 38688]]

The public comment period for the FAR proposed rule closed July 20, 2009. Eight respondents submitted comments to the proposed rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided below. Three respondents concurred with the proposed changes to clarify the criteria that needed to be met in order to conduct a sole source SDVOSB concern acquisition.

1. Comment: Increase knowledge of the marketplace and SDVOSB advocacy. One respondent expressed concern that the contracting officer does not have sufficient knowledge of the marketplace to make a sole-source determination without the advice of the U.S. Department of Veterans Affairs, the Small Business Administration (SBA), or other entities that advocate for the veteran community. The respondent further added that the regulatory language needs to mandate that the contracting officer exercise a higher level of advocacy for service-disabled veteran-owned firms to ensure these firms receive greater representation in the procurement process.

Response: The purpose of this regulatory change is to clarify the circumstances under which a contracting officer may award a sole-source contract to a small business concern owned and controlled by a service-disabled veteran. This case does not address market research or advocacy; therefore the respondent's comments are considered outside the scope of this case.

2. Comment: Correction to FAR 19.1306(a)(2). One respondent requested an additional review be conducted regarding FAR 19.1306(a)(2), because paragraph (c) does not exist.

Response: The reference to paragraph (c) is deleted.

3. Comment: Revise the language in FAR 19.1306(a) and 19.1406(a). Two respondents recommended revising paragraph (a) of FAR 19.1406 Sole Source Awards to Service-disabled Veterans-owned Small Business concerns to match the language in paragraph (a) of FAR 19.1306 by adding the language: `` (a) A participating agency contracting office may award contracts to a service-disabled Veteran-owned small business concern on a sole source basis without considering small business set-asides provided-''.

Response: FAR 19.1406(a) has been revised to be consistent with FAR 19.1306(a).

4. Comment: Revise the SDVOSB language to mirror the 8(a) language. One respondent recommended that the language in the FAR for SDVOSB sole source criteria mirror the language of the 8(a) criteria.

Response: The SDVOSB program and the 8(a) Business Development Program were established under two separate statutes with different sole-source award requirements. The statute for the SDVOSB program does not require the FAR language to be similar to the FAR language for the 8(a) Business Development Program.

5. Comment: Raise the prescribed \$3 million threshold to \$3.5 million. One respondent recommended that the dollar limit for the sole source awards to a Service-disabled Veteran-owned small business be raised to \$3.5 million from the prescribed \$3 million to be consistent with the dollar limits for non-manufacturing 8(a) awards.

Response: Threshold changes are based on statute. Federal Acquisition Circular 2005-013, FAR Case 2004-033, published in the

Federal Register at 71 FR 57363 on September 28, 2006, was based on a statutory requirement, raising thresholds in the FAR due to inflation. The escalation calculation for the inflationary threshold for sole source awards to Service-disabled Veteran-owned small businesses was not eligible for an inflationary increase (see <http://acquisition.gov/far/facsframe.html>). However, FAR Case 2008-024 is the case handling the next round of inflationary increases, and when that case is published as a final rule, the threshold may be raised; the Councils note that the inflation calculation is different for SDVOSB than for 8(a) and HUBZone because these statutes were enacted at different times.

This rule is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 this rule clarifies the intent of the existing language and is not a change in policy. The Councils did not receive any comments on the Regulatory Flexibility Act or a perceived burden on small business.

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. chapter 35, et seq.

List of Subjects in 48 CFR Part 19

Government procurement.

Dated: June 25, 2010.

Edward Loeb,
Director, Acquisition Policy Division.

0

Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

PART 19--SMALL BUSINESS PROGRAMS

0

1. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

0

2. Amend section 19.1306 by revising the introductory text of paragraph

(a), paragraph (a)(1), the introductory text of paragraph (a)(2), and paragraph (a)(3) to read as follows:

19.1306 HUBZone sole source awards.

(a) A contracting officer may award contracts to HUBZone small business concerns on a sole source basis (see 19.501(c) and 6.302-5(b)(5)) before considering small business set-asides (see subpart 19.5), provided--

(1) The contracting officer does not have a reasonable expectation that offers would be received from two or more HUBZone small business concerns;

(2) The anticipated price of the contract, including options, will not exceed--

* * * * *

(3) The requirement is not currently being performed by an 8(a) participant under the provisions of subpart 19.8 or has been accepted as a requirement by SBA under subpart 19.8.

* * * * *

0

3. Amend section 19.1406 by revising the introductory text of paragraph (a), paragraph (a)(1), and the introductory text of paragraph (a)(2); redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(5), respectively, and adding a new paragraph (a)(3) to read as follows:

19.1406 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to service-disabled veteran-owned small business concerns on a sole source basis (see 19.501(d) and

[[Page 38689]]

6.302-5(b)(6)), before considering small business set-asides (see subpart 19.5) provided none of the exclusions of 19.1404 apply and--

(1) The contracting officer does not have a reasonable expectation that offers would be received from two or more service-disabled veteran-owned small business concerns;

(2) The anticipated award price of the contract, including options, will not exceed--

* * * * *

(3) The requirement is not currently being performed by an 8(a) participant under the provisions of subpart 19.8 or has been accepted as a requirement by SBA under subpart 19.8;

* * * * *