

FAR Council Clarifies 8(a) Sole Source Justification Requirements for High Value Contracts

COVINGTON

Article By

[Jason A. "Jay" Carey](#)

[Ryan Burnette](#)

[Covington & Burling LLP](#)

[Inside Government Contracts](#)

- [Government Contracts, Maritime & Military Law](#)
- [All Federal](#)

Tuesday, November 29, 2016

On October 15, the Federal Acquisition Regulatory Council (FAR Council), issued a proposed rule to clarify contracting officer and agency responsibilities when justifying sole source awards exceeding \$22 million dollars made through the Small Business Administration's 8(a) program. The revisions directly address recommendations from a [December 2012 Government Accountability Office \(GAO\) report](#) titled, "Slow Start to Implementation of Justifications for 8(a) Sole-Source Contracts," which, among other things, highlighted agency "confusion" about the existing justification requirements in the FAR.

The 8(a) sole source justification requirement for high value contracts is a statutory mandate, established by Section 811 of the FY 2010 National Defense Authorization Act, presumably to ensure that these high value awards are in the government's best interest. While the FAR Council published implementing regulations in April 2012, as noted in the 2012 GAO report, a number of agencies had difficulty complying with the new requirements, which differ from those governing other sole source justifications.

In subsequent GAO reports (published in [September 2014](#) and in [June 2016](#)) reviewing the number of DoD issued 8(a) awards exceeding \$20 million dollars, GAO identified a significant decline in high value sole source awards to 8(a) firms since implementation of the justification requirement in the Federal Acquisition

Regulation (FAR).^[1] Some agency officials at least partly attributed these declines to the new regulations. GAO also noted a corresponding increase in the number of competitively awarded high value 8(a) contracts.

Key aspects of the proposed rule are highlighted below:

- The rule clarifies that agencies must use the 8(a) sole source justification specified in FAR 6.303-2 when it is applicable — they may not substitute another justification for other than full and open competition set forth at FAR 6.302, such as unusual and compelling urgency.
- The rule adds a requirement for contracting officers to provide the appropriate Small Business Administration (SBA) District Office with a copy of the approved justification. Previously, there was no explicit requirement in the FAR for agencies to share the justification with SBA for review.
- Consistent with the current rule, agency approval must still come from the head of the procuring activity, or his designee, for any justification for a proposed award exceeding \$13.5 million but less than \$68 million (or for DoD, NASA, and the Coast Guard, less than \$93 million). The Senior Procurement Executive must approve any 8(a) sole source justifications in excess of this amount, and excepting the Department of Defense, may not delegate his authority to do so.
- Finally, the preamble to the rule (but not the apparent revisions to the regulatory text) clarifies that an agency may not use 8(a) sole source authorities to justify out of scope modifications to existing contracts, which must be recompleted.

As this justification remains mandatory for large, sole source 8(a) awards, and must be posted publicly, where an agency does not follow the aforementioned requirements, 8(a) vendors may have valid grounds to protest the award decision. However, non-8(a) vendors face potential challenges when protesting solely on the basis of an invalid or missing justification, absent other protest grounds. As the justification may only explain why non-competitive sole source procedures are used when selecting among 8(a) firms, a non-8(a) vendor could have difficulty proving that it would otherwise be eligible for award.

The FAR Council will accept comments on these proposed revisions through January 17, 2017.

[1] The FAR Council issued a notice to revise the justification threshold upward from \$20 million to \$22 million dollars last year. 80 Fed. Reg. 38,293 (July 2, 2015).

© 2019 Covington & Burling LLP

Source URL: <https://www.natlawreview.com/article/far-council-clarifies-8a-sole-source-justification-requirements-high-value-contracts>