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FAR Part 19 Shake-Up: What It Means for Your Contracts, Your Team, and Your Bottom Line

Learning objectives include:

- Understand key changes to FAR Part 19
- Evaluate the impact on contracting strategies; and
- Apply compliance best practices under the revised rules



SPEAKER

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HOST

Reena Bhatia
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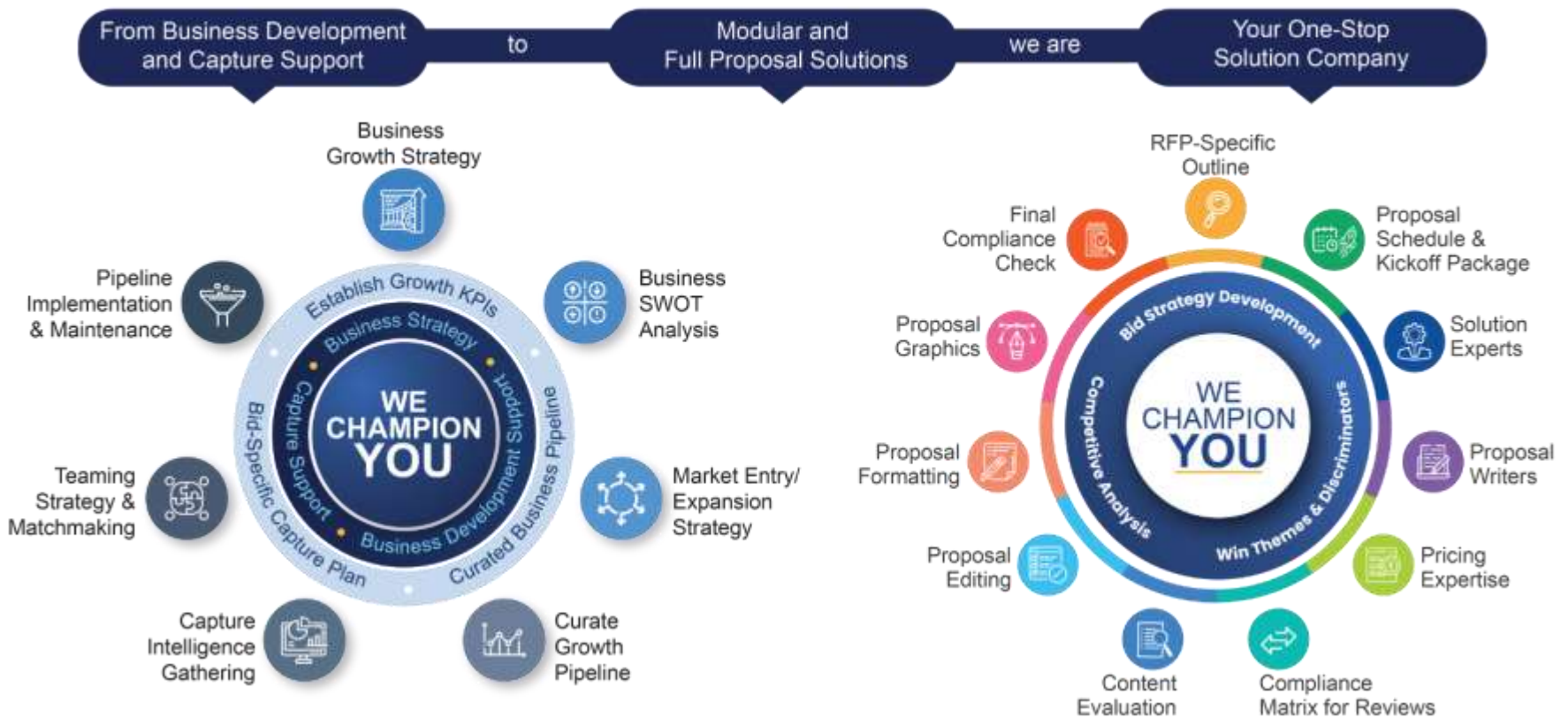
Ms. Reena Bhatia brings more than 30 years of experience in business development, account/capture, and proposal management for various international markets and the US Federal contracting sector. She has helped large, US defence contractors with strategy planning, international market entry, developing bid strategies and capturing opportunities with a high probability of win.

Prior to starting Proposal Helper, Reena was the Director for International Business Development with L-3 Communications where she was involved with the capture of a multi-billion-dollar command and control integration project in Saudi Arabia and assisted in expanding business across the Middle East through strategic alliances, collaboration across borders, and by cultivating relationships to achieve common goals. She, also, maintains significant contacts in the Asia Pacific region having done business in India, Philippines, Singapore, Malaysia, and Hong Kong. Reena has held senior strategic capture and proposal management positions with L-3, CACI, Genpact/Headstrong, DMI Inc., and other fast-growing global companies.

Ms. Bhatia holds a master's degree in public policy from the University of Maryland, College Park, and a bachelor's degree in Management from Trine University.

About ProposalHelper

ProposalHelper is America's largest employee-only company providing complete business development, capture, and proposal solutions.



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Cy Alba is a Partner at PilieroMazza. He counsels clients in a broad range of government contracting matters before government agencies and federal courts that include overall regulatory compliance with numerous regulatory schemes, including FAR and DFARS requirements. Cy also represents companies of all sizes with compliant corporate structuring, mergers and acquisitions, and small business rules and regulations. He handles the prosecution and defense of small business size and status protests and appeals, as well as bid protests and claims and appeals before administrative agencies and federal courts.

About PilieroMazza

PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States. We deliver results for our clients by implementing legal and business solutions that take the client’s best interests into consideration. Moreover, PilieroMazza’s efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

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Overview

- FAR Overhaul
- Structural Reorganization
- The Rule of Two
- 8(a) Program: Once 8(a), Not Always 8(a)
- Recertification
- SBA's Role
- Regulatory Gaps
- Protests
- Implications on M&A

FAR Overhaul

- The FAR Council overhauled the FAR to eliminate regulations not grounded in statutory authority
- The FAR Council completed this overhaul on September 30
- A much-anticipated part was FAR Part 19, particularly the Rule of Two (which is not codified in statute)

FAR Part 19 Overhaul

- Formerly titled, “Small Business Programs”
- Now titled, “Small Business”
- Good surprise: much of the original content remains intact
- The Rule of Two is retained
- Cuts more than 12,000 words
- The goal is to improve clarity, usability, and implementation

Structural Reorganization

- Like other sections of the FAR Overhaul, FAR Part 19 was reorganized to track the acquisition lifecycle
- Section 19.001, Definitions, consolidates all terms that were previously scattered
- Three parts:
 - 19.1: Presolicitation
 - 19.2: Evaluation and Award
 - 19.3: Postaward

Core Small Business Policy

- The general policy of FAR Part 19 is unchanged

“It is the Government’s policy to provide maximum practicable opportunities in its acquisitions to small business and other small business socioeconomic categories (i.e. veteran-owned small business [(VOSB)], service-disabled veteran-owned small business [(SDVOSB)], HUBZone small business, small disadvantaged business, and women-owned small business concerns [(WOSB)]).”

The Rule of Two: Old

- If “there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.”
13 C.F.R. § 125.1.
- FAR 19.502-2(a):
 - “Each acquisition of supplies or services that has an anticipated dollar value above the micro-purchase threshold, but not over the simplified acquisition threshold, shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of fair market prices, quality, and delivery. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. The small business set-aside does not preclude the award of a contract as described in 19.203.”

The Rule of Two: Old

- FAR 19.502-2(b):
 - Before setting aside an acquisition under this paragraph, refer to 19.203(c). The contracting officer shall set aside any acquisition over the simplified acquisition threshold for small business participation when there is a reasonable expectation that-
 - (1) Offers will be obtained from at least two responsible small business concerns; and
 - (2) Award will be made at fair market prices.
 - Total small business set-asides shall not be made unless such a reasonable expectation exists (see 19.502-3 for partial set-asides). Although past acquisition history and market research of an item or similar items are always important, these are not the only factors to be considered in determining whether a reasonable expectation exists. In making research and development small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

The Rule of Two: New

– 19.104-1 Total small business set-asides.

- (a) A “set-aside for small business” is the limiting of an acquisition exclusively for participation by small business concerns. For contracts above the micro-purchase threshold, the contracting officer must set the contract aside for small business if there is a reasonable expectation of obtaining offers—
 - (1) From two or more responsible small business concerns; and
 - (2) That are competitive in terms of fair market prices, quality, and delivery.

The Rule of Two: New

- Preserves the essence of the Rule of Two
- Eliminates the requirement for COs to consider socioeconomic set-asides before others
- COs are no longer required to prioritize socioeconomic set-asides

The New FAR 19.111-2

- COs have discretion to set aside orders under MACs
- The decision to set aside a contract is not subject to a protest

8(a) Contracts with Competition Prioritized

- Previously, contracts awarded under the 8(a) Program were required to remain in the 8(a) Program unless released by SBA
- FAR 19.108-11 makes follow-on 8(a) contracts available for set asides under the HUBZone, SDVOSB, or WOSB programs—without SBA approval
- The new rules prioritize competition over sole-sourcing
- Sole-source awards may only be pursued if competition is not feasible

8(a) under the Old FAR Part 19

- Historically, once a firm was accepted into the 8(a) Program, the CO had to notify the SBA of any changes, and any follow-on contract must remain in the program unless
 - The SBA approved the release, or
 - A mandatory source requirement under FAR Part 8 applied

Once 8(a), Not Always 8(a)

- Three provisions removed regarding SBA oversight:
 - The introductory policy language explicitly stated once in the program, they “must remain in the 8(a) Program unless the SBA agrees to its release”
 - Each Subpart related to other socioeconomic programs reiterated this restriction
 - For sole-source awards, contracting officers were prohibited from considering such awards where a requirement was being performed by an 8(a) firm or accepted into the 8(a) Program

What Changed?

- New exception limits SBA's authority by removing control over follow-on contract decisions
- COs have greater discretion on how to meet agency needs/goals
- No one small business program is favored over another
- Written notice to SBA was eliminated
 - CO does not need to obtain written approval or provide notice to SBA about mandatory source requiring a follow-on contract

What Was Retained?

- No mandatory source, and the follow-on will not be set-aside; SBA approval is still required
 - CO must submit a request to SBA, including:
 - whether the agency achieved its small, disadvantaged business goal;
 - whether the agency achieved its HUBZone, SDVOSB, WOSB, or small business goal(s); and
 - whether the requirement is critical to the business development of the current 8(a) contractor
 - These restrictions don't apply to task/delivery orders issued if the base contract is not accepted into the 8(a) Program

Contract-Level Recertification

- Order-level representations are eliminated for MACs
- Representations, size, and status are updated for specific contract-level events
 - Novations, mergers, or long-term contract option exercises
- This presents a discrepancy with SBA's current regulations

SBA Oversight and Advocacy

- Revised FAR Part 19 removes direct references to SBA's role in promoting small business contracting
- Looking closely, the Revised FAR Part 19 retains the same oversight as the previous version
- E.g., SBA's role in the Subcontracting Plan Program was removed in the line out
 - Core requirements of reviewing the plans during solicitation, evaluation, and post-award monitoring are intact

Gaps in the Rewrite

After a contractor rerepresents it is other than small in accordance with 52.219-28, the agency may no longer include the value of options exercised, modifications issued, orders issued, or purchases made under blanket purchase agreements on that contract in its small business prime contracting goal achievements. Agencies should issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation.

Gaps in the Rewrite

- FAR does not address eligibility for options or new awards after a disqualifying recertification
 - E.g., when a firm recertifies as “other than small” following a merger, acquisition, or novation
- SBA’s rules govern how recertification affects current and future contracts
- While the new FAR part 19 omits language expressly permitting COs to request recertification at the order level, it does not expressly prohibit them from doing so either

Order-Level Protests

- FAR retains language allowing size and socioeconomic protests at the order level in situations:
 - Recertification requested
 - Small business set-aside order is issued under an unrestricted MAC
 - Order is issued under a MAC set aside for small businesses, but further set aside for a different socioeconomic category

M&A Implications

- Can a buyer acquire a small business with IDIQ vehicles and reliably continue competing for options and set-aside orders after recertification?
 - No, not without careful analysis and risk mitigation
- The FAR still expressly requires recertification for mergers, acquisitions, and novations
- SBA regulations are still operative for eligibility under current and future contracts
- SBA has not issued clarification/guidance, and buyers/sellers must assume consequences

Key Takeaways

- Follow-On Flexibility
- Increased Competition
- Limited Application
- Public Feedback Requested
- SBA Rules Still in Control
- M&A Risk
- Check with your CO
- Hire an Attorney

Questions?



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