

and material costs contingency in the contract price, the contracting officer should normally use an economic price adjustment clause (see 16.203). When contracting for services, the contracting officer—

(1) Shall add the clause at 52.222-43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts), when the contract includes the clause at 52.222-41, Service Contract Act of 1965, as amended;

(2) May modify the clause at 52.222-43 in overseas contracts when laws, regulations, or international agreements require contractors to pay higher wage rates; or

(3) May use an economic price adjustment clause authorized by 16.203, when potential fluctuations require coverage and are not included in cost contingencies provided for by the clause at 52.222-43.

## **PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

### **22.1001 [Amended]**

3. Section 22.1001 is amended in the second sentence of the definition of "Multiple year contracts," by removing the phrase "with a term of more than 1 year (see 17.101)" and inserting "(see 17.103)" in its place.

## **PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

### **52.217-1 [Reserved]**

4. Section 52.217-1 is removed and reserved.

5. Section 52.217-2 is revised to read as follows:

### **52.217-2 Cancellation Under Multiyear Contracts.**

As prescribed in 17.109(a), insert the following clause:

CANCELLATION UNDER MULTIYEAR CONTRACTS (JUL 1996)

(a) *Cancellation*, as used in this clause, means that the Government is canceling its requirements for all supplies or services in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the Schedule, unless a later date is agreed to, if the Contracting Officer (1) notifies the Contractor that funds are not available for contract performance for any subsequent program year, or (2) fails to notify the Contractor that funds are available for performance of the succeeding program year requirement.

(b) Except for cancellation under this clause or termination under the Default

clause, any reduction by the Contracting Officer in the requirements of this contract shall be considered a termination under the Termination for Convenience of the Government clause.

(c) If cancellation under this clause occurs, the Contractor will be paid a cancellation charge not over the cancellation ceiling specified in the Schedule as applicable at the time of cancellation.

(d) The cancellation charge will cover only (1) costs (i) incurred by the Contractor and/or subcontractor, (ii) reasonably necessary for performance of the contract, and (iii) that would have been equitably amortized over the entire multiyear contract period but, because of the cancellation, are not so amortized, and (2) a reasonable profit or fee on the costs.

(e) The cancellation charge shall be computed and the claim made for it as if the claim were being made under the Termination for Convenience of the Government clause of this contract. The Contractor shall submit the claim promptly but no later than 1 year from the date (1) of notification of the nonavailability of funds, or (2) specified in the Schedule by which notification of the availability of additional funds for the next succeeding program year is required to be issued, whichever is earlier, unless extensions in writing are granted by the Contracting Officer.

(f) The Contractor's claim may include—

(1) Reasonable nonrecurring costs (see Subpart 15.8 of the Federal Acquisition Regulation) which are applicable to and normally would have been amortized in all supplies or services which are multiyear requirements;

(2) Allocable portions of the costs of facilities acquired or established for the conduct of the work, to the extent that it is impracticable for the Contractor to use the facilities in its commercial work, and if the costs are not charged to the contract through overhead or otherwise depreciated;

(3) Costs incurred for the assembly, training, and transportation to and from the job site of a specialized work force; and

(4) Costs not amortized solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning.

(g) The claim shall not include—

(1) Labor, material, or other expenses incurred by the Contractor or subcontractors for performance of the canceled work;

(2) Any cost already paid to the Contractor;

(3) Anticipated profit or unearned fee on the canceled work; or

(4) For service contracts, the remaining useful commercial life of facilities. "Useful commercial life" means the commercial utility of the facilities rather than their physical life with due consideration given to such factors as location of facilities, their specialized nature, and obsolescence.

(h) This contract may include an Option clause with the period for exercising the option limited to the date in the contract for notification that funds are available for the next succeeding program year. If so, the Contractor agrees not to include in option quantities any costs of a startup or nonrecurring nature that have been fully set forth in the contract. The Contractor further agrees that the option quantities will reflect only those recurring costs and a reasonable profit or fee necessary to furnish the additional option quantities.

(i) Quantities added to the original contract through the Option clause of this contract shall be included in the quantity canceled for the purpose of computing allowable cancellation charges.

(End of clause)

[FR Doc. 96-18504 Filed 7-25-96; 8:45 am]

BILLING CODE 6820-EP-P

## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

### **48 CFR Parts 19 and 52**

[FAC 90-40; FAR Case 94-782; Item VIII]

RIN 9000-AH08

### **Federal Acquisition Regulation; Small Business/Simplified Acquisition Threshold**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council has agreed to amend the Federal Acquisition Regulation (FAR) to implement section 4004 of the Act. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993,

but is not a major rule under 5 U.S.C. 804.

**EFFECTIVE DATE:** July 26, 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. Victoria Moss at (202) 501-4764 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-40, FAR case 94-782.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Small Business Team drafted FAR coverage to implement sections 4004, 7101(a), 7102 and 7106 of the Act. The proposed rule was published in the Federal Register at 60 FR 2302, January 6, 1995, and was published in the Federal Register at 60 FR 48258, September 18, 1995, as a final rule in FAR case 94-780, FAC 90-32.

In order to facilitate the issuance of the Simplified Acquisition Threshold/Federal Acquisition Computer Network (SAT/FACNET) rule (FAR Case 94-770), those portions of the Small Business Rule dealing with simplified acquisitions were included in the SAT/FACNET rule and issued as an interim rule in the Federal Register at 60 FR 34741, July 3, 1995, and finalized under that case. Those portions primarily implemented section 4004 of the Act which reserves each contract for the purchase of goods or services that has an anticipated value greater than \$2,500, but not greater than \$100,000, for exclusive small business participation, unless the contracting officer determines there is no reasonable expectation of obtaining offers from two or more small businesses that are competitive with market price, quality, and delivery.

One of the most significant issues in this case was the relationship between simplified acquisitions and the Small Business Administration's (SBA's) "nonmanufacturer rule." On January 31, 1996, SBA issued a final rule in the Federal Register at 61 FR 3280 revising its nonmanufacturer rule to provide that, where the procurement of a manufactured item processed under the procedures set forth in FAR Part 13 is set aside for small business, and where the anticipated cost of the procurement will not exceed \$25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States (13 CFR 121.406(d)). This final rule reflects that change.

**B. Regulatory Flexibility Act**

The final rule is expected to have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it implements changes to the SBA's regulations pertaining to the nonmanufacturer rule. The Act created a conflict between the FAR and 13 CFR 121.906(d) which authorized a small business dealer to furnish any domestically manufactured end product under a small business/small purchase set-aside. Public Law 103-355 eliminated the procedures entitled "small business/small purchase" and created new procedures called "simplified acquisitions." However, SBA had not revised its regulations to recognize "simplified acquisitions". In preparing the interim rule, SBA advised the drafting team that the automatic waiver to the nonmanufacturer rule for small purchases did NOT extend to simplified acquisitions. Consequently, the interim rule required a small business submitting an offer on all small business set-asides to furnish the products of small businesses unless the SBA had issued a waiver. Since issuance of the interim rule, SBA has revisited this issue and has issued changes to their nonmanufacturer rule. This final rule reflects the changes issued by SBA. A Final Regulatory Flexibility Analysis (FRFA) was prepared by the Small Business Administration under its rule dated January 31, 1996 (61 FR 3280), and provided to the Chief Counsel for Advocacy for the Small Business Administration.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**D. Public Comments**

An interim rule was published in the Federal Register at 60 FR 34741, July 3, 1995, as FAR case 94-770. In response to the notice of proposed rulemaking, 12 responses containing 28 comments relating to the small business coverage were received. The comments of all respondents were considered in developing this final rule. As a result of public comments and changes in SBA regulations, the following significant changes have been made:

The regulation has been revised to provide that, where the procurement of a manufactured item processed under the procedures set forth in FAR Part 13 is set aside for small business, and where the anticipated cost of the procurement will not exceed \$25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States.

Language in FAR Part 19 concerning acquisitions reserved for small businesses was expanded.

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

Dated: July 16, 1996.

Edward C. Loeb,

*Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.*

Therefore, 48 CFR Parts 19 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 19 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 19—SMALL BUSINESS PROGRAMS**

2. Section 19.102 is amended in the first sentence of paragraph (f)(1) by removing "(f)(2) through (f)(5)" and inserting "(f)(4) through (f)(7)" in its place; revising (f)(4); and adding (f)(7) to read as follows:

**19.102 Size standards.**

\* \* \* \* \*

(f) \* \* \*

(4) In the case of acquisitions set aside for small business or awarded under section 8(a) of the Small Business Act, when the acquisition is for a specific product (or a product in a class of products) for which the SBA has determined that there are no small business manufacturers or processors in the Federal market, then the SBA may grant a class waiver so that a nonmanufacturer does not have to furnish the product of a small business. For the most current listing of classes for which SBA has granted a waiver, contact an SBA Office of Government Contracting. A listing is also available in the SBA's Procurement Automated Source System (PASS) and on SBA's Internet Homepage at <http://www.sbaonline.sba.gov/GC/nonmanuf.html>. Contracting officers may request that the SBA waive the

nonmanufacturer rule for a particular class of products.

\* \* \* \* \*

(7) The SBA provides for an exception to the nonmanufacturer rule where the procurement of a manufactured item processed under the procedures set forth in part 13 is set aside for small business and where the anticipated cost of the procurement will not exceed \$25,000. In those procurements, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States.

\* \* \* \* \*

3. Section 19.502-2 is amended by revising paragraphs (a) and (c); and in the first sentence of (b)(2) by removing the "s" in the word "awards", and in the third sentence of paragraph (b)(2) by removing "the item" and inserting "an item" in its place. The revised text reads as follows:

**19.502-2 Total set-asides.**

(a) Each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500, but not over \$100,000, is automatically reserved exclusively for small business concerns and shall be set aside 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 market prices, quality, and delivery. If the contracting officer does not proceed with the small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase. 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 reservation does not preclude the award of a contract with a value not greater than \$100,000 under subpart 19.8, Contracting with the Small Business Administration, or under 19.1006(c), Emerging small business set-aside.

\* \* \* \* \*

(c) For set-asides other than for construction or services, any concern proposing to furnish a product which it did not itself manufacture must furnish the product of a small business manufacturer unless the SBA has

granted either a waiver or exception to the nonmanufacturer rule (see 19.102(f)). In industries where the SBA finds that there are no small business manufacturers, it may issue a waiver to the nonmanufacturer rule (see 19.102(f) (4) and (5)). In addition, SBA has excepted procurements processed under simplified acquisition procedures (see part 13), where the anticipated cost of the procurement will not exceed \$25,000, from the nonmanufacturer rule. Waivers permit small businesses to provide any firm's product. The exception permits small businesses to provide any domestic firm's product. In both of these cases, the contracting officer's determination in paragraph (b)(1) of this subsection or the decision not to set aside a procurement reserved for small business under paragraph (a) of this subsection will be based on the expectation of receiving offers from at least two responsible small businesses, including nonmanufacturers, offering the products of different concerns.

\* \* \* \* \*

4. Section 19.508 is amended in paragraphs (c) and (d) by revising the second sentences to read as follows:

**19.508 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(c) \* \* \* The clause at 52.219-6 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has waived the nonmanufacturer rule (see 19.102(f) (4) and (5)).

(d) \* \* \* The clause at 52.219-7 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has waived the nonmanufacturer rule (see 19.102(f) (4) and (5)).

\* \* \* \* \*

5. Section 19.811-3 is amended by revising paragraph (d)(3) to read as follows:

**19.811-3 Contract clauses.**

\* \* \* \* \*

(d) \* \* \*

(3) The clause at 52.219-18 with its Alternate III will be used when the acquisition is for a product in a class for which the Small Business Administration has waived the nonmanufacturer rule (see 19.102(f) (4) and (5)).

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

4. Section 52.219-6 is amended by revising the introductory text, the clause date, and paragraph (c) to read as follows:

**52.219-6 Notice of Total Small Business Set-Aside.**

As prescribed in 19.508(c), insert the following clause:

**NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (JUL 1996)**

\* \* \* \* \*

(c) *Agreement.* A small business concern submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States. The term "United States" includes its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia. If this procurement is processed under simplified acquisition procedures and the total amount of this contract does not exceed \$25,000, a small business concern may furnish the product of any domestic firm. This paragraph does not apply in connection with construction or service contracts.

\* \* \* \* \*

(End of clause)

5. Section 52.219-7 is amended by revising the clause date and paragraph (c) to read as follows:

**52.219-7 Notice of Partial Small Business Set-Aside.**

\* \* \* \* \*

**NOTICE OF PARTIAL SMALL BUSINESS SET-ASIDE (JUL 1996)**

\* \* \* \* \*

(c) *Agreement.* For the set-aside portion of the acquisition, a small business concern submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States. The term "United States" includes its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia. If this procurement is processed under simplified acquisition procedures and the total amount of this contract does not exceed \$25,000, a small business concern may furnish the product of any domestic firm. This paragraph does not apply in connection with construction or service contracts.

\* \* \* \* \*

(End of clause)

6. Section 52.219-18 is amended in the clause by revising the date and paragraph (d)(1); and in Alternate III by revising the date to read "(JUL 1996)" and removing the phrase "paragraph (d)" and inserting "subparagraph (d)(1)" in its place. The revised text reads as follows:

## 52.219-18 Notification of Competition Limited to Eligible 8(a) Concerns.

\* \* \* \* \*

### NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(a) CONCERNS (JUL 1996)

\* \* \* \* \*

(d)(1) *Agreement.* A small business concern submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States. The term "United States" includes its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia. If this procurement is processed under simplified acquisition procedures and the total amount of this contract does not exceed \$25,000, a small business concern may furnish the product of any domestic firm. This subparagraph does not apply in connection with construction or service contracts.

\* \* \* \* \*

[FR Doc. 96-18505 Filed 7-25-96; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 26 and 52

[FAC 90-40; FAR Case 91-028; Item IX]

RIN 9000-AE52

#### Federal Acquisition Regulation; Indian-Owned Economic Enterprises

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

**ACTION:** Interim rule adopted as final with changes.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to convert the interim rule published in the Federal Register at 56 FR 41736, August 22, 1991, to a final rule with additional changes. The interim rule added FAR Subpart 26.1, Indian Incentive Program, which allows contractors to recover certain costs of subcontracting with Indian organizations and Indian-owned economic enterprises. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

**EFFECTIVE DATE:** September 24, 1996.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ralph DeStefano at (202) 501-1758 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-40, FAR case 91-028.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 7 of Public Law 100-442 amended the Indian Financing Act of 1974 by adding a new Section 504 (25 U.S.C. 1544) to encourage the use of Indian organizations and Indian-owned economic enterprises in subcontracting by allowing the prime contractor "an additional amount of compensation equal to 5 percent of the amount paid." The statute allows this "[n]otwithstanding any other provision of law."

The interim rule published on August 22, 1991, added language at FAR Subpart 26.1, Indian Incentive Program. Minor amendments to the interim rule were made at 57 FR 20376, May 12, 1992, and 60 FR 48258, September 18, 1995. All comments received on the interim rule were considered in formulation of the final rule.

The final rule makes, among other changes, one major revision to the interim rule as a result of the analysis of public comments. The principal distinction between the interim rule and the final rule is how each treats the payment language under 25 U.S.C. 1544. The interim rule allowed prime contractors to recover certain costs of subcontracting with Indian organizations and Indian-owned economic enterprises based on the difference in price between the acceptable low non-Indian subcontractor and the price, if provided, of the acceptable low Indian-owned subcontractor when the Indian-owned subcontractor's price exceeds the price of acquiring the supplies or services from a non-Indian subcontractor. The final rule permits payment of a flat 5 percent bonus to the prime contractor of the amount paid to the Indian subcontractor by the prime contractor. Also, the final rule adds the definitions of "Indian" and "Indian tribe" to FAR 26.101 and the clause at 52.226-1 and adds the definition of "Interested party" to 52.226-1. The final rule allows civilian agencies to include the clause in all contracts (FAR 26.104(b)) where certain criteria apply, regardless of whether the contract includes a subcontracting plan pursuant to FAR 52.219-9.

##### B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, applies to this final rule and a Final Regulatory Flexibility Analysis (FRFA) has been performed. A copy of the FRFA may be obtained from the FAR Secretariat

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Parts 26 and 52

Government procurement.

Dated: July 16, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Interim Rule Adopted as Final With Change

Accordingly, the interim rule amending 48 CFR Parts 26 and 52 and published at 56 FR 41736, August 22, 1991, is adopted as a final rule with the following changes.

1. The authority citation for 48 CFR Parts 26 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### PART 26—OTHER SOCIOECONOMIC PROGRAMS

2. Section 26.101 is amended by revising the definitions of "Indian organization" and "Interested party"; and adding, in alphabetical order, the definitions for "Indian" and "Indian tribe" to read as follows:

##### 26.101 Definitions.

\* \* \* \* \*

*Indian* means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs (BIA) in accordance with 25 U.S.C. 1452(c) and any "Native" as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601).

*Indian organization* means the governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe for the purposes of 25 U.S.C., chapter 17.

\* \* \* \* \*

*Indian tribe* means any Indian tribe, band, group, pueblo, or community,