

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION48 CFR Parts 12, 14, 15, 19, 33, 52, and
53

[FAR Case 97-004]

RIN 9000-AH59

Federal Acquisition Regulation;
Reform of Affirmative Action in Federal
Procurement

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

ACTION: Proposed rule with request for comments.

SUMMARY: The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration are proposing amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business concerns. These amendments conform to a Department of Justice (DoJ) proposal to reform affirmative action in Federal procurement. DoJ's proposal is designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). This proposed rule is not requesting public comments on the DoJ proposal or its disposition of the public comments received. This proposed rule requests public comments only on the FAR implementation of the DoJ proposal. Comments on the DoJ proposal will not be considered. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is a major rule under 5 U.S.C. 804.

DATES: Comments on the proposed rule should be submitted to the address below on or before July 8, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: 97-004@www.arnet.gov. Please cite FAR case 97-004 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Ms. Victoria Moss, Procurement Analyst, Federal Acquisition Policy Division, General Services Administration, telephone (202) 501-4764, or Mike Sipple, Procurement Analyst, Office of the Director of Defense Procurement, Department of Defense, telephone (703) 695-8567. For general information, contact the FAR Secretariat, 1800 F Street, NW, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 97-004.

SUPPLEMENTARY INFORMATION:

A. Background

In *Adarand*, the Supreme Court extended strict judicial scrutiny to Federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny, any Federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling government interest.

DoJ developed a proposed structure to reform affirmative action in Federal procurement designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand*. The DoJ proposal was previously published for public notice and invitation for comments (61 FR 26042, May 23, 1996). Its proposal, and its disposition of the public comments which is discussed elsewhere in this publication, are within the purview of DoJ. The DoJ model is expected to be implemented in several parts: Small Business Administration regulations; Department of Commerce regulations; and revisions to the FAR and the FAR supplements. This proposed rule contains the FAR revisions.

B. Regulatory Flexibility Act

This proposed rule may 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 the rule provides mechanisms through which small disadvantaged business concerns may be provided a benefit in Federal contracting. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and may be obtained from the FAR Secretariat. A copy of the IRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. The IRFA is summarized as follows:

This proposed rule would establish in the FAR three procurement mechanisms

benefiting small disadvantaged businesses (SDBs). These mechanisms will be authorized in certain two-digit Standard Industrial Classification (SIC) Major Groups authorized by the Administrator of the Office of Federal Procurement Policy (OFPP). The first mechanism is a price evaluation adjustment of up to 10 percent. This price evaluation adjustment would be mandatory for those competitive procurements to which it applied. The second mechanism is a source selection evaluation factor or subfactor for planned SDB participation, primarily at the subcontract level, in the performance of a contract. This evaluation factor or subfactor would be used in competitive, negotiated acquisitions expected to exceed \$500,000 (\$1,000,000 for construction). A third mechanism provides for a monetary incentive for subcontracting with SDBs.

The main impact of the proposed rule is expected to be on SDBs seeking to obtain from Federal Government agencies, or Federal Government agency prime contractors, contracts and subcontracts that are subject to the procurement mechanisms described above. The best available estimate of the number of such firms is 17,350. The proposed rule would also directly affect, although to a lesser degree, all non-SDB small businesses seeking Federal Government contracts that are subject to any of the procurement mechanisms described above, except the price evaluation adjustment (this mechanism applies only to SDB prime contractors).

Comments are invited. Comments from small entities concerning the affected FAR subparts will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 97-004), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Public Law 104-13) applies because the proposed rule contains reporting and recordkeeping requirements. This proposed rule provides mechanisms through which businesses may be provided a benefit in Federal contracting through their status as small disadvantaged business concerns or their utilization of small disadvantaged business concerns. In order to obtain these benefits, businesses must provide information supporting their status. In addition, firms claiming an advantage on the basis of their utilization of small disadvantaged business concerns must report on their actual accomplishments.

In addition, this proposed rule requires contractors that submit reports under small, small disadvantaged and women-owned small business subcontracting plans to annually provide a breakout of awards (in dollars) to small disadvantaged business concerns by Standard Industrial Classification Major Group.

A request for approval of the paperwork burden has been submitted to the Office of Management and Budget and a notice of that request appears elsewhere in this issue.

List of Subjects in 48 CFR Parts 12, 14, 15, 19, 33, 52, and 53

Government procurement.

Dated: May 6, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 12, 14, 15, 9, 33, 52, and 53 be amended as set forth below:

1. The authority citation for 48 CFR Parts 12, 14, 15, 9, 33, 52, and 53 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 12—ACQUISITION OF COMMERCIAL ITEMS

2. Section 12.303 is amended by revising paragraph (b)(1) to read as follows:

12.303 Contract format.

* * * * *

(b) * * *

(1) Block 10 if set-aside for emerging small businesses, if a price evaluation adjustment for small disadvantaged business concerns is applicable (the contracting officer shall indicate the percentage(s) and applicable line item(s)), or if an incentive subcontracting clause is used (the contracting officer shall indicate the applicable percentage);

* * * * *

PART 14—SEALED BIDDING

14.206 Small business set-asides, and price evaluation adjustments for small disadvantaged business concerns.

3. The section heading for 14.206 is revised to read as set forth above.

4. Section 14.502 is amended by redesignating paragraph (b)(4) as (b)(5) and adding a new (b)(4) to read as follows:

14.502 Conditions for use.

* * * * *

(b) * * *

(4) The use of the price evaluation adjustment for small disadvantaged business concerns (see subpart 19.11).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

5. Section 15.605 is amended by adding paragraph (b)(1)(v) to read as follows:

15.605 Evaluation factors and subfactors.

* * * * *

(b)(1) * * *

(v) The extent of participation of small disadvantaged business concerns in performance of the contract shall be evaluated in unrestricted acquisitions expected to exceed \$500,000 (\$1,000,000 for construction) subject to certain limitations (see 19.201 and 19.1202).

* * * * *

6. Section 15.608 is amended in paragraph (a)(2)(ii) by adding the following sentence after the fourth sentence:

15.608 Proposal evaluation.

(a) * * *

(2) * * *

(ii) * * * Where past performance is to be evaluated, the evaluation should include the past performance of offerors in complying with subcontracting plan goals for small disadvantaged business (SDB) concerns (see subpart 19.7), monetary targets for SDB participation (see 19.1202), and notifications submitted under 19.1202-4(b).

* * * * *

7. Section 15.1003 is amended by revising paragraph (a)(2) to read as follows:

15.1003 Notifications to unsuccessful offerors.

(a) * * *

(2) *Preaward notices for small business set-asides.* (i) In a small business set-aside (see subpart 19.5), or when a small disadvantaged business concern receives a benefit based on its disadvantaged status (see subpart 19.11 and 19.1202) and is the apparently successful offeror, upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each unsuccessful offeror in writing of the name and location of the apparently successful offeror. The notice shall also—

(A) Include, when applicable, the name and address of the organization that certified ownership and control of the small disadvantaged business concern;

(B) State that the Government will not consider subsequent revisions of the unsuccessful offerors proposal; and

(C) State that no response is required unless a basis exists to challenge the disadvantaged status and/or small business size status of the apparently successful offeror.

(ii) The notice is not required when the contracting officer determines in writing that the urgency of the

requirement necessitates award without delay.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

8. Section 19.000 is amended by revising paragraph (a) introductory text; at the end of (a)(6) by removing and; at the end of (a)(7) by removing the period and inserting a semicolon in its place; and adding (a)(8) and (a)(9) to read as follows:

19.000 Scope of part.

(a) This part implements the acquisition-related sections of the Small Business Act (15 U.S.C. 631, *et seq.*), applicable sections of the Armed Services Procurement Act (10 U.S.C. 2302, *et seq.*), the Federal Property and Administrative Services Act (41 U.S.C. 252), section 7102 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), 10 U.S.C. 2323, and Executive Order 12138, May 18, 1979. It covers—

* * * * *

(8) The use of a price evaluation adjustment for small disadvantaged business concerns; and

(9) The Small Disadvantaged Business Participation Program.

* * * * *

9. Section 19.201 is amended by redesignating paragraphs (b), (c), and (d) as (c), (d), and (e), respectively; and adding new paragraphs (b) and (f) to read as follows:

19.201 General policy.

* * * * *

(b) The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) Manual, and by region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms, and their effective dates for new solicitations for the upcoming year. The SDB procurement mechanisms currently authorized are a price evaluation adjustment for SDB concerns (see subpart 19.11), an evaluation factor or subfactor for participation of SDB concerns (see 19.1202), and monetary subcontracting incentive clauses for SDB concerns (see 19.1203). This issuance shall also include the applicable factors, by SIC Major Group, to be used in the price evaluation adjustment for SDB concerns (see 19.1104). The authorized procurement mechanisms shall be applied

consistently with the policies and procedures in this subpart. No SDB procurement mechanisms recommended by the Department of Commerce may be used unless authorized by the Administrator of OFPP. The Department of Commerce, in making its recommendations to the Administrator of OFPP, is not limited to the SDB procurement mechanisms identified in this section where the Department of Commerce has found substantial and persuasive evidence of—

(1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and

(2) A demonstrated incapacity to alleviate the problem by using those mechanisms.

* * * * *

(f)(1) Each agency shall designate, at levels it determines appropriate, personnel responsible for determining whether use of the SDB mechanism in subpart 19.11 has caused a particular industry category to bear a disproportionate share of the contracts awarded by a contracting activity of the agency to achieve its goal for SDB concerns. Requests for a determination may be submitted by any individual or business concern to the agency designee. If that person makes an affirmative determination of disproportionate impact, the determination shall be forwarded through agency channels for submittal to the Department of Commerce [*name and address*]. The following information should be included in any submittal:

(i) A determination of disproportionate impact, including proposed corrective action;

(ii) The SIC code(s) affected;

(iii) Supporting information to justify the determination, including dollars and percentages by the contracting activity under the affected SIC code(s) for the previous two fiscal years and current fiscal year to date for—

(A) Total awards;

(B) Total awards to small businesses;

(C) Total awards to SDBs; and

(D) Awards to SDBs categorized as SDB price evaluation adjustment, 8(a), small business set-aside, and other; and

(iv) A discussion of the pertinent findings, including any peculiarities related to the industry, regions, or demographics.

(2) If the determination is approved by the Department of Commerce, the contracting activity shall limit the use of the SDB mechanism in subpart 19.11. This limitation shall not apply to solicitations that already have been synopsized.

Subpart 19.3—Determination of Status as a Small Disadvantaged Business Concern or a Small Business Concern

10. The heading of subpart 19.3 is revised to read as set forth above.

11. Section 19.304 is redesignated as 19.306 and new 19.304 and 19.305 are added to read as follows:

19.304 Disadvantaged business status.

(a) The contracting officer may accept an offeror's representation that it is a small disadvantaged business (SDB) concern for general statistical purposes.

(b) For a prime contractor to be eligible to receive a benefit based on its disadvantaged status, the concern must be a small business and must, no later than the date specified by the contracting officer in the solicitation (see 19.306(b)), qualify as a disadvantaged business concern. The mechanisms that may provide benefits on the basis of disadvantaged status as a prime contractor are a price evaluation adjustment for SDB concerns (see subpart 19.11), and an evaluation factor or subfactor for SDB participation (see 19.1202). Disadvantaged status is determined by two factors: Social and economic disadvantage; and ownership and control by the designated socially and economically disadvantaged individuals. Status as a small business is addressed in 19.301.

(1) The contracting officer shall grant members of designated minority groups (see the provision at 52.219–22, Small Disadvantaged Business Status) a presumption of social and economic disadvantage. An offeror must represent in good faith its minority status. Offerors that are not members of designated minority groups shall be required to establish social and economic disadvantage. For non-presumed offerors, a determination of social and economic disadvantage shall be obtained by the offeror from the Small Business Administration (SBA). When a non-presumed offeror represents that it has a current determination of social and economic disadvantage from the SBA, the contracting officer may assess the validity of the representation of social and economic disadvantage by accessing the SBA's on-line central registry at [*Internet address*].

(2) To claim disadvantaged status, an offeror must also submit to the contracting officer a certification, obtained within the prior three years, that the business is owned and controlled by the designated socially and economically disadvantaged individuals. Such a certification must come from an SBA approved

organization, a list of which is maintained by the SBA.

(3) Non-presumed offerors must obtain a determination of social and economic disadvantage, and all offerors claiming a disadvantaged status must provide a certification of ownership and control, no later than the date specified by the contracting officer in the solicitation (see 19.306(b)).

§ 19.305 Protesting a determination of disadvantaged business status.

This section applies to protests of a small business concern's disadvantaged status as a prime contractor. Protests of a small business concern's disadvantaged status as a subcontractor are processed under 19.703(a)(2). Protests of a concern's size as a prime contractor are processed under 19.302. Protests of a concern's size as a subcontractor are processed under 19.703(b). Any offeror, the contracting officer, or the SBA may protest the apparently successful offeror's representation of disadvantaged status if the concern is eligible to receive a benefit based on its disadvantaged status (see subpart 19.11 and 19.1202).

(a) An offeror may protest a concern's representation of disadvantaged status by filing a protest with the contracting officer. The protest—

(1) Must be filed within the times specified in 19.302(d)(1); and

(2) Must contain specific detailed evidence supporting the basis of protest.

(b) The contracting officer or the SBA may protest a concern's representation of disadvantaged status at any time.

(1) If a contracting officer's protest is based on information provided by a party ineligible to protest directly or ineligible to protest under the timeliness standard, the contracting officer must be persuaded by the evidence presented before adopting the grounds for protest as his or her own.

(2) The SBA may protest a concern's representation of disadvantaged status by filing directly with its Office of Program Certification and Eligibility and by notifying the contracting officer.

(c) The contracting officer shall return untimely protests to the protester. This includes protests filed before bid opening or notification of the apparently successful offeror.

(d) Upon receipt of a timely protest, the contracting officer shall withhold award and forward the protest to the SBA Office of Program Certification and Eligibility, Office of Minority Enterprise Development, 409 Third Street, SW, Washington, DC 20416. The contracting officer shall send to SBA—

(1) The protest;

(2) The date the protest was received and a determination of timeliness;

(3) A copy of the protested concern's submittals regarding disadvantaged status; and

(4) The date of bid opening or date on which notification of the apparently successful offeror was sent to unsuccessful offerors.

(e) When the contracting officer makes a written determination that award must be made to protect the public interest, award may be made notwithstanding the protest.

(f) The SBA, Office of Program Certification and Eligibility, will determine the disadvantaged status of the challenged offeror and will notify the contracting officer, the challenged offeror, and the protester. Award may be made on the basis of that determination. The determination is final for purposes of the instant acquisition, unless—

(1) It is appealed; and

(2) The contracting officer receives the SBA's decision on the appeal before award.

(g) If the contracting officer does not receive an SBA determination within 15 business days after the SBA's receipt of the protest, the contracting officer shall presume that the challenged offeror is disadvantaged.

(h) An SBA determination may be appealed by—

(1) The interested party whose protest has been denied;

(2) The concern whose status was protested; or

(3) The contracting officer.

(i) The appeal must be filed with the SBA's Associate Administrator for Minority Enterprise Development within five business days after receipt of the determination. If the contracting officer receives the SBA's decision on the appeal before award, the decision shall apply to the instant acquisition. If the decision is received after award, it will apply to future acquisitions.

12. Newly redesignated 19.306 is amended by redesignating paragraph (b) as (c) and adding a new (b) to read as follows:

19.306 Solicitation provision and contract clause.

* * * * *

(b) The contracting officer shall insert the provision at 52.219-22, Small Disadvantaged Business Status, in solicitations that include the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, or 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting. The contracting officer shall insert a date that allows offerors a reasonable time, consistent with the needs of the procurement, to obtain a

determination of social and economic disadvantage and a certification of ownership and control.

* * * * *

13. Section 19.703 is amended in paragraph (a)(2) by inserting the following sentence after the first sentence; in the new sixth sentence by removing "Small Business and Capital Ownership" and inserting "Enterprise" in its place; and in paragraph (b) by removing the first sentence. The new text reads as follows:

19.703 Eligibility requirements for participating in the program.

(a) * * *

(2) * * * A prime contractor, acting in good faith, may accept, for general statistical purposes or for purposes of a subcontracting plan, a subcontractor's representation that it is a small disadvantaged business concern. * * *

14. Section 19.705-1 is amended by inserting the following sentence after the first sentence of the undesignated paragraph to read as follows:

19.705-1 General support of the program.

* * * This subsection does not apply to small disadvantaged business subcontracting (see 19.1203). * * *

19.705-4 [Amended]

15. Section 19.705-4 is amended in the last sentence of paragraph (c) by removing ", small disadvantaged".

19.708 [Amended]

16. Section 19.708 is amended in the first sentence of paragraphs (c)(1), (c)(2), and (c)(3) by removing ", small disadvantaged".

17. Section 19.1001 is amended by designating the undesignated introductory paragraph as (a); redesignating paragraphs (a) and (b) as (a)(1) and (a)(2), respectively; and adding paragraph (b) to read as follows:

19.1001 General.

* * * * *

(b) Notwithstanding the Small Business Competitiveness Demonstration Program, the following apply to acquisitions in the designated industry groups if authorized by the Administrator of the Office of Federal Procurement Policy (see 19.201(b)):

(1) A price evaluation adjustment for small disadvantaged business concerns (see subpart 19.11), provided this mechanism may only be used when small business set-asides are authorized in the designated industry groups;

(2) An evaluation factor or subfactor for participation of small disadvantaged business concerns (see 19.1202); and

(3) Monetary subcontracting incentive clauses for small disadvantaged business concerns (see 19.1203).

18. Subparts 19.11 and 19.12, consisting of sections 19.1101 through 19.1204, are added to read as follows:

Subpart 19.11—Price Evaluation Adjustment for Small Disadvantaged Business Concerns

Sec.

19.1101 General.

19.1102 Applicability.

19.1103 Procedures.

19.1104 Solicitation provisions and contract clauses.

19.1101 General.

A price evaluation adjustment for small disadvantaged business concerns shall be applied when authorized by the Administrator of the Office of Federal Procurement Policy (OFPP) (see 19.201(b)). The Administrator of OFPP will publish an annual listing of price evaluation adjustment percentages, by Standard Industrial Classification Major Group, to be used in solicitations for the upcoming year.

19.1102 Applicability.

(a) The price evaluation adjustment shall be used in competitive acquisitions.

(b) The price evaluation adjustment shall not be used in acquisitions that—

(1) Are not greater than the simplified acquisition threshold;

(2) Are awarded pursuant to the 8(a) program;

(3) Are set-aside for small business concerns; or

(4) Are for long distance telecommunications services.

19.1103 Procedures.

(a) Give offers from small disadvantaged business concerns a price evaluation adjustment by adding the factor authorized by OFPP to all offers, except—

(1) Offers from small disadvantaged business concerns that have not waived the evaluation adjustment;

(2) Otherwise successful offers of eligible products under the Trade Agreements Act when the acquisition equals or exceeds the dollar threshold in 25.402;

(3) Offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government.

(b) Apply the factor on a line item basis or apply it to any group of items on which award may be made. Add other evaluation factors such as transportation costs or rent-free use of

Government facilities to the offers before applying the price evaluation adjustment.

(c) Do not evaluate offers using the price evaluation adjustment when it would cause award to be made at a price that exceeds fair market price by more than 10 percent (10 U.S.C. 2323(e)(3) and section 7102(a)(1)(B) of Public Law 103-355).

19.1104 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, in solicitations and contracts when the circumstances in 19.1102 apply. The contracting officer shall insert the authorized price evaluation adjustment factor. The clause shall be used with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation. This clause does not apply to the Department of Defense, the National Aeronautics and Space Administration, or the Coast Guard.

Subpart 19.12—Small Disadvantaged Business Participation Program

Sec.

- 19.1201 General.
- 19.1202 Evaluation factor or subfactor.
- 19.1202-1 General.
- 19.1202-2 Applicability.
- 19.1202-3 Considerations in developing an evaluation factor or subfactor.
- 19.1202-4 Procedures.
- 19.1203 Incentive subcontracting with small disadvantaged business concerns.
- 19.1204 Solicitation provisions and contract clauses.

19.1201 General.

This subpart addresses the evaluation of the extent of participation of small disadvantaged business (SDB) concerns in performance of contracts in the Standard Industrial Classification (SIC) Major Groups authorized by the Administrator of the Office of Federal Procurement Policy (OFPP) (see 19.201(b)) and to the extent authorized by law. Two mechanisms are addressed in this subpart:

- (a) An evaluation factor or subfactor for the participation of SDB concerns in performance of the contract; and
- (b) An incentive subcontracting program for SDB concerns.

19.1202 Evaluation factor or subfactor.

19.1202-1 General.

The extent of participation of SDB concerns in performance of the contract, in the SIC Major Groups authorized by

the Administrator of OFPP and to the extent authorized by law, shall be evaluated consistent with this section. Participation in performance of the contract includes joint ventures, teaming arrangements, and subcontracts. Credit under the evaluation factor or subfactor is not available to SDB concerns that receive a price evaluation adjustment under subpart 19.11. If an SDB concern waives the price evaluation adjustment at subpart 19.11, participation in performance of that contract includes the work expected to be performed by the SDB concern at the prime contract level.

19.1202-2 Applicability.

- (a) Except as stated in paragraph (b) of this subsection, the extent of participation of SDB concerns in performance of the contract in the authorized SIC Major Groups shall be evaluated in competitive, negotiated acquisitions expected to exceed \$500,000 (\$1,000,000 for construction).
- (b) The extent of participation of SDB concerns in performance of the contract in the authorized SIC Major Groups (see paragraph (a) of this subsection) shall not be evaluated in—

- (1) Small business set-asides (see subpart 19.5);
- (2) 8(a) acquisitions (see subpart 19.7);
- (3) Negotiated acquisitions where source selection is based on cost or price competition between proposals that meet the Government's minimum requirements stated in the solicitation (see 15.602); or
- (4) Contract actions that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

19.1202-3 Considerations in developing an evaluation factor or subfactor.

In developing an SDB participation evaluation factor or subfactor, agencies may consider: The extent to which such concerns are specifically identified; the extent to which identified concerns have obtained disadvantaged status (for example, non-presumed offerors that have already obtained disadvantaged status (*i.e.*, obtained a determination of social and economic disadvantage and a certification of ownership and control) are to receive greater consideration than non-presumed offerors that have only applied for disadvantaged status)); the extent of commitment to use such concerns (for example, enforceable commitments are to be weighted more heavily than non-enforceable ones); the complexity and variety of the work small disadvantaged concerns are to

perform; the realism of the proposal; past performance of offerors in complying with subcontracting plan goals for SDB concerns and monetary targets for SDB participation; and the extent of participation of such firms in terms of the value of the total acquisition.

19.1202-4 Procedures.

- (a) The solicitation shall describe the SDB participation evaluation factor or subfactor. The solicitation shall require offerors to provide, with their offers, targets, expressed as dollars and percentages of total contract value, in each of the applicable, authorized SIC Major Groups, and total targets for SDB participation segregated by joint venture partners, team members, and subcontractors. The solicitation shall require an SDB offeror that waives the SDB price evaluation adjustment in the clause at 52.219-23 to provide with its offer a target for the work that it intends to perform as the prime contractor. The solicitation shall state that any targets will be incorporated into and become part of any contract. Contractors with SDB participation targets shall be required to report SDB participation.

- (b) When an evaluation includes an SDB participation evaluation factor or subfactor that considers the extent to which SDB firms are specifically identified, the SDBs considered in the evaluation shall be listed in the contract, and the contractor shall be required to notify the contracting officer of any substitutions of firms that are not SDB concerns.

19.1203 Incentive subcontracting with small disadvantaged business concerns.

The contracting officer may encourage increased subcontracting opportunities in the SIC Major Groups authorized by the Administrator of OFPP for SDB concerns in negotiated acquisitions by providing monetary incentives (see the clause at 52.219-26, Incentive Subcontracting Program for Small Disadvantaged Business Concerns, and 19.1204(c)). Monetary incentives shall be based on actual achievement as compared to proposed monetary targets for SDB subcontracting (see 19.1202) or award fee contracting. The incentive subcontracting program is separate and distinct from the establishment, monitoring, and enforcement of SDB subcontracting goals in a subcontracting plan.

19.1204 Solicitation provisions and contract clauses.

- (a) The contracting officer may insert a provision substantially the same as the provision at 52.219-24, Small

Disadvantaged Business Participation Targets, in solicitations that consider the extent of participation of SDB concerns in performance of the contract. The contracting officer may vary the terms of this provision consistent with the policies in 19.1202-4.

(b) The contracting officer shall insert the clause at 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, in solicitations and contracts that consider the extent of participation of small disadvantaged business concerns in performance of the contract.

(c) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts containing the clause at 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, a clause substantially the same as the clause at 52.219-26, Incentive Subcontracting Program for Small Disadvantaged Business Concerns, when authorized (see 19.1203). The contracting officer may include an award fee provision in lieu of the incentive; in such cases, however, the contracting officer shall not use the clause at 52.219-26.

PART 33—PROTESTS, DISPUTES, AND APPEALS

19. Section 33.102 is amended by revising the last sentence of paragraph (a) to read as follows:

33.102 General.

(a) * * * (See 19.302 for protests of small business status and 19.305 for protests of disadvantaged business status.)

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-2 [Amended]

20. Section 52.212-2 is amended by revising the provision date; and in the parenthetical following paragraph (a) of the provision by inserting “; (iv) small disadvantaged business participation;” after “(see FAR 15.605)”.

21. Section 52.212-3 is amended by revising the provision date; and adding two sentences at the end of paragraph (c)(2) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Date)

* * * * *

(c) * * *

(2) * * * See the clause at 52.212-5, Contract Terms and Conditions Required to

Implement Statutes or Executive Orders—Commercial Items. If the Contracting Officer has checked 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, or 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, and the offeror desires a benefit based on its disadvantaged status, the offeror shall submit a completed copy of the provision at 52.219-22, Small Disadvantaged Business Status, together with any documents required by that provision.

* * * * *

22. Section 52.212-5 is amended by revising the clause date; redesignating paragraphs (b)(6) through (b)(17) as (b)(9) through (b)(20), respectively; and adding paragraphs (b)(6), (b)(7), and (b)(8) to read as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Date)

* * * * *

(b) * * *

(6) 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (Pub. L. 103-355, section 7102). (____ Alternate I). If the offeror elects to waive the adjustment, it shall so indicate in its offer.

(7) 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.

(8) 52.219-26, Incentive Subcontracting Program for Small Disadvantaged Business Concerns.

* * * * *

23. Section 52.219-9 is amended by revising the clause date and paragraph (d)(10)(iii); and by adding paragraph (j) to read as follows:

52.219-9 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.

* * * * *

Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (Date)

* * * * *

(d)(10) * * * (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms and in paragraph (j) of this clause, and * * *

* * * * *

(j) The Contractor shall submit the following reports:

(1) *Standard Form 294, Subcontracting Report for Individual Contracts.* This report shall be submitted to the Contracting Officer semiannually and at contract completion.

The reports cover subcontract award data related to this contract. This report is not required for company-wide or division-wide subcontracting plans.

(2) *Standard Form 295, Summary Subcontract Report.* This report encompasses all the contracts with the awarding agency. It must be submitted semi-annually for contracts with the Department of Defense and annually for contracts with civilian agencies. If the reporting activity is covered by a company-wide or division-wide plan, the reporting activity must report annually all subcontract awards under that plan. All reports submitted at the close of each fiscal year (both individual and company-wide or division-wide plans) shall include a breakout of subcontract awards, in whole dollars, to small disadvantaged business concerns by Standard Industrial Classification (SIC) Major Group. For a company-wide or division-wide plan, the Contractor may obtain from each of its subcontractors a predominant SIC code and report all awards to that subcontractor under its predominant SIC code.

* * * * *

52.219-10 [Amended]

24. Section 52.219-10 is amended by revising the clause date; and in the first sentence of paragraph (b) of the clause by inserting “for small business concerns and women-owned small business concerns” after the word “goals”.

25. Sections 52.219-22 through 52.219-26 are added to read as follows:

52.219-22 Small Disadvantaged Business Status.

As prescribed in 19.306(b), insert the following provision:

Small Disadvantaged Business Status (Date)

(a) *Definition.* *Small disadvantaged business concern*, as used in this provision, means—

(1) A small business concern that—

(i) Is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals;

(ii) Has its management and daily business controlled by one or more such individuals; and

(iii) For the Department of Defense, National Aeronautics and Space Administration, and Coast Guard only, the majority of earnings of which accrue to such individuals; or

(2) A small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian Organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities, which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian Organization, and which meets the requirements of 13 CFR Part 124.

(b) *General.* This provision is used to assess an offeror's small disadvantaged business status for the purpose of obtaining a benefit as a result of this solicitation. Status as a small business concern and status as a small disadvantaged business concern for general statistical purposes is covered by the provision at 52.219-1, Small Business Program Representation. Offerors claiming disadvantaged business status must demonstrate social and economic disadvantage and ownership and control by the designated individuals. [The offeror shall check one of the following:]

_____ The offeror is not claiming disadvantaged business status.

_____ The offeror is claiming disadvantaged business status. [The offeror shall enter the name(s), title(s) and business address(es) of the socially and economically disadvantaged individuals and paragraphs (b)(1) and (b)(2) of this provision.] The socially and economically disadvantaged individual(s) are:

(1) *Social and Economic Disadvantage.* Individuals who are members of the groups named in paragraph (b)(1)(i) of this provision are entitled to a presumption of social and economic disadvantage and must check the applicable categories. However, these presumptions are rebuttable (see the criteria for social disadvantage at 13 CFR 124.105 and economic disadvantage at 13 CFR 124.106). Individuals who are not members of the named groups must complete paragraph (b)(1)(ii) of this provision.

(i) *Individuals with a Presumption of Social and Economic Disadvantage.* The offeror represents that its ownership falls within at least one of the following categories [the offeror shall check the applicable categories]:

_____ Black American;
 _____ Hispanic American;
 _____ Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians);

_____ Asian-Pacific American (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru);

_____ Subcontinent Asian (Asian-Indian American (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, or Nepal).

_____ Individual/concern, other than one of the preceding, currently certified for participation in the Minority Enterprise Development Program under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(ii) *Individuals without a Presumption of Social and Economic Disadvantage.* Offerors must obtain a determination of social and economic disadvantage from the Small

Business Administration dated no earlier than three years prior to the date of the solicitation. The offeror shall check one of the following:

_____ The offeror represents, as part of its offer, that the Small Business Administration has made a determination concerning the individual's or individuals' status as socially and economically disadvantaged. The offeror certifies that it was found by the Small Business Administration to be socially and economically disadvantaged as a result of that determination and that no circumstances have changed to alter that determination.

_____ The offeror represents that it will obtain a determination of social and economic disadvantage from the Small Business Administration by _____

[contracting officer shall insert date] or forego any benefits based on disadvantaged status.

(2) *Ownership and Control.* Both presumed and non-presumed offerors must demonstrate ownership and control by providing a certification from an organization approved by the Small Business Administration dated no earlier than three years prior to the date of the solicitation. [The offeror shall check one of the following:]

_____ Attached is a certification of ownership and control. The offeror certifies that no circumstances have changed to alter the validity of the certification.

_____ The offeror represents that it will provide a certification of ownership and control from an organization approved by the Small Business Administration by _____ [contracting officer shall insert date] or forego any benefits based on disadvantaged status.

(c) *Penalties and Remedies.* Anyone who misrepresents any aspects of the disadvantaged status of a concern for the purposes of securing a contract or subcontract shall—

(1) Be punished by imposition of a fine, imprisonment, or both;

(2) Be subject to administrative remedies, including suspension and debarment; and

(3) Be ineligible for participation in programs conducted under authority of the Small Business Act.

(End of provision)

52.219-23 Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

As prescribed in 19.1104, insert the following clause:

Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (Date)

(a) *Definitions.* *Small disadvantaged business concern*, as used in this clause, means—

(1) A small business concern that—

(i) Is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals; and

(ii) Has its management and daily business controlled by one or more such individuals; or

(2) A small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian Organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities, which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian Organization, and which meets the requirements of 13 CFR Part 124.

United States, as used in this clause, means the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, and the District of Columbia.

(b) *Evaluation adjustment.* (1) Offers will be evaluated by adding a factor of _____ [percentage to be inserted by the contracting officer] percent to the price of all offers, except—

(i) Offers from small disadvantaged business concerns that have not waived the adjustment;

(ii) Otherwise successful offers of eligible products under the Trade Agreements Act when the dollar threshold for application of the Act is exceeded (see section 25.402 of the Federal Acquisition Regulation); and

(iii) Offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government.

(2) The factor shall be applied on a line item basis or to any group of items on which award may be made. Other evaluation factors described in the solicitation shall be applied before application of the factor. The factor may not be applied if using the adjustment would cause the contract award to be made at a price that exceeds the fair market price by more than 10 percent.

(c) *Waiver of evaluation adjustment.* A small disadvantaged business concern may elect to waive the adjustment, in which case the factor will be added to its offer for evaluation purposes. The agreements in paragraph (d) of this clause do not apply to offers that waive the adjustment.

_____ Offeror elects to waive the adjustment.

(d) *Agreements.* (1) A small disadvantaged business concern, that did not waive the adjustment, agrees that in performance of the contract, in the case of a contract for

(i) Services, except construction, at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern.

(ii) Supplies (other than procurement from a nonmanufacturer of such supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern.

(iii) General construction, at least 15 percent of the cost of the contract, excluding the cost of materials, will be performed by employees of the concern.

(iv) Construction by special trade contractors, at least 25 percent of the cost of the contract, excluding the cost of materials, will be performed by employees of the concern.

(2) A small disadvantaged business concern submitting an offer in its own name agrees to furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns in the United States. This paragraph does not apply in connection with construction or service contracts.

(End of clause)

Alternate I (Date). As prescribed in 19.1104, substitute the following paragraph (d)(2) for paragraph (d)(2) of the basic clause:

(d)(2) A small disadvantaged business concern submitting an offer in its own name agrees to furnish in performing this contract only end items manufactured or produced by small business concerns in the United States. This paragraph does not apply in connection with construction or service contracts.

52.219–24 Small Disadvantaged Business Participation Targets.

As prescribed in 19.1204(a), insert a provision substantially as follows:

Small Disadvantaged Business Participation Targets (Date)

(a) This solicitation contains a source selection factor or subfactor related to the participation of small disadvantaged business (SDB) concerns in the contract. Credit under that evaluation factor or subfactor is not available to an SDB concern that qualifies for a price evaluation adjustment under the clause at FAR 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, unless the SDB concern specifically waives the price evaluation adjustment.

(b) In order to receive credit under the source selection factor or subfactor, the offeror must provide, with its offer, targets, expressed as dollars and percentages of total contract value, for SDB participation in any of the Standard Industrial Classification (SIC) Major Groups for which the Administrator of the Office of Federal Procurement Policy has authorized the use of an evaluation factor or subfactor for SDB participation. A listing of those SIC codes may be found at: gopher://www.sbaonline.sba.gov:70/00/Government-Contracting/Size/sizeall.txt. The targets may provide for participation by a prime contractor, joint venture partner, teaming arrangement member, or subcontractor; however, the targets for subcontractors must be listed separately.

(End of provision)

52.219–25 Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.

As prescribed in 19.1204(b), insert the following clause:

Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (Date)

(a) *Disadvantaged status for joint venture partners, team members, and subcontractors.* This clause addresses disadvantaged status for joint venture partners, teaming arrangement members, and subcontractors and is applicable if this contract contains small disadvantaged business (SDB) participation targets. Disadvantaged status consists of a determination of social and economic disadvantage, and a certification of ownership and control by the designated socially and economically disadvantaged individuals.

(1) *Social and economic disadvantage.* The Contractor, acting in good faith, may rely on the representations of joint venture partners, teaming arrangement members, and subcontractors regarding membership in designated minority groups. Representations shall be obtained from joint venture partners, teaming arrangement members, and subcontractors by way of a provision substantially the same as the provision at FAR 52.219–22, Small Disadvantaged Business Status. The Contractor shall grant members of designated minority groups a presumption of social and economic disadvantage. The Contractor shall also consider individuals to be socially and economically disadvantaged if they have obtained a determination of social and economic disadvantage from the Small Business Administration (SBA). The Contractor shall assess the validity of the determination by accessing the SBA's on-line registry at [INTERNET ADDRESS].

(2) *Ownership and control.* To claim disadvantaged status, a joint venture partner, teaming arrangement member or subcontractor must submit to the Contractor a certification that the business is owned and controlled by the designated socially and economically disadvantaged individuals. Such a certification must come from an SBA approved organization dated no earlier than three years from the date of the joint venture or teaming arrangement or subcontract solicitation. A list of approved certifying organizations is maintained by the SBA.

(b) *Reporting requirement.* If this contract contains SDB participation targets, the Contractor shall report on the participation of SDB concerns at contract completion, or as otherwise provided in this contract. Reporting may be on the Optional Form XX, Small Disadvantaged Business Participation Report, or in the Contractor's own format providing the same information. This report is required for each contract containing SDB participation targets. If this contract contains an individual Small, Small Disadvantaged and Women-owned Small Business

Subcontracting Plan, reports may be submitted with the final Subcontracting Report for Individual Contracts (Standard Form 294) at the completion of the contract. (End of clause)

52.219–26 Incentive Subcontracting Program for Small Disadvantaged Business Concerns.

As prescribed in 19.1204(c), insert the following clause:

Incentive Subcontracting Program for Small Disadvantaged Business Concerns (Date)

(a) Of the total dollars it plans to spend under subcontracts, the Contractor has committed itself in its offer to try to award a certain amount to small disadvantaged business concerns in the Standard Industrial Classification (SIC) Major Groups authorized by the Administrator of the Office of Federal Procurement Policy.

(b) If the Contractor exceeds its total monetary target for subcontracting to small disadvantaged business concerns in the authorized SIC Major Groups, it will receive _____ [insert the appropriate number between 0 and 10] percent of the dollars in excess of the monetary target, unless the Contracting Officer determines that the excess was not due to the Contractor's efforts (e.g., a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the offer, or the excess was caused by the award of subcontracts that had been planned but had not been disclosed in the offer during contract negotiations). Determinations made under this paragraph are not subject to the Disputes clause.

(c) If this is a cost-plus-fixed-fee contract, the sum of the fixed fee and the incentive fee earned under this contract may not exceed the limitations in Subpart 15.9 of the Federal Acquisition Regulation.

(End of clause)

PART 53—FORMS

26. Section 53.219 is amended by adding paragraph (c) to read as follows:

§ 53.219 Small business programs.

* * * * *

(c) *OF XX (DATE), Small Disadvantaged Business Participation Report.* (See subpart 19.12.)

27. Section 53.302–XX is added to read as follows:

53.302–XX OF XX, Small Disadvantaged Business Participation Report.

BILLING CODE 6820–EP–U

Expires xx/xx/xx

\$

8. Date _____

Optional Form XX
Prescribed by

GENERAL INSTRUCTIONS

1. This form collects data on the participation of small disadvantaged business concerns in contracts that contain the clause at FAR 52.219-26, Small Disadvantaged Business Participation Program - Disadvantaged Status and Reporting. This form may also be used to report the breakout of subcontracting with small disadvantaged business concerns under the clause at FAR 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.
2. Reports may be submitted on this form, or in any other format that includes all the required information.
3. Submit this report to the contracting officer. If your organization is required to report subcontracting data under an individual subcontracting plan, you may attach this report to the final SF 294 report submitted under the contract.
4. Report in whole dollars.

SPECIFIC INSTRUCTIONS:

Block 3: Report the total dollar amount of participation of small disadvantaged business concerns under the contract cited in Block 2. Participation may be through subcontracting, teaming arrangement, joint ventures, or as the prime contractor (provided the prime contractor waived its right to a price evaluation adjustment).

Block 4. Report the participation, if any, by small disadvantaged business concerns in this contract at the prime contract level. All prime contract dollars must be reported under the Major Group (first two digits of the SIC code) assigned to the prime contract. Report the dollar amount and percentage of the total contract value.

Block 5. Report, by major group, the participation by small disadvantaged business concerns in this contract at the subcontract level. Report the dollar amount and percentage of the total contract value.

Blocks 6 and 7. Provide the name and telephone number of the individual who can answer questions related to this report.