

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12, 14, 15, 26, 36, and 52**

[FAR Case 97-603]

RIN 9000-AH58

**Federal Acquisition Regulation;
Empowerment Contracting**

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, General Services Administration, National Aeronautics And Space Administration are proposing amendments to the Federal Acquisition Regulation (FAR) to establish phase one of an Empowerment Contracting Program that provides procurement incentives to both large and small businesses to encourage their activity in areas of general and severe economic distress. This action is being taken to implement Presidential Executive Order 13005 of May 21, 1996, Empowerment Contracting. On September 13, 1996, the Department of Commerce (DoC) published in the **Federal Register** proposed guidelines for implementing Executive Order 13005 in the FAR. The amendments to the FAR that are being proposed in this rule are largely based on those guidelines. However, the amendments to the FAR in this proposed rule do depart from the September 13, 1996, guidelines in certain respects based either on comments received in response to the guidelines' publication or on the need to develop a program that could more readily be implemented. 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: *Comment Closing Date:* Comments on the proposed rule should be submitted in writing to the address below on or before June 17, 1997, to be considered in the formulation of the final rule.

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

Please cite FAR case 97-603 in all correspondence related to this issue.
FOR FURTHER INFORMATION CONTACT: Ms. Victoria Moss, Procurement Analyst, Federal Acquisition Policy Division, General Services Administration, Telephone: (202) 501-4764 or Mr. Mike Sipple, Procurement Analyst, Office of the Director of Defense Procurement, Department of Defense, Telephone: (703) 695-8567. For general information pertaining to publication and scheduling call the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:**A. Background**

Executive Order 13005 established the Empowerment Contracting Program to encourage business activity in areas of general economic distress by providing procurement incentives to qualified businesses. The procurement incentive program prescribed in the Executive order applies to both large and small businesses and is race neutral. DoC has published for comment proposed guidelines for implementing the Empowerment Contracting Program in the FAR (61 FR 48463, September 13, 1996). That program is expected to be implemented through revisions to the FAR and the FAR Supplements and through the issuance of DoC regulations. This proposed rule contains the FAR revisions. The program that is described in this proposed rule represents phase one of a phased implementation that will likely be amended following the evaluation of its results. The planned duration of phase one of the program is 18 months following the issuance of an interim or final FAR rule. Agencies shall select the contracting activities that will participate in phase one. Agencies shall select a sufficient number of contracting activities such that approximately twenty five percent (in terms of dollars) of the applicable acquisitions awarded during phase one of the program, in each of the applicable Standard Industrial Classification (SIC) major groups, are subject to an empowerment contracting preference.

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 preferences through which small and large business concerns may be provided benefits 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. Comments are invited. Comments from small entities concerning the affected FAR subparts will be considered in accordance with Section 610 of the Regulatory Flexibility Act. Such comments must be submitted separately and cite FAR Case 97-603 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) applies because the proposed rule contains reporting and recordkeeping requirements. This proposed rule provides two means by which a firm can apply for an evaluation preference. Under the first process, prequalification with the DoC, a firm may submit information to DoC under rules being developed by that agency and receive a qualification certification which will be valid for the period of time determined by DoC. When competing for Federal contracts, these firms need only show that they are prequalified in order to receive the preference.

Firms that are not prequalified may self-certify on individual solicitations. Under self-certification, a firm must indicate how it will qualify against the stated empowerment criteria, report on its actual performance against those criteria, and grant the Government certain audit rights.

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, 26, 36, and 52

Government procurement.

Dated: April 14, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 12, 14, 15, 26, 36, and 52 are proposed to be amended as follows:

1. The authority citation for 48 CFR 12, 14, 15, 26, 36, 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 12—COMMERCIAL ITEMS

2. Section 12.301 is amended by adding paragraph (g) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(g) *Empowerment Contracting Program.* The contracting officer shall

ensure that solicitations and contracts subject to the Empowerment Contracting Program (see subpart 26.4) include the appropriate solicitation provisions and contract clauses (see 26.409).

PART 14—SEALED BIDDING

3. Section 14.206 is revised to read as follows:

14.206 Small business set-asides and the Empowerment Contracting Program.

See part 19 for small business set-asides, and part 26 for the Empowerment Contracting Program.

PART 15—CONTRACTING BY NEGOTIATION

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

15.605 Evaluation factors and subfactors.

* * * * *

(b)(1) * * *

(v) For acquisitions subject to subpart 26.4, Empowerment Contracting Program, a 10 percent price evaluation preference shall be used in acquisitions when cost or price is a significant evaluation factor; a non-price empowerment contracting evaluation factor shall be used when price or cost is not a significant evaluation factor (see subpart 26.4).

* * * * *

5. Section 15.1003 is amended by adding paragraph (a)(3) to read as follows:

15.1003 Notifications to unsuccessful offerors.

(a) * * *

(3) *Preaward notices for the Empowerment Contracting Program.* When the apparently successful offeror has received an empowerment contracting preference (see subpart 26.4) that was the determining factor in its selection, 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 indicate whether the apparently successful offeror represented itself as prequalified or self-certified, and shall indicate the type of prequalification or self-certification. The notice also shall state that—

(i) The Government will not consider subsequent revisions of the unsuccessful offeror's proposal; and

(ii) No response is required unless a basis exists to challenge the

empowerment contracting status of the apparently successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.

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PART 26—OTHER SOCIOECONOMIC PROGRAMS

6. Part 26 is amended by adding subpart 26.4 to read as follows:

Subpart 26.4—Empowerment Contracting Program

26.401 General.

26.402 Definitions.

26.403 Status as a qualified business.

26.404 Protesting a firm's status as a qualified business.

26.405 Applicability.

26.406 Preferences.

26.406-1 Price evaluation preference.

26.406-2 Non-price evaluation factor.

26.407 Contractor obligations.

26.408 Agency reporting requirements.

26.409 Solicitation provisions and contract clauses.

26.401 General.

This subpart implements Executive Order 13005, Empowerment Contracting. The Order provides for procurement preferences in certain acquisition categories to encourage business activity by both large and small businesses in areas of general economic distress. The program that is described in this subpart represents phase one of a phased implementation that will likely be amended following the evaluation of its results. The planned duration of phase one of the program is 18 months following the issuance of an interim or final FAR rule. The head of the agency shall select the contracting activities that will participate in phase one. The head of the agency shall select a sufficient number of contracting activities such that approximately 25 percent (in terms of dollars) of the applicable acquisitions awarded during phase one of the program, in each of the applicable Standard Industrial Classification (SIC) major groups (see 26.405), are subject to an empowerment contracting preference.

26.402 Definitions.

"Qualified business," as used in this subpart, means a for-profit or not-for-profit business concern that has represented itself as prequalified by the Department of Commerce for the Empowerment Contracting Program or has self-certified to specific definitions in accordance with the clause at 52.226-3, Empowerment Contracting—Qualified Business Status.

26.403 Status as a qualified business.

(a) *Size.* The appropriate size standard for each acquisition shall be established consistent with 19.102. Notwithstanding the definition of business or concern at 13 CFR 121.403, the size standard for each acquisition shall also apply to not-for-profit entities.

(b) *Qualification process.* In order to qualify for the procurement preferences of this subpart, a business concern may obtain status as a qualified business through either prequalification by the Department of Commerce (DoC) or self-certification on a solicitation-by-solicitation basis. Prequalification may be used when a business concern believes that it already meets the qualification criteria established by DoC (XX CFR Part XXX). Self-certification may be used when a business concern can meet established criteria during the period of performance of a contract (see 52.226-3). If a business concern is prequalified, it is entitled to receive preferences for the effective period of its prequalification. If a business concern chooses to qualify by self-certifying, it must grant the Government certain audit rights and shall be required to pay the amount of any premium paid due to an empowerment contracting preference should it not fulfill its promises. Prequalification by DoC will be conducted according to DoC regulations at XX CFR Part XXX. Offerors shall represent to the contracting officer whether they have obtained prequalification from DoC in the clause at 52.226-3. Self-certification also shall be accomplished using the clause at 52.226-3. For an apparently successful offeror that represented itself as prequalified or self-certified, the contracting officer shall ensure that the offeror is not listed on DoC's List of Ineligible Contractors for Empowerment Contracting Preferences by accessing DoC's website at [insert URL].

26.404 Protesting a firm's status as a qualified business.

This section applies to protests of a business concern's status as a qualified business. Protests of a concern's size shall be processed in accordance with 19.302. Issues related to the Empowerment Contracting Program, other than size, shall be resolved in accordance with the procedures in this section. If a protest includes both size and other issues, the protest shall be processed concurrently under the procedures in 19.302 and this section. Any offeror, the contracting officer, or the DoC may protest the apparently successful offerors prequalified status or self-certification.

(a) An offeror may protest a concern's prequalified status or self-certification by filing a protest with the contracting officer. The protest—

(1) Must be filed within the times specified in paragraph (b) of this section; and

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

(b) In order to affect a specific solicitation, a protest must be timely.

(1) To be timely, a protest by an interested party must be received by the contracting officer by the close of business on the 5th business day after bid opening (in sealed bid acquisitions) or by the close of business on the 5th business day after receipt of the notification from the contracting officer that identifies the apparently successful offeror (in negotiated acquisitions) (see 15.1003(a)(3)).

(i) An oral protest must be confirmed in writing. The written confirmation must be delivered to the contracting officer within the 5-day period or sent by U.S. mail postmarked no later than one day after the oral protest.

(ii) A written protest must be delivered to the contracting officer within the 5-day period, or sent by U.S. mail postmarked within the 5-day period.

(2) A contracting officer's protest is always considered timely whether filed before or after award.

(c) The contracting officer or the DoC may protest a concern's prequalified status or self-certification 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 DoC may protest a concern's prequalified status or self-certification by filing directly with its Office of XXXXX and notifying the contracting officer.

(d) The contracting officer shall return untimely protests to the protestor, including protests filed before bid opening or notification of the apparently successful offeror.

(e) Upon receipt of a timely protest, the contracting officer shall withhold award and forward the protest to the DoC Office of XXXXX, 14th and Constitution Ave. NW, Washington, DC 20230. The contracting officer shall send to DoC—

(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 prequalified status or self-certification; and

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

(f) 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.

(g) The DoC, Office of XXXXX, will determine the qualification status of the challenged offeror and will notify the contracting officer, the challenged offeror, and the protestor. 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 DoC's decision on the appeal before award.

(h) If the contracting officer does not receive a DoC determination within 15 business days after the DoC's receipt of the protest, the contracting officer shall presume that the challenged offeror's prequalified status or self-certification is valid.

(i) A DoC 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. The appeal must be filed with the DoC's Office of XXXXX within five business days after receipt of the determination.

26.405 Applicability.

(a) Except as stated in paragraph (b) of this section, the empowerment contracting preferences shall be applied in competitive acquisitions, at contracting activities designated by the head of the agency, in the following Standard Industrial Classification (SIC) Major Groups:

- 15 Building Construction-General Contractors and Operative Builders;
- 20 Food and Kindred Products;
- 23 Apparel and Other Finished Products Made from Fabrics and Similar Materials;
- 25 Furniture and Fixtures;
- 27 Printing, Publishing, and Allied Industries;
- 30 Rubber and Miscellaneous Plastic Products;
- 34 Fabricated Metal Products, Except Machinery and Transportation Equipment;
- 42 Motor Freight Transportation and Warehousing;
- 51 Wholesale Trade-Nondurable Goods;
- 73 Business Services; and
- 87 Engineering, Accounting, Research, Management, and Related Services.

(b) Do not use the empowerment contracting preferences in acquisitions that—

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

(2) Are set-aside for small business concerns;

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

(4) Are awarded to required sources of supply under part 8 (e.g., Federal Prison Industries, Committee for Purchase from People Who are Blind or Severely Disabled, and Federal Supply Schedule Contracts); or

(5) 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.

26.406 Preferences.

For each acquisition subject to this subpart, the contracting officer shall use a 10 percent price evaluation preference or a non-price evaluation factor. When the non-price evaluation factor is used, and the source selection uses a numerical rating system, the non-price evaluation factor for empowerment contracting may be given a weight of up to 15 percent. The Empowerment Contracting Program shall not displace the agencies' authority or responsibilities, as authorized by law, regarding any other programs designed to promote the development of small, small disadvantaged, or woman-owned small businesses. Accordingly, any preference a business receives under this program shall be added to the preference it may receive pursuant to other statutory or regulatory programs.

26.406-1 Price evaluation preference.

(a) *Policy.* A price evaluation preference of 10 percent shall be used in acquisitions subject to this subpart when price or cost is a significant evaluation factor.

(b) *Procedures.* (1) The contracting officer shall—

(i) Give offers from qualified businesses a price evaluation preference by adding ten percent to all offers, except offers from qualified businesses;

(ii) Apply the preference on a line item basis or apply it to any group of items on which award may be made; and

(iii) Add other evaluation factors such as transportation costs or rent-free use of Government facilities to the offers before applying the price evaluation preference.

(2) This preference shall be additive along with any other price evaluation preferences. Preferences shall not be calculated based on an offer with

another preference added, but rather on the base offer alone. For example, if an acquisition is subject to this subpart and a price evaluation preference or adjustment for small disadvantaged business concerns, each of the preferences shall be applied to the initial offers and the preferences combined to arrive at total evaluated prices.

26.406–2 Non-price evaluation factor.

A non-price evaluation factor shall be used in acquisitions when price or cost is not a significant evaluation factor. The contracting officer shall ensure that the factor will be given sufficient weight to be meaningful when source selection is made on a best value basis. When the non-price evaluation factor is used, and the source selection uses a numerical rating system, the non-price evaluation factor for empowerment contracting may be given a weight of up to 15 percent. The solicitation shall describe the empowerment contracting non-price evaluation factor.

26.407 Contractor obligations.

(a) All qualified business contractors shall comply with the limitations on subcontracting specified in the clause at 52.226–5.

(b) *Contractors that qualify by self-certification—(1) Reporting requirement.* Not later than 30 days after completion of the contract, the contractor shall submit a report to the contracting officer that documents its compliance or failure to comply with the criteria by which the contractor self-certified its status as a qualified business.

(2) *Government right to audit.* The contracting officer, or an authorized representative of the contracting officer, shall have the right to examine and audit all of the contractor's records necessary to determine whether the contractor complied with the terms of the self-certification. "Records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(3) *Failure to comply with the terms of the self-certification.* In addition to other remedies available to the Government, the following apply:

(i) *Preference recoupment.* When a contractor does not comply with the terms of a self-certification, the Government shall require a preference recoupment. If the contracting officer finds that the contractor failed to comply with the terms of the self-certification, the contracting officer

shall issue a final decision to the contractor to that effect and require recoupment of the dollar amount of the premium paid by the Government due to an empowerment contracting preference. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes. Preference recoupments shall be in addition to any other remedies that the Government may have.

(ii) *List of Ineligible Contractors for the Empowerment Contracting Program.* If the contracting officer suspects that the contractor failed to make a good faith effort to comply with the terms of its self-certification, the matter shall be referred to DoC's Office of XXXXX for a determination on whether the contractor should be included on the List of Ineligible Contractors for Empowerment Contracting Program. This is in addition to other remedies, including suspension, debarment, and ineligibility under Part 9.

26.408 Agency reporting requirements.

Each agency shall submit to the DoC Office of XXXXX, 14th and Constitution Ave. NW, Washington, DC 20230, a report covering each fiscal year in which it has conducted procurements under the Empowerment Contracting Program described in this subpart. The report shall be submitted within three months after the end of the fiscal year and shall contain the following information:

(a) The number and dollar amount of solicitations in which an empowerment contracting preference was offered. This information will be broken down by SIC Major Group and by the use of the 10 percent price evaluation preference and non-price evaluation factor;

(b) The contract numbers, dollar amounts, names of awardees, and price premiums paid (if identifiable) for awards made as a result of an empowerment contracting preference. This information will be broken down by SIC Major Group.

(c) Comments on the advantages and disadvantages of the Empowerment Contracting Program, including comments on whether the program had any impact on the quality of supplies and services procured through its use.

26.409 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52.226–3, Empowerment Contracting—Qualified Business Status, in solicitations and contracts that include an empowerment contracting preference.

(b) The contracting officer shall insert the provision at 52.226–4, Empowerment Contracting—Notice of Price Evaluation Preference, in solicitations that include an empowerment contracting price evaluation preference.

(c) The contracting officer shall insert the clause at 52.226–5, Empowerment Contracting—Contractor Obligations, in solicitations and contracts that include an empowerment contracting preference. The clause shall be used with its Alternate I when the contracting officer believes that the amount of the preference recoupment should be specified in the contract.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

7. 36.602–1 is amended by adding paragraph (a)(8) to read as follows:

36.602–1 Selection criteria.

(a) * * *

(8) Status as a qualified business, if the acquisition is subject to subpart 26.4, Empowerment Contracting.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Part 52 is amended by adding 52.226–3, 52.226–4, and 52.226–5 to read as follows:

52.226–3 Empowerment Contracting—Qualified Business Status.

As prescribed in 26.409(a), use the following clause:

EMPOWERMENT CONTRACTING—QUALIFIED BUSINESS STATUS (XXX 1997)

(a) *Definitions.* As used in this clause—
"Area of general economic distress" means, for all urban and rural communities, any census tract that has a poverty rate of at least 20 percent or any designated Federal Empowerment Zone, Supplemental Empowerment Zone, Enhanced Enterprise Community, or Enterprise Community. It also means any rural area or Indian reservation that currently meets the criteria for designation as a redevelopment area under section 401(a) of the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3161(a)), as set forth at 13 CFR 301.2 (loss of population), 13 CFR 301.4 (Indian Lands), and 13 CFR 301.7 (special impact areas). *Note:* These areas have been identified by the Department of Commerce (DoC) and are available on the DoC website at [enter URL].

"Area of severe economic distress" means any census tract that has a poverty rate of at least 50 percent. *Note:* These areas have been identified by DoC and are available on the DoC website at [enter URL].

(b) *General.* This clause is used to assess an offeror's qualified status for the purpose of obtaining an empowerment contracting preference for this acquisition. Status as a

small business is covered by 52.219-1, Small Business Program Representations or 52.212-3, Offeror Representations and Certifications—Commercial Items. An offeror claiming qualified business status must either represent that it has obtained prequalification from DoC or certify to specified definitions. (The offeror shall check one of the following.)

- ____ The offeror is claiming qualified business status on the basis of prequalification by DoC (the offeror must complete subparagraph (b)(1)).
- ____ The offeror is claiming qualified business status on the basis of self-certification to specified definitions (the offeror must complete subparagraph (b)(2)).

(1) *Prequalification by the Department of Commerce.* If DoC has prequalified the offeror as meeting one or more of the definitions for qualification (see XX CFR XXX), the offeror shall provide a copy of its current prequalification certificate with its offer. Based on its current prequalification certificate and the size standard applicable to this acquisition, the offeror represents its status as a (the offeror shall check one of the following):

- ____ Qualified small business.
- ____ Qualified large business in areas of general economic distress.
- ____ Qualified business in areas of severe economic distress.

(2) *Self-certification.* The offeror certifies, as part of its offer, that it meets the definitions of qualified small business, qualified large business in areas of general economic distress, or qualified business in areas of severe economic distress for the Standard Industrial Classification (SIC) Major Group of this acquisition (the offeror shall check the applicable criterion or criteria):

- ____ (i) *Qualified small business* (check one of the following).
 - ____ The contractor will pay, during the period of performance of the contract, at least 25 percent of its total wages and benefits to residents from areas of general economic distress; or
 - ____ The contractor will maintain, during the period of performance of the contract, physical plant(s) in areas of general economic distress where at least 25 percent of its employees will perform their jobs (employees will be considered to perform their jobs at the location where they spend the most time working, as long as it is at least six hours per work week); or
 - ____ The contractor will incur, during the period of performance of the contract, at least 25 percent of its expenses on goods, materials, and services from firms located in areas of general economic distress.
- ____ (ii) *Qualified large business in areas of general economic distress.* The contractor will pay, during the period of performance of the contract, at least 25 percent of its total wages and benefits to residents from areas of general economic distress; and at least one of the following:

- ____ The contractor will maintain, during the period of performance of the contract, physical plant(s) in areas of general economic distress where at least 25 percent of its employees will perform their jobs (employees will be considered to perform their jobs at the location where they spend the most time working, as long as it is at least six hours per work week); or
- ____ The contractor will pay, during the period of performance of the contract, at least 50 percent of its total wages and benefits to residents from areas of general economic distress; or
- ____ The contractor will incur, during the period of performance of the contract, at least 25 percent of its expenses on goods, materials, and services from firms located in areas of general economic distress.
- ____ (iii) *Qualified business in areas of severe economic distress* (check one of the following).
 - ____ The contractor will pay, during the period of performance of the contract, at least 25 percent of its total wages and benefits to residents from areas of severe economic distress; or
 - ____ The contractor will maintain, during the period of performance of the contract, physical plant(s) in areas of severe economic distress where at least 25 percent of its employees will perform their jobs (employees will be considered to perform their jobs at the location where they spend the most time working, as long as it is at least six hours per work week); or
 - ____ The contractor will incur, during the period of performance of the contract, at least 25 percent of its expenses on goods, materials, and services from firms located in areas of severe economic distress.

(End of clause)

52.226-4 Empowerment Contracting—Notice of Price Evaluation Preference.

As prescribed in 26.409(b), use the following provision:

EMPOWERMENT CONTRACTING—NOTICE OF PRICE EVALUATION PREFERENCE (XXX 1997)

(a) Definition.

"Qualified business," as used in this provision, means a for-profit or not-for-profit business concern that has represented itself as prequalified by the Department of Commerce for the Empowerment Contracting Program or has self-certified to specific definitions in accordance with the clause at 52.226-3, Empowerment Contracting—Qualified Business Status.

(b) Evaluation preference.

- (1) Offers will be evaluated by adding a factor of ten percent to the price of all offers, except offers from qualified businesses.
- (2) The preference 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 described in paragraph (b)(1) of this provision.

(3) This preference is additive along with any other price evaluation preferences. Preferences shall not be calculated based on an offer with another preference added, but rather on the base offer alone.

(End of provision)

52.226-5, Empowerment Contracting—Contractor Obligations.

As prescribed in 26.409(a), use the following clause:

EMPOWERMENT CONTRACTING—CONTRACTOR OBLIGATIONS (XXX 1997)

This clause applies to Contractors that claim qualified business status under the Empowerment Contracting Program.

(a) *Limitations on subcontracting.* The Contractor agrees that in performance of this contract in the case of a contract for—

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

(2) Supplies, at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern.

(3) 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.

(4) 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.

(b) *Additional requirements.* This paragraph applies if the Contractor self-certified its status as a qualified business in the clause at 52.226-3, Empowerment Contracting—Qualified Business Status.

(1) *Reporting requirement.* Not later than 30 days after the completion of this contract, the Contractor shall submit a report to the Contracting Officer that documents its compliance or failure to comply with the criteria by which the Contractor self-certified its status as a qualified business.

(2) *Government right to audit.* The Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all of the Contractor's records necessary to determine whether the Contractor complied with the terms of its self-certification. "Records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(3) *Failure to comply with the terms of the self-certification—(i) Preference recoupment.* If the Contractor does not comply with the terms of the self-certification, the Government shall require a preference recoupment. If the Contracting Officer finds that the Contractor failed to comply with the terms of the self-certification, the Contracting Officer shall issue a final decision to the Contractor to that effect and unilaterally reduce the price of the contract by the dollar amount of the premium paid by the Government due to an empowerment contracting preference. The Contractor has the right to appeal the Contracting Officer's

final decision in accordance with the Disputes clause of this contract. Preference recoupment shall be in addition to any other remedies that the Government may have.

(ii) *List of Ineligible Contractors for the Empowerment Contracting Program.* If the Contracting Officer suspects that the Contractor failed to make a good faith effort to comply with the terms of its self-certification, the Contracting Officer shall refer the Contractor to Department of Commerce's Office of XXXXX for a determination on whether or not the contractor should be included on the List of Ineligible Contractors for Empowerment Contracting Program.

(End of clause)

Alternate 1 (XXX 1997). As prescribed in 26.409(c), substitute the following paragraph (b)(3)(i) for paragraph (b)(3)(i) of the basic clause:

(i) *Preference recoupment.* If the Contractor does not comply with the terms of the self-certification, the contract price shall be reduced by an amount equal to _____ (Contracting Officer shall insert an amount equal to the dollar amount of the premium paid by the Government due to an empowerment contracting preference). If the Contracting Officer finds that the Contractor failed to comply with the terms of the self-

certification, the Contracting Officer shall issue a final decision to the Contractor to that effect, reduce the contract price, and require payment of the preference recoupment in the amount stated in this paragraph. The Contractor has the right to appeal the Contracting Officer's final decision in accordance with the Disputes clause of this contract. Preference recoupment shall be in addition to any other remedies that the Government may have.

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