

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION48 CFR Parts 1, 12, 14, 15, 19, 33, and
52

[FAC 97-06; FAR Case 97-004A]

RIN 9000-AH59

Federal Acquisition Regulation;
Reform of Affirmative Action in Federal
Procurement

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

ACTION: Interim rule with request for comment.

SUMMARY: The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have agreed to issue Federal Acquisition Circular 97-06, as an interim rule to make amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business (SDB) 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 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: *Effective Date:* October 1, 1998.

Applicability Date: The policies, provisions, and clauses of this interim rule are effective for all solicitations issued on or after October 1, 1998.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before August 31, 1998 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, Attn: Ms. Laurie Duarte, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to: farcase.97-004A@gsa.gov

Please cite FAC 97-06, FAR case 97-004A in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT:

Ms. Victoria Moss, Procurement Analyst, Federal Acquisition Policy Division, General Services Administration, 1800 F Street NW, Washington DC 20405, Telephone: (202) 501-4764

or

Mr. Mike Sipple, Procurement Analyst, Contract Policy and Administration, Director, Defense Procurement, Department of Defense, 3060 Defense Pentagon, Washington DC 20301-3060, Telephone: (703) 695-8567.

For general information call the FAR Secretariat at (202) 501-4755.

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 published in the **Federal Register** for public notice and invitation for comments at 61 FR 26042, May 23, 1996. The DoJ model is expected to be implemented in several parts: revisions to the FAR and the FAR supplements; Small Business Administration (SBA) regulations; and procurement mechanisms and applicable factors (percentages) determined by the Department of Commerce (DoC). The SBA regulations were published for public comment on August 14, 1997 (62 FR 23584). This interim rule contains certain FAR revisions. On May 9, 1997, proposed amendments to the FAR, based on the DoJ Model, were published as a proposed rule in the **Federal Register** (62 FR 25786). All public comments received in response to the proposed rule were considered in the formulation of this interim rule. 143 letters containing approximately 222 comments were received in response to the proposed rule. The following significant changes were made to the rule based on the comments received:

1. Changes were made to conform it to the regulations issued by the Small Business Administration. These changes include conforming protest and appeal

and certification procedures in the FAR to those prescribed by SBA.

2. Clarifying that the annual DoC determination of procurement mechanisms shall only affect solicitations that are issued on or after the effective date of the DoC determination.

3. Clarifying that any decisions to limit use of the mechanisms because of a finding of undue burden will not affect on-going acquisitions.

4. Clarifying that an individual or business concern need only provide supporting rationale in a request for an undue burden determination.

5. Clarifying that fair market price under the price evaluation adjustment shall be determined in accordance with the procedures in 15.404-1(b) (referenced in 19.202-6).

6. Removing the prohibition against use of the price evaluation adjustment for acquisitions under the Competitiveness Demonstration Program.

7. Revising the provisions at 52.212-3 and 52.219-1, and the clause at 52.219-23 to facilitate their use by all agencies.

Other changes have been made to make the rule effective at the earliest practicable date, taking account of the time required for SBA to determine eligibility of SDB firms. This rule implements the price evaluation adjustment for SDB concerns. It is anticipated that coverage pertaining to the SDB participation program will be issued 1 day following publication of this rule under FAR Case 97-004B.

B. Regulatory Flexibility Act

These changes 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 through the rule small business concerns may be provided benefits in Federal contracting. An Initial Regulatory Flexibility Analysis (IRFA) was prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration (SBA). A summary of the IRFA was published along with the FAR proposed rule in the **Federal Register** at 62 FR 25786, May 9, 1997. The economic impact associated with certification and associated costs, as well as other program requirements addressed in the SBA's changes to 13 CFR Parts 121, 124, and 134 have been addressed in analyses prepared by the SBA. The following information is provided to update the IRFA related to this FAR interim rule:

This interim rule would establish in the FAR a procurement mechanism benefiting

small disadvantaged businesses (SDBs). The mechanism is a price evaluation adjustment of up to ten percent in certain Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce. This price evaluation adjustment would be mandatory for those competitive procurements to which it applied. It would not, however, apply to several major categories of acquisition, including, for example, acquisitions within the simplified acquisition threshold, acquisitions set aside for small business, and acquisitions conducted pursuant to the 8(a) program.

The main impact of the rule is expected to be on SDBs seeking to obtain contracts from Federal government agencies. The best available estimate of the number of such firms is 30,000. The basis for this estimate is the IRFA prepared by SBA addressing the changes to 13 CFR Parts 121, 124, and 134. The anticipated costs for certification and protest and appeal procedures are addressed in SBA's IRFA. The primary impact of this interim rule is expected to be the increase in contract awards to qualified firms and a corresponding decrease in contract awards to firms that are not qualified as SDBs.

Within the constraints imposed by the need to implement the DoJ-proposed reforms, the rule was crafted throughout to select alternatives that would minimize any adverse economic impact on small business.

A copy of the IRFA may be obtained from the FAR Secretariat.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) applies because the interim rule contains reporting and recordkeeping requirements. Requests for approval of new information collection requirements were submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* The information collections required by this rule were approved under clearance 9000-0150 through June 30, 2000. Public comments concerning this request were invited through a **Federal Register** notice published on May 9, 1997. No comments were received.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to conform the FAR to the model program designed by the Department of Justice to ensure compliance with Constitutional standards established by the Supreme Court and, thereby, avoid unnecessary litigation. A proposed FAR rule on this

subject was published for public comment at 62 FR 25786 on May 9, 1997. As a result of public comments received in response to the proposed rule, changes have been made to the rule. This interim rule would qualify for publication as a final rule; however, further public comments are requested. Pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 12, 14, 15, 19, 33, and 52

Government procurement.

Dated: June 23, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Federal Acquisition Circular—FAC 97-06

Federal Acquisition Circular (FAC) 97-06 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

The policies, provisions, and clauses of this interim rule are effective for all solicitations issued on or after October 1, 1998.

Dated: June 17, 1998.

R.D. Kerrins,

Col., USA, Dep Director, Defense Procurement.

Dated: June 16, 1998.

Ida M. Ustad,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration, Office of Acquisition Policy, General Services Administration.

Dated: June 17, 1998.

Deidre A. Lee,

Associate Administrator for Procurement, NASA.

Therefore, 48 CFR Parts 1, 12, 14, 15, 19, 33, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 12, 14, 15, 19, 33, and 52 continues to read as follows:

Authority: 41 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.106 is amended in the table following the introductory paragraph by adding, in numerical order, the following entries:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment			OMB control No.	
*	*	*	*	*
52.219-22			9000-0150	
52.219-23			9000-0150	
*	*	*	*	*

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Section 12.301 is amended by revising paragraph (b)(2) to read as follows:

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

* * * * *

(b) * * *

(2) *The provision at 52.212-3, Offeror Representations and Certifications-Commercial Items.* This provision provides a single, consolidated list of certifications and representations for the acquisition of commercial items and is attached to the solicitation for offerors to complete and return with their offer. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard that are expected to exceed the threshold at 4.601(a);

* * * * *

4. Section 12.303(b)(1) is revised to read as follows:

12.303 Contract format.

* * * * *

(b) * * *

(1) Block 10 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 set aside for emerging small businesses;

* * * * *

PART 14—SEALED BIDDING

5. The section heading for 14.206 is revised to read as set forth below.

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

6. 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

7. Section 15.503 is amended by revising paragraph (a)(2) to read as follows:

15.503 Notifications to unsuccessful offerors.

(a) * * *

(2) *Preaward notices for small business programs.* In addition to the notice in paragraph (a)(1) of this section, when using 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 is the apparently successful offeror, upon completion of negotiations and determinations of responsibility, and completion of the process in 19.304(d), if necessary, but prior to award, the contracting officer shall notify each offeror in writing of the name and address of the apparently successful offeror. The notice shall also state that the Government will not consider subsequent revisions of the offeror's proposal; and no response is required unless a basis exists to challenge the disadvantaged status and/or small business size 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 or when the contract is entered into under the 8(a) program (see 19.805-2).

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

8. Section 19.000 is amended by revising the introductory text of paragraph (a); at the end of (a)(6) by removing "and"; at the end of (a)(7) by removing the period and inserting "; and"; and by adding paragraph (a)(8) 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.

* * * * *

9. Section 19.001 is amended in the definition of "Small disadvantaged business concern" by revising its introductory paragraph; by redesignating paragraphs (a) and (b) introductory text as (a)(1) and (a)(2) introductory text; (b)(1), (b)(2), and (b)(3) as (a)(2)(i), (a)(2)(ii), and (a)(2)(iii); and (c) and (d) as (a)(3) and (a)(4); and by adding paragraphs (a) introductory text and (b) to read as follows:

19.001 Definitions.

* * * * *

Small disadvantaged business concern, as used in this part, means—

(a) For subcontractors, a small business concern that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals and that has its management and daily business controlled by one or more such individuals. This term also means 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 that has at least 51 percent of its stock unconditionally owned by one of these entities, that has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian Organization, and that meets the requirements of 13 CFR 124.

* * * * *

(b) For prime contractors, (except for 52.212-3(c)(2) and 52.219-1(b)(2) for general statistical purposes and 52.212-3(c)(7)(ii), 52.219-22(b)(2), and 52.219-23(a) for joint ventures under the price evaluation adjustment for small disadvantaged business concerns) an offeror that represents, as part of its offer, that it is a small business under the size standard applicable to the acquisition; and either—

(1) It has received certification from the Small Business Administration as a small disadvantaged business concern consistent with 13 CFR 124, Subpart B, and

(i) No material change in disadvantaged ownership and control has occurred since its certification;

(ii) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(iii) It is listed, on the date of its representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration; or

(2) It has submitted a completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR 124, Subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since its application was submitted. In this case, a contractor must receive certification as an SDB by the SBA prior to contract award.

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

19.201 General policy.

* * * * *

(b) The Department of Commerce will determine on an annual basis, by Major Groups as contained in the Standard Industrial Classification (SIC) manual, and region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms and applicable factors (percentages). The Department of Commerce determination shall only affect solicitations that are issued on or after the effective date of the determination. The effective date of the Department of Commerce determination shall be no less than 60 days after its publication date. The Department of Commerce determination shall not affect ongoing acquisitions. The Department of Commerce determination shall 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. The agencies shall apply the SDB procurement mechanisms determined by the Department of Commerce. The Department of Commerce, in making its determination, is not limited to the price evaluation adjustment for SDB concerns 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, in order to achieve the contracting agency's goal for SDB concerns, the use of the SDB mechanism in Subpart 19.11 has resulted in an undue burden on non-SDB firms in one of the major industry groups and regions identified by Department of Commerce following paragraph (b) of this section, or is otherwise inappropriate. Determinations under this subpart are for the purpose of determining future acquisitions and shall not affect ongoing acquisitions. Requests for a determination, including supporting rationale, may be submitted to the agency designee. If the agency designee makes an affirmative determination that the SDB mechanism has an undue burden or is otherwise inappropriate, the determination shall be forwarded through agency channels to the OFPP, which shall review the determination in consultation with the Department of Commerce and the Small Business Administration. At a minimum, the following information should be included in any submittal:

(i) A determination of undue burden or other inappropriate effect, including proposed corrective action.

(ii) The SIC Major Group affected.

(iii) Supporting information to justify the determination, including, but not limited to, dollars and percentages of contracts awarded by the contracting activity under the affected SIC Major Group for the previous two fiscal years and current fiscal year to date for—

(A) Total awards;

(B) Total awards to SDB concerns;

(C) Awards to SDB concerns awarded contracts under the SDB price evaluation adjustment where the SDB concerns would not otherwise have been the successful offeror;

(D) Number of successful and unsuccessful SDB offerors; and

(E) Number of successful and unsuccessful non-SDB offerors.

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

(v) A discussion of other efforts the agency has undertaken to ensure equal opportunity for SDBs in contracting with the agency.

(2) After consultation with OFPP, or if the agency does not receive a response from OFPP within 90 days after notice is provided to OFPP, the contracting agency may limit the use of the SDB mechanism in Subpart 19.11 until the Department of Commerce determines the updated price evaluation adjustment, as required by this section. This limitation shall not apply to solicitations that already have been synopsized.

11. Section 19.202-6 is amended by revising the introductory paragraph and paragraph (a) to read as follows:

19.202-6 Determination of fair market price.

Agencies shall determine the fair market price as follows:

(a) For total and partial small business set-aside contracts and contracts utilizing the price evaluation adjustment for small disadvantaged business concerns, the fair market price shall be the price achieved in accordance with the reasonable price guidelines in 15.404-1(b).

* * * * *

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

12. The heading for Subpart 19.3 is revised to read as set forth above.

13. Section 19.302 is amended at the end of the introductory text of paragraph (d) by adding the following sentence:

19.302 Protesting a small business representation.

* * * * *

(d) * * * SBA's regulations on timeliness related to protests of disadvantaged status are contained in 13 CFR 124, Subpart B.

19.304 [Redesignated as 19.306]

14a. Section 19.304 is redesignated as 19.306.

14b. New sections 19.304 and 19.305 are added to read as follows:

19.304 Disadvantaged business status.

(a) To be eligible to receive a benefit as a prime contractor based on its disadvantaged status, a concern, at the time of its offer, must either be certified as a small disadvantaged business (SDB) concern or have a completed SDB application pending at the SBA or a Private Certifier (see 19.001).

(b) The contracting officer may accept an offeror's representation that it is an SDB concern for general statistical purposes. The provision at 52.219-1, Small Business Program Representations, or 52.212-3(c)(2),

Offeror Representations and Certifications-Commercial Items, is used to collect SDB data for general statistical purposes.

(c) The provision at 52.219-22, Small Disadvantaged Business Status, or 52.212-3(c)(7), Offeror Representations and Certifications—Commercial Items, is used to obtain SDB status when the prime contractor may receive a benefit based on its disadvantaged status. The mechanism that may provide benefits on the basis of disadvantaged status as a prime contractor is a price evaluation adjustment for SDB concerns (see Subpart 19.11).

(1) If the apparently successful offeror has represented that it is currently certified as an SDB, the contracting officer may confirm that the concern is listed on the SBA's register by accessing the list at <http://www.sba.gov> or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

(2) If the apparently successful offeror has represented that its SDB application is pending at the SBA or a Private Certifier, and its position as the apparently successful offeror is due to the application of the price evaluation adjustment, the contracting officer shall follow the procedure in paragraph (d) of this section.

(d) Notifications to SBA of potential awards to offerors with pending SDB applications. (1) The contracting officer shall notify the Small Business Administration Assistant Administrator for SDBCE 409 Third Street, SW Washington, DC 20416. The notification shall contain the name of the apparently successful offeror, and the names of any other offerors that have represented that their applications for SDB status are pending at the SBA or a Private Certifier and that could receive the award due to the application of a price evaluation adjustment if the apparently successful offeror is determined not to be an SDB by the SBA.

(2) The SBA will, within 15 calendar days after receipt of the notification, determine the disadvantaged status of the apparently successful offeror and, as appropriate, any other offerors referred by the contracting officer and will notify the contracting officer.

(3) If the contracting officer does not receive an SBA determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer shall presume that the apparently successful offeror, and any other offerors referred by the contracting officer, are not disadvantaged, and shall make award accordingly, unless the contracting officer grants an extension to the 15-day response period. No

written determination is required for the contracting officer to make award at any point following the expiration of the 15-day response period.

(4) When the contracting officer makes a written determination that award must be made to protect the public interest, the contracting officer may proceed to contract award without notifying SBA or before receiving a determination of SDB status from SBA during the 15-day response period. In both cases, the contracting officer shall presume that the apparently successful offeror, or any other offeror referred to the SBA whose SDB application is pending, is not an SDB and shall make award accordingly.

19.305 Protesting a representation of disadvantaged business status.

(a) 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). An 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).

(b) An offeror, excluding an offeror determined by the contracting officer to be non-responsive or outside the competitive range, or an offeror that SBA has previously found to be ineligible for the requirement at issue, may protest the apparently successful offeror's representation of disadvantaged status by filing a protest in writing with the contracting officer. SBA regulations concerning protests are contained in 13 CFR 124, Subpart B. The protest—

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

(2) Must contain specific facts or allegations supporting the basis of protest.

(c) The contracting officer or the SBA may protest in writing a concern's representation of disadvantaged status at any time following bid opening or notification of intended award.

(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 Assistant Administrator for Small Disadvantaged Business Certification and Eligibility and notifying the contracting officer.

(d) The contracting officer shall return premature protests to the protestor. A protest is considered to be premature if it is submitted before bid opening or notification of intended award. SBA normally will not consider a postaward protest. SBA may consider a postaward protest in its discretion where it determines that an SDB determination after award is meaningful (*e.g.*, where the contracting officer agrees to terminate the contract if the protest is sustained).

(e) Upon receipt of a protest that is not premature, the contracting officer shall withhold award and forward the protest to Small Business Administration, Assistant Administrator for SDBCE, 409 Third Street, SW, Washington, DC 20416. The contracting officer shall send to SBA—

(1) The written protest and any accompanying materials;

(2) The date the protest was received;

(3) A copy of the protested concern's representation as a small disadvantaged business, and the date of such representation; 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 SBA Assistant Administrator for Small Disadvantaged Business Certification and Eligibility will notify the protestor and the contracting officer of the date the protest was received and whether it will be processed or dismissed for lack of timeliness or specificity. For protests that are not dismissed, the SBA will, within 15 working days after receipt of the protest, determine the disadvantaged 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 it is appealed and—

(1) The contracting officer receives the SBA's decision on the appeal before award; or

(2) The contracting officer has agreed to terminate the contract, as appropriate,

based on the outcome of the appeal (see 13 CFR 124, Subpart B).

(h) If the contracting officer does not receive an SBA determination within 15 working days after the SBA's receipt of the protest, the contracting officer shall presume that the challenged offeror is disadvantaged and may award the contract, unless the SBA requests and the contracting officer grants an extension to the 15-day response period.

(i) An SBA determination may be appealed by—

(1) The party whose protest has been denied;

(2) The concern whose status was protested; or

(3) The contracting officer.

(j) The appeal must be filed with the SBA's Administrator or designee within five working 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 not apply to the instant acquisition (but see paragraph (g)(2) of this section).

15. Newly redesignated 19.306 is amended in paragraph (a) by adding a sentence at the end of the paragraph; and by redesignating paragraph (b) as (c) and adding a new paragraph (b) to read as follows:

19.306 Solicitation provision and contract clause.

(a) * * * The provision shall be used with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard that are expected to exceed the threshold at 4.601(a).

(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.

* * * * *

16. Subpart 19.11, consisting of sections 19.1101 through 19.1104, is 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.

Authority: 41 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

Subpart 19.11—Price Evaluation Adjustment for Small Disadvantaged Business Concerns

19.1101 General.

A price evaluation adjustment for small disadvantaged business concerns shall be applied as determined by the Department of Commerce (see 19.201(b)). Joint ventures may qualify provided the requirements set forth in 13 CFR 124.1002(f) are met.

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; or

(3) Are set aside for small business concerns.

19.1103 Procedures.

(a) Give offers from small disadvantaged business concerns a price evaluation adjustment by adding the factor determined by the Department of Commerce 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) Otherwise successful offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government;

(4) For DOD, NASA, and Coast Guard acquisitions, otherwise successful offers from historically black colleges and universities or minority institutions; or

(5) For DOD acquisitions, otherwise successful offers of qualifying country end products (see DFARS 225.000–70 and 252.225–7001).

(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, as a result of this adjustment, to be made at a price that exceeds fair market price by more than the factor as determined by the Department of Commerce (see 19.202–6(a)).

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.

PART 33—PROTESTS, DISPUTES, AND APPEALS

17. Section 33.102 is amended in paragraph (a) by revising the last sentence 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

18. Section 52.212–3 is amended by revising the date of the provision; removing the definition of “Small disadvantaged business concern”; revising paragraph (c)(2); adding (c)(7); and adding Alternate I following “(End of provision)” to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Oct 1998)

* * * * *

(c) * * *

(2) Small disadvantaged business concern. The offeror represents, for general statistical purposes, that it ☐ is, ☐ is not, a small disadvantaged business concern as defined in 13 CFR 124.1002.

* * * * *

(7) (Complete only if the solicitation contains the clause at FAR 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, and the offeror desires a benefit based on its disadvantaged status.)

(i) General. The offeror represents that either—

(A) It ☐ is, ☐ is not certified by the Small Business Administration as a small disadvantaged business concern and is listed, on the date of this representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration, and that no material change in disadvantaged ownership and control has occurred since its certification, and, where

the concern is owned by one or more individuals claiming disadvantaged status, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); or

(B) It ☐ has, ☐ has not submitted a completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR 124, Subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since its application was submitted.

(ii) Joint Ventures under the Price Evaluation Adjustment for Small Disadvantaged Business Concerns. The offeror represents, as part of its offer, that it is a joint venture that complies with the requirements in 13 CFR 124.1002(f) and that the representation in paragraph (c)(7)(i) of this provision is accurate for the small disadvantaged business concern that is participating in the joint venture. [The offeror shall enter the name of the small disadvantaged business concern that is participating in the joint venture: _____.]

* * * * *

(End of provision)

Alternate I (Oct 1998). As prescribed in 12.301(b)(2), add the following paragraph (c)(8) to the basic provision:

(8) (Complete if the offeror has represented itself as disadvantaged in paragraph (c)(2) or (c)(7) of this provision.) [The offeror shall check the category in which its ownership falls]:

- ___ 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.

19. Section 52.212–5 is amended by revising the clause date; redesignating paragraphs (b)(6) through (b)(17) as (b)(7) through (b)(18), respectively; and adding a new paragraph (b)(6) 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 (Oct 1998)

* * * * *

(b) * * *

____(6)(i) 52.219–23, Notice of Price Evaluation

Adjustment for Small Disadvantaged Business Concerns (Pub. L. 103–355, section 7102, and 10 U.S.C. 2323) (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

(ii) ____Alternate I of 52.219–23.

* * * * *

20. Section 52.219–1 is amended by revising the introductory text of the provision; the provision date and paragraph (b)(2); by deleting the definitions of “Joint venture” and “Small disadvantaged business concern”; and adding an Alternate I to read as follows:

52.219–1 Small Business Program Representations.

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

Small Business Program Representations (Oct 1998)

* * * * *

(b) * * *

(2) (Complete only if offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents, for general statistical purposes, that it ☐ is, ☐ is not, a small disadvantaged business concern as defined in 13 CFR 124.1002.

* * * * *

Alternate I (Oct 1998). As prescribed in 19.306(a), add the following paragraph (b)(4) to the basic provision:

(4) (Complete if offeror represented itself as disadvantaged in paragraph (b)(2) of this provision). [*The offeror shall check the category in which its ownership falls*]:

____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.

52.219–2 [Amended]

21. Section 52.219–2 is amended in the introductory paragraph by revising “19.304(b)” to read “19.306(c)”.

22. Sections 52.219–22 and 52.219–23 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 (Oct 1998)

(a) *General.* This provision is used to assess an offeror’s small disadvantaged business status for the purpose of obtaining a benefit on this solicitation. Status as a small business and status as a small disadvantaged business for general statistical purposes is covered by the provision at FAR 52.219–1, Small Business Program Representation.

(b) *Representations.*

(1) *General.* The offeror represents, as part of its offer, that it is a small business under the size standard applicable to this acquisition; and either—

☐ (i) It has received certification by the Small Business Administration as a small disadvantaged business concern consistent with 13 CFR 124, Subpart B; and

(A) No material change in disadvantaged ownership and control has occurred since its certification;

(B) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(C) It is listed, on the date of this representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration; or

☐ (ii) It has submitted a completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR 124, Subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since its application was submitted.

(2) ☐ *For Joint Ventures.* The offeror represents, as part of its offer, that it is a joint venture that complies with the requirements at 13 CFR 124.1002(f) and that the representation in paragraph (b)(1) of this provision is accurate for the small disadvantaged business concern that is participating in the joint venture. [*The offeror shall enter the name of the small disadvantaged business concern that is participating in the joint venture*: ____.]

(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 the 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 (Oct 1998)

(a) *Definitions.* As used in this clause—

Small disadvantaged business concern means an offeror that represents, as part of its offer, that it is a small business under the size standard applicable to this acquisition; and either—

(1) It has received certification by the Small Business Administration as a small disadvantaged business concern consistent with 13 CFR 124, Subpart B; and

(i) No material change in disadvantaged ownership and control has occurred since its certification;

(ii) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(iii) It is listed, on the date of its representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration;

(2) It has submitted a completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR 124, Subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since its application was submitted. In this case, in order to receive the benefit of a price evaluation adjustment, an offeror must receive certification as a small disadvantaged business concern by the Small Business Administration prior to contract award; or

(3) Is a joint venture as defined in 13 CFR 124.1002(f).

Historically black college or university means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. For the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, the term also includes any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority institution means an institution of higher education meeting the requirements of Section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d–5(3)) which, for purposes of this clause, includes a Hispanic-serving institution of higher education as defined in Section 316(b)(1) of the Act (20 U.S.C. 1059c(b)(1)).

United States 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) For DOD, NASA, and Coast Guard acquisitions, otherwise successful offers from historically black colleges or universities or minority institutions;

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

(iv) Otherwise successful offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government; and

(v) For DOD acquisitions, otherwise successful offers of qualifying country end products (see sections 225.000–70 and 252.225–7001 of the Defense FAR Supplement).

(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 the factor in paragraph (b)(1) of this clause.

(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; or

(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 (Oct 1998). As prescribed in 19.1104, substitute the following paragraph (d)(2) for paragraph (d)(2) of the basic clause:

(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.

[FR Doc. 98–17197 Filed 6–26–98; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration as the Federal Acquisition Regulatory Council. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121). It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 97–06 which amends the Federal Acquisition Regulation (FAR). Further information regarding this rule may be obtained by referring to FAC 97–06 which precedes this document. This document may be obtained from the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, (202) 501–4755.

Reform of Affirmative Action in Federal Procurement

FAC 97–06/FAR Case 97–004A. The interim rule amends FAR Parts 1, 12, 14, 15, 19, 33, and 52 to establish a mechanism to benefit small disadvantaged business concerns at the prime contract level. This mechanism is a price evaluation adjustment of up to ten percent in certain Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce. This price evaluation adjustment conforms to the Department of Justice proposal to reform affirmative action in Federal

procurement and to regulations issued by the Small Business Administration regarding small disadvantaged business programs. This price evaluation adjustment is mandatory for those competitive procurements to which it applies. It does not, however, apply to several major categories of acquisition, including, for example, acquisitions within the simplified acquisition threshold, acquisitions set aside for small business, and acquisitions conducted pursuant to the 8(a) program.

Dated: June 23, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

[FR Doc. 98–17198 Filed 6–26–98; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, and 134

Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: In response to President Clinton's government-wide regulatory reform initiative, the Small Business Administration (SBA) amends both the eligibility requirements for, and contractual assistance provisions within, the SBA's 8(a) Business Development (8(a) BD) program. This final rule changes the name of the program from the Minority Small Business and Capital Ownership Development program to the 8(a) BD program to better reflect the purpose of the program. This rule streamlines the operation of the 8(a) BD program, eases certain restrictions perceived to be burdensome on Program Participants, clarifies certain eligibility requirements, and deletes obsolete regulations.

DATES: *Effective Date:* This rule is effective on July 30, 1998.

Compliance Dates: Subpart A applies to all applications for the 8(a) Business Development program pending as of July 30, 1998 and all 8(a) procurement requirements accepted by SBA on or after July 30, 1998. These rules do not apply to any appeals pending before SBA's Office of Hearings and Appeals. The revisions to 13 CFR part 121 apply with respect to all solicitations issued on or after June 30, 1998. Except for 13 CFR 134.408(c), the procedural revisions to 13 CFR part 134 apply to all appeals served or filed on or after June