

meets the eligibility criteria of § 518.2, the approval criteria of § 518.4, the requirements of § 518.7 or the requirements of § 518.8. The Commission shall provide the tribe with prompt notice of the Commission's intent to remove a certificate of self-regulation under this Part. Such notice shall state the reasons for the Commission's action and shall advise the tribe of its right to a hearing under § 518.11. The decision to remove a certificate is appealable to Federal District Court pursuant to 25 U.S.C. 2714.

§ 518.11 May a tribe request a hearing on the Commission's proposal to remove its certificate?

Yes. A tribe may request a hearing regarding the Commission's proposal to remove a certificate of self-regulation under § 518.10. Such a request shall be filed with the Commission within thirty (30) days after the tribe receives notice of the Commission's action. Failure to request a hearing within the time provided by this section shall constitute a waiver of the right to a hearing.

§ 518.12 May a tribe request reconsideration by the Commission of a denial of a petition or a removal of a certificate of self-regulation?

Yes. A tribe may file a request for reconsideration of a denial of a petition or a removal of a certificate of self-regulation within 30 days of receipt of the denial or removal. Such request shall set forth the basis for the request, specifically identifying those Commission findings which the tribe believes to be erroneous. The Commission shall issue a final decision within 30 days of receipt of the request. If the Commission fails to issue a decision within 30 days, the request shall be considered to be disapproved.

Authority and Signature

This Final Rule was prepared under the direction of Tadd Johnson, Chairman, National Indian Gaming Commission, 1441 L. St. N.W., Suite 9100, Washington, D.C. 20005.

Signed at Washington, D.C. this 29th day of July, 1998.

Tadd Johnson,
Chairman.

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DEPARTMENT OF DEFENSE

48 CFR Parts 205, 206, 217, 219, 225, 226, 236, 252, and 253

[DFARS Case 98-D007]

Defense Federal Acquisition Regulation Supplement; Reform of Affirmative Action in Federal Procurement

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) guidance 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, and are consistent with the changes made to the Federal Acquisition Regulation (FAR) in Federal Acquisition Circular (FAC) 97-06. 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).

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 on the interim rule should be submitted in writing to the address shown below on or before October 5, 1998, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Ms. Susan Schneider, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062, telefax (703) 602-0350.

E-mail comments submitted over the Internet should be addressed to: dfarsacq.osd.mil

Please cite DFARS Case 98-D007 in all correspondence related to this issue. E-mail comments should cite DFARS Case 98-D007 in the subject line.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Schneider, PDUSD (A&T) DP (DAR), (703) 602-0131, or Mr. Mike Sipple, PDUSD (A&T) DP (CPA), (703) 695-8567. Please cite DFARS Case 98-D007.

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 for public notice and comment (61 FR 26042, May 23, 1996). DoJ issued a notice that provided a response to the public comments (62 FR 25648, May 9, 1997). To implement the DoJ concept, two interim FAR rules were issued: FAC 97-06, effective October 1, 1998, implements a price evaluation adjustment for SDB concerns (63 FR 35719, June 30, 1998); and FAC 97-07, effective January 1, 1999, implements an SDB participation program (63 FR 36120, July 1, 1998). This interim rule contains the revisions necessary to conform the DFARS to the interim FAR rule in FAC 97-06, and to the DoJ proposal implemented by the FAR rule. Subsequent revisions will be issued to conform the DFARS to the interim FAR rule in FAC 97-07.

B. Regulatory Flexibility Act

This interim rule is not excepted to 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 most of the changes merely conform the DFARS to the FAR rule in FAC 97-06. Two source selection considerations for SDB concerns currently in the DFARS, but not in the FAR, are amended by this rule to conform to the DoJ model: Leader company contracting (DFARS 217.401); and architect-engineer (A-E) services (DFARS 236.602). These two changes are not expected to have a significant economic impact on a substantial number of small entities since (1) leader company contracting is infrequently used by DoD; and (2) the primary factor in A-E selection is the determination of the most highly qualified firm; the SDB consideration is one of several secondary source selection factors. Therefore, an initial regulatory flexibility analysis has not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance

with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 98-D007 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the interim rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule amends the DFARS to conform it to the requirements of FAC 97-06, dated June 30, 1998, effective October 1, 1998. FAC 97-06 contains an interim rule amending the FAR to implement a DoJ proposal for reform of affirmative action in Federal procurement, to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). The FAR rule requires use of a price evaluation adjustment for small disadvantaged business concerns in competitive acquisitions. Publication of an interim DFARS rule is necessary to conform the DFARS to the interim FAR rule effective October 1, 1998, and to the DoJ proposal implemented by the FAR rule. Comments received in response to the publication of this interim rule will be considered in formulating the final rule.

List of Subjects in 48 CFR Parts 205, 206, 217, 219, 225, 226, 236, 252, and 253

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition
Regulations Council.

Therefore, 48 CFR Parts 205, 206, 217, 219, 225, 226, 236, 252, and 253 are amended as follows:

1. The authority citation for 48 CFR Parts 205, 206, 217, 219, 225, 226, 236, 252, and 253 continue to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 205—PUBLICIZING CONTRACT ACTIONS

205.207 [Amended]

2. Section 205.207 is amended by removing paragraphs (d)(i) and (d)(ii) and by redesignating paragraphs (d)(iii)

through (d)(v) as paragraphs (d)(i) through (d)(iii), respectively.

PART 206—COMPETITION REQUIREMENTS

3. Section 206.203 is revised to read as follows:

206.203 Set-asides for small business concerns.

(b) Also no separate justification or determination and findings is required for contract actions processed as historically black college and university and minority institution set-asides (see 226.7003).

PART 217—SPECIAL CONTRACTING METHODS

4. Section 217.401 is revised to read as follows:

217.401 General.

(1) When leader company contracting is to be considered, take special effort to select a small disadvantaged business (SDB) concern as the follower company if—

(i) The follower company will be a subcontractor and the Standard Industrial Classification (SIC) Major Group of the acquisition is one in which use of a price evaluation adjustment is currently authorized (see FAR 19.201(b)).

(2) If the follower company will be a subcontractor, or if a price evaluation adjustment in the SIC Major Group is authorized, and an SDB is not selected as the follower company, the contracting officer shall document the contract file to reflect—

(i) The extent of actions taken to identify SDB concerns for participation in the acquisition; and

(ii) The rationale for selection of a non-SDB as the follower company.

PART 219—SMALL BUSINESS PROGRAMS

5. Section 219.001 is revised to read as follows:

219.001 Definitions.

Small disadvantaged business concern, as used in Subpart 217.4 (if the follower company will be a prime contractor), Subpart 219.11, and Subpart 236.6 (if the small disadvantaged business concern is a prime contractor or a participant in a joint venture at the prime contract level), is defined at FAR 19.001, paragraph (b) of the definition of “small disadvantaged business concern.” As used elsewhere in the DFARS, the term “small disadvantaged business concern,” for both prime contractors and subcontractors, is as

defined at FAR 19.001, paragraph (b) of the definition of “small disadvantaged business concern,” except that the firm need not have received certification as a small disadvantaged business concern by the Small Business Administration or be listed on the register of small disadvantaged business concerns maintained by the Small Business Administration.

6. Section 219.201 is amended by revising paragraph (a); and by adding, after paragraph (d)(viii), paragraph (f) to read as follows:

219.201 General policy.

(a) The DoD will use the Section 8(a) program, small disadvantaged business evaluation preferences, advance payments, outreach, and technical assistance to meet its five percent goal for contract and subcontract awards to small disadvantaged businesses.

* * * * *

(f) The Directors, Office of Small and Disadvantaged Business Utilization, of the military departments and defense agencies are responsible for determining whether use of the price evaluation adjustment to achieve a small disadvantaged business goal has caused non-SDB firms in a particular Standard Industrial Classification Major Group to bear an undue burden or other inappropriate effect. A copy of each determination shall be forwarded to the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition and Technology), simultaneously with submittal to the Office of Federal Procurement Policy.

7. Section 219.201-5 is amended by revising the introductory text and paragraphs (1), (2), and (3) to read as follows:

219.202-5 Data collection and reporting requirements.

Determine the premium percentage to be entered in Item D4E of the Individual Contracting Action Report (DD Form 350), (see 253.204-70), as follows:

(1) For small disadvantaged business or historically black college and university/minority institution set-asides, divide the difference between the fair market price and the award price by the fair market price.

(2) For price evaluation adjustment awards (see FAR Subpart 19.11), divide the difference between the low responsive offer and the award price by the low responsive offer.

(3) For partial small business set-asides with preferential consideration for small disadvantaged business concerns, divide the difference between the award price on the non-set-aside

portion and the award price on the set-aside portion by the award price on the non-set-aside portion.

* * * * *

Subpart 219.3 [Removed]

8. Subpart 219.3 is removed.

219.501 [Removed]

9. Section 219.501 is removed.

219.502–2–70 [Removed]

10. Section 219.502–2–70 is removed.

11. Section 219.502–3 is revised to read as follows:

219.502–3 Partial set-asides.

(c)(1) If the Standard Industrial Classification Major Group of the acquisition is one in which use of a price evaluation adjustment for small disadvantaged business concerns is currently authorized (see FAR 19.201(b)), the adjustment shall be applied to the non-set-aside portion.

219.502–4, 219.504, 219.506, 219.508, and 219.508–70 [Removed]

12. Section 219.502–4, 219.504, 219.506, 219.508, and 219.508–70 are removed.

13. Section 219.703 is amended by revising paragraph (a)(2)(A) to read as follows:

219.703 Eligibility requirements for participating in the program.

(1) * * *

(2)(A) To be eligible as an SDB subcontractor, a concern must meet the definition in 219.001.

* * * * *

14. Section 219.705–4 is amended in paragraph (d) by revising the first sentence to read as follows:

219.705–4 Reviewing the subcontracting plan.

(d) Challenge any subcontracting plan that does not contain positive goals and consider the extent to which an offeror plans to use competition restricted to historically black colleges and universities or minority institutions.

* * *

15. Section 219.803 is amended by revising paragraph (c) to read as follows:

219.803 Selecting acquisitions for the 8(a) Program.

* * * * *

(c) Before considering a small business set-aside, review the acquisition for offering under the 8(a) Program.

16. Section 219.804–1 is revised to read as follows:

219.804–1 Agency evaluation.

(f) The 8(a) firms should be offered the opportunity to give a technical presentation.

17. Section 219.1005 is amended by revising paragraph (a)(3)(A) to read as follows:

219.1005 Applicability.

(a)(3)(A) Architect-engineering services in support of military construction projects or military family housing projects are exempt from the Small Business Competitiveness Demonstration Program, except for the emerging small business (ESB) set-aside requirements. Accordingly, these shall—

(1) Be reviewed for possible award under the 8(a) Program regardless of dollar value.

(2) Not be set aside for small business if the estimated value is \$85,000 or more (including indefinite delivery-indefinite quantity contracts if the value of all anticipated orders exceeds \$85,000).

(3) Be considered for ESB set-aside if the estimated value is both less than the emerging small business reserve amount and less than \$85,000.

(4) Be considered for small business set-aside if the estimated value is less than \$85,000, regardless of whether small business set-asides for other architect-engineer services are prohibited under the Small Business Competitiveness Demonstration Program, when an ESB set-aside is not appropriate.

* * * * *

219.1006 [Amended]

18. Section 219.1006 is amended by removing paragraph (b)(1); and in paragraph (b)(2) by removing the phrase “Office of the Deputy Under Secretary of Defense (International & Commercial Programs)” and inserting in its place the phrase “Office of the Under Secretary of Defense (Acquisition and Technology)”.

219.1007 [Removed]

19. Section 219.1007 is removed.

20. Subpart 219.11 is added to read as follows:

Subpart 219.11—Price Evaluation Adjustments for Small Disadvantaged Business Concerns

Sec.

219.1102 Applicability.

Subpart 219.11—Price Evaluation Adjustment for Small Disadvantaged Business Concerns

219.1102 Applicability.

(b) The price evaluation adjustment also shall not be used in acquisitions that are for commissary or exchange resale.

Subpart 219.70 [Removed and Reserved]

21. Subpart 219.70 is removed and reserved.

Subpart 219.72 [Removed]

22. Subpart 219.72 is removed.

PART 225—FOREIGN ACQUISITION

225.403 [Amended]

23. Section 225.403 is amended by removing paragraph (b).

PART 226—OTHER SOCIOECONOMIC PROGRAMS

226.7004 [Removed and Reserved]

24. Section 226.7004 is removed and reserved.

25. Section 226.7008 is amended by revising paragraph (b) to read as follows:

226.7008 Solicitation provision and contract clause.

* * * * *

(b) Use the provision at FAR 52.226–2, Historically Black College or University and Minority Institution Representation, in solicitations set aside for HBCU/MIs and in solicitations that contain the clause at FAR 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

226.7103 [Amended]

26. Section 226.7103 is amended by removing paragraph (c)(2) and by redesignating paragraph (c)(3) as paragraph (c)(2).

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

27. Section 236.602–1 is amended by revising paragraph (a)(i)(6)(A) introductory text and paragraph (a)(i)(6)(C) to read as follows:

236.602–1 Selection criteria.

(a)(i) * * *

(6) * * *

(A) Consider the volume of work awarded by DoD during the previous 12 months. In considering equitable distribution of work among A–E firms, include small business concerns; historically black colleges and universities and minority institutions; firms that have not had prior DoD contracts; and small disadvantaged business concerns and joint ventures with small disadvantaged business participants if the Standard Industrial Classification Major Group of the acquisition is one in which use of a price evaluation adjustment is currently authorized (see FAR 19.201(b)).

* * * * *

(C) Consider the extent to which potential contractors identify and commit to small business and to small advantaged business, historically black college and university, or minority institution performance of the contract as subcontractors.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212-7001 [Amended]

28. Section 252.212-7001 is amended by revising the clause date to read "OCT 1998"; and in paragraph (b) by removing the entries at 252.219-7001, 252.219-7002, and 252.219-7006.

252.219-7000, 252.219-7001, 252.219-7002, 252.219-7006, and 252.219-7008 [Removed and Reserved]

29. Sections 252.219-7000, 252.219-7001, 252.219-7002, 252.219-7006, and 252.219-7008 are removed and reserved.

PART 253—FORMS

30. Section 253.204-70 is amended—

a. In paragraph (c)(4)(viii)(B)(8)(ii) by removing the parenthetical "(see 206.203)";

b. In paragraphs (d)(5)(iv)(A)(4) and (d)(5)(iv)(B)(3) by removing the parenthetical "(219.502-2-70)";

c. By revising paragraphs

(d)(5)(iv)(B)(4);

d. In paragraph (d)(5)(iv)(B)(5) by removing the parenthetical "(219.502-3)";

e. By removing paragraph

(d)(5)(iv)(B)(6); and

f. By revising paragraph (d)(5)(v)(B) introductory text and paragraph (e)(3)(ii). The revised text reads as follows:

§ 253.204-70 DD Form 350, Individual Contracting Action Report.

* * * * *

(d) * * *

(5) * * *

(iv) * * *

(B) * * *

(4) *Code D—SDB Price Evaluation Adjustment—Unrestricted.* Enter code D if the action was unrestricted but an SDB received an award as a result of a price evaluation adjustment (see FAR Subpart 19.11).

* * * * *

(v) * * *

(B) Enter the code from the following list which corresponds to the ethnic group marked by the contractor in the solicitation provision at FAR 52.219-1, Small Business Program Representation, or FAR 52.212-3(c).

* * * * *

(e) * * *

(3) * * *

(ii) If Block E1 or E2 is completed, enter the offered price from the small business firm that would have been the low offeror if qualified nonprofit agencies employing people who are blind or severely disabled had not participated in the acquisition.

* * * * *

31. Section 253.204-71 is amended in paragraph (g)(2)(ii)(B)(1) by removing the parenthetical "(219.502-2-70)"; by revising paragraph (g)(2)(ii)(B)(2); and in paragraph (g)(2)(ii)(B)(3) by removing the parenthetical "(219.502-3)". The revised text reads as follows:

§ 253.204-71 DD Form 1057, Monthly Contracting Summary of Actions \$25,000 or Less.

* * * * *

(g) * * *

(2) * * *

(ii) * * *

(B) * * *

(2) Application of an SDB price evaluation adjustment (see FAR Subpart 19.11); or

* * * * *

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