

28.101-3 Authority of an attorney-in-fact for a bid bond.

(a) Any person signing a bid bond as an attorney-in-fact shall include with the bid bond evidence of authority to bind the surety.

(b) An original, or a photocopy or facsimile of an original, power of attorney is sufficient evidence of such authority.

(c) For purposes of this section, electronic, mechanically-applied and printed signatures, seals and dates on the power of attorney shall be considered original signatures, seals and dates, without regard to the order in which they were affixed.

(d) The contracting officer shall—

(1) Treat the failure to provide a signed and dated power of attorney at the time of bid opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the power of attorney at the time of bid opening as a matter of responsibility. These questions are handled after bid opening.

(e)(1) If the contracting officer contacts the surety to validate the power of attorney, the contracting officer shall document the file providing, at a minimum, the following information:

- (i) Name of person contacted.
- (ii) Date and time of contact.
- (iii) Response of the surety.

(2) If, upon investigation, the surety declares the power of attorney to have been valid at the time of bid opening, the contracting officer may require correction of any technical error.

(3) If the surety declares the power of attorney to have been invalid, the contracting officer shall not allow the bidder to substitute a replacement power of attorney or a replacement surety.

(f) Determinations of non-responsibility based on the unacceptability of a power of attorney are not subject to the Certificate of Competency process of subpart 19.6 if the surety has disavowed the validity of the power of attorney.

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 19 and 52**

[FAC 2005-06; FAR Case 2005-002; Item VIII]

RIN 9000-AK28

**Federal Acquisition Regulation;
Expiration of the Price Evaluation
Adjustment**

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to cancel for civilian agencies (except National Aeronautics and Space Administration (NASA) and Coast Guard) the Small Disadvantaged Business (SDB) price evaluation adjustment which was originally authorized under the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, Sec. 7102). Civilian agencies (except NASA and Coast Guard) are not authorized to apply the price evaluation adjustment to their acquisitions.

DATES: *Effective Date:* September 30, 2005.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before November 29, 2005, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-06, FAR case 2005-002, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.
- E-mail: farcase.2005-002@gsa.gov. Include FAC 2005-06, FAR case 2005-002 in the subject line of the message.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-06, FAR case 2005-002, in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. Please cite FAC 2005-06, FAR case 2005-002.

SUPPLEMENTARY INFORMATION:**A. Background**

The small disadvantaged business price evaluation adjustment for civilian agencies, originally authorized under the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, Sec. 7102) expired. This provision, as implemented in FAR subpart 19.11, authorized agencies to apply the price evaluation adjustment to benefit certain small disadvantaged business concerns in competitive acquisitions. As a result of its expiration for civilian agencies (except NASA and Coast Guard), civilian agencies (except NASA and Coast Guard) have no statutory authority to apply the small disadvantaged business price evaluation adjustment to their acquisitions.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The 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 certain small disadvantaged business concerns for specific North American Industry Classification System (NAICS) codes will no longer benefit from the price evaluation adjustment in competitive acquisitions. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

This interim rule amends Federal Acquisition Regulation (FAR) Subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns. The small disadvantaged business price evaluation adjustment for civilian agencies other than National Aeronautics and Space Administration (NASA) and Coast Guard,

originally authorized under the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, Sec. 7102) expired. This provision, as implemented in Federal Acquisition Regulation subpart 19.11 authorized agencies to apply the price evaluation adjustment to benefit certain small disadvantaged business concerns in competitive acquisitions. This change 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 civilian agencies (excluding NASA and Coast Guard) will no longer have the authority to apply the price evaluation adjustment to benefit certain small disadvantaged business concerns in competitive acquisitions. However, the price evaluation adjustment is still authorized for the Department of Defense, U.S. Coast Guard, and NASA.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Part 19 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601 *et seq.* (FAC 2005-06, FAR case 2005-002), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose 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 (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 because the small disadvantaged business price evaluation adjustment for civilian agencies other than NASA and Coast Guard, originally authorized under the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, Sec. 7102) expired. This revision to the FAR is necessary to ensure that civilian agencies (except Coast Guard and NASA) are aware that the price evaluation adjustment should not be applied to their acquisitions. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this

interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

Dated: September 22, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 19 and 52 as set forth below:

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

Authority: Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.1102 by redesignating paragraphs (a) and (b) as (b) and (c), respectively, and adding a new paragraph (a) to read as follows:

19.1102 Applicability.

(a) This subpart applies to the Department of Defense, National Aeronautics and Space Administration, and the U.S. Coast Guard. Civilian agencies do not have the statutory authority (originally authorized in the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, Sec. 7102)) for use of the Small Disadvantaged Business (SDB) price evaluation adjustment.

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■ 2. Amend section 19.1103 by revising paragraph (a)(2) to read as follows:

19.1103 Procedures.

(a) * * *

(2) An otherwise successful offer from a historically black college or university or minority institution.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(10)(i) of the clause to read as follows:

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

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CONTRACT TERMS AND CONDITIONS
REQUIRED TO IMPLEMENT STATUTES OR
EXECUTIVE ORDERS—COMMERCIAL
ITEMS (SEP 2005)

* * * * *

(b) * * *

(10)(i) 52.219-23, Notice of Price Evaluation Adjustment for Small

Disadvantaged Business Concerns (SEP 2005) (10 U.S.C. 2323) (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

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■ 4. Amend section 52.219-23 by revising the date of the clause and paragraph (b)(1)(ii) of the clause to read as follows:

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

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NOTICE OF PRICE EVALUATION
ADJUSTMENT FOR SMALL
DISADVANTAGED BUSINESS CONCERNS
(SEP 2005)

* * * * *

(b) Evaluation adjustment. (1) * * *

(ii) An otherwise successful offer from a historically black college or university or minority institution.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-06; FAR Case 2004-006; Item IX]

RIN 9000-AK06

Federal Acquisition Regulation; Accounting for Unallowable Costs

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by revising language regarding accounting for unallowable costs. The final rule adds language which provides specific criteria on the use of statistical sampling as a method to identify unallowable costs, including the applicability of penalties for failure to exclude certain projected unallowable costs. The final rule also revises the language regarding advance agreements by adding statistical sampling methods as an example for which advance agreements between the