

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

**48 CFR Parts 1, 12, 14, 15, 19, 26, 33,
52, and 53**

[FAC 97-13; FAR Case 97-004]

RIN 9000-AH59

**Federal Acquisition Regulation;
Reform of Affirmative Action in Federal
Procurement**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency
Acquisition Council and the Defense
Acquisition Regulations Council (the
Councils) have agreed to adopt the
interim rules published in the **Federal
Register** at 63 FR 35719, June 30, 1998;
63 FR 36120, July 1, 1998; 63 FR 52426,
September 30, 1998; and 63 FR 71721,
December 29, 1998, as final rules with
changes. These amendments conform to
a Department of Justice (DoJ) model for
reform of 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).

DATES: *Effective Date:* October 1, 1999.

Applicability Date: The policies,
provisions, and clauses of this final rule
are effective for all solicitations issued
on or after October 1, 1999.

FOR FURTHER INFORMATION CONTACT: Ms.
Victoria Moss, Procurement Analyst,
Federal Acquisition Policy Division,
General Services Administration, at
(202) 501-4764, or Mr. Charles
Zuckerman, Office of the Director of
Defense Procurement, Department of
Defense, at (703) 697-0895. For general
information, contact the FAR
Secretariat, Room 4035, GS Building,
Washington, DC, 20405, (202) 501-4755.
Please cite FAC 97-13, FAR case 97-
004.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA issued the
following Federal Acquisition Circulars
(FACs) to make amendments to the FAR
concerning programs for small
disadvantaged business concerns:
FAC 97-06, 63 FR 35719, June 30, 1998

FAC 97-07, 63 FR 36120, July 1, 1998
FAC 97-08, 63 FR 52426, September 30,
1998

FAC 97-07 Addendum, 63 FR 71721,
December 29, 1998

These amendments conformed to the
DoJ model for reform of affirmative
action in Federal procurement. This rule
revises and finalizes the above interim
rules. The Councils received twenty-
four letters containing 63 comments in
response to the interim rules and
considered them in the formulation of
this final rule. The Councils made only
one significant change to the rule, as
follows:

FAC 97-07 Addendum amended the
FAR to allow contractors acting in good
faith to rely upon the self-
representations of their subcontractors
as to their status as small disadvantaged
business concerns. The change provided
an additional period of time for
subcontractors to become certified
under rules issued by the Small
Business Administration. That time
period is being extended to September
30, 1999. Accordingly, this final rule,
which becomes effective on October 1,
1999, rescinds the change made by FAC
97-07 Addendum.

Also, the Councils made several
clarifying amendments in this final rule,
including removing all references to a
list of SDBs to be maintained by the
Small Business Administration and
referring instead to SBA's PRO-Net
database.

This rule was subject to Office of
Management and Budget review under
Section 6(b) of Executive Order 12866,
Regulatory Planning and Review, dated
September 30, 1993. This is 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 the
rule provides preferences through
which the Government may provide
small business concerns benefits in
Federal contracting. The Final
Regulatory Flexibility Analysis (FRFA)
is summarized as follows:

In *Adarand Constructors, Inc. v. Peña*, 115
S. Ct. 2097 (1995), the Supreme Court
extended strict judicial scrutiny to Federal
affirmative action programs that use racial or
ethnic criteria as a basis for decision-making.
Following the decision, the Department of
Justice (DoJ) published, at 61 FR 26042 (May
23, 1996), Proposed Reforms to Affirmative
Action in Federal Procurement. This DoJ
model was implemented in several parts:
Small Business Administration (SBA)
regulations; publication of the Department of

Commerce price evaluation adjustments for
use in Federal procurements; and interim
FAR rules.

Four interim FAR rules established in the
FAR three procurement mechanisms
benefiting small disadvantaged businesses
(SDBs). The first mechanism is a price
evaluation adjustment of up to 10 percent in
certain two-digit Standard Industrial
Classification (SIC) Major Groups. The
second mechanism is a source selection
evaluation factor or subfactor for planned
SDB participation in the performance of a
contract. The third mechanism provides for
a monetary incentive for subcontracting with
SDBs.

We received one public comment that
specifically addressed the Initial Regulatory
Flexibility Analysis. That comment provided
that the rule imposes a complicated tracking
system and will not increase opportunities
for small disadvantaged businesses. We made
no changes to the rule based on this
comment. While we recognize that the rule
calls for more detailed reporting of SDB
subcontractors in order to comply with the
DoJ proposal, no alternatives to that reporting
exist. The commenter provided no evidence
to support the commenter's opinion that this
rule will not increase opportunities for small
disadvantaged businesses. It is our opinion
that, to the contrary, this rule will increase
opportunities for such firms, particularly in
the award of prime contracts by civilian
agencies that, unlike DoD, have not
previously granted procurement preferences
to SDBs.

The FAR Secretariat has submitted a
copy of the FRFA to the Chief Counsel
for Advocacy of the Small Business
Administration. Interested parties may
obtain a copy from the FAR Secretariat.
The Council will consider comments
from small entities concerning the
affected FAR subpart 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 97-13, FAR Case 97-004), in
correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub.
L. 104-13) applies because the rules
being converted to a final rule contain
reporting and recordkeeping
requirements. OMB approved the
information collections under OMB
clearance numbers 9000-0007 through
June 30, 2000, and 9000-0150 through
June 30, 2000. This final rule does not
affect those previously approved
information collection requirements.

**List of Subjects in 48 CFR Parts 1, 12,
14, 15, 19, 26, 33, 52, and 53**

Government procurement.

Dated: June 25, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97-13 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 final rule are effective for all solicitations issued on or after October 1, 1999.

Eleanor R. Spector,

Director, Defense Procurement.

Dated: June 15, 1999

Ida M. Ustad,

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

June 16, 1999.

Tom Luedtke,

Associate Administrator for Procurement, National Aeronautics and Space Administration.

June 11, 1999.

Interim Rules Adopted as Final With Changes

Accordingly, DoD, GSA, and NASA adopt the interim rules amending 48 CFR parts 1, 12, 14, 15, 19, 26, 33, 52, and 53, which were published at 63 FR 35719, June 30, 1998; 63 FR 36120, July 1, 1998; 63 FR 52426, September 30, 1998; and 63 FR 71721, December 29, 1998, as final with the following changes:

1. The authority citation for 48 CFR parts 1, 12, 14, 15, 19, 26, 33, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 19—SMALL BUSINESS PROGRAMS

2. Amend section 19.001 to revise the definition "Small disadvantaged business concern" to read as follows:

19.001 Definitions.

* * * * *

Small disadvantaged business concern, as used in this part (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), means 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 as a small disadvantaged business concern

consistent with 13 CFR part 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 identified, on the date of its representation, as a certified small disadvantaged business (SDB) concern in the database maintained by the Small Business Administration (PRO-Net); or

(2) For a prime contractor, 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 part 124, subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since it submitted its application. In this case, a contractor must receive certification as an SDB by the SBA prior to contract award.

* * * * *

3. Amend section 19.304 to revise paragraph (c)(1) to read as follows:

19.304 Disadvantaged business status.

* * * * *

(c) * * *

(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 identified as a small disadvantaged business concern by accessing SBA's database (PRO-Net) or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

* * * * *

4. Amend section 19.703 to add two new sentences after the first sentence of paragraph (b) to read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(b) * * * The clause at 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, requires the contractor to obtain representations of small disadvantaged status from subcontractors through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at 52.219-22, Small Disadvantaged Business Status. The clause requires the contractor to confirm that a subcontractor representing itself as a small disadvantaged business concern is

identified by SBA as a small disadvantaged business concern by accessing SBA's database (PRO-Net) or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility. * * *

5. Revise section 19.1102 to read as follows:

19.1102 Applicability.

(a) Use the price evaluation adjustment in competitive acquisitions in the authorized SIC Major Groups.

(b) Do not use the price evaluation adjustment in acquisitions—

(1) That are less than or equal to the simplified acquisition threshold;

(2) That are awarded pursuant to the 8(a) Program;

(3) That are set aside for small business concerns;

(4) That are set aside for HUBZone small business concerns;

(5) Where price is not a selection factor so that a price evaluation adjustment would not be considered (e.g., architect/engineer acquisitions); or

(6) Where all fair and reasonable offers are accepted (e.g., the award of multiple award schedule contracts).

6. Amend section 19.1103 to revise paragraphs (a)(2), (a)(3), (a)(4), (a)(5), and (b) to read as follows:

19.1103 Procedures.

(a) * * *

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

(3) An otherwise successful offer 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, an otherwise successful offer from a historically black college or university or minority institution; or

(5) For DoD acquisitions, an otherwise successful offer of qualifying country end products (see DFARS 225.000-70 and 252.225-7001).

(b) Apply the factor to a line item or a group of line 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.

* * * * *

7. Amend section 19.1104 to revise the heading and the first sentence to read as follows:

19.1104 Contract clause.

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 19.1101 and 19.1102 apply. * * *

8. Amend section 19.1202-3 to revise the introductory text to read as follows:

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

In developing an SDB participation evaluation factor or subfactor for the solicitation, agencies may consider

* * * * *

19.1202-4 [Amended]

9. In section 19.1202-4, remove paragraph (c).

PART 26—OTHER SOCIOECONOMIC PROGRAMS

10. Revise section 26.304 to read as follows:

26.304 Solicitation provision.

Insert the provision at 52.226-2, Historically Black College or University and Minority Institution Representation, in solicitations exceeding the micro-purchase threshold, for research, studies, supplies, or services of the type normally acquired from higher educational institutions. For DoD, NASA, and Coast Guard acquisitions, also insert the provision in solicitations that contain the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Amend section 52.212-3 to revise the date of the provision and paragraph (c)(7)(i)(A) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Oct 1999)

* * * * *

(c) * * *

(7) * * *

(i) * * *

(A) It /___/ is, /___/ is not certified by the Small Business Administration as a small disadvantaged business concern and identified, on the date of this representation, as a certified small disadvantaged business concern in the database maintained by the Small Business Administration (PRO-Net), 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

* * * * *

12. Amend section 52.219-8 to revise the date of the clause and paragraph (c)(3) to read as follows:

52.219-8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (Oct 1999)

* * * * *

(c) * * *

(3) *Small business concern owned and controlled by socially and economically disadvantaged individuals and small disadvantaged business concern* mean a small business concern that represents, as part of its offer that—

(i) It has received certification as a small disadvantaged business concern consistent with 13 CFR 124, Subpart B;

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

(iii) Where the concern is owned by one or more 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

(iv) It is identified, on the date of its representation, as a certified small disadvantaged business in the database maintained by the Small Business Administration (PRO-Net).

* * * * *

13. Amend section 52.219-9 to revise the date of the clause and paragraph (d)(5) to read as follows:

52.219-9 Small Business Subcontracting Plan.

* * * * *

SMALL BUSINESS SUBCONTRACTING PLAN (OCT 1999)

* * * * *

(d) * * *

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Marketing and Access Network (PRO-Net) of the Small Business Administration (SBA), the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in PRO-Net as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, HUBZone, small disadvantaged and women-owned small business source list. Use of PRO-Net as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

* * * * *

14. Amend section 52.219-22 to revise the date of the provision and paragraph (b)(1)(i)(C) to read as follows:

52.219-22 Small Disadvantaged Business Status.

* * * * *

SMALL DISADVANTAGED BUSINESS STATUS (OCT 1999)

* * * * *

(b) * * *

(1) * * *

(i) * * *

(C) It is identified, on the date of its representation, as a certified small disadvantaged business concern in the database maintained by the Small Business Administration (PRO-Net); or

* * * * *

15. Amend section 52.219-23 to revise the date of the clause and paragraphs (a)(1)(iii) and (b) to read as follows:

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

* * * * *

NOTICE OF PRICE EVALUATION ADJUSTMENT FOR SMALL DISADVANTAGED BUSINESS CONCERNS (OCT 1999)

(a) * * *

(1) * * *

(iii) It is identified, on the date of its representation, as a certified small disadvantaged business concern in the database maintained by the Small Business Administration (PRO-Net).

* * * * *

(b) *Evaluation adjustment.* (1) The Contracting Officer will evaluate offers by adding a factor of _____ [Contracting Officer insert the percentage] percent to the price of all offers, except—

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

(ii) An otherwise successful offer 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));

(iii) An otherwise successful offer where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government;

(iv) For DoD, NASA, and Coast Guard acquisitions, an otherwise successful offer from a historically black college or university or minority institution; and

(v) For DoD acquisitions, an otherwise successful offer of qualifying country end products (see sections 225.000-70 and 252.225-7001 of the Defense FAR Supplement).

(2) The Contracting Officer will apply the factor to a line item or a group of line items on which award may be made. The Contracting Officer will apply other evaluation factors described in the solicitation 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.

* * * * *

16. Amend section 52.219-25 to revise the date of the clause and paragraph (a) to read as follows:

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

* * * * *

SMALL DISADVANTAGED BUSINESS PARTICIPATION PROGRAM—DISADVANTAGED STATUS AND REPORTING (OCT 1999)

(a) *Disadvantaged status for joint venture partners, team members, and subcontractors.* This clause addresses disadvantaged status for joint venture partners, teaming arrangement members, and subcontractors and is applicable if this contract contains small disadvantaged business (SDB) participation targets. The Contractor shall obtain representations of small disadvantaged status from joint venture partners, teaming arrangement members, and subcontractors through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at FAR 52.219-22, Small Disadvantaged Business Status. The Contractor shall confirm that a joint venture partner, team member, or subcontractor representing itself as a small disadvantaged business concern, is identified as a certified small disadvantaged business in the database maintained by the Small Business Administration (PRO-Net) or by contacting

the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

* * * * *

[FR Doc. 99-16855 Filed 7-1-99; 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. 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) 97-13 which amends the Federal Acquisition Regulation (FAR). A Final Regulatory Flexibility Analysis (FRFA) has been prepared in accordance with 5 U.S.C. 604. Interested parties may

obtain a copy of the FRFA from the FAR Secretariat. In addition, interested parties may obtain further information regarding this rule by referring to FAC 97-13, which precedes this document. This document is also available via the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, at (202) 501-4225. For clarification of content, contact Victoria Moss, Procurement Analyst, General Services Administration, at (202) 501-4764.

Reform of Affirmative Action in Federal Procurement

FAC 97-13, FAR Case 97-004. FAR Parts 19, 26, and 52 are amended to rescind the changes made in FAC 97-07 Addendum and finalize interim rules published in FACs 97-06, 97-07, and 97-08. These rules establish in the FAR three procurement mechanisms benefiting small disadvantaged businesses (SDBs). The first mechanism is a price evaluation adjustment of up to ten percent in certain two-digit Standard Industrial Classification (SIC) Major Groups. The second mechanism is a source selection evaluation factor or subfactor for planned SDB participation in the performance of a contract. The third mechanism provides for a monetary incentive for subcontracting with SDBs.

Dated: June 25, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

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