

**PART 3—REGISTRATION**

1. The authority citation for Part 3 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 4a, 6, 6b, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6o, 6p, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21 and 23; 5 U.S.C. 552, 552b.

**§ 3.34 [Amended]**

2. Section 3.34 as amended by a final rule published on December 13, 1995, is proposed to be amended by removing and reserving paragraph (b)(3)(ii) and revising the introductory text of paragraph (b)(3)(iii) to read as follows:  
 § 3.34 Mandatory ethics training for registrants.

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(ii) [Reserved]

(iii) A person included on a list maintained by a registered futures association who has presented satisfactory evidence to the registered futures association that he has taken and passed the proficiency testing requirements established by a registered futures association for an ethics training provider, possesses a minimum of three years of relevant experience, and who certifies that:

\* \* \* \* \*

Issued in Washington, D.C. on December 7, 1995, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 95-30359 Filed 12-13-95; 8:45 am]

BILLING CODE 6351-01-P

Register notice, if adverse or critical comments were received by November 24, 1995, the effective date would be delayed and timely notice would be published in the Federal Register.

Therefore, due to receiving an adverse comment within the comment period, EPA is withdrawing the final rule and will address the comments received in a subsequent final rule based on the proposed rule also published on October 24, 1995. 60 FR 54465. EPA will not institute a second comment period on this document.

**DATES:** This withdrawal notice is effective December 14, 1995.

**FOR FURTHER INFORMATION CONTACT:** Montel Livingston, Office of Air (AT-082), EPA, Region 10, 1200 6th Avenue, Seattle, WA 98101, (206-553-0180).

**SUPPLEMENTARY INFORMATION:** See the information provided in the direct final rule located in the final rules section of the October 24, 1995 Federal Register, and in the short informational notice located in the proposed rule section of the October 24, 1995 Federal Register.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Ozone, and Volatile organic compounds.

Dated: December 7, 1995.

Chuck Clarke,

Regional Administrator.

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continue. It is expected that further proposals will be published for comment in the near future. This action was reviewed by the Office of Management and Budget under Executive Order 12866.

**DATES:** Comment Date: Comments on the proposed rule should be submitted in writing to the address below on or before February 12, 1996, 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 number (703) 602-0350. Please cite DFARS Case 95-D039 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan Schneider, (703) 602-0131.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This proposed rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement initiatives designed to facilitate awards to SDBs while taking account of the Supreme Court's decision in *Adarand Constructors, Inc. vs. Pena*, 63 U.S.L.W. 4523 (U.S. June 12, 1995).

**B. Regulatory Flexibility Act**

This proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and may be obtained from the address specified herein. A copy of the IRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts will be considered in accordance with Section 610 of the Regulatory Flexibility Act. Such comments must be submitted separately and cite DFARS Case 95-D039 in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) applies because the proposed rule contains a reporting and recordkeeping requirement. The necessary request for approval of the information collection requirement has been submitted to the Office of

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[AK6-1-6587; FRL-5345-7]

**State Implementation Plan: Alaska; Withdrawal**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Withdrawal.

**SUMMARY:** Due to an adverse comment, EPA is withdrawing the effective date for the approval of a moderate nonattainment area state implementation plan revision for Anchorage, Alaska, submitted by the Alaska Department of Environmental Conservation for the purpose of implementing an oxygenated gasoline program in the Municipality of Anchorage. The original action was published in the Federal Register on October 24, 1995, as a direct final rule. 60 FR 54435. As stated in the Federal

**DEPARTMENT OF DEFENSE**

**48 CFR Parts 215, 219, 236, 242, 252, and 253**

[DFARS Case 95-D039]

**Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business Concerns**

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Department of Defense has suspended the sections of the Defense Acquisition Regulation Supplement (DFARS) that prescribe the set-aside of acquisitions for small disadvantaged businesses (SDBs). The Department of Defense is proposing to amend the DFARS to implement initiatives designed to limit the adverse impact of the suspension. This proposal is an initial response to the suspension. The efforts of a government-wide group to reform affirmative action programs

Management and Budget under Section 3570(d) of the Act.

1. *Title for the collection of information, applicable forms, applicable OMB controls number, and type of request.*

Approval of the information collection requirement in DFARS 252.219-7003(g) has been requested as a new clearance, "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (DoD Contracts)."

2. *Summary of information collection.*

DFARS 219.704(a)(4) with its corresponding clause coverage at 252.219-7003(g) adds a notification requirement for contractors that have identified small, small disadvantaged or women-owned small businesses in subcontracting plans. Firms are to notify the administrative contracting officer of any substitutions of firms that are not small, small disadvantaged, or women-owned small businesses for the firms listed in the subcontracting plan. Notifications shall be in writing and shall occur within a reasonable period of time after award of the subcontract. Contractor specified formats shall be acceptable.

3. *Needs and Uses.*

Information is collected on an occasional basis as the need arises to keep the administrative contracting officer apprised of a contractor's compliance with approved subcontracting plans. Under the current procedure, the prime contractor proposes, and the contracting officer negotiates, an approved subcontracting plan. Consistent with 10 U.S.C. 2323, these subcontracting plans are evaluated as part of source selection. Under DFARS 215.605, criteria for proposal evaluation may include the extent to which small or small disadvantaged businesses are specifically identified in proposals (expected to be expanded to include women-owned small businesses in a separate DFARS case). Under the proposed rule, when an evaluation includes this criteria, the small, small disadvantaged, or women-owned small businesses considered in the evaluation shall be listed in any subcontracting plan submitted pursuant to FAR 52.219-9. The current procedures do not explicitly provide a vehicle to determine if those small, small disadvantaged or women-owned small business firms which have been identified as subcontractors are actually awarded subcontracts. Small firms have repeatedly raised the issue that prime contractors do not follow through on subcontracting plans as proposed and evaluated. Notification is required for DoD to assess compliance with

approved subcontracting plans. Under the proposed rule at DFARS 242.1503, past performance evaluations for previously awarded contracts should consider any notifications under the proposed DFARS 252.219-7003(g).

4. *Frequency.* On Occasion.

5. *Estimate of total annual reporting and recordkeeping burden.*

Number or respondents: 41.

Annual responses: 41.

Annual burden hours: 41.

We estimate that 30 percent (1,650) of the total estimated number of subcontracting plans (5,500) include specific names of small businesses, small disadvantaged businesses, and women-owned small businesses. We estimate that substitution occurs in 10 percent (165) of those plans. Since subcontracting plans typically address several years of contract effort, we estimate that 25 percent (41) of the substitutions will occur on an annual basis.

6. *Comments.* Written comments to OMB, citing DFARS Case 95-D039, are invited. Particular comments are solicited on:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

b. The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. Ways to minimize the burden of the collection of information on respondents.

List of Subjects in 48 CFR Parts 215, 219, 236, 242, 252, and 253

Government procurement.

Michele P. Peterson,

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR Parts 215, 219, 236, 242, 252, and 253 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 215, 219, 236, 242, 252 and 253 continues to read as follows:

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

**PART 215—CONTRACTING BY NEGOTIATION**

2. Section 215.605 is amended by revising paragraph (b)(ii)(E) and by adding paragraph (b)(iv) to read as follows:

**215.605 Evaluation factors.**

(b) \* \* \*

(ii) \* \* \*

(E) When not otherwise required by 215.608(a)(2), prior performance of the offerors in complying with requirements of the clause at FAR 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, and 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan; and

\* \* \* \* \*

(iv) When an evaluation includes the criterion at (b)(ii)(A), the small, small disadvantaged, or women-owned small businesses considered in the evaluation shall be listed in any subcontracting plan submitted pursuant to FAR 52.219-9 to facilitate compliance with 252.219-7003(g).

\* \* \* \* \*

3. Section 215.608 is amended by redesignating existing paragraph (a) as paragraph (a)(1) and by adding paragraph (a)(2) to read as follows:

**215.608 Proposal evaluation.**

(a) \* \* \*

(2) When a past performance evaluation is required by FAR 15.605 and the solicitation includes the clause at FAR 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, the evaluation shall include the past performance of offerors in complying with requirements of that clause. When a past performance evaluation is required by FAR 15.605, and the solicitation includes the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the evaluation shall include the past performance of offerors in complying with requirements of that clause.

\* \* \* \* \*

**PART 219—SMALL BUSINESS PROGRAMS**

4. The heading of Part 219 is revised to read as set forth above.

5. Section 219.704 is amended by adding paragraph (a)(4) to read as follows:

**219.704 Subcontracting plan requirements.**

(a) \* \* \*

(4) In those subcontracting plans which specifically identify small, small disadvantaged, and women-owned small businesses, prime contractors shall notify the administrative contracting officer of any substitutions of firms that are not small, small

disadvantaged, or women-owned small businesses for the firms listed in the subcontracting plan. Notifications shall be in writing and shall occur within a reasonable period of time after award of the subcontract. Contractor specified formats shall be acceptable.

6. Section 219.1006 is amended by revising paragraph (b)(1)(B) to read as follows:

**219.1006 Procedures.**

- (b) \* \* \*
- (1) \* \* \*

(B) The evaluation preference at 219.70 shall not be used. However, note the test program at 219.72 for construction acquisitions.

\* \* \* \* \*

7. Section 219.7001 is amended by revising paragraph (a) to read as follows:

**219.7001 Applicability.**

(a) The evaluation preference shall be used in competitive acquisitions except as provided in paragraph (b) of this section and in 219.1006(b)(1)(B).

\* \* \* \* \*

8. Subpart 219.72 is added to read as follows:

**219.72—Evaluation Preference for Small Disadvantaged Business (SDB) Concerns in Construction Acquisitions—Test Program**

Sec.

- 219.7200 Policy.
- 219.7201 Administration of the Test Program.
- 219.7202 Applicability.
- 219.7203 Procedures.
- 219.7204 Contract Clause.

**219.72—Evaluation Preference for Small Disadvantaged Business (SDB) Concerns in Construction Acquisitions—Test Program**

**219.7200 Policy.**

DoD policy is to ensure that, during this test program, offers from small disadvantaged business (SDB) concerns shall be given an evaluation preference in construction acquisitions.

**219.7201 Administration of the test program.**

The test program will be conducted over an eighteen-month period. The test program will be conducted by all DoD contracting activities that award construction contracts. The focal point for the test program is the Director, Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition and Technology (Director, SADBUD). Fourteen months after the initiation of this test program, the military departments and defense agencies shall submit a status report to the Director, SADBUD. This report shall specify the

impact of the evaluation preference over the first twelve months of the test program, and shall provide recommendations with respect to continuation and/or modification of the evaluation preference.

**219.7202 Applicability.**

(a) The evaluation preference shall be used in competitive acquisitions for construction (see definition in FAR subpart 36.1) when work is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

(b) Do not use the evaluation preference in acquisitions which—

- (1) Are less than or equal to the simplified acquisition threshold;
- (2) Are set aside for small businesses;
- or
- (3) Are awarded under section 8(a) procedures.

(c) The evaluation preference need not be applied when the head of the contracting activity expects that—

- (1) The contracting activity will meet its goal for SDB concerns, established pursuant to 10 U.S.C. 2323, during the current fiscal year, without this preference;
- (2) The evaluation preference is having a disproportionate impact on non-SDB concerns; or
- (3) The preference is otherwise not in the best interest of the Government.

**219.7203 Procedures.**

(a) Solicitations that require bonding shall require offerors to separately state bond costs in the offer. Bond costs include the costs of bid, performance, and payment bonds.

(b) Evaluate total offers. If the apparently successful offeror is an SDB concern, no further preference-based evaluation is required under this subpart.

(c) If the apparently successful offeror is not an SDB concern, evaluate offers excluding bond costs. If, after excluding bond costs, the apparently successful offeror is an SDB concern, add bond costs back to all offers, and give offers from SDB concerns a preference in evaluation by adding a factor of 10 percent to the total price of all offers, except—

- (1) Offers from SDBs which have not waived the evaluation preference; and
  - (2) Offers from historically black colleges and universities or minority institutions, which have not waived the evaluation preference.
- (d) When using the procedures in 36.303–70, Additive or deductive items, the evaluation preference in this subpart shall be applied.

**219.7204 Contract clause.**

Use the clause at 252.219–7010, Notice of Evaluation Preference for Small Disadvantaged Business Concerns—Construction Acquisitions—Test Program, in all solicitations—

- (1) That involve the evaluation preference; and
- (2) Where work is to be performed inside the U.S., its territories or possession, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

**PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

9. Section 236.303–70 is amended by revising the introductory text of paragraph (c)(2) to read as follows:

**236.303–70 Additive or deductive items.**

\* \* \* \* \*

(c) \* \* \*

(2) Evaluate all bids, including those using the procedures in 219.703, on the basis of the same additive or deductive bid items.

\* \* \* \* \*

**PART 242—CONTRACT ADMINISTRATION**

10. Subpart 242.15 is added to read as follows:

**Subpart 242.15—Contractor Performance Information**

Sec.

- 242.1503 Procedures.

**242.1503 Procedures.**

Evaluations should consider any notifications submitted under paragraph (g) of the clause at 252.219–7003, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (DoD Contracts).

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

11. Section 252.219–7003 is amended by adding paragraph (g) to read as follows:

**252.219–7003 Small, small disadvantaged and women-owned small business subcontracting plan (DoD contracts).**

\* \* \* \* \*

(g) In those subcontracting plans which specifically identify small, small disadvantaged, and women-owned small businesses, the Contractor shall notify the Administrative Contracting Officer of any substitutions of firms that are not small, small disadvantaged, or women-owned small businesses for the firms listed in the subcontracting plan. Notifications shall be in writing and

shall occur within a reasonable period of time after award of the subcontract. Contractor specified formats shall be acceptable.

12. Section 252.219-7010 is added to read as follows:

**252.219-7010 Notice of evaluation preference for small disadvantaged business concerns—construction acquisitions—Test program.**

As prescribed in 219.7204, use the following clause:

Notice of Evaluation Preference for Small Disadvantaged Business Concerns—Construction Acquisitions—Test Program (Date)

(a) *Definitions.*

As used in this clause—

“Historically black colleges and universities (HBCUs),” means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986. “Minority institutions,” means institutions meeting the requirements of paragraphs (3), (4), and (5) of Section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d-5(3)). The term also includes Hispanic-serving institutions as defined in Section 316(b)(1) of such Act (20 U.S.C. 1059c(b)(1)).

“Small disadvantaged business (SDB) concern,” means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR part 124, the majority of earnings of which directly accrue to such individuals. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

(b) *Evaluation preference.* (1) Offerors shall separately state bond costs in the offer. Bond costs include the costs of bid, performance, and payment bonds.

(2) Offers will be evaluated initially based on their total prices. If the apparently successful offeror is an SDB concern, no further preference based evaluation will be conducted.

(3) If the apparently successful offeror is not an SDB concern, offers will be evaluated based on their prices excluding bond costs.

If, after excluding bond costs, the apparently successful offeror is an SDB concern, bond costs will be added back to all offers, and offers from SDB concerns will be given a preference in evaluation by adding a factor of ten percent to the total price of all offers, except—

(i) Offers from SDBs which have not waived the evaluation preference; or

(ii) Offers from HBCUs or minority institutions, which have not waived the evaluation preference.

(c) *Waiver of evaluation preference.* A small disadvantaged business, historically black college or university, or minority institution offeror may elect to waive the preference. The agreements in paragraph (d) of this clause do not apply to offers which waive the preference.

\_\_\_\_\_ Offeror elects to waive the preference.

(d) *Agreements.* A small disadvantaged business concern, historically black college or university, or minority institution offeror, which did not waive the preference, agrees that in performance of the contract, in the case of a contract for—

(i) 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.

(ii) 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.

(End of clause)

**PART 253—FORMS**

13. Section 253.204-70 is amended by revising paragraph (e)(3) to read as follows:

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

\* \* \* \* \*

(e) \* \* \*

(3) *Block E3, Next Low Offer.*

(i) Complete Block E3 only if Block E2 is completed, or the evaluation preference for small disadvantaged business concerns in construction acquisitions set forth at 219.72 is applied. Otherwise, leave Block E3 blank.

(ii) If Block 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. If the evaluation preference for small disadvantaged business concerns in construction acquisitions set forth at 219.72 is applied, enter the offered price from the non-SDB concern that would have been the successful offeror if the evaluation preference had not been applied. Enter the amount in whole dollars.

\* \* \* \* \*

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**48 CFR Part 242**

**[DFARS Case 91-085D]**

**Defense Federal Acquisition Regulation Supplement; Personal Services Compensation**

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The Department of Defense has decided to withdraw a proposed rule published on December 6, 1994 (59 FR 62704). The rule proposed revisions to the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a dollar threshold for DoD contractors for application of the Federal Acquisition Regulation (FAR) requirements for contractor compensation system reviews. After review of public comments, DoD has determined the proposed DFARS revisions are unnecessary.

**FOR FURTHER INFORMATION CONTACT:** Defense Acquisition Regulations Council, Attn: Ms. Sandra G. Haberlin, PDUSD (A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062, (703) 602-0131.

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

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