

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

[FAC 97-08; FAR Case 97-004C]

RIN 9000-AH59

48 CFR Parts 12, 19, and 52

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 97-08, as an interim rule to make amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business (SDB) concerns. These amendments accommodate the use of the price evaluation adjustment for small disadvantaged business concerns in those Standard Industrial Classification (SIC) Major Groups where eligibility has been determined by region. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not 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 November 30, 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.97-004C@gsa.gov.

Please cite FAC 97-08, FAR case 97-004C 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.

The Department of Justice (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 being 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). This interim rule revises the FAR rule published in the **Federal Register** at 63 FR 35719, June 30, 1998 (FAR Case 97-004A, Reform of Affirmative Action in Federal Procurement), to accommodate the use of the price evaluation adjustment for small disadvantaged business concerns in those Standard Industrial Classification (SIC) Major Groups where eligibility has been determined by region. The DoC determination was issued on June 30, 1998.

B. Regulatory Flexibility Act

The interim rule is not expected 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 the rule merely reflects eligibility requirements in the FAR that

are governed by the Small Business Administration. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subparts also will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAC 97-08, FAR Case 97-004C), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) applies because the interim rule contains reporting requirements. This rule amends the information collection requirements contained in the FAR rule published at 63 FR 35719, June 30, 1998. Those requirements were submitted to the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*, and were approved under OMB clearance number 9000-0150 through June 30, 2000. The clearance 9000-0150 has been amended to add the certification requirements in this rule.

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 accommodate the determination by the Department of Commerce (DoC) to limit eligibility for a price evaluation adjustment to businesses within specific regions for certain industry categories. The DoC determination was issued on June 30, 1998. This interim rule must be published immediately because it revises FAR case 97-004A, which goes into effect on October 1, 1998. 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 12, 19, and 52

Government procurement.

Dated: September 25, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

FAC 97-08

Federal Acquisition Circular (FAC) 97-08 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: September 24, 1998.

Eleanor R. Spector,
Director, Defense Procurement.

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

Dated: September 24, 1998.

Tom Luedtke,
Acting Associate Administrator for Procurement, National Aeronautics and Space Administration.

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

1. The authority citation for 48 CFR Parts 12, 19, 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 12—ACQUISITION OF COMMERCIAL ITEMS

2. Section 12.301 is amended at the end of paragraph (b)(2) by adding a sentence to read as follows:

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

* * * * *

(b) * * *

(2) * * * Use the provision with its Alternate II in solicitations for acquisitions for which small disadvantaged business procurement mechanisms are authorized on a regional basis;

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

3. Section 19.201 is amended in the introductory text of paragraph (b) by adding a sentence after the fifth sentence to read as follows:

19.201 General policy.

* * * * *

(b) * * * The General Services Administration shall post the Department of Commerce determination at <http://www.arnet.gov/References/sdbadjustments.htm>.

* * * * *

4. Section 19.306 is amended at the end of paragraph (b) by adding a sentence to read as follows:

19.306 Solicitation provision and contract clause.

* * * * *

(b) * * * Use the provision with its Alternate I in solicitations for acquisitions for which a price evaluation adjustment for small disadvantaged business concerns is authorized on a regional basis.

* * * * *

5. Section 19.1103 is amended by revising paragraph (a)(1) to read as follows:

19.1103 Procedures.

(a) * * *

(1) Offers from small disadvantaged business concerns that have not waived the evaluation adjustment; or, if a price evaluation adjustment for small disadvantaged business concerns is authorized on a regional basis, offers from small disadvantaged business concerns, whose address is in such a region, that have not waived the evaluation adjustment;

* * * * *

6. Section 19.1104 is revised to read as follows:

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 19.1101 and 19.1102 apply. If a price evaluation adjustment is authorized on a regional basis, the clause shall be included in the solicitation even if the place of performance is outside an authorized region. 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. The clause shall be used with its Alternate II when a price evaluation adjustment is authorized on a regional basis.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Section 52.212–3 is amended by adding Alternate II following Alternate I to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

(End of provision)

* * * * *

Alternate II (Oct 1998). As prescribed in 12.301(b)(2), add the following paragraph (c)(7)(iii) to the basic provision:

(iii) *Address.* The offeror represents that its address _____ is, _____ is not in a region for which a small disadvantaged business procurement mechanism is authorized and its address has not changed since its certification as a small disadvantaged business concern or submission of its application for certification. The list of authorized small disadvantaged business procurement mechanisms and regions is posted at <http://www.arnet.gov/References/sdbadjustments.htm>. The offeror shall use the list in effect on the date of this solicitation. “Address,” as used in this provision, means the address of the offeror as listed on the Small Business Administration’s register of small disadvantaged business concerns or the address on the completed application that the concern has submitted to the Small Business Administration or a Private Certifier in accordance with 13 CFR part 124, subpart B. For joint ventures, “address” refers to the address of the small disadvantaged business concern that is participating in the joint venture.

8. Section 52.219–22 is amended by adding Alternate I following “(End of provision)” to read as follows:

52.219–22 Small Disadvantaged Business Status.

* * * * *

(End of provision)

Alternate I (Oct 1998). As prescribed in 19.306(b), add the following paragraph (b)(3) to the basic provision:

(3) *Address.* The offeror represents that its address _____ is, _____ is not in a region for which a small disadvantaged business procurement mechanism is authorized and its address has not changed since its certification as a small disadvantaged business concern or submission of its application for certification. The list of authorized small disadvantaged business procurement mechanisms and regions is posted at <http://www.arnet.gov/References/sdbadjustments.htm>. The offeror shall use the list in effect on the date of this solicitation. “Address,” as used in this provision, means the address of the offeror as listed on the Small Business Administrations register of small disadvantaged business concerns or the address on the completed application that the concern has submitted to the Small Business Administration or a Private Certifier in accordance with 13 CFR part 124, subpart B. For joint ventures, “address” refers to the address of the small disadvantaged business concern that is participating in the joint venture.

9. Section 52.219–23 is amended by adding Alternate II following Alternate I to read as follows:

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

* * * * *

(End of clause)

* * * * *

Alternate II (Oct 1998). As prescribed in 19.1104, substitute the following paragraph (b)(i) for paragraph (b)(i) of the basic clause:

(i) Offers from small disadvantaged business concerns, that have not waived the adjustment, whose address is in a region for which an evaluation adjustment is authorized;

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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) 97-08 which amends the Federal Acquisition Regulation (FAR). Further information regarding this rule may be obtained by referring to FAC 97-08 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 97-08/FAR Case 97-004C. FAC 97-06, FAR case 97-004A, Reform of Affirmative Action in Federal Procurement, published in the **Federal Register** at 63 FR 35719, June 30, 1998, established in the FAR a price evaluation adjustment (PEA) of up to 10 percent for small disadvantaged businesses (SDB) for acquisitions in the Standard Industrial Classification (SIC) Major Groups designated by the Department of Commerce. This rule amends those regulations to accommodate the use of the PEA in those Major Groups where eligibility has been determined by region.

Dated: September 25, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

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