

on a declared disaster, the borrower must have operated in a county declared a major disaster by the President or the Secretary, or in a county contiguous to such a county, and the Agency must have determined that second set-asides can be processed and approved for declared disasters in the specified year. The first set aside must have been provided for a previous crop year.

(iii) All FLP borrowers may apply for an installment to be set aside based on low commodity prices during 1999. If the borrower is applying for a second installment to be set aside based on low commodity prices, the first set-aside must have been provided for a previous crop year. County location, or proximity to a disaster declared county is not a consideration when the DSA is justified by low commodity prices.

* * * * *

(5) As a direct result of the declared disaster or the 1999 low commodity prices, both pursuant to paragraph (a)(1) of this section, the borrower does not have sufficient income available to pay all family living and operating expenses, other creditors, and FSA. This determination will be based on the borrower's actual production, income and expense records for the disaster or affected year and any other records required by the servicing official. Compensation received for losses shall be considered as well as increased expenses incurred because of a disaster. Consideration will also be given to insufficient income for the next production and marketing period following the affected year if the borrower establishes that production will be reduced or expenses increased as a result of the disaster or the 1999 low commodity prices.

(6) For the next business accounting year, the borrower must develop a positive cash flow projection showing that the borrower will at least be able to pay all operating expenses and taxes due during the year, essential family living expenses and meet scheduled payments on all debts. The cash flow projection must be prepared in accordance with 7 CFR 1924.56. The borrower will provide any documentation required to support the cash flow projection.

* * * * *

- (b) * * *
- (2) * * *

(i) Except as provided in paragraph (a) of this section, only one unpaid installment for each FLP loan may be set-aside.

* * * * *

6. In subpart T of part 1951, revise all references to "FC" to read "FLP".

Signed in Washington, DC, on May 8, 2000.

August Schumacher, Jr.,

Under Secretary for Farm and Foreign Agricultural Services.

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BILLING CODE 3410-05-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 361

RIN 3064-AB12

Minority and Women Outreach Program—Contracting

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) is amending its regulation establishing an outreach program for minority- and women-owned businesses and announcing its policy to utilize that portion of the Federal Affirmative Action Contracting Program, set forth in the Federal Acquisition Regulations, providing contracting benefits to Small Disadvantaged Businesses. The FDIC will no longer grant a price incentive based solely on race and gender criteria. The FDIC will, however, continue its outreach programs for minorities and women, and entities owned by them.

EFFECTIVE DATE: May 10, 2000.

FOR FURTHER INFORMATION CONTACT: Martin Blumenthal, Counsel, Legal Division, Corporate Operations Branch, Corporate Legal Issues Section, Contracting Law Unit (202) 736-0756; David McDermott, Chief, Policy and Compliance Unit, Acquisition and Corporate Services Branch, Division of Administration, (202) 942-3434; Rita Wiles Ross, Counsel, Legal Division, Corporate Operations Branch, Legal Operations Section, Legal Services Unit, (202) 736-3072; or Judith M. Wood, Chief, Diversity Branch, Office of Diversity and Economic Opportunity, (202) 416-2456.

SUPPLEMENTARY INFORMATION:

I. Background

In 1989, with enactment of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Congress mandated that the FDIC augment its program for contracting activities by prescribing

“regulations to establish and oversee minority outreach program [s] * * * to ensure inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women

* * * in all contracts entered into by the agency * * *” 12 U.S.C. 1833e(c).

In response, the FDIC adopted a regulation that obligates and requires the Corporation to engage in outreach efforts to identify and register minority- and women-owned businesses (MWOBs) that can provide the goods and services utilized by the FDIC. 12 CFR 361.6(b); Minority and Women Outreach Program—Contracting, 57 FR 15004 (April 24, 1992). In addition, to ensure that MWOBs are “being included in each solicitation, the solicitation process will include: * * * (3) Allowing qualified MWOBs a 3% price incentive and additional technical consideration for competitively bid services; * * *” 12 CFR 361.8(b)(3).

However, the Supreme Court has held that all such racial classifications, whether imposed by federal, state, or local governments, must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227; 115 S.Ct. 2097, 2113 (1995). Thereafter, in 1996, the Department of Justice invited public comments on a system designed to reform affirmative action in federal procurement in response to *Adarand*. 61 FR 26042, May 23, 1996. Continuing in that vein, in 1998, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration published a revision to the Federal Acquisition Regulations (FAR) implementing a new program of affirmative action in federal procurement. 63 FR 52426, September 30, 1998.

In this program, each year, the Department of Commerce makes a determination as to which industries demonstrate the results of past discrimination and are thereby eligible for a benefit in federal contracting. The Department of Commerce also determines the size of a price evaluation adjustment, not to exceed 10%, to be available in those industries. In the first year of the program, eligible industries that are generally used by the FDIC include accounting firms, asset managers, information technology contractors, office services, and building services. The amount of the price evaluation adjustment for 1999 is 10%.

The price evaluation adjustment is available to firms certified as Small Disadvantaged Businesses (SDBs) by the Small Business Administration (SBA). An SDB is a small business firm that is at least 51% owned by individuals who are both socially and economically disadvantaged. Socially disadvantaged individuals include Black Americans,

Hispanic Americans, Asian Pacific Americans, Subcontinent Asian Americans, and Native Americans as a class, as well as other groups that the SBA may from time to time designate, and individuals that can prove by a preponderance of the evidence previous discrimination on a case-by-case basis. Economically disadvantaged individuals have an individual net worth of less than \$750,000.¹ The standard for determining whether a firm qualifies as "small" varies between industry classifications and may be based on revenue or number of employees.

In lieu of a price incentive, an SDB may take advantage of an SDB participation factor, if the contracting agency includes such a factor in the procurement. A non-SDB may take advantage of the factor by proposing to partner with an SDB or to use SDB subcontractors. An SDB can also take advantage of this factor as the prime contractor. However, the SDB would only be eligible for the participation factor if it first waives the price evaluation adjustment. Utilization of SDBs as subcontractors may also be encouraged, at the discretion of the contracting agency, by offering prime contractors a financial incentive to exceed the proposed SDB subcontracting. An additional payment can be authorized where the prime contractor promises a particular monetary target of SDB subcontracting and its actual performance exceeds that promise. The monetary incentive can be up to 10% of the SDB subcontracting dollars in excess of the target amount.

II. Utilization of SDB Program

The FDIC has determined that it was unlikely that the FDIC MWOB price incentive, as implemented, would pass the Constitutional tests enunciated by the Supreme Court in *Adarand*. Accordingly, although the FDIC is not subject to the FAR, it believes that the FAR's affirmative action contracting program provides a constitutionally sustainable means of enhancing the opportunities for SDBs in FDIC contracting. The FDIC will, therefore, voluntarily utilize that program in lieu of the constitutionally questionable price incentive based on race and gender that has been awarded in the past. 64 FR 42862 (August 6, 1999). No comments were filed in response to that Notice.

The program, to be included in the FDIC Acquisition Policy Manual (APM),

¹ The \$750,000 excludes individual equity in a primary residence and the value of the individual's ownership interest in the firm seeking SDB status.

will provide that, for goods and services acquired under Formal Contracting Procedures, as defined in the APM, generally involving expenditures of \$100,000 or more, a price evaluation adjustment will be available to technically qualified SDB bidders in the following circumstances: (a) The bidder has been certified as an SDB by the SBA under procedures set forth in 13 CFR part 124; and (b) the Standard Industrial Classification (SIC) code for the prime contract is one in which the Department of Commerce has authorized the use of a preference. The eligible SICs and amount of the price evaluation adjustment is established annually by the Department of Commerce pursuant to 48 CFR 19.201(b).

Moreover, solicitations issued under the Formal Contracting Procedures involving awards of \$500,000 or more (\$1,000,000 for construction contracts) may also include an evaluation factor for SDB participation in the performance of the contract. The value to be assigned this factor, if any, is determined by the contracting officer on a contract-by-contract basis. The prime contract need not be in a SIC code identified as authorized by the Department of Commerce for the use of preferences, but only SDB participation in authorized SIC codes would be considered in the evaluation of the participation factor. SDB participation may be in the form of subcontracts, joint ventures or teaming partners.² Where the SDB is bidding as a prime contractor in response to a solicitation that includes an SDB participation factor, the SDB will not be eligible for the participation factor unless it first waives its price evaluation adjustment.³

Utilization of SDBs as subcontractors may also be encouraged, at the FDIC's discretion, by offering prime contractors a financial incentive to exceed the proposed SDB subcontracting. An additional payment can be authorized where the prime contractor promises a

² Any joint venture in which an SDB undertakes to perform a portion of the work could qualify for consideration under the SDB participation factor. The technical value assigned to such joint venture under the SDB participation factor would, of course, depend on the proportion of the work to be performed by the SDB joint venture. In other circumstances, a joint venture may itself qualify as an SDB under SBA regulations. Generally, for a joint venture to qualify, the SDB participant must have at least a 51% ownership share, perform 51% of the work, and the managing partner must be from the SDB participant.

³ In evaluating this factor, the contracting officer may consider the specificity of the proposal, the enforceability of the commitments, the complexity and variety of the work to be performed by SDBs, the realism of the proposal, and the contractor's past performance in complying with SDB participation goals.

particular monetary target of SDB subcontracting and its actual performance exceeds that promise. The monetary incentive can be up to 10% of the SDB subcontracting dollars in excess of the target amount.

The FDIC will not certify SDBs. That process will be carried out by the SBA under procedures established in the SBA's regulations, 13 CFR part 124. SDBs responding to FDIC solicitations are responsible for identifying themselves and certifying their current status as an SDB. An SDB that has applied for, but not yet received, SBA certification may be entitled to treatment as an SDB where certification can be obtained before the contract is awarded. It is the intention of the FDIC to establish procedures whereby the SBA will treat FDIC contractors seeking SDB certification in the same manner as contractors with FAR agencies that are similarly situated. However, if certification cannot be obtained in a timely manner, the contract may be awarded to another bidder.⁴

III. Final Rule

To facilitate the implementation of the policy enunciated above, we have repealed the provisions of part 361 that confer a price incentive, 12 CFR 361.8(b)(3), as well as made other conforming amendments to the regulations. The FDIC Office of Diversity and Economic Opportunity (ODEO) will continue to have overall responsibility for providing the FDIC with technical assistance and guidance to facilitate the identification, registration and solicitation of MWOBs. ODEO is also responsible for the Corporation's outreach efforts, such as:

- (1) Identifying MWOBs that can provide legal or other services to FDIC;
- (2) Conducting seminars, meetings, workshops and other various functions to promote the identification of MWOBs; and
- (3) Participating in conventions, seminars, meetings, workshops and other functions to promote the identification and inclusion of MWOBs.

Moreover, ODEO has specific responsibility for the Outreach Program with respect to providers of non-legal services, and in addition to the functions noted above, it will distribute information concerning the FDIC program for outreach to MWOBs. Generally, ODEO will work with contracting officials to ensure that

⁴ The FDIC will communicate with the SBA to ensure that FDIC contractors seeking certification as SDBs are given the same consideration as other contractors seeking similar certification.

MWOBs are included on FDIC solicitation lists.⁵

ODEO will also collect information from each FDIC office and division that performs contracting or outreach activities, on a quarterly basis or upon request, including statistical information on contract awards and solicitations by designated demographic categories and related outreach activities. The FDIC will request and maintain information on firms that have represented themselves as minority- or women-owned for purposes of outreach efforts and statistical reporting.

The Legal Division will perform outreach efforts targeted at providers of legal services. Generally, in addition to the functions listed above, the Legal Division's National Outreach Coordinator will require, at a minimum, quarterly submissions of statistical information on legal fees and expenses paid to outside counsel by designated demographic categories. FDIC will also encourage use of minority and women lawyers within other firms and partnering of firms with MWOBs. Moreover, specific procedures and activities will be detailed in the Legal Division's Outside Counsel Deskbook as well as the FDIC's web site at: www.fdic.gov.

Final Rule Changes

In addition to a general editorial updating and simplification of the rule, the FDIC has amended § 361.3 to remove unnecessary definitions and to conform the definition of a minority to the SBA definition. Section 361.4 remains essentially unchanged.

The FDIC has removed §§ 361.7–361.10 because the FDIC will no longer grant a price incentive based on race and gender criteria. Statistics based on self-certification of minorities and women and entities owned by them will be used in conjunction with survey efforts solely for monitoring the FDIC's outreach efforts.

The FDIC is presenting this final rule in a question-and-answer format in an effort to make the regulation easier to use. This change does not, however, affect the substance of the regulation.

IV. Matters of Regulatory Procedure

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the FDIC may not conduct or sponsor,

⁵ In July 1999, the Board withdrew its proposal to amend 12 CFR part 361 that would have, *inter alia*, established an outreach program for individuals with disabilities. Nevertheless, the FDIC will continue its outreach program for individuals with disabilities and entities owned by them as a matter of policy.

and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. Public comment and OMB approval has previously been obtained for an FDIC collection of information titled "Acquisition Services Information Requirements" which includes questions regarding contractors' minority status. This information collection, approved under OMB control number 3064–0072, will not be changed by this final rule.

Regulatory Flexibility Act

The FDIC has determined that this final 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. 604, *et seq.*, because the amendment repeals the 3% incentive that FDIC rules had provided to MWOBs, including small businesses. We invited comments on the proposal and our initial regulatory flexibility analysis, but none were filed. Accordingly, this final regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604.

In *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), the Supreme Court applied strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decision making. The FDIC has determined that its price incentive for MWOBs may not pass the Constitutional tests enunciated by the Supreme Court in *Adarand*. Therefore, in this final rule, the FDIC is amending its regulation to repeal that part of the regulation which provides a 3% incentive to MWOBs that bid on FDIC contracts. The FDIC believes that this approach is the only readily apparent solution, because providing any price incentive without meeting the criteria of the Court would be constitutionally suspect.

The Federal Acquisition Regulations (FAR), 63 FR 52426 (September 30, 1998), Reform of Affirmative Action in Federal Procurement, provide a constitutionally sustainable means of enhancing opportunities for SDBs. The FDIC will voluntarily utilize the FAR's affirmative action program.

The objective of this final rule is to implement an outreach and affirmative action procurement program consistent the Supreme Court's decision in *Adarand*.

The 3% price incentive being repealed was available to MWOBs without regard to whether such firms were also "small" businesses. 12 CFR 361.8(b)(3). In 1999, the FDIC awarded 2,778 contracts, including 626 (22.5%)

to MWOBs. However, the overwhelming majority of those contracts were awarded without reference to the price incentive because the contract was for less than the \$50,000 threshold in the rule, or the purchase was made off the Federal Supply Schedule. Of the 278 awards that were subject to the price incentive, 54 (19.4%) went to MWOBs. Based on a self-certification, the majority of those firms (about 60%) identified themselves as small business concerns. The FDIC anticipates that there will be no significant change in its contracting activity for 2000. Thus, there may be some adverse effect on small entities that enjoyed the price incentive under the regulation, principally small, women-owned firms. However, given the FDIC's record of contract awards where the price incentive was not applicable as well as the benefits being conferred on SDBs under the federal affirmative action contracting program, it is anticipated that the economic impact on small businesses may be substantially attenuated.

Repeal of regulations establishing a 3% incentive will not impose any new paperwork burden. Public comment and Office of Management and Budget approval has previously been obtained for an FDIC collection of information titled "Acquisition Services Information Requirements" which includes questions regarding contractors' minority- and/or women-owned status. This information collection, approved under OMB control number 3064–0072, will not be changed by this final rule. This rule does not duplicate, overlap, or conflict with any other federal rules.

Because the 3% price incentive for MWOBs would likely fail the constitutionally mandated strict scrutiny test established in the *Adarand* case, the only readily apparent alternative is to repeal the regulation.

Assessment of Impact of Federal Regulation on Families

The FDIC has determined that this amendment will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act of 1999 (Public Law 105–277).

Small Business Regulatory Enforcement and Fairness Act

Pursuant to the congressional review provisions of the Contract with America Advancement Act of 1996, 5 U.S.C. 801 *et seq.*, the FDIC must report certain final rules to Congress. The Office of Management and Budget has determined that this rule is not a "major rule" within the meaning of the relevant

section of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 801, *et seq.* As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office.

List of Subjects in 12 CFR Part 361

Government contracts, Lawyers, Legal services, Minority businesses, Reporting and recordkeeping requirements, Women businesses.

For the reasons set forth above, the Board of Directors of the Federal Deposit Insurance Corporation revises part 361 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 361—MINORITY AND WOMEN OUTREACH PROGRAM CONTRACTING

Sec.

- 361.1 Why do minority- and women-owned businesses need this outreach regulation?
- 361.2 Why does the FDIC have this outreach program?
- 361.3 Who may participate in this outreach program?
- 361.4 What contracts are eligible for this outreach program?
- 361.5 What are the FDIC's oversight and monitoring responsibilities in administering this program?
- 361.6 What outreach efforts are included in this program?

Authority: 12 U.S.C. 1833e.

§ 361.1 Why do minority- and women-owned businesses need this outreach regulation?

The purpose of the FDIC Minority and Women Outreach Program (MWOP) is to ensure that minority- and women-owned businesses (MWOBs) are given the opportunity to participate fully in all contracts entered into by the FDIC.

§ 361.2 Why does the FDIC have this outreach program?

It is the policy of the FDIC that minorities and women, and businesses owned by them have the maximum practicable opportunity to participate in contracts awarded by the FDIC.

§ 361.3 Who may participate in this outreach program?

For purposes of this part:

- (a) *Minority* has the same meaning as defined by the Small Business Administration at 13 CFR 124.103(b).
- (b) *Legal Services* means all services provided by attorneys or law firms (including services of support staff).

§ 361.4 What contracts are eligible for this outreach program?

The FDIC outreach program applies to all contracts entered into by the FDIC. The outreach program is incorporated

into FDIC policies and guidelines governing contracting and the retention of legal services.

§ 361.5 What are the FDIC's oversight and monitoring responsibilities in administering this program?

(a) The FDIC Office of Diversity and Economic Opportunity (ODEO) has overall responsibility for nationwide outreach oversight, which includes, but is not limited to, the monitoring, review and interpretation of relevant regulations. In addition, the ODEO is responsible for providing the FDIC with technical assistance and guidance to facilitate the identification, registration, and solicitation of MWOBs.

(b) Each FDIC office that performs contracting or outreach activities will submit information to the ODEO on a quarterly basis, or upon request. Quarterly submissions will include, at a minimum, statistical information on contract awards and solicitations by designated demographic categories.

§ 361.6 What outreach efforts are included in this program?

(a) Each office engaged in contracting with the private sector will designate one or more MWOP coordinators. The coordinators will perform outreach activities for MWOP and act as liaison between the FDIC and the public on MWOP issues. On a quarterly basis, or as requested by the ODEO, the coordinators will report to the ODEO on their implementation of the outreach program.

(b) Outreach includes the identification and registration of MWOBs who can provide goods and services utilized by the FDIC. This includes distributing information concerning the MWOP.

(c) The identification of MWOBs for the provision of legal and non-legal services will primarily be accomplished by:

- (1) Obtaining various lists and directories of MWOBs maintained by other federal, state, and local governmental agencies;
- (2) Participating in conventions, seminars and professional meetings comprised of, or attended predominately by, MWOBs;
- (3) Conducting seminars, meetings, workshops and other various functions to promote the identification and registration of MWOBs;
- (4) Placing MWOP promotional advertisements indicating opportunities with the FDIC in minority- and women-owned media; and
- (5) Monitoring to assure that FDIC staff interfacing with the contracting community are knowledgeable of, and actively promoting, the MWOP.

By Order of the Board of Directors.

Dated at Washington, DC, this 10th day of May 2000.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 00-12408 Filed 5-16-00; 8:45 am]

BILLING CODE 6714-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-NM-213-AD; Amendment 39-11727; AD 2000-10-03]

RIN 2120-AA64

Airworthiness Directives; McDonnell Douglas Model DC-10 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all McDonnell Douglas Model DC-10 series airplanes, that requires a one-time detailed visual inspection to determine if wire segments of the wire bundle routed through the feed through on the aft side of the flight engineer's station are damaged or chafed, and corrective actions, if necessary. This amendment is prompted by a report of smoke coming out of the flight engineer's upper right circuit breaker panel, which was followed by circuit breakers popping and the panel lights going out. The actions specified by this AD are intended to prevent chafing of the wire bundle located behind the flight engineer's panel caused by the wire bundle coming in contact with the lower edge of the feed through and consequent electrical arcing, which could result in smoke and fire in the cockpit.

DATES: Effective June 21, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 21, 2000.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Technical Publications Business Administration, Dept. C1-L51 (2-60). This information may be examined at the Federal Aviation Administration (FAA),