

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 13 and 19**

[FAC 2005–56; FAR Case 2011–004; Item IV; Docket 2011–0004, Sequence 1]

RIN 9000–AL88

**Federal Acquisition Regulation:
Socioeconomic Program Parity**

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Small Business Jobs Act of 2010 that clarifies that there is no order of precedence among the small business socioeconomic contracting programs. Accordingly, this final rule amends the FAR to clarify the existence of socioeconomic parity and that contracting officers may exercise discretion when determining whether an acquisition will be restricted to small businesses participating in the 8(a) Business Development Program (8(a)), Historically Underutilized Business Zones (HUBZone) Program, Service-Disabled Veteran-Owned Small Business (SDVOSB) Program, or the Women-Owned Small Business (WOSB) Program.

DATES: *Effective Date:* April 2, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at 202–501–2364 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–56, FAR Case 2011–004.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 76 FR 14566 on March 16, 2011, to implement section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240). (A correcting amendment was issued in the **Federal Register** at 76 FR 26220 on May 6, 2011, to reinsert text that was inadvertently omitted in the March 16, 2011, publication.) Section 1347(b) clarifies at section 31(b)(2)(B) of

the Small Business Act, 15 U.S.C. 657a(b)(2)(B), that a contract opportunity “may” be awarded on the basis of competition restricted to qualified Historically Underutilized Business Zone (HUBZone) small business concerns if the contracting officer has a reasonable expectation that not less than two qualified HUBZone small business concerns will submit offers and the award can be made at a fair market price. The interim rule clarified that there is no order of precedence among the small business socioeconomic contracting programs (*i.e.*, 8(a), HUBZone, SDVOSB, or the WOSB programs) and clarified the contracting officer’s authority to use discretion when determining whether an acquisition will be restricted to small businesses participating in those programs. Eighteen respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule are provided as follows:

A. Socioeconomic Program Preferences Below the Simplified Acquisition Threshold

Comment: Several respondents submitted comments suggesting that the Councils misinterpreted the intent of section 1347 of the Small Business Jobs Act of 2010 by eliminating the preference for 8(a), HUBZone, SDVOSB, and WOSB programs at or below the simplified acquisition threshold (SAT). These respondents further suggested that FAR 19.203 be amended to include language stating that the small business socioeconomic contracting programs (*i.e.*, 8(a), HUBZone, SDVOSB, and WOSB programs) shall be considered before a general small business set-aside for acquisitions below the SAT.

Response: The interim rule did not change the relationship among the small business socioeconomic contracting programs (*i.e.*, 8(a), HUBZone, SDVOSB and WOSB programs) at or below the SAT. It clarified that the mandatory requirement to reserve each acquisition for supplies or services with an anticipated dollar value at or below the SAT for small businesses does not preclude the contracting officer from making an award under the small business socioeconomic contracting programs. The text provided at FAR 19.203(b) is consistent with the Small

Business Administration’s (SBA) regulations at 13 CFR 125.2(f)(1), 124.503(j)(1), 125.19(b)(1), 126.607(b)(1), and 127.503(d)(1). FAR 19.203(b) is clarified to reflect that the paragraph applies to acquisitions with an anticipated value above the micro-purchase threshold but not exceeding the SAT.

B. Set-Aside Procedures Over the SAT; Omitted Language (FAR 19.502–2(b))

Comment: A few respondents commented that the reference to set-aside procedures over the SAT, commonly referred to as “Rule of Two,” was omitted.

Response: As published in the **Federal Register** at 76 FR 14566 on March 16, 2011, the regulation contained a technical error which accidentally deleted the Rule of Two in the promulgated rule. A correcting amendment was issued in the **Federal Register** at 76 FR 26220 on May 6, 2011, reinstating the Rule of Two.

C. Sole Source Dollar Thresholds Vary Among the Socioeconomic Programs

Comment: One respondent noted that socioeconomic parity could not be implemented until all socioeconomic programs had the same sole source dollar threshold.

Response: The sole source dollar thresholds associated with the small business socioeconomic contracting programs (*i.e.*, 8(a), HUBZone, SDVOSB, and WOSB programs) were established by their applicable statutes and the applicable inflationary adjustments that occur to acquisition-related thresholds (see FAR 1.109). These dollar thresholds have no impact on the ability of a contracting officer to exercise discretion when selecting the type of small business socioeconomic contracting program to utilize.

D. Sole Source Authority Under the SDVOSB Program

Comment: A number of respondents suggested that the omission of the SDVOSB sole source reference at FAR 13.003 and the revisions to FAR 19.1406 suggest that the use of a SDVOSB sole source before considering a small business set-aside is discretionary above and below the SAT. It was further suggested that FAR 19.1405 should be revised to state that the contracting officer shall consider SDVOSB set-asides before considering SDVOSB sole source awards.

Response: For acquisitions above the SAT, the contracting officer shall consider a SDVOSB sole source award before considering a general small business set-aside; however,

competitive SDVOSB set-asides should be considered before a SDVOSB sole source. Below the SAT, the contracting officer has the discretion to award a general small business set-aside or to utilize the SDVOSB program. FAR 13.003(b)(2) is revised to remove the reference to SDVOSB concerns and to add a reference to the SDVOSB program (FAR subpart 19.14). Additionally, FAR 19.1406(a) was revised to remove the discretionary “may” and add “shall consider” to be consistent with FAR 19.203.

E. Discretionary Use of the 8(a) Program

Comment: One respondent commented that revisions to FAR 19.800(e) suggest that the use of the 8(a) program rather than a small business set-aside is discretionary.

Response: For acquisitions above the SAT, the contracting officer shall consider an award under the 8(a) program before considering a general small business set-aside. An acquisition offered under the 8(a) program shall be awarded on the basis of competition when the conditions in FAR 19.805–1 are met. Below the SAT, the contracting officer has the discretion to award a general small business set-aside or to utilize the 8(a) program. FAR 19.800(e) is revised to clarify that the contracting officer shall consider 8(a) set-asides or sole source awards before considering a general small business set-aside.

F. Discretionary Use of the HUBZone Program

Comment: A number of respondents commented that revisions to FAR 19.1306 suggest that the use of HUBZone sole source over a small business set-aside is discretionary. It was further suggested that FAR 19.1305 should be revised to state that the contracting officer shall consider HUBZone set-asides before considering HUBZone sole source awards.

Response: For acquisitions above the SAT, the contracting officer shall consider a HUBZone sole source award before considering a general small business set-aside. However, a competitive HUBZone set-aside should be considered before a HUBZone sole source. Below the SAT, the contracting officer has the discretion to award a general small business set-aside or to utilize the HUBZone program. Additionally, in accordance with FAR 19.1306(a)(4), HUBZone sole source awards are not permitted at or below the simplified acquisition threshold. FAR 13.003(b)(2) is revised to remove the reference to HUBZone small business concerns and to add a reference to FAR 19.1305 and 19.1306(a)(4) for the

HUBZone program. Additionally, FAR 19.1306(a) is revised to remove the discretionary “may” and add “shall consider” to be consistent with FAR 19.203.

G. Definition of Term “Shall First Consider”

Comment: A few respondents commented that the interim rule requires that contracting officers “shall first consider” socioeconomic programs; however, the rule does not define what constitutes consideration.

Response: FAR 19.203(d) was added to include language consistent with 13 CFR 125.2(f)(2)(ii) regarding the minimum elements a contracting officer should examine when choosing a socioeconomic program: The results of market research and progress in fulfilling agency small business goals.

H. Relationship of Small Business Socioeconomic Contracting Programs (8(a), HUBZone, SDVOSB, and WOSB) With Small Businesses

Comment: A number of respondents commented that the parity rule favors the small business socioeconomic contracting programs over general small businesses and that FAR 19.203 could be interpreted to mean a contracting officer is mandated to make an award under one of the small business socioeconomic contracting programs, to the exclusion of other small businesses.

Response: SBA’s regulations require acquisitions above the micro-purchase threshold and at or below the SAT to be reserved for small business. This requirement does not preclude the contracting officer from having the discretion to award under one of the small business socioeconomic contracting programs (8(a), HUBZone, SDVOSB, and WOSB). However, above the SAT, the contracting officer shall consider the small business socioeconomic contracting programs before a general small business set-aside.

I. Other Changes

In addition to the changes made in response to public comments, an introductory statement was added at FAR 19.800(e), 19.1305(a), and 19.1405(a) to clarify that the contracting officer must keep in mind the priorities and considerations set forth in FAR 19.203 when planning an acquisition under the 8(a), HUBZone, or SDVOSB programs.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The objective of this final rule is to clarify that there is no order of precedence among the small business socioeconomic programs, and to clarify that the contracting officer’s authority to use discretion when determining whether an acquisition will be restricted to small businesses participating in the 8(a), HUBZone, SDVOSB, or WOSB programs. Small businesses that participate in Federal Government contracting are the specific group of small entities affected by this final rule.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the interim rule. This final rule adopts the interim rule with minor changes.

Generally, this rule is applicable to all current and potential small businesses that wish to participate in Federal procurement. Firms interested in obtaining Federal contract awards must register in the Central Contractor Registration (CCR) to be eligible for contract award and payment. Examination of the CCR reveals there are approximately 349,992 small business firms; 9,303 HUBZone firms, 9,234 8(a) firms, 18,213 SDVOSB concerns, and 80,477 WOSB concerns currently registered that may be affected by this final rule.

This final rule will impose no new reporting or record keeping requirements on large or small entities. There are no relevant Federal rules which duplicate, overlap, or conflict with this rule.

Promulgation of this final rule may have a positive impact on small businesses as it presents the maximum practicable opportunity for small business concerns qualified under the socioeconomic programs to participate in the performance of contracts, and assist Federal agencies in meeting each of the Government’s small business contracting goals.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the

Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 13 and 19

Government procurement.

Dated: February 21, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 13 and 19, which was published in the Federal Register at 76 FR 14566, March 16, 2011, is adopted as final with the following changes:

- 1. The authority citation for 48 CFR parts 13 and 19 continues to read as follows:

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

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

- 2. Amend section 13.003 by revising paragraph (b) to read as follows:

13.003 Policy.

* * * * *

(b)(1) Acquisitions of supplies or services that have an anticipated dollar value exceeding \$3,000 (\$15,000 for acquisitions as described in 13.201(g)(1)) but not exceeding \$150,000 (\$300,000 for acquisitions described in paragraph (1) of the simplified acquisition threshold definition at 2.101) are reserved exclusively for small business concerns and shall be set aside (see 19.000, 19.203, and subpart 19.5).

(2) The contracting officer may make an award to a small business concern under the—

- (i) 8(a) Program (see subpart 19.8);
(ii) Historically Underutilized Business Zone (HUBZone) Program (but see 19.1305 and 19.1306(a)(4));
(iii) Service-Disabled Veteran-Owned Small Business (SDVOSB) Program (see subpart 19.14); or
(iv) Women-Owned Small Business (WOSB) Program (see subpart 19.15).

(3) The following contracting officer's decisions for acquisitions at or below the simplified acquisition threshold are

not subject to review under subpart 19.4:

(i) A decision not to make an award under the 8(a) Program.

(ii) A decision not to set aside an acquisition for HUBZone small business concerns, service-disabled veteran-owned small business concerns, or EDWOSB concerns and WOSB concerns eligible under the WOSB Program.

(4) Each written solicitation under a set-aside shall contain the appropriate provisions prescribed by part 19. If the solicitation is oral, however, information substantially identical to that in the provision shall be given to potential quoters.

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PART 19—SMALL BUSINESS PROGRAMS

- 3. Amend section 19.203 by revising paragraphs (b) and (c); redesignating paragraph (d) as paragraph (e); and adding a new paragraph (d) to read as follows:

19.203 Relationship among small business programs.

* * * * *

(b) At or below the simplified acquisition threshold. For acquisitions of supplies or services that have an anticipated dollar value exceeding \$3,000 (\$15,000 for acquisitions as described in 13.201(g)(1)), but not exceeding \$150,000 (\$300,000 for acquisitions described in paragraph (1) of the simplified acquisition threshold definition at 2.101), the requirement at 19.502-2(a) to exclusively reserve acquisitions for small business concerns does not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, SDVOSB Program, or WOSB Program.

(c) Above the simplified acquisition threshold. For acquisitions of supplies or services that have an anticipated dollar value exceeding the simplified acquisition threshold definition at 2.101, the contracting officer shall first consider an acquisition for the small business socioeconomic contracting programs (i.e., 8(a), HUBZone, SDVOSB, or WOSB programs) before considering a small business set-aside (see 19.502-2(b)). However, if a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless the SBA agrees to its release in accordance with 13 CFR parts 124, 125, and 126.

(d) In determining which socioeconomic program to use for an acquisition, the contracting officer should consider, at a minimum—

(1) Results of market research that was done to determine if there are socioeconomic firms capable of satisfying the agency's requirement; and

(2) Agency progress in fulfilling its small business goals.

* * * * *

- 4. Amend section 19.800 by revising paragraph (e) to read as follows:

19.800 General.

* * * * *

(e) The contracting officer shall comply with 19.203 before deciding to offer an acquisition to a small business concern under the 8(a) Program. For acquisitions above the simplified acquisition threshold, the contracting officer shall consider 8(a) set-asides or sole source awards before considering small business set-asides.

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- 5. Amend section 19.1305 by revising paragraph (a) to read as follows:

19.1305 HUBZone set-aside procedures.

(a) The contracting officer—
(1) Shall comply with 19.203 before deciding to set aside an acquisition under the HUBZone Program;
(2) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to HUBZone small business concerns when the requirements of paragraph (b) of this section can be satisfied; and
(3) Shall consider HUBZone set-asides before considering HUBZone sole source awards (see 19.1306) or small business set-asides (see subpart 19.5).

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(3) Shall consider HUBZone set-asides before considering HUBZone sole source awards (see 19.1306) or small business set-asides (see subpart 19.5).

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- 6. Amend section 19.1306 by revising the introductory text of paragraph (a) to read as follows:

19.1306 HUBZone sole source awards.

(a) A contracting officer shall consider a contract award to a HUBZone small business concern on a sole source basis (see 6.302-5(b)(5)) before considering a small business set-aside (see 19.203 and subpart 19.5), provided none of the exclusions at 19.1304 apply; and—

* * * * *

- 7. Amend section 19.1405 by revising paragraph (a) to read as follows:

19.1405 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer—
(1) Shall comply with 19.203 before deciding to set aside an acquisition under the SDVOSB Program;
(2) May set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVOSB concerns when the requirements of paragraph (b) of this section can be satisfied; and

(3) Shall consider SDVOSB set-asides before considering SDVOSB sole source awards (see 19.1406) or small business set-asides (see subpart 19.5).

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■ 8. Amend section 19.1406 by revising the introductory text of paragraph (a) to read as follows:

19.1406 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer shall consider a contract award to a SDVOSB concern on a sole source basis (see 6.302–5(b)(6)), before considering small business set-asides (see 19.203 and subpart 19.5) provided none of the exclusions of 19.1404 apply and—

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25, and 52

[FAC 2005–56; FAR Case 2012–002; Item V; Docket 2012–0002, Sequence 1]

RIN 9000–AM17

Federal Acquisition Regulation: Trade Agreements Thresholds

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to incorporate adjusted thresholds for

application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.

DATES: *Effective Date:* March 2, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–56, FAR Case 2012–002.

SUPPLEMENTARY INFORMATION:

I. Background

Every two years, the trade agreements thresholds are adjusted according to a pre-determined formula set forth in the agreements. The United States Trade Representative has specified the following new thresholds in the **Federal Register** (see 76 FR 76808, published on December 8, 2011):

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	\$202,000	\$202,000	\$7,777,000
FTAs:			
Australia FTA	77,494	77,494	7,777,000
Bahrain FTA	202,000	202,000	10,074,262
CAFTA–DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	77,494	77,494	7,777,000
Chile FTA	77,494	77,494	7,777,000
Morocco FTA	202,000	202,000	7,777,000
NAFTA:			
—Canada	25,000	77,494	10,074,262
—Mexico	77,494	77,494	10,074,262
Oman FTA	202,000	202,000	10,074,262
Peru FTA	202,000	202,000	7,777,000
Singapore FTA	77,494	77,494	7,777,000
Israeli Trade Act	50,000		

II. Discussion and Analysis

This final rule implements the new thresholds in FAR subpart 25.4, Trade Agreements, and other sections in the FAR that include trade agreements thresholds (*i.e.*, 22.1503, 25.202, 25.603, 25.1101, and 25.1102).

In addition, changes are required to FAR clause 52.204–8, Annual Representations and Certifications, and FAR clause 52.222–19, Child Labor-Cooperation with Authorities and Remedies. Conforming changes are also required to the clause dates in FAR clause 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items, and FAR clause 52.213–4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Items).

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 and does not require publication for public comment.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.