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Dated: March 3, 2008.

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Mitigation, Department of Homeland  
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Agency.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 13 and 19

[FAR Case 2006-034; Docket 2007-0001;  
Sequence 15]

RIN 9000-AK92

#### Federal Acquisition Regulation: FAR Case 2006-034, Socioeconomic Program Parity

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

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency  
Acquisition Council and the Defense  
Acquisition Regulations Council  
(Councils) are proposing to amend the  
Federal Acquisition Regulation (FAR) to  
ensure that the FAR reflects the Small  
Business Administration's (SBA)  
interpretation of the Small Business Act  
and SBA regulations with regard to the  
relationship among various small  
business programs.

**DATES:** *Comment date:* Interested parties  
should submit written comments to the  
Regulatory Secretariat at the address  
shown below on or before May 9, 2008,  
to be considered in the formation of the  
final rule.

**ADDRESSES:** Submit comments,  
identified by FAR Case 2006-034, by  
any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal  
eRulemaking portal by inputting "FAR  
Case 2006-034" under the heading  
"Comment or Submission". Select the  
link "Send a Comment or Submission"  
that corresponds with FAR Case 2006-  
034. Follow the instructions provided to  
complete the "Public Comment and  
Submission Form". Please include your  
name, company name (if any), and  
"FAR Case 2006-034" on your attached  
document.

- *Fax:* 202-501-4067.

- *Mail:* General Services

Administration, Regulatory Secretariat  
(VPR), 1800 F Street, NW., Room 4035,  
ATTN: Diedra Wingate, Washington, DC  
20405.

*Instructions:* Please submit comments  
only and cite FAR case 2006-034 in all  
correspondence related to this case. All  
comments received will be posted  
without change to <http://www.regulations.gov>, including any  
personal and/or business confidential  
information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms.  
Rhonda Cundiff, Procurement Analyst,  
at (202) 501-0044 for clarification of  
content. The FAR Secretariat at (202)  
501-4755 for information pertaining to  
status or publication schedules. Please  
cite FAR case 2006-034.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The purpose of this rule is to ensure  
that the FAR clearly reflects SBA's  
interpretation of the Small Business Act  
and SBA's interpretation of its  
regulations with regard to the order of  
precedence that applies when deciding  
whether to satisfy a requirement  
through an award to a small business, a  
HUBZone small business concern, a  
service-disabled veteran-owned small  
business (SDVOSB) concern or a small  
business participating in the 8(a)  
Business Development Program (8(a)  
Program).

This FAR rule is intended to make the  
following clear:

(1) There is no order of precedence  
among the 8(a), HUBZone, or SDVOSB  
Programs. However, if a requirement has  
been accepted by SBA under the 8(a)  
Program, it must remain in the 8(a)  
Program unless SBA agrees to its release  
in accordance with 13 CFR 124, 125 and  
126.

(2) For acquisitions exceeding  
\$100,000, the contracting officer must  
consider making award under the 8(a),  
HUBZone or SDVOSB Programs (either  
set-aside or sole source) before the  
contracting officer proceeds with a  
small business set-aside. See 19.203(b)  
and 19.502-2(b).

After having considered making  
award under the 8(a), HUBZone or  
SDVOSB Programs, the contracting  
officer may set aside an acquisition for  
small business, with one exception. By  
statute (15 U.S.C. 657a(b)(2)(B)), the  
contracting officer cannot set the  
acquisition aside for small business if  
the criteria for setting it aside for  
HUBZone small business are met.

(3) FAR 19.502-2(a) sets forth the  
requirement to exclusively reserve

acquisitions for small business between  
\$3,000 and \$100,000 unless the  
contracting officer determines there is  
not a reasonable expectation of  
obtaining offers from two or more small  
businesses that are competitive in terms  
of market prices, quality, and delivery.  
This proposed rule clarifies that these  
small business set-asides do not  
preclude award of a contract to a  
qualified HUBZone small business  
concern pursuant to the HUBZone  
Program, an 8(a) Program participant  
pursuant to the 8(a) Program, or to a  
SDVOSB concern pursuant to the  
SDVOSB Program because the SBA's  
regulations give the contracting officer  
discretionary authority to use the  
HUBZone, 8(a), or SDVOSB Programs at  
these dollar levels. In addition, the rule  
shows that, unlike procurements that  
are expected to exceed \$100,000, it is  
not mandatory that the contracting  
officer set aside an acquisition for  
HUBZone small business concerns  
before setting aside the requirement for  
small businesses.

(4) SBA believes that progress in  
fulfilling the various small business  
goals, as well as other factors such as  
the results of market research and the  
acquisition history, should be  
considered in making a decision as to  
which program to use for the  
acquisition.

This is not a significant regulatory  
action and, therefore, was not subject to  
review under Section 6(b) of Executive  
Order 12866, Regulatory Planning and  
Review, dated September 30, 1993. The  
rule is not a major rule under 5 U.S.C.  
804.

##### B. Regulatory Flexibility Act

This change may have a significant  
economic impact on a significant  
number of small entities within the  
meaning of the Regulatory Flexibility  
Act 5 U.S.C. 601, *et seq.*, because it will  
clarify the relationship among various  
small business programs with regard to  
whether one has priority over another  
for acquisition purposes. It has been  
unclear to the acquisition community if  
there is an order of precedence that  
applies when deciding whether to  
satisfy a requirement through an award  
to small business, HUBZone small  
business, service disabled veteran-  
owned small business or a small  
business participating in the 8(a)  
Business Development Program. This  
proposed rule will have both a negative  
and positive impact on the 8(a) Business  
Development Program, the HUBZone  
Program, the Service-Disabled Veteran-  
Owned Small Business Program and the  
Small Business Program.

Viewed as a whole, there is no impact on the small business community, as this rule does not increase or decrease the number of contracts awarded to small businesses. However, there will be a negative impact on contractors with a particular preference who lose a contract set-aside to another socioeconomic category of contractors with a different preference who gain the contract set-aside, who thereby will receive a positive impact. The FAR Secretariat has submitted a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.*, FAR Case 2006-034, in correspondence. The analysis is summarized as follows:

The purpose of this proposed rule is to revise the FAR to ensure that it complies with SBA's interpretation of the Small Business Act and the SBA regulations that implement that Act. The entities that will be affected are small businesses that do business with the Federal Government. Generally, all current and potential Government contractors must register in the Central Contractor Registration (CCR) to be eligible for contract award and payment. There are approximately 313,512 small business firms; 13,000 HUBZone firms; 9,947 8(a) firms and 9,614 SDVO SBC currently registered in CCR that may be affected by this proposed rule.

There are no significant alternatives that would reduce any impact on small businesses. The FAR rule is implementing SBA's interpretation of the Small Business Act and SBA's implementing regulations.

### C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does not apply because the proposed rule does not contain information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 13 and 19

Government procurement.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 13 and 19 as set forth below:

1. The authority citation for 48 CFR parts 13 and 19 continue 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 the first sentence in paragraph (b)(2) to read as follows:

#### 13.003 Policy.

\* \* \* \* \*

(b) \* \* \*

(2) The contracting officer may make an award under the 8(a) Program (see Subpart 19.8) or set aside for HUBZone small business concerns (see 19.1305) or service-disabled veteran-owned small business concerns (see 19.1405) an acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold and not exceeding the simplified acquisition threshold. \* \* \*

\* \* \* \* \*

### PART 19—SMALL BUSINESS PROGRAMS

3. Amend section 19.202 by revising the first sentence to read as follows:

#### 19.202 Specific policies.

In order to further the policy in 19.201(a), contracting officers shall comply with the specific policies listed in this section and shall consider recommendations of the agency Director of Small and Disadvantaged Business Utilization, or the Director's designee, as to whether a particular acquisition should be awarded under Subparts 19.5, 19.8, 19.13, or 19.14. \* \* \*

4. Amend subpart 19.2 by adding section 19.203 to read as follows:

#### 19.203 Relationship among small business programs.

(a) Acquisitions subject to the small business set-aside at 19.502-2(a).

The requirement to exclusively reserve acquisitions for small business at 19.502-2(a) does not preclude the contracting officer from awarding a contract under the—

(1) 8(a) Program (Subpart 19.8);

(2) HUBZone Program (Subpart 19.13); or

(3) Service-Disabled Veteran-Owned Small Business Procurement Program (SDVOSB)(Subpart 19.14).

(b) *Acquisitions subject to the small business set-aside at 19.502-2(b).* (1) The contracting officer must consider the 8(a), HUBZone, and SDVOSB programs before using a small business set-aside. There is no order of precedence among the 8(a), HUBZone, and SDVOSB programs. However, if a requirement has been accepted by SBA under the 8(a) Program, it must remain in the 8(a) Program unless SBA agrees to its release in accordance with 13 CFR 124, 125 and 126; and

(2) The contracting officer must set aside an acquisition for HUBZone small business concerns if the conditions at 19.1305 are met, before considering a small business set-aside.

5. Amend section 19.501 by—

a. Removing paragraphs (c) and (d);

b. Redesignating paragraphs (e), (f), (g), (h), and (i) as (c), (d), (e), (f), and (g), respectively; and

c. Revising the second sentence of new paragraph (c) to read as follows:

#### 19.501 General.

\* \* \* \* \*

(c) \* \* \*. The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated under the 8(a), HUBZone or service-disabled veteran-owned small business programs. \* \* \*

\* \* \* \* \*

6. Amend section 19.502-2 by adding a new first sentence and revising the last sentence in paragraph (a) and adding a new first sentence in paragraph (b) to read as follows:

#### 19.502-2 Total small business set-asides.

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(a). \* \* \*. The small business reservation does not preclude the award of a contract as described in 19.203 or 19.1007(c).

(b) Before setting aside an acquisition under this paragraph, follow 19.203(b). \* \* \*

\* \* \* \* \*

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

#### 19.800 General.

\* \* \* \* \*

(e) Before deciding to set aside an acquisition in accordance with Subpart 19.5, the contracting officer must consider offering the acquisition under the 8(a) Program (see 19.203).

\* \* \* \* \*

8. Amend section 19.1305 by revising paragraphs (a) through (d) to read as follows:

#### 19.1305 HUBZone set-aside procedures.

(a) The contracting officer—

(1) May set aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone small business concerns when the requirements of paragraph (b) of this section can be satisfied (see 19.203);

(2) Must set-aside acquisitions exceeding the simplified acquisition threshold for HUBZone small business

concerns before setting them aside for small business concerns or conducting the acquisition using full and open competition if the conditions in paragraph (b) of this section are met; and

(3) Must consider HUBZone set-asides before considering HUBZone sole source awards (see 19.1306).

(b) To set aside an acquisition for competition restricted to HUBZone small business concerns, the contracting officer must have a reasonable expectation that—

(1) Offers will be received from two or more HUBZone small business concerns; and

(2) Award will be made at a fair market price.

(c) A contracting officer may set aside acquisitions exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold for competition restricted to HUBZone small business concerns at the sole

discretion of the contracting officer, provided the requirements of paragraph (b) of this section can be satisfied.

(d) If the contracting officer receives only one acceptable offer from a qualified HUBZone small business concern in response to a set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from HUBZone small business concerns, the HUBZone set-aside shall be withdrawn.

\* \* \* \* \*

9. Amend section 19.1405 by revising paragraph (a) and the second sentence of paragraph (c) to read as follows:

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

(a) The contracting officer—

(1) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business

concerns when the requirements of paragraph (b) of this section can be satisfied (see 19.203); and

(2) Must consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards (see 19.1406) or small business set-asides (see 19.5).

\* \* \* \* \*

(c) \* \* \*. If the contracting officer receives no acceptable offers from service-disabled veteran-owned small business concerns, the service-disabled veteran-owned set-aside shall be withdrawn.

\* \* \* \* \*

**19.1406 [Amended]**

10. Amend introductory paragraph (a) by removing “19.501(d)” and adding “19.203” in its place.

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