

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 1, 12, 15, 19, 52, and 53

[FAC 97-07; FAR Case 97-004B]

RIN 9000-AH59

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 97-07, as an interim rule to make amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business (SDB) concerns. These amendments conform to a Department of Justice (DoJ) proposal to reform affirmative action in Federal procurement. DoJ's proposal is designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is a major rule under 5 U.S.C. 804.

DATES: *Effective Date:* January 1, 1999.

Applicability Date: The policies, provisions, and clauses of this interim rule are effective for all solicitations issued on or after January 1, 1999.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before August 31, 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.97-004B@gsa.gov.

Please cite FAC 97-07, FAR case 97-004B 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.

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 for public notice and invitation for comments (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. The SBA regulations were published for public comment on August 14, 1997 (62 FR 23584). Requirements related to certification, protests, and appeals and other issues are also addressed in SBA's rules. On May 9, 1997, proposed amendments to the FAR, based on the DoJ Model, were published as a proposed rule in the **Federal Register** (62 FR 25786). An interim FAR rule that implemented the price evaluation adjustment for SDB concerns was previously issued in the **Federal Register** on June 30, 1998. This interim rule implements the evaluation factor or subfactor for SDB participation, incentive subcontracting with SDB concerns, and other coverage that is not directly related to the price evaluation adjustment for SDB concerns.

B. Regulatory Flexibility Act

These changes 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.*, because through the rule small business concerns may be provided benefits in Federal contracting. An Initial Regulatory Flexibility Analysis (IRFA) was submitted to the Chief Counsel for Advocacy of the Small Business Administration. A summary of the IRFA was published along with the FAR proposed rule in the **Federal Register** at 62 FR 25786, May 9, 1997. The economic impact associated with certification and associated costs, as well as other program requirements addressed in the SBA's changes to 13 CFR Parts 121, 124, and 134 have been addressed in analyses prepared by the SBA. The following information is provided to update the IRFA related to this FAR interim rule:

This interim rule would establish in the FAR two procurement mechanisms benefiting small disadvantaged businesses (SDBs). The first of these mechanisms is a source selection evaluation factor or subfactor for planned SDB participation, primarily at the subcontract level, in the performance of a contract in the SIC Major Groups as determined by the Department of Commerce. This evaluation factor or subfactor would be used in competitive, negotiated acquisitions expected to exceed \$500,000 (\$1,000,000 for construction). This mechanism would not be applied to certain major categories of acquisition, including, for example, small business set-asides, 8(a) acquisitions, and acquisitions in which source selection is based on a cost or price competition between proposals meeting the Government's minimum requirements.

The second mechanism provides for a monetary incentive for subcontracting with SDBs. Contracts resulting from solicitations in which SDB participation is evaluated may provide for a monetary payment to those prime contractors that meet specified targets for SDB participation as subcontractors in the SIC Major Groups as determined by the Department of Commerce.

The rule would also add to the FAR a requirement to evaluate the past performance of offerors in complying with targets for SDB participation and subcontracting plan goals for SDBs whenever past performance is to be evaluated.

The main impact of the rule is expected to be on firms seeking to obtain contracts from Federal government agencies and SDBs seeking subcontracts under those prime contracts. The best available estimate of the number of such firms is 30,000. The basis for this estimate is the IRFA prepared by SBA addressing the changes to 13 CFR Parts 121, 124, and 134. The anticipated costs for certification and protest and appeal procedures are addressed in SBA's IRFA. The primary impact of this interim rule is expected to be the increase in contract awards to qualified firms and a corresponding decrease in contract awards to firms that are not qualified as SDBs.

Within the constraints imposed by the need to implement the DOJ-proposed reforms, the rule was crafted throughout to select alternatives that would minimize any adverse economic impact on small business.

A copy of the IRFA may be obtained from the FAR Secretariat.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) applies because the interim rule contains reporting and recordkeeping requirements. Requests for approval of new and revised information collection requirements were submitted to the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* The information collections required by this rule were approved under clearance 9000-0007 through June 30, 2000, and 9000-0150 through June 30, 2000. Public comments concerning this request were invited through a **Federal Register** notice published on May 9, 1997. No comments were received.

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 allow adequate time for the significant number of potential SDB subcontractors to understand the requirements of the rule and to be certified as SDB's by SBA. The rule will conform the FAR to the model program designed by the Department of Justice to ensure compliance with Constitutional standards established by the Supreme Court and, thereby, avoid unnecessary litigation. A proposed FAR rule on this subject was published for public comment at 62 FR 25786 on May 9, 1997. As a result of public comments received in response to the proposed rule, changes have been made to the rule. This interim rule would qualify for publication as a final rule; however, further public comments are requested. 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 1, 12, 15, 19, 52, and 53

Government procurement.

Dated: June 23, 1998.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

FAC 97-07
 Federal Acquisition Circular (FAC) 97-07 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 January 1, 1999.

Dated: June 17, 1998.
 R.D. Kerrins,
Col, USA, Deputy Director, Defense Procurement.

Dated: June 16, 1998.
 Ida M. Ustad,
Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: June 17, 1998.
 Deidre A. Lee,
Associate Administrator for Procurement, NASA.

Therefore, 48 CFR Parts 1, 12, 15, 19, 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 12, 15, 19, 52, and 53 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.106 is amended in the table following the introductory paragraph by adding, in numerical order, the following entries:

1.106 OMB approval under the Paperwork Reduction Act.

FAR segment	OMB control No.
19.12	9000-0150
52.219-25	9000-0150
OF 312	9000-0150

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Section 12.303(b)(1) is revised to read as follows:

12.303 Contract format.

* * * * *

(b) * * *

(1) Block 10 if a price evaluation adjustment for small disadvantaged business concerns is applicable (the contracting officer shall indicate the percentage(s) and applicable line item(s)), if an incentive subcontracting clause is used (the contracting officer shall indicate the applicable percentage), or if set aside for emerging small businesses;

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.304 is amended by adding paragraph (c)(4) to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(4) The extent of participation of small disadvantaged business concerns in performance of the contract shall be evaluated in unrestricted acquisitions expected to exceed \$500,000 (\$1,000,000 for construction) subject to certain limitations (see 19.201 and 19.1202).

* * * * *

5. Section 15.305 is amended by adding paragraph (a)(2)(v) to read as follows:

15.305 Proposal evaluation.

(a) * * *

(2) * * *

(v) The evaluation should include the past performance of offerors in complying with subcontracting plan goals for small disadvantaged business (SDB) concerns (see Subpart 19.7), monetary targets for SDB participation (see 19.1202), and notifications submitted under 19.1202-4(b).

* * * * *

6. Section 15.503 is amended in paragraph (a)(2) by revising the first sentence to read as follows:

15.503 Notifications to unsuccessful offerors.

(a) * * *

(2) *Preaward notices for small business programs.* In addition to the notice in paragraph (a)(1) of this section, when using a small business set-aside (see Subpart 19.5), or when a small disadvantaged business concern receives a benefit based on its disadvantaged status (see Subpart 19.11 and 19.1202) and is the apparently successful offeror, upon completion of negotiations and determinations of

responsibility, and completion of the process in 19.304(d), if necessary, but prior to award, the contracting officer shall notify each offeror in writing of the name and address of the apparently successful offeror. * * *

PART 19—SMALL BUSINESS PROGRAMS

7. Section 19.000 is amended at the end of paragraph (a)(7) by removing "and"; in paragraph (a)(8) by removing the period and inserting "; and" in its place; and by adding paragraph (a)(9) to read as follows:

19.000 Scope of part.

(a) * * *

(9) The Small Disadvantaged Business Participation Program.

19.001 Definitions.

8. Section 19.001 is amended by revising the definition of "Small disadvantaged business concern" to read as follows:

19.001 Definitions.

Small disadvantaged business concern, as used in this part, means (except for 52.212-3(c)(2) and 52.219-1(b)(2) for general statistical purposes and 52.212-3(c)(7)(ii), 52.219-22(b)(2), and 52.219-23(a) for joint ventures under the price evaluation adjustment for small disadvantaged business concerns) an offeror that represents, as part of its offer, that it is a small business under the size standard applicable to the acquisition; and either—

(1) It has received certification as a small disadvantaged business concern consistent with 13 CFR 124, Subpart B; and

(i) No material change in disadvantaged ownership and control has occurred since its certification;

(ii) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(iii) It is listed, on the date of its representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration; or

(2) For prime contractors, it has submitted a completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in

accordance with 13 CFR 124, Subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since its application was submitted. In this case, a contractor must receive certification as an SDB by the SBA prior to contract award.

9. Section 19.201 is amended by revising paragraph (b) to read as follows:

19.201 General policy.

(b) The Department of Commerce will determine on an annual basis, by Major Groups as contained in the Standard Industrial Classification (SIC) manual, and region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms and applicable factors (percentages). The Department of Commerce determination shall only affect solicitations that are issued on or after the effective date of the determination. The effective date of the Department of Commerce determination shall be no less than 60 days after its publication date. The Department of Commerce determination shall not affect ongoing acquisitions. The SDB procurement mechanisms are a price evaluation adjustment for SDB concerns (see Subpart 19.11), an evaluation factor or subfactor for participation of SDB concerns (see 19.1202), and monetary subcontracting incentive clauses for SDB concerns (see 19.1203). The Department of Commerce determination shall also include the applicable factors, by SIC Major Group, to be used in the price evaluation adjustment for SDB concerns (see 19.1104). The authorized procurement mechanisms shall be applied consistently with the policies and procedures in this subpart. The agencies shall apply the procurement mechanisms determined by the Department of Commerce. The Department of Commerce, in making its determination, is not limited to the SDB procurement mechanisms identified in this section where the Department of Commerce has found substantial and persuasive evidence of—

(1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and

(2) A demonstrated incapacity to alleviate the problem by using those mechanisms.

10. Section 19.304 is amended in the introductory text of paragraph (c) by revising the second sentence to read as follows:

19.304 Disadvantaged business status.

(c) * * * The mechanisms that may provide benefits on the basis of disadvantaged status as a prime contractor are a price evaluation adjustment for SDB concerns (see Subpart 19.11), and an evaluation factor or subfactor for SDB participation (see 19.1202).

11. Section 19.305 is amended in paragraph (a) by revising the last sentence to read as follows:

19.305 Protesting a representation of disadvantaged business status.

(a) * * * An offeror, the contracting officer, or the SBA may protest the apparently successful offeror's representation of disadvantaged status if the concern is eligible to receive a benefit based on its disadvantaged status (see Subpart 19.11 and 19.1202).

12. Section 19.306 is amended by revising paragraph (b) to read as follows:

19.306 Solicitation provisions.

(b) The contracting officer shall insert the provision at 52.219-22, Small Disadvantaged Business Status, in solicitations that include the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, or 52.219-25, Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting.

13. Section 19.703 is amended by revising paragraphs (a)(2) and (b) to read as follows:

19.703 Eligibility requirements for participating in the program.

(2) In connection with a subcontract, or a requirement for which the apparently successful offeror received an evaluation credit for proposing one or more SDB subcontractors, the contracting officer or the SBA may protest the disadvantaged status of a proposed subcontractor. Such protests will be processed in accordance with 13 CFR 124.1015 through 124.1022. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.

(b) A contractor acting in good faith may rely on the written representation

of its subcontractor regarding the subcontractor's status as a small business concern or a woman-owned small business concern. The contractor shall obtain representations of small disadvantaged status from subcontractors through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at 52.219-22, Small Disadvantaged Business Status. A contractor shall confirm that a subcontractor representing itself as a small disadvantaged business concern is listed on the SBA's list of SDBs by accessing the list at <http://www.sba.gov> or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility. The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1601 through 121.1608. Protests challenging a subcontractor's small disadvantaged business representation shall be filed in accordance with 13 CFR 124.1015 through 124.1022.

14. Section 19.705-1 is amended by inserting the following sentence after the first sentence to read as follows:

19.705-1 General support of the program.

* * * This subsection does not apply to SDB subcontracting (see 19.1203). * * *

19.705-4 [Amended]

15. Section 19.705-4 is amended in the last sentence of paragraph (c) by removing “, small disadvantaged”.

19.708 [Amended]

16. Section 19.708 is amended in the first sentence of paragraphs (c)(1), (c)(2), and (c)(3) by removing “, small disadvantaged”.

17. Subpart 19.12, consisting of sections 19.1201 through 19.1204, is added to read as follows:

Subpart 19.12—Small Disadvantaged Business Participation Program

19.1201 General.

19.1202 Evaluation factor or subfactor.

19.1202-1 General.

19.1202-2 Applicability.

19.1202-3 Considerations in developing an evaluation factor or subfactor.

19.1202-4 Procedures.

19.1203 Incentive subcontracting with small disadvantaged business concerns.

19.1204 Solicitation provisions and contract clauses.

Authority: 41 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

Subpart 19.12—Small Disadvantaged Business Participation Program

19.1201 General.

This subpart addresses the evaluation of the extent of participation of small disadvantaged business (SDB) concerns in performance of contracts in the Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce (see 19.201(b)), and to the extent authorized by law. Two mechanisms are addressed in this subpart—

(a) An evaluation factor or subfactor for the participation of SDB concerns in performance of the contract; and

(b) An incentive subcontracting program for SDB concerns.

19.1202 Evaluation factor or subfactor.

19.1202-1 General.

The extent of participation of SDB concerns in performance of the contract, in the SIC Major Groups as determined by the Department of Commerce, and to the extent authorized by law, shall be evaluated consistent with this section. Participation in performance of the contract includes joint ventures, teaming arrangements, and subcontracts. Credit under the evaluation factor or subfactor is not available to SDB concerns that receive a price evaluation adjustment under Subpart 19.11. If an SDB concern waives the price evaluation adjustment at Subpart 19.11, participation in performance of that contract includes the work expected to be performed by the SDB concern at the prime contract level.

19.1202-2 Applicability.

(a) Except as provided in paragraph (b) of this subsection, the extent of participation of SDB concerns in performance of the contract in the authorized SIC Major Groups shall be evaluated in competitive, negotiated acquisitions expected to exceed \$500,000 (\$1,000,000 for construction).

(b) The extent of participation of SDB concerns in performance of the contract in the authorized SIC Major Groups (see paragraph (a) of this subsection) shall not be evaluated in—

(1) Small business set-asides (see Subpart 19.5);

(2) 8(a) acquisitions (see Subpart 19.8);

(3) Negotiated acquisitions where the lowest price technically acceptable source selection process is used (see 15.101-2); or

(4) Contract actions that will be performed entirely outside of any State, territory, or possession of the United

States, the District of Columbia, and the Commonwealth of Puerto Rico.

19.1202-3 Considerations in developing an evaluation factor or subfactor.

In developing an SDB participation evaluation factor or subfactor, agencies may consider—

(a) The extent to which SDB concerns are specifically identified;

(b) The extent of commitment to use SDB concerns (for example, enforceable commitments are to be weighted more heavily than non-enforceable ones);

(c) The complexity and variety of the work SDB concerns are to perform;

(d) The realism of the proposal;

(e) Past performance of offerors in complying with subcontracting plan goals for SDB concerns and monetary targets for SDB participation; and

(f) The extent of participation of SDB concerns in terms of the value of the total acquisition.

19.1202-4 Procedures.

(a) The solicitation shall describe the SDB participation evaluation factor or subfactor. The solicitation shall require offerors to provide, with their offers, targets, expressed as dollars and percentages of total contract value, in each of the applicable, authorized SIC Major Groups, and a total target for SDB participation by the contractor, including joint venture partners, and team members, and a total target for SDB participation by subcontractors. The solicitation shall require an SDB offeror that waives the SDB price evaluation adjustment in the clause at 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, to provide with its offer a target for the work that it intends to perform as the prime contractor. The solicitation shall state that any targets will be incorporated into and become part of any resulting contract. Contractors with SDB participation targets shall be required to report SDB participation.

(b) When an evaluation includes an SDB participation evaluation factor or subfactor that considers the extent to which SDB concerns are specifically identified, the SDB concerns considered in the evaluation shall be listed in the contract, and the contractor shall be required to notify the contracting officer of any substitutions of firms that are not SDB concerns.

19.1203 Incentive subcontracting with small disadvantaged business concerns.

The contracting officer may encourage increased subcontracting opportunities in the SIC Major Groups as determined by the Department of Commerce for SDB

concerns in negotiated acquisitions by providing monetary incentives (see the clause at 52.219-26, Small

Disadvantaged Business Participation Program Incentive Subcontracting, and 19.1204(c)). Monetary incentives shall be based on actual achievement as compared to proposed monetary targets for SDB subcontracting. The incentive subcontracting program is separate and distinct from the establishment, monitoring, and enforcement of SDB subcontracting goals in a subcontracting plan.

19.1204 Solicitation provisions and contract clauses.

(a) The contracting officer may insert a provision substantially the same as the provision at 52.219-24, Small Disadvantaged Business Participation Program Targets, in solicitations that consider the extent of participation of SDB concerns in performance of the contract. The contracting officer may vary the terms of this provision consistent with the policies in 19.1202-4.

(b) The contracting officer shall insert the clause at 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, in solicitations and contracts that consider the extent of participation of SDB concerns in performance of the contract.

(c) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts containing the clause at 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, a clause substantially the same as the clause at 52.219-26, Small Disadvantaged Business Participation Program—Incentive Subcontracting, when authorized (see 19.1203). The contracting officer may include an award fee provision in lieu of the incentive; in such cases, however, the contracting officer shall not use the clause at 52.219-26.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-2 [Amended]

18. Section 52.212-2 is amended by revising the provision date to read "(Jan 1999)"; and in the parenthetical following paragraph (a) of the provision by inserting "; (iv) small disadvantaged business participation;" after "(see FAR 15.304)".

19. Section 52.212-3 is amended by revising the provision date; and the introductory text of paragraph (c)(7) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Jan. 1999)

* * * * *

(c) * * *

(7) (Complete only if the solicitation contains the clause at FAR 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, or FAR 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, and the offeror desires a benefit based on its disadvantaged status.)

* * * * *

20. Section 52.212-5 is amended by revising the clause date; redesignating paragraphs (b)(7) through (b)(18) as (b)(9) through (b)(20), respectively; and adding new paragraphs (b)(7) and (b)(8) to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Jan. 1999)

* * * * *

(b) * * *

(7) 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

(8) 52.219-26, Small Disadvantaged Business Participation Program—Incentive Subcontracting (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

* * * * *

21. Section 52.219-8 is amended by revising the clause date and paragraph (c) to read as follows:

52.219-8 Utilization of Small, Small Disadvantaged, and Women-Owned Small Business Concerns.

* * * * *

Utilization of Small, Small Disadvantaged, and Women-Owned Small Business Concerns (Jan. 1999)

* * * * *

(c) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" means an offeror that represents, as part of its offer, that—

(1) It is a small business under the size standard applicable to the acquisition;

(2) It has received certification as a small disadvantaged business concern consistent with 13 CFR 124, Subpart B;

(3) No material change in disadvantaged ownership and control has occurred since its certification;

(4) Where the concern is owned by one or more individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(5) It is listed, on the date of its representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration.

* * * * *

22. Section 52.219-9 is amended by revising the clause date and paragraphs (d)(5), and (d)(10)(iii); and by adding paragraph (j) to read as follows:

52.219-9 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.

* * * * *

Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (Jan. 1999)

* * * * *

(d) * * *

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Marketing and Assistance Network (PRONET) of the Small Business Administration (SBA), the list of certified small disadvantaged business concerns of the SBA, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in PRONET as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small and women-owned small business source list. A firm shall rely on the information contained in SBA's list of small disadvantaged business concerns as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small disadvantaged business source list. Use of PRONET and/or the SBA list of small disadvantaged business concerns as its source lists does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, publicizing subcontracting opportunities) in this clause.

(10) * * *

(iii) Submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms or as provided in agency regulations and in paragraph (j) of this clause; and

* * * * *

(j) The Contractor shall submit the following reports:

(1) *Standard Form 294, Subcontracting Report for Individual Contracts.* This report shall be submitted to the Contracting Officer semiannually and at contract completion. The report covers subcontract award data related to this contract. This report is not required for commercial plans.

(2) *Standard Form 295, Summary Subcontract Report*. This report encompasses all the contracts with the awarding agency. It must be submitted semi-annually for contracts with the Department of Defense and annually for contracts with civilian agencies. If the reporting activity is covered by a commercial plan, the reporting activity must report annually all subcontract awards under that plan. All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a breakout, in the Contractor's format, of subcontract awards, in whole dollars, to small disadvantaged business concerns by Standard Industrial Classification (SIC) Major Group. For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant SIC Major Group and report all awards to that subcontractor under its predominant SIC Major Group.
(End of clause)

* * * * *

52.219-10 [Amended]

23. Section 52.219-10 is amended by revising the clause date to read "(Jan. 1999)"; and in the first sentence of paragraph (b) of the clause by inserting "for small business concerns and women-owned small business concerns" after the word "goals".

24. Sections 52.219-24 through 52.219-26 are added to read as follows:

52.219-24 Small Disadvantaged Business Participation Program—Targets.

As prescribed in 19.1204(a), insert a provision substantially the same as the following:

Small Disadvantaged Business Participation Program—Targets (Jan. 1999)

(a) This solicitation contains a source selection factor or subfactor related to the participation of small disadvantaged business (SDB) concerns in the contract. Credit under that evaluation factor or subfactor is not available to an SDB concern that qualifies for a price evaluation adjustment under the clause at FAR 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, unless the SDB concern specifically waives the price evaluation adjustment.

(b) In order to receive credit under the source selection factor or subfactor, the offeror must provide, with its offer, targets, expressed as dollars and percentages of total contract value, for SDB participation in any

of the Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce. The targets may provide for participation by a prime contractor, joint venture partner, teaming arrangement member, or subcontractor; however, the targets for subcontractors must be listed separately.

(End of provision)

52.219-25 Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.

As prescribed in 19.1204(b), insert the following clause:

Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (Jan. 1999)

(a) *Disadvantaged status for joint venture partners, team members, and subcontractors*. This clause addresses disadvantaged status for joint venture partners, teaming arrangement members, and subcontractors and is applicable if this contract contains small disadvantaged business (SDB) participation targets. The Contractor shall obtain representations of small disadvantaged status from joint venture partners, teaming arrangement members, and subcontractors through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at FAR 52.219-22, Small Disadvantaged Business Status. The Contractor shall confirm that a joint venture partner, team member, or subcontractor representing itself as a small disadvantaged business concern is included in the SBA's on-line list of SDBs at <http://www.sba.gov> or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

(b) *Reporting requirement*. If this contract contains SDB participation targets, the Contractor shall report on the participation of SDB concerns at contract completion, or as otherwise provided in this contract. Reporting may be on Optional Form 312, Small Disadvantaged Business Participation Report, or in the Contractor's own format providing the same information. This report is required for each contract containing SDB participation targets. If this contract contains an individual Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, reports may be submitted with the final Subcontracting Report for Individual Contracts (Standard Form 294) at the completion of the contract.
(End of clause)

52.219-26 Small Disadvantaged Business Participation Program—Incentive Subcontracting.

As prescribed in 19.1204(c), insert a clause substantially the same as the following:

Small Disadvantaged Business Participation Program—Incentive Subcontracting (Jan. 1999)

(a) Of the total dollars it plans to spend under subcontracts, the Contractor has committed itself in its offer to try to award a certain amount to small disadvantaged business concerns in the Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce.

(b) If the Contractor exceeds its total monetary target for subcontracting to small disadvantaged business concerns in the authorized SIC Major Groups, it will receive _____ [Contracting Officer to insert the appropriate number between 0 and 10] percent of the dollars in excess of the monetary target, unless the Contracting Officer determines that the excess was not due to the Contractor's efforts (e.g., a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the offer, or the excess was caused by the award of subcontracts that had been planned but had not been disclosed in the offer during contract negotiations). Determinations made under this paragraph are not subject to the Disputes clause of this contract.

(c) If this is a cost-plus-fixed-fee contract, the sum of the fixed fee and the incentive fee earned under this contract may not exceed the limitations in subsection 15.404-4 of the Federal Acquisition Regulation.
(End of clause)

PART 53—FORMS

25. Section 53.219 is amended by adding paragraph (c) to read as follows:

53.219 Small business programs.

* * * * *

(c) *OF 312 (1/99), Small Disadvantaged Business Participation Report*. (See Subpart 19.12.)

26. Section 53.302-312 is added to read as follows:

53.302-312 OF 312, Small Disadvantaged Business Participation Report.

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GENERAL INFORMATION INSTRUCTIONS

1. This form collects data on the participation of small disadvantaged business concerns in contracts that contain the clause at FAR 52.219-25, Small Disadvantaged Business Participation Program - Disadvantaged Status and Reporting.
2. Submit this report to the contracting officer. If your organization is required to report subcontracting data under an individual subcontracting plan, you may attach this report to the final SF 294, Subcontracting Report for Individual Contracts, submitted under the contract.
3. Report in whole dollars.

SPECIFIC INSTRUCTIONS

Block 3. Report the total dollar amount of participation of small disadvantaged business concerns under the contract cited in Block 2. Participation may be through subcontracting, teaming arrangement, joint ventures, or as the prime contractor (provided the prime contractor waived its right to a price evaluation adjustment).

Block 4. Report the participation, if any, by small disadvantaged business concerns in this contract at the prime contract level. All prime contract dollars must be reported under the SIC code assigned to the prime contract. Report the dollar amount and percentage of the total contract value.

Block 5. Report, by SIC Major Group, as determined by the Department of Commerce, the participation by small disadvantaged business concerns in this contract at the subcontract level. Report the dollar amount and percentage of the total contract value.

Block 6. Provide the name, telephone number, and e-mail address of the individual who can answer questions related to this report.

OPTIONAL FORM 312 1-99 **BACK**