

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 19 and 52****[FAR Case 2003–015]****RIN 9000–AK02****Federal Acquisition Regulation;
Applicability of SDB and HUBZone
Price Evaluation Factor**

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), at the request of the Small Business Administration, in order to remove some of the exceptions to the applicability of the Small Disadvantaged Business (SDB) and HUBZone price evaluation factor.

DATES: Interested parties should submit comments in writing on or before November 1, 2004, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2003–015 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.
- E-mail: farcase.2003-015@gsa.gov.

Include FAR case 2003–015 in the subject line of the message.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (V), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2003–015 in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification

of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAR case 2003–015.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule proposes to amend FAR 19.1103(a) and FAR 19.1307(b) in order to remove the exceptions to the Small Disadvantaged Business (SDB) and HUBZone preference programs that direct the contracting officer not to apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) or where application of the factor would be inconsistent with a Memorandum of Understanding (MOU) or other international agreement.

The Councils are proposing these changes for the following reasons:

- These exceptions result in more favorable treatment for offers of eligible products or qualifying country products than an offer from a U.S. large business, or, in the case of the SDB preference, even an offer from a U.S. small business. The basic goal of the trade agreements and other international agreements is to provide nondiscriminatory treatment for certain foreign products, not preferential treatment.

- The Trade Agreements Act (19 U.S.C. 2511(f)) specifically restricts the authority of the President to authorize the waiver of any small business or minority preferences.

- With regard to the exception relating to MOUs or other international agreements, DoD MOUs do not override small business preferences. The Councils were unable to identify any other MOU or international agreement that is inconsistent with the application of a preference for small business. If any international agreement supercedes a small business preference, it should be specifically identified, either in the FAR if it is Governmentwide, or in an agency supplement. The contracting officer is not in a position to know when application of the factor would be inconsistent with an MOU or international agreement.

Conforming amendments are required in the associated clauses at 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, and 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns. Conforming date changes are also required for the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

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. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The 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 it would reduce the exceptions to the preference for small disadvantaged businesses and HUBZone small businesses. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. The Analysis is summarized as follows:

This proposed rule was initiated at the request of the Small Business Administration in order to remove preferential treatment for certain offers of foreign products in acquisitions intending to provide a preference for small disadvantaged business concerns or HUBZone small business concerns. The objective of this proposed rule is to remove exceptions to the Small Disadvantaged Business (SDB) and HUBZone preference programs that direct the contracting officer not to apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act or where application of the factor would be inconsistent with a Memorandum of Understanding (MOU) or other international agreement. The legal basis for the proposed rule is 19 U.S.C. 2501, *et seq.* and 15 U.S.C. 631(note). The proposed rule applies to all offerors in acquisitions that provide a preference for small disadvantaged business concerns or HUBZone small business concerns. Because of the reduced exceptions to the preferences, this rule will have a beneficial impact all domestic concerns, especially small entities that are small disadvantaged business concerns or HUBZone small business concerns.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR 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 2003–015), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose 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 19 and 52

Government procurement.

Dated: August 26, 2004.

Laura Auletta,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 19 and 52 as set forth below:

1. The authority citation for 48 CFR parts 19 and 52 is revised 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 19—SMALL BUSINESS PROGRAMS**19.1103 [Amended]**

2. Amend section 19.1103 by—

- a. Adding “or” to the end of paragraph (a)(1);
- b. Removing paragraphs (a)(2), (a)(3), and (a)(5); and redesignating paragraph (a)(4) as (a)(2); and
- c. Removing “; or” from the end of newly redesignated paragraph (a)(2) and adding a period in its place.

19.1307 [Amended]

3. Amend section 19.1307 by—

- a. Adding “or” to the end of paragraph (b)(1);
- b. Removing the semicolon from the end of paragraph (b)(2) and adding a period in its place; and
- c. Removing paragraphs (b)(3) and (b)(4).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**52.212–5 [Amended]**

- 4. Amend section 52.212–5 by—
 - a. Revising the date of the clause to read “(Date)”;
 - b. Removing “(Jan 1999)” from paragraph (b)(3) of the clause and adding “(Date)” in its place; and
 - c. Removing “(June 2003)” from paragraph (b)(10)(i) of the clause and adding “(Date)” in its place.

52.219–4 [Amended]

- 5. Amend section 52.219–4 by—
 - a. Revising the date of the clause to read “(Date)”;
 - b. Adding “and” to the end of paragraph (b)(1)(i) of the clause; removing the semicolon from the end of paragraph (b)(1)(ii) and adding a period in its place; and removing paragraphs (b)(1)(iii) and (b)(1)(iv).

6. Amend section 52.219–23 by revising the date of the clause and paragraph (b)(1) to read as follows:

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

* * * * *

NOTICE OF PRICE EVALUATION
ADJUSTMENT FOR SMALL
DISADVANTAGED BUSINESS CONCERNS
(DATE)

* * * * *

(b) *Evaluation adjustment.* (1) The Contracting Officer will evaluate offers by adding a factor of _____ [Contracting Officer insert the percentage] percent to the price of all offers, except—

(i) Offers from small disadvantaged business concerns that have not waived the adjustment; and

(ii) For DoD, NASA, and Coast Guard acquisitions, an otherwise successful offer from a historically black college or university or minority institution.

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[FR Doc. 04–20003 Filed 9–1–04; 8:45 am]

BILLING CODE 6820–EP–S