



Department of Energy
Acquisition Regulation

No. 94-20

Date December 13, 1994

ACQUISITION LETTER

AUTHORITY

This Acquisition Letter is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Department of Energy Acquisition Regulation (DEAR) Subpart 901.301-70.

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- I. PURPOSE. The purpose of this Acquisition Letter (AL) is to provide guidance concerning certain provisions of the Federal Acquisition Streamlining Act of 1994, Public Law 103-355, which may be implemented immediately or require clarification.
- II. BACKGROUND. On October 13, 1994, the President signed into law the Federal Acquisition Streamlining Act of 1994, Public Law 103-355. The majority of the Act's changes take effect only when implemented in the Federal Acquisition Regulation (FAR). However, certain statutory authorities are effective immediately. This AL identifies the more

significant of these changes with associated guidance. FAR interim rules on those sections which are effective immediately have been or are expected to be issued starting in December 1994. Regulatory implementation of the remaining sections of the Act are scheduled to be published no later than April 1995. A number of field offices have inquired as to the status of certain of the Act's other provisions. This AL also highlights these provisions and provides related information.

To assess the impact on DOE procurement policies and procedures, the Office of Procurement and Assistance Management has formed a Headquarters/Field working group. The responsibilities of the group include determining what guidance and training are necessary to accomplish the requirements of the Act. Training on the Act's requirements will be provided in two phases. The first phase will include a familiarization briefing to discuss the specific sections of the Act. The second phase will be provided through "workshops" that focus on specific subject matter. The latter training will be offered after the FAR rulemaking process has developed implementation procedures.

- III. GUIDANCE. Heads of Contracting Activities are authorized to implement certain sections of the Act immediately as set forth in the attached guidance.
- IV. EFFECTIVE DATE. This Acquisition Letter is effective upon receipt.
- V. EXPIRATION DATE. This Acquisition Letter will remain in effect until superseding FAR or DEAR coverage has been published for the sections discussed in the attachment.

FASA PROVISIONS EFFECTIVE IMMEDIATELY:

TITLE I, Section 1251 Revision of Civilian Agency Provisions to Ensure Uniform Treatment of Cost or Pricing Data

Title III of the Federal Property and Administrative Services Act of 1949 has been amended by raising the threshold for submission of certified cost or pricing data from \$100,000 to \$500,000.

DOE GUIDANCE PENDING FAR IMPLEMENTATION: Contracting officers shall require offerors, contractors and subcontractors to make cost or pricing data available when the price is expected to exceed \$500,000; and to modify current contracts, if requested by the prime contractor, to change the threshold. A FAR Interim rule was published in the Federal Register on 12/5/94 to effect this change. A copy is attached for information.

The following provisions of the Act will not be effective until a rulemaking to the FAR implementing them has been issued: Section 304A, paragraphs: (b) Exceptions; (c) Restrictions on Additional Authority to Require Cost or Pricing Data or Other Information; (d) Additional Exception Provisions Regarding Commercial Items; (e) Price Reductions for Defective Cost or Pricing Data; (f) Interest and Penalties for Certain Overpayments; (g) Right of United States to Examine Contractor Records; and (h) Required Regulations.

TITLE I, Section 1252 Repeal of Obsolete Provisions

Section 303E of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253e), dealing with commercial pricing certificates, has been repealed.

DOE GUIDANCE: A FAR interim rule implementing this change was published in the Federal Register on 12/5/94. The requirement no longer exists.

TITLE IV, Section 4301, Micro-Purchase Procedures

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) has been amended by adding a new section 32, Procedures Applicable to Purchases Below Micro-Purchase Threshold. The new section provides, among other things, that micro-purchases may be made without competitive quotations, provided the price is reasonable, and that micro-purchases are exempt from the Buy American Act and the small business reserve of the Small Business Act. In addition, program personnel who make micro-purchases will not be considered "procurement officials" as provided in procurement integrity provisions if their delegation of authority does not exceed \$2,500 and if they occupy a position where the purchases they make during any 12-month period are not expected to exceed \$20,000.

DOE GUIDANCE PENDING FAR IMPLEMENTATION: This section may be implemented immediately. A copy is attached for information. Contracting officers should review their purchase card guidelines to make appropriate revisions to the delegation of authority to program personnel.

TITLE VII, Section 7102 Contracting Program for Certain Small Business Concerns

Section 7102 establishes a set-aside for small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637). This provision also provides that a price evaluation preference not in excess of 10 percent may be applied to an offer from such a small disadvantaged business in an unrestricted solicitation.

DOE GUIDANCE PENDING FAR IMPLEMENTATION: Solicitations may be set-aside and issued for small disadvantaged businesses and a price evaluation preference may be applied. In the absence of final FAR implementation instructions, the procedures set forth in the Defense Federal Acquisition Regulation Supplement at Subpart 219.70 and Clauses 252.219-7006 and 252.219-7007 may be referred to for guidance. A copy is attached for information.

TITLE I, Section 1071 Repeal of Agency Head Determination Regarding Use of Cost Type or Incentive Contract

The second sentence of 41 U.S.C. 254(b), requiring a determination and findings prior to use of cost type or incentive type contracts, has been deleted.

DOE GUIDANCE PENDING FAR IMPLEMENTATION: Effective immediately contracting officers are no longer required to prepare the determination and findings at DEAR 916.301-3 (Authority to use Cost-Reimbursement Type Contract) which is required by FAR 16.301-3(c). A FAR interim final rule implementing this change is scheduled to be issued in December. A DOE interim rule is being prepared to delete the DEAR requirement.

GUIDANCE CONCERNING CERTAIN OTHER FASA PROVISIONS:

TITLE I, Section 1092 Repeal of Requirement for Annual Report on Competition

Section 23 of the Office of Federal Procurement Policy Act (41 U.S.C. 419) has been repealed.

DOE GUIDANCE: Field Competition Advocates shall continue to provide annual reports to the Headquarters Competition Advocate. The repealed provision deletes an expired statutory provision requiring an annual report on competition to Congress. However, the statutory requirement that agency competition advocates submit an annual report to the agency senior procurement executive, as set forth in FAR 6.502, remains in effect.

TITLE I, Section 1554 Repeal of Preference for Recycled Toner Cartridges

Section 6962(j) of title 42 of the U.S. Code, which established a preference for procurement of recycled toner cartridges, has been repealed.

DOE GUIDANCE: The repealed provision required that recycled toner cartridges be procured in the absence of a contracting officer's determination. This preference, which does not appear in the FAR or DEAR, no longer exists; however, contracting activities may choose to procure recycled toner cartridges.

TITLE II, Section 2191 Travel expenses of Government contractors
Section 24 of the Office of Federal Procurement Policy Act (41 U.S.C. 420 has been repealed.

DOE GUIDANCE PENDING FAR IMPLEMENTATION: Although the statutory provisions for reimbursement of contractor travel expenses have been repealed, the policy set forth at FAR 31.205-46, DEAR 970.3102-17 and Office of Management and Budget Circulars A-21, A-87 and A-122 will continue in effect until amended by a formal rulemaking.

TITLE VII, Section 7101 Repeal of Certain Requirements

Section 15 of the Small Business Act (15 U.S.C. 644) has been amended by striking out subsections (e) and (f), stating the order of set-aside preference.

DOE GUIDANCE PENDING FAR IMPLEMENTATION: The priority of set-asides at FAR Parts 19.504 remains in effect pending FAR implementation.

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 14, 15, and 52

[FAC 90-22; FAR Case 94-720]

RIN 9000-AG19

Federal Acquisition Regulation;
Certified Cost or Pricing Data
Threshold

AGENCIES: 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 an interim rule to increase the threshold for certified cost or pricing data from \$100,000 to \$500,000 for civilian agencies and to remove the requirements for commercial pricing certificates. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Effective Date:* December 5, 1994.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before February 3, 1995, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4037, Washington, DC 20405. Phone: (202) 501-4755.

Please cite FAC 90-22, FAR case 94-720 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Al Winston, Truth in Negotiations Act (TINA) Team Leader, at (703) 602-2119 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-22, FAR case 94-720.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994 (the Act), Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize

burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network.

This notice announces FAR revisions developed under FAR case 94-720, which was based on provisions in the Act that increased the threshold for obtaining certified cost or pricing data from \$100,000 to \$500,000 for civilian agencies. This matches the threshold previously applicable only to the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard. The Act also repealed the requirements to obtain commercial pricing certification for certain items under civilian agency contracts. This interim rule is intended solely to make the changes necessary to implement those limited portions of the Act. Further, more extensive changes to implement other portions of the Act will be made subsequently.

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR case 94-720) because of the clarity and non-controversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see ADDRESSES caption, above) on or before January 4, 1995. The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

B. Regulatory Flexibility Act

The interim rule is not expected to 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 nearly all contracts awarded to small business are awarded on the basis of competition for a firm fixed price and submittal of cost or pricing data is not required. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately

and cite 5 U.S.C. 601, et seq. (FAC 90-22, FAR case 94-720), in correspondence.

C. Paperwork Reduction Act

The paperwork burden estimate applicable to the requirements for certified cost or pricing data (9000-0013) has been reduced to reflect the reduced numbers of submittals of certified cost or pricing data by civilian agency contractors. The reduction in the estimated burden for cost or pricing data requirements stems from the reduced number of submittals of cost or pricing data due to the increase in the threshold from \$100,000 to \$500,000. The paperwork burden applicable to the Commercial Pricing Certification requirements (9000-0105) has been eliminated. Inquiries should be directed to the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755 and cite FAC 90-22, OMB Clearance No. 9000-0013 or 9000-0105.

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 compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the portion of the Federal Acquisition Streamlining Act of 1994 that increases the certified cost or pricing data threshold for civilian agencies is effective upon enactment. Additionally, the Act repeals the requirements for commercial pricing certifications and the unnecessary regulatory burden related to commercial pricing certificates should be eliminated as quickly as possible to reduce administrative costs within the Government and at contractor locations.

List of Subjects in 48 CFR Parts 14, 15 and 52

Government procurement.

Dated: November 29, 1994.

Capt. Barry L. Cohen, SC, USN,
Project Manager for the Implementation of
the Federal Acquisition Streamlining Act of
1994.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-22 are effective December 5, 1994.

Dated: November 17, 1994.

Albert A. Vicchiolla
Acting Associate Administrator, Office of
Acquisition Policy, General Services
Administration.

Dated: November 23, 1994.

Thomas Luedtke,
Deputy Associate Administrator for
Procurement, NASA.

Dated: November 28, 1994.

Eleanor R. Spector,
Director, Defense Procurement.

Therefore, 48 CFR Parts 14, 15 and 52
are amended as set forth below:

1. The authority citation for 48 CFR
Parts 14, 15 and 52 continues to read as
follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C.
chapter 137; and 42 U.S.C. 2473(c).

PART 14—SEALED BIDDING

2. Section 14.201-7 is amended in
paragraphs (a), (b)(1), and (c)(1) by
removing "\$100,000, or for the
Department of Defense, the National
Aeronautics and Space Administration,
and the Coast Guard, is expected to
exceed \$500,000." and inserting "the
threshold for submission of cost or
pricing data at 15.804-2(a)(1)." in its
place, by redesignating paragraph (d) as
(e), and adding a new (d) to read as
follows:

14.201-7 Contract clauses.

(d) Contracting officers shall, if
requested by the prime contractor,
modify contracts to change the
threshold in the contract to the cost or
pricing data threshold in 15.804-2(a)(1),
without requiring consideration. The
contract modification shall be
accomplished by inserting into the
contract the current version of clauses
52.214-27, Price Reduction for
Defective Cost or Pricing Data—
Modifications—Sealed Bidding, and
52.214-28, Subcontractor Cost or
Pricing Data—Modifications—Sealed
Bidding. These new contract clauses
shall apply only to contract
modifications and subcontracts for
which agreement on price occurs after
the contracting officer has inserted the
new clauses.

14.214 [Reserved]

3. Section 14.214 is removed and
reserved.

PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.804-2 is amended by
revising paragraphs (a)(1) and (2) to read
as follows:

15.804-2 Requiring cost or pricing data.

(a)(1) The threshold for obtaining cost
or pricing data is \$500,000. This amount
will be subject to adjustment, effective
October 1, 1995, and every five years
hereafter. Except as provided in
15.804-3, certified cost or pricing data
are required before accomplishing any
of the following actions expected to
exceed the threshold in effect at time of
agreement on price or, in the case of
existing contracts, the threshold
specified in the contract—

(i) The award of any negotiated
contract (except for undefinitized
actions such as letter contracts);

(ii) The award of a subcontract at any
tier, if the contractor and each higher
tier subcontractor have been required to
furnish cost or pricing data [see 15.804-
3(i)]; or

(iii) The modification of any sealed
bid or negotiated contract (whether or
not cost or pricing data were initially
required) or subcontract covered by
paragraph (a)(1)(ii) of this subsection.

Price adjustment amounts shall
consider both increases and decreases.
(For example, a \$150,000 modification
resulting from a reduction of \$350,000
and an increase of \$200,000 is a pricing
adjustment exceeding \$500,000.) This
requirement does not apply when
unrelated and separately priced changes
for which cost or pricing data would not
otherwise be required are included for
administrative convenience in the same
modification.

(2) Contracting officers shall, if
requested by the prime contractor,
modify contracts to change the
threshold in the contract to the cost or
pricing data threshold in paragraph
(a)(1) of this subsection, without
requiring consideration. The contract
modification shall be accomplished by
inserting into the contract the current
version of the clauses 52.215-23, Price
Reduction for Defective Cost or Pricing
Data—Modifications, and 52.215-25,
Subcontractor Cost or Pricing Data—
Modifications, or 52.215-24,
Subcontractor Cost or Pricing Data, as
applicable. These new contract clauses
shall apply only to contract
modifications and subcontracts for
which agreement on price occurs after
the contracting officer has inserted the
new clauses.

15.813 [Reserved]

5. Section 15.813 is removed and
reserved, and subsections 15.813-1
through 15.813-7 are removed.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 52.214-27 is amended by
revising the clause date and the
introductory text of paragraph (a) to
read as follows:

52.214-27 Price Reduction for Defective Cost or Pricing Data—Modifications— Sealed Bidding

Price Reduction for Defective Cost or Pricing Data—Modifications—Sealed Bidding (Nov 1994)

(a) This clause shall become operative only
for any modification to this contract
involving aggregate increases and/or
decreases in costs, plus applicable profits, of
more than the threshold for submission of
cost or pricing data at (FAR) 48 CFR 15.804-
2(a)(1), except that this clause does not apply
to any modification for which the price is—

7. Section 52.214-28 is amended:

(a) By revising the clause date and the
introductory text of paragraph (b);

(b) In paragraph (a) by removing
"\$100,000, or for the Department of
Defense, the National Aeronautics and
Space Administration, and the Coast
Guard, expected to exceed \$500,000"
and inserting "the threshold for
submission of cost or pricing data at
(FAR) 48 CFR 15.804-2(a)(1)" in its
place; and

(c) In (d) by removing "\$100,000, or
for the Department of Defense, the
National Aeronautics and Space
Administration, and the Coast Guard, in
each subcontract that exceeds \$500,000"
and inserting "the threshold for
submission of cost or pricing data at
(FAR) 48 CFR 15.804-2(a)(1)" in its
place.

The revised text is to read as follows:

52.214-28 Subcontractor Cost or Pricing Data—Modifications—Sealed Bidding.

Subcontractor Cost or Pricing Data— Modifications—Sealed Bidding (Nov 1994)

(b) Before awarding any subcontract
expected to exceed the threshold for
submission of cost or pricing data at (FAR)
48 CFR 15.804-2(a)(1) when entered into, or
pricing any subcontract modification
involving aggregate increases and/or
decreases in costs, plus applicable profits,
expected to exceed the threshold for
submission of cost or pricing data at (FAR)
48 CFR 15.804-2(a)(1), the Contractor shall
require the subcontractor to submit cost or
pricing data (actually or by specific
identification in writing), unless the price is—

62.214-29 [Amended]

8. Section 52.214-29 is amended in the introductory paragraph by revising "14.201-7(d)" to read "14.201-7(e)".

62.215-23 [Amended]

9. Section 52.215-23 is amended by revising the clause date to read "(NOV 1994)" and in the introductory text of paragraph (a) by removing "\$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000" and inserting "the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1)" in its place.

62.215-24 [Amended]

10. Section 52.215-24 is amended by revising the clause date to read "(NOV 1994)" and twice in the introductory text of paragraph (a) and once in the introductory text of (c) by removing "\$100,000, or for the Department of Defense, the National Aeronautics and

Space Administration, and the Coast Guard, expected to exceed \$500,000" and inserting "the threshold for submission of cost or pricing data at FAR 15.804-2(a)(1)" in its place.

11. Section 52.215-25 is amended by revising the clause date, paragraph (a), the introductory text of (b), and (d) to read as follows:

52.215-25 Subcontractor Cost or Pricing Data—Modifications.

Subcontractor Cost or Pricing Data—Modifications (Nov 1994)

(a) The requirements of paragraphs (b) and (c) of this clause shall (1) become operative only for any modification to this contract involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1); and (2) be limited to such modifications.

(b) Before awarding any subcontract expected to exceed the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1) when entered into, or

pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1), the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is—

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1), when entered into.
(End of clause)

62.215-32 [Removed and Reserved]

12. Section 52.215-32 is removed and reserved.

62.215-37 [Removed and Reserved]

13. Section 52.215-37 is removed and reserved.

[FR Doc. 94-29811 Filed 12-2-94; 8:45 am]
BILLING CODE 6820-34-U.

Subtitle D—Micro-Purchase Procedures

SEC. 4301. PROCEDURES FOR PURCHASES BELOW MICRO-PURCHASE THRESHOLD.

(a) PROCEDURES.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding after section 31, as added by section 4201, the following new section:

*SEC. 32. PROCEDURES APPLICABLE TO PURCHASES BELOW MICRO-PURCHASE THRESHOLD.

“(a) REQUIREMENTS.—(1) The head of each executive agency shall ensure that procuring activities of that agency, in awarding a contract with a price exceeding the micro-purchase threshold, comply with the requirements of section 8(a) of the Small Business Act (15 U.S.C. 637(a)), section 2323 of title 10, United States Code, and section 7102 of the Federal Acquisition Streamlining Act of 1994.

“(2) The authority under part 13.106(a)(1) of the Federal Acquisition Regulation (48 C.F.R. 13.106(a)(1)), as in effect on November 18, 1993, to make purchases without securing competitive quotations does not apply to any purchases with a price exceeding the micro-purchase threshold.

“(b) EXCLUSION FOR MICRO-PURCHASES.—A purchase by an executive agency with an anticipated value of the micro-purchase threshold or less is not subject to section 15(j) of the Small Business Act (15 U.S.C. 644(j)) and the Buy American Act (41 U.S.C. 10a-10c).

“(c) APPLICABILITY OF CERTAIN PROVISIONS.—For purposes of section 27, an officer or employee of an executive agency, or a member of the Armed Forces of the United States, shall not be considered a procurement official if—

“(1) the contracting authority of the officer, employee, or member does not exceed \$2,500; and

“(2) the head of the contracting activity concerned (or a designee of the head of the contracting activity concerned) determines that the duties of the position of that officer, employee, or member are such that it is unlikely that the officer, employee, or member will be required to conduct procurements in a total amount greater than \$20,000 in any 12-month period.

“(d) PURCHASES WITHOUT COMPETITIVE QUOTATIONS.—A purchase not greater than \$2,500 may be made without obtaining competitive quotations if the contracting officer determines that the price for the purchase is reasonable.

“(e) EQUITABLE DISTRIBUTION.—Purchases not greater than \$2,500 shall be distributed equitably among qualified suppliers.

“(f) IMPLEMENTATION THROUGH FAR.—This section shall be implemented through the Federal Acquisition Regulation.

“(g) MICRO-PURCHASE THRESHOLD DEFINED.—For purposes of this section, the micro-purchase threshold is the amount of \$2,500.”

(b) EXCEPTION TO BUY AMERICAN ACT FOR MICRO-PURCHASES.—Section 2 of the Buy American Act (41 U.S.C. 10a) is amended by adding at the end the following: “This section shall not apply to manufactured articles, materials, or supplies procured under any contract the award value of which is less than or equal to the micro-purchase threshold under section 32 of the Office of Federal Procurement Policy Act.”

(c) EFFECTIVE DATE.—Notwithstanding any other provision of law—

(1) section 32 of the Office of Federal Procurement Policy Act, as added by subsection (a); and

(2) the amendment made by subsection (b); shall take effect on the date of the enactment of this Act and shall be implemented in the Federal Acquisition Regulation not later than 60 days after such date of enactment.

Department of Defense

219.7002

tion Program, when an ESB set-aside is not appropriate.

(B) All requirements of the Small Business Competitiveness Demonstration Program apply to architectural-engineer services in support of other than military construction projects or military housing objects, which otherwise meet criteria at FAR 19.1006(a)(3).

(b) The targeted industry categories for DOD are:

Standard Industrial Classification (SIC)	SIC Code
(1) Pharmaceutical preparations	2834
(2) Ammunition, except for small arms	3463
(3) Ordnance and accessories, not elsewhere classified	3489
(4) Turbines and turbine generator sets	3511
(5) Aircraft engines and engine parts	3724
(6) Guided missiles and space vehicles	3761
(7) Space vehicle equipment, NEC	3799
(8) Tanks and tank components	3795
(9) Search and navigation equipment	3812
(10) Communication services, NEC	4800

[56 FR 3633, July 31, 1991, as amended at 56 FR 2466, May 13, 1991]

219.1006 Procedures.

(b)(1) During the period when small business set-asides cannot be considered for acquisitions in the four designated industry groups—

(A) The restrictions at 219.502-2-70(b) (1) and (2) do not apply and the acquisitions shall be considered for small disadvantaged business set-asides; and

(B) The evaluation preference at 219.70 shall not be used.

(2) The Director, Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition), will determine whether reinstatement of small business set-asides are necessary to meet the agency goal and will recommend reinstatement to the Director, Defense Procurement. Military departments and defense agencies shall not reinstate small business set-asides unless directed by the Director, Defense Procurement.

(d) Reporting requirements are at 204.670-9.

[56 FR 2466, May 13, 1991]

219.1007 Solicitation provisions.

Do not use the clause at 252.219-7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns.

219.7003

other international agreement with a foreign government.

(b) Apply the factor on a line item by line item basis or apply it to any group of items on which award may be made. Add other evaluation factors such as transportation costs or rent-free use of Government facilities to the offers before applying the ten percent factor.

(c) Do not evaluate offers using the preference when it would cause award to be made at a price which exceeds fair market price by more than ten percent.

(d) In partial small business set-asides, use the evaluation preference procedures set forth in the clause at 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns, instead of the procedures in paragraphs (a) through (c) of this section.

219.7003 Solicitation provisions and contract clauses.

Use the clause at 252.219-7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns, in solicitations and contracts involving the evaluation preference, except those which include the clause at 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns. Use the clause with its Alternative I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.

Subpart 219.71—Pilot Mentor-Protégé Program

SOURCE: 56 FR 6723, Dec. 30, 1991, unless otherwise noted.

219.7100 Scope.

This subpart implements the Pilot Mentor-Protégé Program (the Program), established under section 831 of the National Defense Authorization Act for Fiscal Year 1991, Public Law 101-510, as amended. The purpose of the Program is to provide incentives for DOD contractors to assist small disadvantaged businesses in enhancing their capabilities and to increase par-

ticipation of such firms in Government and commercial contracts. Qualified organizations employing the severely disabled, as defined in section 8064A of Public Law 102-172, are also eligible to participate as protégé firms.

[56 FR 6723, Dec. 30, 1991, as amended at 57 FR 4775, Oct. 16, 1992]

219.7101 Policy.

DOD policy for implementation of the Program is contained in a policy statement entitled, "DOD Policy for the Pilot Mentor-Protégé Program." This statement addresses the program purpose, general procedures, duration, eligibility requirements, the selection/approval process, the mentor-protégé agreement, advance agreements on the treatment of developmental assistance costs, and reporting requirements. A copy of the statement may be obtained from the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition, OUSDA(SA) SADB, room 2A340, The Pentagon, Washington, DC 20301-3061, (703) 697-1698.

219.7102 General.

The Program includes—

(a) Mentor firms, which are prime contractors with at least one active subcontracting plan negotiated under FAR subpart 19.7.

(b) Protégé firms, which are small disadvantaged businesses (SDB) concerns or qualified organizations employing the severely disabled, eligible for receipt of Federal contracts and selected by the mentor firm.

(c) Mentor-protégé agreements which establish a developmental assistance program for a protégé firm.

(d) Incentives, which may be provided to mentor firms by the DOD including:

(1) Reimbursement for developmental assistance costs through:

(i) A separate contract;

(ii) A separately priced contract line item on a DOD contract; or

(iii) Inclusion of program costs in indirect expense pool.

(2) Credit toward SDB subcontracting goals, established under a subcontracting plan negotiated under FAR subpart 19.7, for developmental assistance which are either reimbursed or

price on the non-set-aside as adjusted in evaluating the offer submitting the foreign end product for award under applicable Buy American procedures, except for awards on the set-aside to concerns submitting foreign end products in which case the general rule applies.

(2) Award under the set-aside to a concern offering a foreign end product, when the highest award price on the non-set-aside portion is established by a domestic source end product, shall be at a price which, after application of the evaluation factors used under Buy American procedures for determining eligibility of a foreign end product for award, is equal to the highest award price on the non-set-aside portion, adjusted to reflect transportation and other factors considered in evaluating the offers.

(c) *Obtaining Offers and Processing Set-Aside Awards.*

(1) When an unaccepted low offer is not involved, if there is no unaccepted low offer meeting the criteria in (ii) below, eligible concerns in the order of priority in FAR 19.202-3 will be requested to offer on the set-aside quantity at the highest unit price awarded on the non-set-aside portion. Concerns may offer less than the total set-aside portion. If any part of the set-aside portion is not taken by eligible small business concerns, the partial set-aside is automatically dissolved as to the unawarded portion. Such unawarded portion may be acquired by unaccepted bidding or negotiation, as appropriate, in accordance with existing regulations.

(2) When an unaccepted low offer is involved, if (i) a responsive offer is submitted on the non-set-aside portion at a unit price which, when adjusted, is lower than the adjusted highest unit price awarded on the non-set-aside portion, but cannot be accepted (e.g., because of "all-or-none" or other quantity limitations, or because the offeror is nonresponsive), and (ii) at the time of negotiation for the set-aside portion, the offer could be accepted (e.g., because the set-aside quantity is large enough that the quantity limitations could be complied with, or because the offeror has now become responsible), then the following procedures shall be followed:

Step One. Eligible concerns (in the order of priority in FAR 19.202-3) will be requested to offer at the adjusted unit price of the unaccepted offer, a quantity of the set-aside portion equal to the quantity of the unaccepted offer.

Step Two. If no eligible concern is willing to take the entire quantity of the unaccepted offer, then all eligible concerns (in the order of priority in FAR 19.202-3) shall be requested to make offers on any lesser portion at the price, until either the entire quantity awarded or all eligible concerns receive further portions of such quantity.

Step Three. Case 1. If the unaccepted offer was submitted by a concern not eligible to participate in the set-aside, and if any of the quantity under Step Two is not awarded, then it and all other remaining quantities of the set-aside portion must be withdrawn under Step Two. If the entire quantity under Step Two is awarded among eligible concerns, Steps Four, Five and Six are applicable to the remaining set-aside portion.

Case 2. If the unaccepted offer was submitted by a concern eligible to participate in the set-aside, Steps Four, Five and Six are applicable to the remaining set-aside portion regardless of whether any quantity under Step Two is not awarded after all eligible concerns have been afforded an opportunity to offer on the unaccepted quantity. However, the concern which submitted the unaccepted offer shall be eliminated from consideration under Step Four and Step Five, for award at higher prices, unless that concern first accepts a quantity of the set-aside portion equal to the entire quantity of its unaccepted offer, at the adjusted price of its offer.

Step Four. In case there is more than one unaccepted offer which meets the conditions of (c)(2) (i) and (ii) above, Steps One, Two and Three above shall be applied with respect to the quantities of each such offer, in turn, from lowest to highest.

Step Five. Eligible concerns in the order of priority in FAR 19.202-3 will be requested to offer at the highest unit price awarded on the set-aside portion of any quantity of the set-aside portion remaining after Steps One, Two, Three and Four have been completed.

Step Six. If the entire set-aside portion is not taken by eligible small business concerns pursuant to Steps One through Five above, the partial set-aside is automatically dissolved as to the unawarded portion and such unawarded portion may be acquired by unaccepted bidding or negotiation as appropriate, in accordance with existing regulations.

(End of clause)

252.219-7004 Eligibility for preference as a labor surplus concern.

As prescribed at 219.508(70), insert the following clause:

ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN (APR 1985)

Each offeror desiring to be considered for award as a labor surplus area (LSA) concern on the set-aside portion of this acquisition, shall indicate below the addresses where costs incurred on account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than fifty percent (50%) of the contract price:

Department of Defense

Name of Company: _____

Street Address: _____

City/County: _____

State: _____

(If more than one location is to be used, list each location and the costs to be incurred at each, stated as a percentage of the contract price.)

CAUTION: Failure to list the location of manufacture or production and the percentage, if required, of cost to be incurred at each location will preclude consideration of the offeror as a LSA concern.

(End of clause)

252.219-7005 Small disadvantaged business concern representation (DoD FAR Supplement Deviation).

As prescribed in 219.304(b), insert the following provision:

SMALL DISADVANTAGED BUSINESS CONCERN REPRESENTATION (DoD FAR SUPPLEMENT DEVIATION) (JUN 1988)

(a) *Definition.* "Small disadvantaged business concern", as used in this provision, means a small business concern, including mass media, owned and controlled by individuals who are both socially and economically disadvantaged, as defined in regulations prescribed by the U.S. Small Business Administration at 13 CFR Part 124, the majority of earnings of which directly accrue to such individuals. (13 CFR Part 124 generally provides that a small disadvantaged business concern is a small business concern (1) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals; or in the case of any publicly owned business, at least 51 percent of the voting stock of which is owned by one or more socially and economically disadvantaged individuals, and (2) whose management and daily business operations are controlled by one or more such individuals.) (See 13 CFR 124.101 through 124.110.)

(b) *Representation.* The Offeror represents that its qualifying ownership falls within at least one of the following categories (check the applicable category):

— Subcontinent Asian (Asian-Indian) American (US Citizen with origins from India, Pakistan, Bangladesh, or Sri Lanka)

— Asian-Pacific American (US Citizen with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, or Taiwan)

— Black American (US Citizen)

Hispanic American (US Citizen with origins from South America, Central America, Mexico, Cuba, the Dominican Republic, Puerto Rico, Spain or Portugal)

— Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

— Individual/concern currently certified for participation in the Minority Small Business and Capital Ownership Development Program under section 8(a) of the Small Business Act (15 U.S.C. 637(a))

— Other (In addition to (c)(1), offeror must complete (c)(2) below:

(c) *Certification.*

(1) The Offeror represents and certifies, as part of its offer, that it is

— is not

— a small disadvantaged business concern.

(2) Complete only if item (b) above is checked "Other". The Offeror represents and certifies, as part of its offer, that the Small Business Administration (SBA) has

— has not

— made a determination concerning the Offeror's status as a small disadvantaged business concern. If the SBA has made such a determination, the date of the determination was

— was not

— found by the SBA to be socially and economically disadvantaged as a result of that determination and that no circumstances have changed to vary that determination.

(d) *Notification.* The Offeror agrees to notify the Contracting Officer before award of any change in its status as a small disadvantaged business concern occurring between the submission of its offer and contract award.

(e) *Penalty.* The Offeror represents and certifies that the above information is true and understands that whoever for the purpose of securing a contract or subcontract under subsection (a) of Section 1207 of Pub. L. 99-661 misrepresents the status of any concern or person as a small business concern owned and controlled by a minority (as described in subsection (a)) shall be punished by a fine of not less than \$10,000 or by imprisonment for not more than a year, or both.

(End of provision)

(53 FR 5129, Feb. 19, 1988, as amended at 53 FR 20630, 20631, June 6, 1988)

252.219-7006 Notice of total small disadvantaged business set-aside

As prescribed in 219.508(71)(1), insert the following clause:

NOTICE OF TOTAL SMALL DISADVANTAGED BUSINESS SET-ASIDE (FEBRUARY 1988)

(a) **Definition.** The term "small disadvantaged business (SDB) concern," as used in this clause, has the meaning set forth in Section 219.001 of the DoD Federal Acquisition Regulation Supplement.

(b) General.

(1) Offers are solicited only from SDB concerns. Offers received from concerns that are not SDB concerns shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to an SDB concern.

(c) **Agreement.** An SDB manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing this contract, only end items manufactured or produced by SDB concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. However, this requirement does not apply in connection with construction or service contracts.

(End of clause)

ALTERNATE I (FEB 1988)

If a determination has been made in accordance with 219.508(S-7)(2) that there are no SDB manufacturers available who can meet the requirements of the solicitation, insert the following paragraph (c) in lieu of paragraph (c) of the basic clause:

(c) **Agreement.** An SDB regular dealer submitting an offer in its own name agrees to furnish, in performing this contract, only end items manufactured or produced by small business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. However, this requirement does not apply in connection with construction or service contracts.

153 FR 5129, Feb. 19, 1988, as amended at 53 FR 20630, 20631, June 6, 1988)

252.219-7007 Notice of evaluation preference for Small Disadvantaged Business (SDB) concerns (unrestricted).

As prescribed in 219.7002(a), insert the following clause:

NOTICE OF EVALUATION PREFERENCE FOR SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS (UNRESTRICTED) (JUL 1989)

(a) **Definition.** The term "small disadvantaged business (SDB) concern," as used in this clause, has the meaning set forth in the clause entitled "Small Disadvantaged Business Concern Definition (DoD FAR Supplement).

(b) **Exclusion.** (1) After all other evaluation factors described in this solicitation are applied, offers will be evaluated by adding a factor of ten percent (10%) to offers from concerns that are not SDB concerns and to offers from those SDB concerns which elect to waive the SDB evaluation preference (see paragraph (c) below) by checking the box below. However, in no event may award be made to an SDB concern at a price which exceeds fair market price (as determined under FAR 19.806-2) by more than ten percent (10%).

(2) The evaluation factor described in paragraph (b)(1) above shall not be applied to (i) otherwise low offers of (A) eligible products under the Trade Agreements Act as defined in DFARS 225.401 when the acquisition equals or exceeds the dollar threshold stated in FAR 25.402, or (B) qualifying country end products as defined in DFARS 225.001; or (ii) where the application would be inconsistent with a Memorandum of Understanding or any other international agreement with a foreign government (see Appendix T to the DoD FAR Supplement).

The SDB Offeror requests that the evaluation preference in paragraph (b) above not be given to this offer.

(c) **Agreement.** (1) By submission of an offer and execution of a contract, the SDB Offeror/Contractor (except a regular dealer) who did not waive the evaluation preference by checking the box in paragraph (b) above agrees that in performance of the contract in the case of a contract for—

(i) **Services (except construction).** At least fifty percent (50%) of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(ii) **Supplies.** The concern shall perform work for at least fifty percent (50%) of the cost of manufacturing the supplies, not including the cost of materials.

(iii) **General construction.** The concern will perform at least fifteen percent (15%) of the cost of the contract, not including the cost of materials, with its own employees.

(iv) **Construction by special trade contractors.** The concern will perform at least twenty-five percent (25%) of the cost of the contract, not including the cost of materials, with its own employees.

(2) An SDB regular dealer submitting an offer in its own name, who did not waive the evaluation preference by checking the box in paragraph (b) above, agrees to furnish, in performing this contract, only end items manufactured or produced by SDB concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. However,

er, this requirement does not apply in connection with construction or service contracts.

(d) **HBCU/MI Offer.** In the event an HBCU/MI, as defined at 226.7002, submits an offer under this solicitation, it shall be evaluated as though it were an SDB concern and shall be required to submit to the Contracting Officer, upon request, a certification as to its HBCU/MI status.

(End of clause)

ALTERNATE I (JUL 1989)

If a determination has been made in accordance with DFARS 219.7002 that there are no SDB manufacturers available who can meet the requirements of this solicitation, insert the following paragraph (c)(2) in lieu of paragraph (c)(2) of the basic clause:

(c)(2) An SDB regular dealer submitting an offer in its own name, who did not waive the evaluation preference by checking the box in paragraph (b) above, agrees to furnish, in performing this contract, only end items manufactured or produced by small business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. However, this requirement does not apply in connection with construction or service contracts.

153 FR 5129, Feb. 19, 1988, as amended at 53 FR 20630, 20631, June 6, 1988; 53 FR 50417, Dec. 15, 1988; 54 FR 31039, July 26, 1989)

252.219-7008 [Reserved]

252.219-7009 Incentive program for subcontracting with small and small disadvantaged business concerns, Historically Black Colleges and Universities and Minority Institutions.

As prescribed in 219.708(c) (1), insert the following clause:

INCENTIVE PROGRAM FOR SUBCONTRACTING WITH SMALL AND SMALL DISADVANTAGED BUSINESS CONCERNS, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES AND MINORITY INSTITUTIONS (JUN 1988)

(a) Of the total dollars it plans to spend under subcontracts, the Contractor has committed itself in its subcontracting plan to try to award a certain percentage to small business concerns and a certain percentage to small disadvantaged business (SDB) concerns, Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).

(b) To encourage placement of subcontracts with SDBs/HBCUs/MIs, the Contractor

will be entitled to receive an incentive award under this clause, as follows:

(1) Where the SDB/HBCU/MI goal in this contract is less than five percent (5%) of the total planned subcontracting dollars and the Contractor both exceeds its SDB/HBCU/MI goal and awards more than five percent (5%) of the total actual subcontracting dollars to SDBs/HBCUs/MIs in performing this contract, the Contractor will receive ten percent (10%) of the difference between the total actual dollar amount of subcontracts awarded to SDBs/HBCUs/MIs and five percent (5%) of total actual subcontracting dollars.

(2) Where the SDB/HBCU/MI goal in this contract is equal to or greater than five percent (5%) of total planned subcontracting dollars and the Contractor both exceeds its SDB/HBCU/MI goal and awards more than five percent (5%) of total actual subcontracting dollars to SDBs/HBCUs/MIs in performing this contract, the Contractor will receive ten percent (10%) of the difference between the total actual dollar amount of subcontracts awarded to SDBs/HBCUs/MIs and the SDB/HBCU/MI goal amount.

(c) The Contractor will not be entitled to receive an incentive award under this clause if the Contracting Officer determines that the amount by which the Contractor exceeded its goal was not due to the Contractor's efforts (e.g., a subcontractor cost overrun, or the award of subcontracts that had been planned but had not been disclosed in the subcontracting plan during contract negotiations, caused the actual subcontract amount to exceed that estimated in the subcontracting plan). Determinations made under this paragraph are not subject to the Disputes clause.

(d) If this is a cost contract, the limitations of FAR Subpart 15.9 may not be exceeded.

(e) This clause is not effective if this contract is awarded based on a subcontracting plan submitted and approved under FAR 25.219-9, paragraph (g).

(End of clause)

ALTERNATE I (FEBRUARY 1988)

As prescribed at 219.708(c)(1), insert the following paragraph (c) and (d) as (d) and (e) in the existing paragraphs (c) and (d) as (d) and (e):

(c) With reference to small businesses other than SDBs, If the Contractor exceeds its small business subcontracting goals in performance of this contract, it will receive (insert the appropriate number between 0 and 10) percent of the dollars in excess of the goal in the plan.

153 FR 5130, Feb. 19, 1988, as amended at 53 FR 20631, June 6, 1988)