

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

[FAC 2005–50; FAR Case 2011–004; Item V; Docket 2011–0004, Sequence 1]

RIN 9000–AL88

**Federal Acquisition Regulation;
Socioeconomic Program Parity**

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 1347 of the “Small Business Jobs Act of 2010.” Section 1347 clarifies the contracting officer’s ability to use discretion when determining whether an acquisition will be restricted to small businesses participating in the 8(a), HUBZone, or service-disabled veteran-owned small business (SDVOSB) programs. There is no order of priority among small businesses in the 8(a) Business Development Program, the HUBZone Program, or the SDVOSB Program.

DATES: *Effective Date:* March 16, 2011.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–50, FAR Case 2011–004, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2011–004” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2011–004.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2011–004” on your attached document.

- *Fax:* (202) 501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–50, FAR Case

2011–004, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2011–004.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA are issuing an interim rule amending the FAR, to implement section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240). Section 1347 changed the word “shall” to “may” at section 31(b)(2)(B) of the Small Business Act (15 U.S.C. 657a(b)(2)(B)). This interim rule makes similar changes to the FAR, ensuring that the FAR clearly reflects the statutory relationship among the small business programs and eliminates any confusion on the part of contracting officers or others.

DoD, GSA, and NASA published a proposed rule under FAR Case 2006–034 in the **Federal Register** at 73 FR 12699, March 10, 2008, which would have amended the FAR to clearly reflect the Small Business Administration’s (SBA) interpretation of the Small Business Act and its agency regulations that no order of precedence applies when the contracting officer considers satisfying a requirement through an award to a HUBZone small business concern, a SDVOSB concern, or a small business participating in the 8(a) Program. The proposed rule was closed due to the Government Accountability Office’s and the Court of Federal Claims’ interpretation of the Small Business Act to require acquisitions to be set aside for HUBZone small businesses before setting aside acquisitions for other small business programs. See *Mission Critical Solutions v. U.S.*, 91 Fed. Cl. 386 (2010), and B–401057.

This rule does not address the women-owned small businesses and their relationship to the other small business programs. FAR Case 2010–015, Women-Owned Small Business Program, will be published as an interim rule with request for comments to implement the SBA’s Women-owned Small Business (WOSB) Federal Contract Program final rule, (75 FR 62258, October 7, 2010), which became effective on February 4, 2011. SBA’s rule provides parity for WOSBs with

SBA’s other small business contracting programs.

II. Discussion and Analysis

Section 1347 amended the language concerning HUBZone set asides by deleting the “shall” set aside in the statute and replacing that term with “may” set aside. This clarifies that contracting officers can exercise discretion when determining whether a requirement will be restricted to small business concerns under the 8(a), HUBZone or SDVOSB programs.

This interim rule is intended to address the recent statutory clarification and make clear that—

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

2. For acquisitions exceeding the simplified acquisition threshold, the contracting officer must consider a set-aside or sole source acquisition to a small business under the 8(a), HUBZone, or SDVOSB programs before the contracting officer proceeds with a small business set-aside. See FAR 19.203(c) and 19.502–2(b); and

3. The small business set-aside requirement of FAR 19.502–2(a) does not preclude award of a contract to a qualified 8(a) Program participant, HUBZone small business concern, or SDVOSB concern, because the SBA’s regulations give the contracting officer discretionary authority to use the 8(a), HUBZone, or SDVOSB, at dollar levels above the micro-purchase threshold and at or below the simplified acquisition threshold.

III. Executive Order 12866

This is a significant regulatory action and, therefore, was 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.

IV. Regulatory Flexibility Act

The change 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 this rule revises the FAR to implement Section 1347 of the Small Business Jobs Act of 2010 governing specific contracting and business assistance programs which include the 8(a), HUBZone, and the SDVOSB programs.

The Regulatory Secretariat will be submitting a copy of the Interim

Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–50, FAR Case 2011–004) in correspondence.

The analysis is summarized as follows:

The purpose of this rule is to ensure that the FAR clearly reflects section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and to incorporate the SBA's interpretation of the Small Business Act and regulations promulgated thereunder. Following recent interpretations of the Small Business Act by the Government Accountability Office and the Court of Federal Claims, some in the acquisition community have been confused about whether there is an order of precedence that applies when deciding whether to satisfy a requirement through an award to a small business, a small business participating in the 8(a) Business Development Program, a HUBZone small business, or a SDVOSB. Section 1347 clarified that there is parity, rather than an order of precedence, and the purpose of this interim rule is to ensure that the FAR removes any uncertainty on the part of the contracting officer, small businesses, and others.

Small businesses that participate in Federal Government contracting are the entities that may be impacted by the rule. There should be no negative impact on small businesses as a whole. The number of contracts awarded overall to small businesses should not decrease as a result of this rule. However, it is possible that the clarity the rule provides could result in a difference in the number of contracts awarded to any particular category of small businesses.

Generally, all current and potential Government contractors must register in the Central Contractor Registration (CCR) database to be eligible for contract award and payment. There are approximately 349,992 small business firms; 9,303 HUBZone firms; 9,234 8(a) firms and 18,213 SDVOSB firms currently registered in CCR that may be affected by this final rule.

There are no significant alternatives that would reduce the impact on small businesses. This FAR rule is implementing section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240).

V. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

V. 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 because the enactment of the Small Business Jobs Act of 2010 requires the implementation of section 1347. The statute was enacted on September 27, 2010. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 13 and 19

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

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

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

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

PART 13—SIMPLIFIED ACQUISITIONS PROCEDURES

■ 2. Amend section 13.003 by removing from paragraph (b)(1) “see 19.000” and adding “see 19.000, 19.203,” in its place; and by revising paragraph (b)(2) to read as follows:

13.003 Policy.

* * * * *

(b) * * *

(2) The contracting officer may make an award to a small business under the 8(a) Program (*see* subpart 19.8), or set aside for HUBZone small business concerns (*see* 19.1305) or service-disabled veteran-owned small business concerns (*see* 19.1405) an acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold and at or below the simplified acquisition threshold. The following contracting officer's decisions for acquisitions at or below the simplified acquisition

threshold are not subject to review under subpart 19.4:

(i) A decision not to make an award under the 8(a) Program (*see* subpart 19.8).

(ii) A decision not to set aside an acquisition for HUBZone small business or service-disabled veteran-owned small business concerns participation.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

19.202 [Amended]

■ 3. Amend section 19.202 by removing “Subpart 19.5, 19.8, or 19.13” and adding “subpart 19.5, 19.8, 19.13, or 19.14” in its place.

■ 4. Add section 19.203 to read as follows:

19.203 Relationship among small business programs.

(a) There is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), or Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14).

(b) *At or below the simplified acquisition threshold.* The requirement to exclusively reserve acquisitions for small business concerns at 19.502–2(a) does not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, or SDVOSB Program. If the contracting officer does not proceed with a small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase.

(c) *Above the simplified acquisition threshold.* The contracting officer shall first consider an acquisition for the 8(a), HUBZone, or SDVOSB programs before using a small business set-aside (*see* 19.502–2(b)). However, if a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless SBA agrees to its release in accordance with 13 CFR parts 124, 125 and 126.

(d) Small business set-asides have priority over acquisitions using full and open competition. *See* requirements for establishing a small business set-aside at subpart 19.5.

■ 5. Amend section 19.501 by removing paragraphs (c) and (d); redesignating paragraphs (e) through (i) as paragraphs (c) through (g), respectively; and revising the newly redesignated paragraph (c) to read as follows:

19.501 General.

* * * * *

(c) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, or service-disabled veteran-owned programs. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.

* * * * *

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

19.502-2 Total small business set-asides.

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

(b) Before setting aside an acquisition under this paragraph, refer to 19.203(c). * * *

* * * * *

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

19.800 General.

* * * * *

(e) Before deciding to set aside an acquisition in accordance with subpart 19.5, the contracting officer may consider offering the acquisition to a small business under the 8(a) Program in accordance with 19.203.

* * * * *

19.804-2 [Amended]

■ 8. Amend section 19.804-2 by removing paragraph (a)(12); and redesignating paragraphs (a)(13) through (a)(16) as paragraphs (a)(12) through (a)(15), respectively.

■ 9. Amend section 19.1305 by—

- a. Revising paragraph (a);
- b. Removing paragraph (c);
- c. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively; and
- d. Removing from the newly redesignated paragraph (c) “(see subpart 19.5)” and adding “(see 19.203)” in its place.

The revised text reads as follows:

19.1305 HUBZone set-aside procedures.

(a) The contracting officer—
(1) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to HUBZone small business concerns when the requirements of paragraph (b) of this section can be satisfied (see 19.203); and

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

* * * * *

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

19.1306 HUBZone sole source awards.

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

* * * * *

■ 11. Amend section 19.1405 by revising paragraph (a); and removing from paragraph (c) “(see Subpart 19.5)” and adding “(see 19.203)” in its place.

The revised text reads as follows:

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

(a) The contracting officer—
(1) May set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business concerns when the requirements of paragraph (b) of this section can be satisfied (see 19.203); and

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

* * * * *

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

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

(a) A contracting officer may award contracts to service-disabled veteran-owned small business concerns on a sole source basis (see 6.302-5(b)(6)), before considering small business set-asides (see 19.203 and subpart 19.5) provided none of the exclusions of 19.1404 apply and—

* * * * *

[FR Doc. 2011-5556 Filed 3-15-11; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005-50; FAR Case 2008-034; Item VI; Docket 2009-0035, Sequence 1]

RIN 9000-AL44

Federal Acquisition Regulation; Use of Commercial Services Item Authority

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 868 provides that the FAR shall be amended with respect to the procurement of commercial services, specifically services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace. These services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such services. The rule details the information the contracting officer may consider in order to make this determination.

DATES: *Effective Date:* March 16, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-50, FAR Case 2008-034.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 52852 on October 14, 2009, to implement section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. The comment period closed on December 14, 2009.