

Dated: September 2, 2011.

R.C. Proctor,

Acting Director of Commercial Regulations and Standards.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 4, 12, 14, 15, 19, 22, 26, 52, and 53

[FAR Case 2009-016; Docket 2011-0090;
Sequence 1]

RIN 9000-AM05

Federal Acquisition Regulation; Constitutionality of Federal Contracting Programs for Minority- Owned and Other Small Businesses

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to address the impact of the decision in *Rothe Development Corporation vs. the DoD and the U.S. Department of the Air Force (USAF)* on small disadvantaged business concerns and certain institutions of higher education.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before November 8, 2011 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2009-016 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-016" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "FAR Case 2009-016." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2009-016" 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 FAR Case 2009-016, 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 FAR Case 2009-016.

SUPPLEMENTARY INFORMATION:

I. Background

In November 1998, Rothe Development Corporation (RDC) filed suit against DoD and the USAF (Rothe), in the U.S. District Court for the Western District of Texas. In its complaint, RDC challenged the constitutionality of section 1207 of the National Defense Authorization Act of 1987, Public Law 99-661 (10 U.S.C. 2323), alleging that it violated the right to equal protection under the Due Process Clause of the Fifth Amendment to the United States Constitution. RDC's initial complaint against the DoD/USAF focused on the reauthorization of section 1207 in 1992. On September 25, 2007, the U.S. District Court for the Western District of Texas entered a judgment in favor of DoD. However, RDC appealed the court's ruling and on November 4, 2008, the U.S. Court of Appeals for the Federal Circuit decided in its favor (*Rothe Dev. Corp. v. DoD*, 545 F.3d 1023 (Fed. Cir. November 4, 2008)). The U.S. Court of Appeals for the Federal Circuit found 10 U.S.C. 2323 unconstitutional. A District court decision mandated by the U.S. Court of Appeals was issued on February 27, 2009, enjoining all application of 10 U.S.C. 2323 (*Rothe Dev. Corp. v. DoD*, 606 F. Supp. 2d 648 (W.D. Tex. 2009)).

Section 1207 of the National Defense Authorization Act of 1987, Public Law 99-661, codified at 10 U.S.C. 2323, established the DoD, NASA, and the U.S. Coast Guard (USCG), Small Disadvantaged Business (SDB) Participation Program. The purpose of the program was to ensure that SDBs could fully participate in the Federal contracting process. Section 1207 provided the authority for DoD, NASA, and USCG contracting officers to apply a price adjustment of up to 10 percent to afford SDBs a competitive price advantage when competing in a full and open competition and assist in

achieving a 5 percent SDB goal. Section 1207 serves as the statutory underpinning for FAR subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns, as well as some of FAR subpart 19.12, Small Disadvantaged Business Participation Program, and certain associated FAR clauses.

A. FAR Revisions

DoD, GSA, and NASA are proposing to amend the FAR to remove coverage at FAR subpart 19.11, FAR subpart 19.12, corresponding clauses at FAR 52.219-22, Small Disadvantaged Business Status, FAR 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, FAR 52.219-24, Small Disadvantaged Business Participation Program—Targets, FAR 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, and FAR 52.219-26, Small Disadvantaged Business Participation Program—Incentive Subcontracting, and to remove references to FAR subpart 19.11, 19.12, and corresponding clauses in FAR parts 1, 2, 4, 12, 14, 15, 19, 22, 26, 52, and 53.

Certain authorities in FAR subpart 19.12 and supporting clauses addressing the award of subcontracts to SDBs that are rooted in the Small Business Act, rather than in section 1207, were not at issue in the Rothe decision, and therefore retain their legal status. These include the authority to (1) provide monetary incentives to prime contractors to encourage subcontracting opportunities to SDBs and (2) use an evaluation factor or subfactor to evaluate the participation of small businesses as subcontractors. Because these authorities are not affected by the Rothe decision, the coverage in FAR subpart 19.12 addressing subcontracting (with the exception of the coverage at FAR 19.1202 on the use of factors or subfactors to evaluate SDB subcontract participation) has been retained but moved to FAR subpart 19.7, which already addresses subcontracting issues generally, including the use of monetary incentives to encourage subcontracting opportunities. As a result, this realignment consolidates coverage on subcontracting with small business programs in one place.

With respect to FAR 19.1202, Evaluation factor or subfactor, FAR subpart 19.7 is currently silent on its use. Nothing in this rulemaking precludes an agency from using evaluation factors and subfactors for subcontracting during source selections. The Small Business Administration's

(SBA) regulations (13 CFR 125.3(g)) allow the application of evaluation factors and subfactors to subcontracting with any of the small business programs, including, but not limited to, SDBs. The Federal Acquisition Regulatory Council will confer with SBA to evaluate the need for guidance in the FAR on the use of evaluation factors and subfactors for subcontracting.

B. Standard Form (SF) 294, Subcontracting Report for Individual Contracts

DOD, GSA, and NASA are proposing to revise the SF 294, Subcontracting Report for Individual Contracts to remove references to DOD and the USCG collecting subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs). In addition, conforming changes are made to reflect that the threshold for contractors to submit small business subcontracting plans was increased from \$550,000 to \$650,000 (from \$1.0 million to \$1.5 million for construction).

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. 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.

III. Regulatory Flexibility Act

This 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 DOD, GSA, and NASA are proposing to implement changes in the FAR necessitated by the impact of the decision in *Rothe*. The court in *Rothe* found 10 U.S.C. 2323 unconstitutional, thus impacting some SDBs. This rule proposes to delete FAR subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns, FAR subpart 19.12, Small Disadvantaged Business Participation Program, and

associated clauses and references, and reincorporate certain provisions of FAR subpart 19.12 addressing SDB subcontracting in FAR subpart 19.7. This proposed rule may impact small entities because the removal of FAR subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns and FAR subpart 19.12, Small Disadvantaged Business Participation Program may have an effect on SDBs seeking awards as prime contractors.

Under this proposed revision to the FAR, Federal agencies will no longer be authorized to apply certain procurement mechanisms (FAR subparts 19.11 and 19.12) that had offered a benefit for SDB prime awards. As a practical matter, however, because the price evaluation adjustment at issue in *Rothe* had not been used for approximately a decade before that decision, this change will not alter the status quo for SDBs. In addition, the Small Business Act (15 U.S.C. 644(g)(1)) establishes a 5 percent SDB governmentwide contracting goal at the prime and subcontract levels. Further, prime contractors may continue to receive a benefit in solicitations that utilize factors or subfactors during source selection for small businesses and small disadvantaged businesses, as well as monetary incentives as part of the incentive subcontracting program (FAR 52.219–10).

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

1. Description of the reasons why action by the agency is being considered.

This proposed rule implements changes in the FAR necessitated by the impact of the decision in *Rothe Development Corporation vs. the U.S. Department of Defense and the U.S. Department of the Air Force* (545 F. 3rd 1023 (Fed. Cir. November 4, 2008)).

2. Succinct statement of the objectives of, and legal basis for, the proposed rule.

The Court found 10 U.S.C. 2323 unconstitutional, thus impacting SDBs and certain institutions of higher education (i.e., HBCUs/MIs). As a result of the *Rothe* decision, DOD, GSA, and NASA propose to revise the FAR to delete FAR subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns, for DoD, NASA, and USCG. FAR subpart 19.12, Small Disadvantaged Business Participation Program, is revised to remove considerations associated with the evaluation factors and subfactors of SDB concerns with the expiration of section 7102 of the Federal Acquisition Streamlining Act (FASA) and the *Rothe* decision. Clauses associated with FAR subparts 19.11 and 19.12 are either deleted or revised.

3. Description of, and where feasible, estimated of the number of small entities to which the rule will apply.

There are approximately 24,702 SDBs currently listed in the Central Contractor Registration.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The rule will impose no new reporting or record keeping requirements on small entities. This proposed rule may impact small entities because the removal of FAR subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns and FAR subpart 19.12, Small Disadvantaged Business Participation Program may have an effect on SDBs seeking awards as prime contractors.

Under this proposed revision to the FAR, Federal agencies will no longer be authorized to apply certain procurement mechanisms (FAR subparts 19.11 and 19.12) that had offered a benefit for SDB prime awards. As a practical matter, however, because the price evaluation adjustment at issue in *Rothe* had not been used for approximately a decade before that decision, this change will not alter the status quo for SDBs. In addition, the Small Business Act (15 U.S.C. 644(g)(1)) establishes a 5 percent SDB government-wide contracting goal at the prime and subcontract levels. Further, prime contractors may continue to receive a benefit in solicitations that utilize factors or subfactors during source selection for small businesses and small disadvantaged businesses, as well as monetary incentives as part of the incentive subcontracting program (FAR 52.219–10).

5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

DOD, GSA, and NASA did not identify any significant alternatives that would accomplish the objectives of the statute of publishing this proposed rule.

The Regulatory Secretariat will be submitting 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 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

(FAR Case 2009–016) in correspondence.

IV. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

DOD, GSA, and NASA are proposing to remove FAR coverage at FAR subpart 19.11, FAR subpart 19.12, and corresponding clauses at FAR 52.219–22, Small Disadvantaged Business Status, FAR 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, FAR 52.219–24, Small Disadvantaged Business Participation Program—Targets, FAR 52.219–25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, and FAR 52.219–26, Small Disadvantaged Business Participation Program—Incentive Subcontracting. With these changes, the information collection associated with FAR subpart 19.12, FAR 52.219–22, FAR 52.219–23, and FAR 52.219–25 for OMB Control number 9000–0150 will be removed, reducing the information collection burden imposed by the Federal Government on the public by 15,000 burden hours.

List of Subjects in 48 CFR Parts 1, 2, 4, 12, 14, 15, 19, 22, 26, 52, and 53

Government procurement.

Dated: September 1, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 2, 4, 12, 14, 15, 19, 22, 26, 52, and 53 as set forth below:

1. The authority citation for 48 CFR parts 1, 2, 4, 12, 14, 15, 19, 22, 26, 52, and 53 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106, in the table following the introductory text, by removing FAR segments “19.12,” “52.219–22,” “52.219–23,” and “52.219–25,” and their corresponding OMB Control Numbers “9000–0150.”

PART 2—DEFINITIONS OF WORDS AND TERMS

3. Amend section 2.101 in paragraph (b)(2) in the definition “Small

disadvantaged business concern” to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Small disadvantaged business

concern consistent with 13 CFR 124.1002, means an offeror, that is a small business under the size standard applicable to the acquisition; and—

(1) Not less than 51 percent of which is unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, the management and daily business operations of which are controlled by one or more socially and economically disadvantaged individuals;

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

(3) If it represents in writing that it qualifies as a small disadvantaged business (SDB) for any Federal subcontracting program, it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals and meets the SDB eligibility criteria of 13 CFR 124.1002.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

4.1202 [Amended]

4. Amend section 4.1202 by removing paragraph (k); and redesignating paragraphs (l) through (bb) as paragraphs (k) through (aa), respectively.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

5. Amend section 12.301 by revising paragraph (b)(2) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(2) The provision at 52.212–3, Offeror Representations and Certifications—Commercial Items. This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with subpart 1.4. Use the provision with its

Alternate I in solicitations issued by DoD, NASA, or the Coast Guard.

* * * * *

6. Amend section 12.303 by revising paragraph (b)(1) to read as follows:

12.303 Contract format.

* * * * *

(b) * * *

(1) Block 10 if an incentive subcontracting clause is used (the contracting officer shall indicate the applicable percentage);

* * * * *

PART 14—SEALED BIDDING

14.502 [Amended]

7. Amend section 14.502 by removing paragraph (b)(4); and redesignating paragraphs (b)(5) through (b)(8) as paragraphs (b)(4) through (b)(7), respectively.

PART 15—CONTRACTING BY NEGOTIATION

15.304 [Amended]

8. Amend section 15.304 by removing paragraph (c)(4); and redesignating paragraphs (c)(5) and (c)(6) as paragraphs (c)(4) and (c)(5), respectively.

9. Amend section 15.305 by revising paragraph (a)(2)(v); and removing from paragraph (a)(5) “15.304(c)(3)(ii) and (c)(5)” and adding “15.304(c)(3)(ii) and (c)(4)” in its place.

The revision reads 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).

* * * * *

10. Amend section 15.503 by—

a. Revising the introductory text of paragraph (a)(2)(i);

b. Removing paragraph (a)(2)(i)(B); and

c. Redesignating paragraphs (a)(2)(i)(C) through (a)(2)(i)(E) as paragraphs (a)(2)(i)(B) through (a)(2)(i)(D).

The revision reads as follows:

15.503 Notifications to unsuccessful offerors.

(a) * * *

(2) * * *

(i) In addition to the notice in paragraph (a)(1) of this section, the contracting officer shall notify each offeror in writing prior to award and

upon completion of negotiations and determinations of responsibility—

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

11. Amend section 19.000 by—
 a. Revising the introductory text of paragraph (a);
 b. Removing paragraphs (a)(8) through (a)(10); and
 c. Redesignating paragraphs (a)(11) and (a)(12) as paragraphs (a)(9) and (a)(10), respectively.

The revision reads as follows:

19.000 Scope of part.

(a) This part implements the acquisition-related sections of the Small Business Act (15 U.S.C. 631, *et seq.*), applicable sections of the Armed Services Procurement Act (10 U.S.C. 2302, *et seq.*), the Federal Property and Administrative Services Act (41 U.S.C. 252), and Executive Order 12138, May 18, 1979. It covers—

* * * * *

19.201 [Amended]

12. Amend section 19.201 by—
 a. Removing paragraph (b);
 b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d), respectively; and
 c. Removing paragraph (f).

19.202–6 [Amended]

13. Amend section 19.202–6 by removing paragraph (a)(3); and redesignating paragraphs (a)(4) through (a)(6) as paragraphs (a)(3) through (a)(5), respectively.

14. Revise section 19.304 to read as follows:

19.304 Disadvantaged business status.

The contracting officer may accept an offeror's representation that it is an SDB concern. The provision at 52.219–1, Small Business Program Representations, or 52.212–3(c)(4), Offeror Representations and Certifications—Commercial Items, is used to collect SDB data.

15. Revise section 19.305 to read as follows:

19.305 Protests and reviews of disadvantaged business status.

(a) This section applies to protests and reviews of a small business concern's disadvantaged status as a prime contractor or subcontractor. An SBA review of a firm's small disadvantaged business (SDB) status differs from a formal protest at 19.703.

(1) A representation of SDB status on a Federal prime contract will be deemed a misrepresentation of SDB status if the

firm does not meet the requirements of 13 CFR 124.1001(b).

(2) Any person or entity that misrepresents a firm's status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" ("SDB status") in order to obtain an 8(d) (15 U.S.C. 637(d)) contracting opportunity will be subject to the penalties imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as well as any other penalty authorized by law.

(3) SBA may initiate the review of SDB status on any firm that has represented itself to be an SDB on a subcontract to a Federal prime contract whenever it receives credible information calling into question the SDB status of the firm.

(b) Requests for an SBA review of SDB status may be forwarded to the Small Business Administration, Assistant Administrator for SDBCE, 409 Third Street, SW, Washington, DC 20416.

(c) Protests of a small business concern's disadvantaged status as a subcontractor are processed under 19.703(a)(2). Protests of a concern's size as a prime contractor are processed under 19.302. Protests of a concern's size as a subcontractor are processed under 19.703(b).

19.309 [Amended]

16. Amend section 19.309 by removing paragraph (b); and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

17. Amend section 19.703 by revising paragraph (a)(2) to read as follows:

19.703 Eligibility requirements for participating in the program.

(a) * * *

(2) In connection with a subcontract, 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 124.1007 through 124.1014. 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.

* * * * *

19.705–1 [Amended]

18. Amend section 19.705–1 by removing the second sentence.

19.708 [Amended]

19. Amend section 19.708 in paragraphs (c)(1), (c)(2), and (c)(3) by

removing "business, HUBZone small business, and" and adding "business, HUBZone small business, small disadvantaged business, and" in its place.

Subpart 19.11—[Removed and Reserved]

20a. Remove and reserve subpart 19.11, consisting of sections 19.1101 through 19.1104.

Subpart 19.12—[Removed and Reserved]

20b. Remove and reserve subpart 19.12, consisting of sections 19.1201 through 19.1204.

21. Amend section 19.1307 by revising paragraph (d) to read as follows:

19.1307 Price evaluation preference for HUBZone small business concerns.

* * * * *

(d) A concern that is a HUBZone small business concern shall receive the benefit of the HUBZone small business price evaluation preference. The applicable price evaluation preference shall be calculated independently against an offeror's base offer. The individual preference shall be added to the base offer to arrive at the total evaluated price for that offer.

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1006 [Amended]

22. Amend section 22.1006 by—
 a. Removing from paragraph (a)(2)(i)(C) "52.204–8(c)(2)(iii) or (iv)" and adding "52.204–8(c)(2)(ii) or (iii)" in its place;

b. Removing from paragraph (e)(2)(i) "52.204–8(c)(2)(iii)" and adding

"52.204–8(c)(2)(ii)" in its place; and
 c. Removing from paragraph (e)(4)(i) "52.204–8(c)(2)(iv)" and adding "52.204–8(c)(2)(iii)" in its place.

PART 26—OTHER SOCIOECONOMIC PROGRAMS

26.304 [Amended]

23. Amend section 26.304 by removing the last sentence.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

24. Amend section 52.204–8 by—
 a. Revising the date of the provision;
 b. Revising paragraph (c)(1)(xxi);
 c. Removing paragraph (c)(2)(i); and
 d. Redesignating paragraphs (c)(2)(ii) through (c)(2)(vii) as (c)(2)(i) through (c)(2)(vi), respectively.

The revised text reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Date)

* * * * *

(c) * * *

(1) * * *

(xxi) 52.226–2, Historically Black College or University and Minority Institution Representation. This provision applies to solicitations for research, studies, supplies, or services of the type normally acquired from higher educational institutions.

* * * * *

25. Amend section 52.212–3 by—

a. Revising the date of the provision;

b. Removing paragraph (c)(10);

c. Redesignating paragraph (c)(11) as paragraph (c)(10);

d. Removing from the newly redesignated paragraph (c)(10)(ii) “representation in paragraph (c)(11)(i)” and adding “representation in paragraph (c)(10)(i)” in its place;

e. Revising Alternate I; and

f. Removing Alternate II.

The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Date)

* * * * *

Alternate I (Date). As prescribed in 12.301(b)(2), add the following paragraph (c)(11) to the basic provision:

(11) (Complete if the offeror has represented itself as disadvantaged in paragraph (c)(4) of this provision.)

* * * * *

26. Amend section 52.212–5 by—

a. Revising the date of the clause;

b. Removing paragraphs (b)(17), (b)(18), and (b)(19); and

c. Redesignating paragraphs (b)(20) through (b)(49) as paragraphs (b)(17) through (b)(46), respectively.

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 (Date)

* * * * *

27. Amend section 52.219–1 by revising the date of the provision; and adding in paragraph (c), in alphabetical order, the definition “Small disadvantaged business concern.”

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (Date)

* * * * *

Small disadvantaged business concern means a small business concern—

Not less than 51 percent of which is unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, the management and daily business operations of which are controlled by one or more socially and economically disadvantaged individuals (as defined at 13 CFR subpart B, 124.1002).

* * * * *

28. Amend section 52.219–2 by revising the introductory paragraph to read as follows:

52.219–2 Equal Low Bids.

As prescribed in 19.309(b), insert the following provision:

* * * * *

29. Amend section 52.219–4 by revising the date of the clause, and paragraph (b)(3) to read as follows:

52.219–4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

* * * * *

Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Date)

* * * * *

(b) * * *

(3) A concern that is a HUBZone small business concern will receive the benefit of the HUBZone small business price evaluation preference. The applicable price evaluation preference shall be calculated independently against an offeror's base offer. The individual preference amounts shall be added together to arrive at the total evaluated price for that offer.

* * * * *

30. Amend section 52.219–8 by revising the date of the clause, and in paragraph (c), revising the definition “Small disadvantaged business concern” to read as follows:

52.219–8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (Date)

* * * * *

(c) * * *

Small disadvantaged business concern means a small business concern that represents, as part of its offer that it meets the criteria—

(1) Consistent with 13 CFR subpart B, 124.1002, and means a small business concern—

(i) Not less than 51 percent of which is unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, the management and daily business operations of which are controlled by one or more socially and economically disadvantaged individuals; and

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

(2) It represents in writing that it qualifies as a small disadvantaged business (SDB) for any Federal subcontracting program, and believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals and meets the SDB eligibility criteria of 13 CFR 124.1002.

* * * * *

31. Amend section 52.219–10 by revising the date of the clause; and removing from paragraph (b) “business, HUBZone small business, and” and adding “business, HUBZone small business, small disadvantaged business, and” in its place. The revised text reads as follows:

52.219–10 Incentive Subcontracting Program.

* * * * *

Incentive Subcontracting Program (Date)

* * * * *

52.219–22, 52.219–23, 52.219–24, 52.219–25, and 52.219–26 [Removed and Reserved]

32. Remove and reserve sections 52.219–22, 52.219–23, 52.219–24, 52.219–25, and 52.219–26.

33. Amend section 52.219–28 by revising the introductory paragraph to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

As prescribed in 19.309(c), insert the following clause:

* * * * *

34. Amend section 52.226–2 by revising the date of the provision, and in paragraph (a) by revising the definition “Historically black college or university” to read as follows:

52.226–2 Historically Black College or University and Minority Institution Representation.

* * * * *

Historically Black College or University and Minority Institution Representation (Date)

(a) * * *

Historically black college or university means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2 and includes any nonprofit research institution that was an

integral part of such a college or university before November 14, 1986.

* * * * *

PART 53—FORMS

35. Revise section 53.219 to read as follows:

53.219 Small business programs.

The following standard form is prescribed for use in reporting small business (including Alaska Native Corporations and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including Alaska Native Corporations and Indian tribes), and women-owned small

business subcontracting data, as specified in part 19: SF 294, (Rev. (Date)) Subcontracting Report for Individual Contracts. SF 294 is authorized for local reproduction.

36. Amend section 53.301–294 by revising the form to read as follows:

53.301–294 Subcontracting Report for Individual Contracts.

BILLING CODE 6820–EP–P

SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS*(See instructions on reverse)*

OMB No: 9000-0006

Expires: 3/31/2013

Public reporting burden for this collection of information is estimated to average 55.34 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Acquisition Policy Division, Regulatory Secretariat, GSA, Washington, DC 20405.

1. CORPORATION, COMPANY, OR SUBDIVISION COVERED			3. DATE SUBMITTED	
a. COMPANY NAME			4. REPORTING PERIOD FROM INCEPTION OF CONTRACT THRU: <div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> MAR 31 <input type="checkbox"/> SEPT 30 </div> <div>YEAR</div> </div>	
b. STREET ADDRESS				
c. CITY	d. STATE	e. ZIP CODE		
2. CONTRACTOR IDENTIFICATION NUMBER			5. TYPE OF REPORT <input type="checkbox"/> REGULAR <input type="checkbox"/> FINAL <input type="checkbox"/> REVISED	
6. ADMINISTERING ACTIVITY <i>(Please check applicable box)</i>				
<div style="display: flex; flex-wrap: wrap;"> <div style="width: 33%;"><input type="checkbox"/> ARMY</div> <div style="width: 33%;"><input type="checkbox"/> GSA</div> <div style="width: 33%;"><input type="checkbox"/> NASA</div> <div style="width: 33%;"><input type="checkbox"/> NAVY</div> <div style="width: 33%;"><input type="checkbox"/> DOE</div> <div style="width: 33%;"><input type="checkbox"/> OTHER FEDERAL AGENCY <i>(Specify)</i></div> <div style="width: 33%;"><input type="checkbox"/> AIR FORCE</div> <div style="width: 33%;"><input type="checkbox"/> DEFENSE CONTRACT MANAGEMENT AGENCY</div> </div>				
7. REPORT SUBMITTED AS <i>(Check one and provide appropriate number)</i>			8. AGENCY OR CONTRACTOR AWARDING CONTRACT	
<input type="checkbox"/> PRIME CONTRACTOR <input type="checkbox"/> SUBCONTRACTOR			a. AGENCY'S OR CONTRACTOR'S NAME	
PRIME CONTRACT NUMBER			b. STREET ADDRESS	
SUBCONTRACT NUMBER			c. CITY	
9. DOLLARS AND PERCENTAGES IN THE FOLLOWING BLOCKS: <input type="checkbox"/> DO INCLUDE INDIRECT COSTS <input type="checkbox"/> DO NOT INCLUDE INDIRECT COSTS.			d. STATE e. ZIP CODE	

SUBCONTRACT AWARDS

TYPE	CURRENT GOAL		ACTUAL CUMULATIVE	
	WHOLE DOLLARS	PERCENT	WHOLE DOLLARS	PERCENT
10a. SMALL BUSINESS CONCERNS <i>(Dollar Amount and Percent of 10c.)</i> (SEE SPECIFIC INSTRUCTIONS)				
10b. LARGE BUSINESS CONCERNS <i>(Dollar Amount and Percent of 10c.)</i> (SEE SPECIFIC INSTRUCTIONS)				
10c. TOTAL <i>(Sum of 10a and 10b.)</i>		100.0%		100.0%
11. SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i> (SEE SPECIFIC INSTRUCTIONS)				
12. WOMEN-OWNED SMALL BUSINESS (WOSB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i> (SEE SPECIFIC INSTRUCTIONS)				
13. HUBZone SMALL BUSINESS (HUBZone SB) CONCERNS <i>(Dollar Amount and Percent of 10c.)</i> (SEE SPECIFIC INSTRUCTIONS)				
14. VETERAN-OWNED SMALL BUSINESS CONCERNS <i>(Dollar Amount and Percent of 10c.)</i> (SEE SPECIFIC INSTRUCTIONS)				
15. SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS CONCERNS <i>(Dollar Amount and Percent of 10c.)</i> (SEE SPECIFIC INSTRUCTIONS)				
16. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCU) AND MINORITY INSTITUTIONS (MI) <i>(Dollar Amount)</i> (SEE SPECIFIC INSTRUCTIONS)				
17. ALASKA NATIVE CORPORATIONS (ANCs) AND INDIAN TRIBES THAT HAVE NOT BEEN CERTIFIED BY THE SMALL BUSINESS ADMINISTRATION AS SMALL DISADVANTAGED BUSINESSES <i>(Dollar Amount)</i> (SEE SPECIFIC INSTRUCTIONS)				
18. ALASKA NATIVE CORPORATIONS (ANCs) AND INDIAN TRIBES THAT ARE NOT SMALL BUSINESSES <i>(Dollar Amount)</i> (SEE SPECIFIC INSTRUCTIONS)				

Previous Edition is Not Usable

STANDARD FORM 294 (REV.)

Prescribed by GSA-FAR (48 CFR 53.219(a))

19. REMARKS

20a. NAME OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN	20b. TELEPHONE NUMBER	
	AREA CODE	NUMBER

GENERAL INSTRUCTIONS

1. This report is not required for small businesses.
2. This report is not required for commercial items for which a commercial plan has been approved, nor from large businesses in the Department of Defense (DOD) Test Program for Negotiation of Comprehensive Subcontracting plans. The Summary Subcontract Report (SSR) is required for contractors operating under one of these two conditions and should be submitted to the Government in accordance with the instructions on that form.
3. This form collects subcontract award data from prime contractors/ subcontractors that: (a) hold one or more contracts over \$650,000 (over \$1,500,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), Women-Owned Small Business (WOSB), HUBZone Small Business (HUBZone SB), Veteran-Owned Small Business (VOSB) and Service-Disabled Veteran-Owned Small Business concerns under a subcontracting plan. For the National Aeronautics and Space Administration (NASA), this form also collects subcontract award data for Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs).
4. This report is required for each contract containing a subcontracting plan and must be submitted to the administrative contracting officer (ACO) or contracting officer if no ACO is assigned, semi-annually, during contract performance for the periods ended March 31st and September 30th. A separate report is required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the previous report.
5. Only subcontracts involving performance in the United States or its outlying areas should be included in this report with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas.
6. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in this report.
7. Subcontract award data reported on this form by prime contractors/ subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors unless you have been designated to receive an SB and SDB credit from an Alaska Native Corporation (ANC) or Indian tribe.
8. FAR 19.703 sets forth the eligibility requirements for participating in the subcontracting program.
9. Actual achievements must be reported on the same basis as the goals set forth in the contract. For example, if goals in the plan do not include indirect and overhead items, the achievements shown on this report should not include them either.

SPECIFIC INSTRUCTIONS

BLOCK 2: For the Contractor Identification Number, enter the nine-digit Data Universal Numbering System (DUNS) number that identifies the specific contractor establishment. If there is no DUNS number available that identifies the exact name and address entered in Block 1, contact Dun and Bradstreet Information Services at 1-866-705-5711 or via the Internet at <http://www.dnb.com>. The contractor should be prepared to provide the following information: (i) Company legal business name. (ii) Tradestyle, doing business, or other name by which your entity is commonly recognized. (iii) Company physical street address, city, state and ZIP Code. (iv) Company mailing address, city, state and ZIP Code (if separate from physical). (v) Company telephone number. (vi) Date the company was started. (vii) Number of employees at your location. (viii) Chief executive officer/key manager. (ix) Line of business (industry). (x) Company Headquarters name and address (reporting relationship within your entity).

BLOCK 4: Check only one. Note that all subcontract award data reported on this form represents activity since the inception of the contract through the date indicated on this block.

BLOCK 5: Check whether this report is a "Regular," "Final," and/or "Revised" report. A "Final" report should be checked only if the contractor has completed the contract or subcontract reported in Block 7. A "Revised" report is a change to a report previously submitted for the same period.

BLOCK 6: Identify the department or agency administering the majority of subcontracting plans.

BLOCK 7: Indicate whether the reporting contractor is submitting this report as a prime contractor or subcontractor and the prime contract or subcontract number.

BLOCK 8: Enter the name and address of the Federal department or agency awarding the contract or the prime contractor awarding the subcontract.

BLOCK 9: Check the appropriate block to indicate whether indirect costs are included in the dollar amounts in blocks 10a through 16. To ensure comparability between the goal and actual columns, the contractor may include indirect costs in the actual column only if the subcontracting plan included indirect costs in the goal.

BLOCKS 10a through 18: Under "Current Goal," enter the dollar and percent goals in each category (SB, SDB, WOSB, VOSB, service-disabled VOSB, and HUBZone SB) from the subcontracting plan approved for this contract. (If the original goals agreed upon at contract award have been revised as a result of contract modifications, enter the original goals in Block 19. The amounts entered in Blocks 10a through 16 should reflect the revised goals.) There are no goals for Blocks 17 and 18. Under "Actual Cumulative," enter actual subcontract achievements (dollars and percent) from the inception of the contract through the date of the report shown in Block 4. In cases where indirect costs are included, the amounts should include both direct awards and an appropriate prorated portion of indirect awards. However, the dollar amounts reported under "Actual Cumulative" must be for the same period of time as the dollar amounts shown under "Current Goal." For a contract with options, the current goal should represent the aggregate goal since the inception of the contract. For example, if the contractor is submitting the report during Option 2 of a multiple year contract, the current goal would be the cumulative goal for the base period plus the goal for Option 1 and the goal for Option 2.

BLOCK 10a: Report all subcontracts awarded to SBs including subcontracts to SDBs, WOSB, VOSB, service-disabled VOSB, and HUBZone SBs. For NASA contracts, include subcontracting awards to HBCUs and MIs. Include subcontracts awarded to ANCs and Indian tribes that are not small businesses and that are not certified by the SBA as SDBs where you have been designated to receive their SB and SDB credit. Where your company and other companies have been designated by an ANC or Indian tribe to receive SB and SDB credit for a subcontract awarded to the ANC or Indian tribe, report only the portion of the total amount of the subcontract that has been designated to your company.

BLOCK 10b: Report all subcontracts awarded to large businesses (LBs) and any other-than-small businesses. Do not include subcontracts awarded to ANCs and Indian tribes that have been reported in 10a above.

BLOCK 10c: Report on this line the total of all subcontracts awarded under this contract (the sum of lines 10a and 10b).

BLOCKS 11 - 16: Each of these items is a subcategory of Block 10a. Note that in some cases the same dollars may be reported in more than one block (e.g., SDBs owned by women or veterans).

BLOCK 11: Report all subcontracts awarded to SDBs (including WOSB, VOSB, service-disabled VOSBs, and HUBZone SB SDBs). Include subcontracts awarded to ANCs and Indian tribes that have not been certified by SBA as SDBs where you have been designated to receive their SDB credit. Where your company and other companies have been designated by an ANC or Indian tribe to receive their SDB credit for a subcontract awarded to the ANC or Indian tribe, report only the portion of the total amount of the subcontract that has been designated to your company. For NASA contracts, include subcontracting awards to HBCUs and MIs.

BLOCK 12: Report all subcontracts awarded to WOSBs (including SDBs, VOSBs (including service-disabled VOSBs), and HUBZone SBs that are also WOSBs).

BLOCK 13: Report all subcontracts awarded to HUBZone SBs (including WOSBs, VOSBs (including service-disabled VOSBs), and SDBs that are also HUBZone SBs).

BLOCK 14: Report all subcontracts awarded to VOSBs including service-disabled VOSBs (and including SDBs, WOSBs, and HUBZone SBs that are also VOSBs).

BLOCK 15: Report all subcontracts awarded to service-disabled VOSBs (including SDBs, WOSBs, and HUBZone SBs that are also service-disabled VOSBs).

BLOCK 16: (For contracts with NASA): Report all subcontracts with HBCUs/MIs. Complete the column under "Current Goal" only when the subcontracting plan establishes a goal.

BLOCK 17: Report all subcontracts awarded to ANCs and Indian tribes that are reported in Block 11, but have not been certified by SBA as SDBs.

BLOCK 18: Report all subcontracts awarded to ANCs and Indian tribes that are reported in Block 10a, but are not small businesses.

BLOCK 19: Enter a short narrative explanation if (a) SB, SDB, WOSB, VOSB, service-disabled VOSB, or HUBZone SB accomplishments fall below that which would be expected using a straight-line projection of goals through the period of contract performance; or (b) if this is a final report, any one of the six goals were not met.

DEFINITIONS

1. Direct Subcontract Awards are those that are identified with the performance of one or more specific Government contract(s).

2. Indirect costs are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

DISTRIBUTION OF THIS REPORT

For the Awarding Agency or Contractor:

The original copy of this report should be provided to the contracting officer at the agency or contractor identified in Block 8. For contracts with DOD, a copy should also be provided to the Defense Contract Management Agency (DCMA) at the cognizant Defense Contract Management Area Operations (DCMAO) office.

For the Small Business Administration (SBA):

A copy of this report must be provided to the cognizant Commercial Market Representative (CMR) at the time of a compliance review. It is NOT necessary to mail the SF 294 to SBA unless specifically requested by the CMR.