



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

NOV 19 2009

In reply refer to DARS Tracking Number: 2009-O0009

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION & LOGISTICS MANAGEMENT),
ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQ
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Class Deviation to the Federal Acquisition Regulation – Small
Disadvantaged Business Certification for Subcontractors

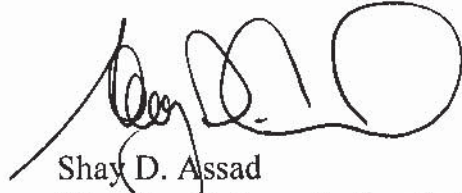
Effective immediately, contracting officers are authorized to use the attached
deviations from the Federal Acquisition Regulation (FAR)—

- 19.703, “Eligibility requirements for participating in the program” (Attachment 1);
- Paragraph (c) of FAR clause 52.219-8, “Utilization of Small Business Concerns” (Attachment 2); and
- Paragraph (a) of FAR 52.219-25, “Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting” (Attachment 3).

A class deviation is necessary to implement changes to the requirement for Small Disadvantaged Business (SDB) certifications. On October 3, 2008, the Small Business Administration (SBA) published an Interim Final Rule in the Federal Register (73 FR 57490), which eliminates the requirement for SBA SDB certification for subcontractors. Prime contractors may now rely on the written representation of subcontractors regarding SDB status.

To be consistent with the SBA's current regulation and to alleviate any adverse impact to the SDB subcontracting goal for DoD prime contractors, contracting officers will deviate from the FAR by following the revised guidance and substituting the attached clauses. Contracting officers may modify existing solicitations and contracts in accordance with FAR 1.108(d).

This deviation remains in effect until incorporated in the FAR or otherwise rescinded. My staff point of contact for this matter is Ms. Cassandra R. Freeman, 703-602-8383 or cassandra.freeman@osd.mil.

A handwritten signature in black ink, appearing to read 'Shay D. Assad', with a large circular flourish at the end.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment(s):
As Stated

cc:
DoD Small Business Programs Director

19.703 Eligibility requirements for participating in the program (DEVIATION).

(a) Except as provided in paragraph (c) of this section to be eligible as a subcontractor under the program, a concern must represent itself as a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or woman-owned small business concern.

(1) To represent itself as a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, or woman-owned small business concern, a concern must meet the appropriate definition (see 2.101 and 19.001).

(2) In connection with a subcontract, ~~or a requirement for which the apparently successful offeror received an evaluation credit for proposing one or more SDB subcontractors~~, the contracting officer or the SBA may protest the disadvantaged status of a proposed subcontractor. Such protests will be processed in accordance with 13 CFR 124.~~1007~~ 1015 through 124.1022 . Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as a small business, veteran-owned small business, service-disabled veteran-owned small business, **small disadvantaged business**, or a woman-owned small business concern. ~~The clause at 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting, requires the contractor to obtain representations of small disadvantaged status from subcontractors through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at 52.219-22, Small Disadvantaged Business Status. The clause requires the contractor to confirm that a subcontractor representing itself as a small disadvantaged business concern is identified by SBA as a small disadvantaged business concern by accessing SBA's database (PRO-Net) or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility. The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.10011601 through 121.1608. Protests challenging a subcontractor's small disadvantaged business representation must be filed in accordance with 13 CFR 124.1007.1015 through 124.1022.~~

(c)(1) In accordance with 43 U.S.C. 1626, the following procedures apply:

(i) Subcontracts awarded to an ANC or Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business (SDB) concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe.

(ii) Where one or more subcontractors are in the subcontract tier between the prime contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

(A) In most cases, the appropriate contractor is the contractor that awarded the subcontract to the ANC or Indian tribe.

(B) If the ANC or Indian tribe designates more than one contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each contractor. The sum of the amounts designated to various contractors cannot exceed the total value of the subcontract.

(C) The ANC or Indian tribe shall give a copy of the written designation to the contracting officer, the prime contractor, and the subcontractors in between the prime contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(D) If the contracting officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the contractor that awarded the subcontract to the ANC or Indian tribe will be considered the designated contractor.

(2) A contractor acting in good faith may rely on the written representation of an ANC or an Indian tribe as to the status of the ANC or Indian tribe unless an interested party challenges its status or the contracting officer has independent reason to question its status. In the event of a challenge of a representation of an ANC or Indian tribe, the interested parties shall follow the procedures at 26.103(b) through (e).

(d)(1) The contractor shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the Central Contractor Registration (CCR) database or by contacting the SBA. Options for contacting the SBA include—

- (i) HUBZone web page at http://dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm;
- (ii) In writing to the—

AA/HUB,
U.S. Small Business Administration,
409 3rd Street, S.W.,
Washington DC 20416; or

- (iii) E-mail at hubzone@sba.gov.

(2) Protests challenging HUBZone small business concern size status must be filed in accordance with 13 CFR 121.411

52.219-8 Utilization of Small Business Concerns.

As prescribed in 19.708(a), insert the following clause:

UTILIZATION OF SMALL BUSINESS CONCERNS (MAY 2004) (DEVIATION)

(a) It is the policy of the United States that small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns.

(b) The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the Contractor's compliance with this clause.

(c) *Definitions.* As used in this contract—

"HUBZone small business concern" means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

"Service-disabled veteran-owned small business concern"—

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

"Small business concern" means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

"Small disadvantaged business concern" means a small business concern that represents, as part of its offer that it meets the criteria consistent with **13 CFR 124.1002—**

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

~~(2) No material change in disadvantaged ownership and control has occurred since its certification;~~

(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; and

~~¶(3)-(2)~~ Where the concern is owned by one or more individuals, **and the net worth of each individual represents that their net worth upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2).; and**

~~(4) It is identified, on the date of its representation, as a certified small disadvantaged business in the database maintained by the Small Business Administration (PRO-Net).~~

"Veteran-owned small business concern" means a small business concern—

(1) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans.

"Women-owned small business concern" means a small business concern—

(1) That is at least 51 percent owned by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(2) Whose management and daily business operations are controlled by one or more women.

(d) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern, a veteran-owned small business concern, a service-disabled veteran-owned small business concern, a HUBZone small business concern, a small disadvantaged business concern, or a women-owned small business concern.

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

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

SMALL DISADVANTAGED BUSINESS PARTICIPATION PROGRAM—DISADVANTAGED STATUS AND REPORTING (APR 2008) (DEVIATION)

(a) *Disadvantaged status for joint venture partners, team members, and subcontractors.* This clause addresses disadvantaged status for joint venture partners, teaming arrangement members, and subcontractors and is applicable if this contract contains small disadvantaged business (SDB) participation targets. The Contractor shall obtain may accept self-representations of small disadvantaged status from joint venture partners, teaming arrangement members, and subcontractors through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at FAR ~~52.219-22~~, ~~Small Disadvantaged Business Status~~. The Contractor shall confirm that a joint venture partner, team member, or subcontractor representing itself as a small disadvantaged business concern is a small disadvantaged business concern certified by the Small Business Administration by using the Central Contractor Registration database or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

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

(End of clause)