

terms of the applicable schedule contract.

* * * * *

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

51.103 [Amended]

6. Section 51.103 is amended by removing paragraph (c) and redesignating paragraph (d) as (c).

[FR Doc. 97-21493 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 19

[FAC 97-01; FAR Case 96-002; Item IX]

RIN 9000-AH66

Federal Acquisition Regulation; Certificate of Competency

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement revisions made to the Small Business Administration's regulations covering the procurement assistance programs. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

DATES: *Effective date:* August 22, 1997

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 21, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to: farcase.96-002@gsa.gov.

Please cite FAC 97-01, FAR case 96-002 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 97-01, FAR case 96-002.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends FAR Parts 9 and 19 to comply with revisions made to the Small Business Administration's (SBA) procurement assistance programs contained in 13 CFR Part 125 (61 FR 3310, January 31, 1996). This rule increases the threshold over which contracting officers may appeal the award of a Certificate of Competency (COC) from \$25,000 to \$100,000; updates the names of SBA offices involved in processing COCs; and implements the requirement that compliance with the limitations on subcontracting be considered an element of responsibility. Also, this interim rule removes language implementing Section 15(c) of the Small Business Act (15 U.S.C. 644(c)) as amended by Section 305 of Public Law 103-403, Small Business Administration Reauthorization and Amendments Act of 1994. Section 305, which authorized public and private organizations for the handicapped to participate in acquisitions set aside for small businesses, has expired.

B. Regulatory Flexibility Act

This 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 the rule does not impose any new requirements on contractors, large or small. The Small Business Administration has certified that the revisions to 13 CFR 125 being implemented by this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. An initial regulatory flexibility analysis has therefore not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subparts also 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 97-01, FAR case 96-002) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

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 urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to conform the Federal Acquisition Regulation to revisions made in 13 CFR Part 125, pertaining to the Small Business Administration (SBA) procurement assistance programs. The SBA revisions became effective on March 1, 1996. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating the final rule.

List of Subjects in 48 CFR Parts 9 and 19

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 9 and 19 are amended as set forth below:

1. The authority citation for 48 CFR Parts 9 and 19 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 9—CONTRACTOR QUALIFICATIONS

2. Section 9.103 is amended in paragraph (b) by revising the third sentence to read as follows:

9.103 Policy.

(b) * * * If the prospective contractor is a small business concern, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determinations of Responsibility-
* * *

* * * * *

3. Section 9.104-3 is amended in paragraph (a) by adding a sentence at the end, and in paragraph (d) by redesignating the text as paragraph

(d)(1) and by adding (d)(2) to read as follows:

9.104-3 Application of standards.

(a) * * * Consideration of a prime contractor's compliance with limitations on subcontracting shall take into account the time period covered by the contract base period or quantities plus option periods or quantities, if such options are considered when evaluating offers for award.

* * * * *

(d) * * * (1) * * *

(2) A small business that is unable to comply with the limitations on subcontracting at 52.219-14 may be considered nonresponsible.

PART 19—SMALL BUSINESS PROGRAMS

19.001 [Amended]

4. Section 19.001 is amended by removing definitions for "Handicapped individual" and "Public or private organization for the handicapped", and in the definition of "Nonmanufacturer rule" by removing "121.906" and inserting "121.406" in its place.

19.201 [Amended]

5. Section 19.201(c) is amended in the introductory text by removing "and 13 CFR 125.4(g)(7)".

19.302 [Amended]

6. Section 19.302 is amended:
 (a) In paragraph (c)(1) by removing the word "Regional" and inserting "Area" in its place;

(b) In the introductory text of paragraph (d) by removing "13 CFR 121.9" and inserting "13 CFR 121.10" in its place;

(c) In paragraphs (g)(2) and (i)(1) by removing "Regional Administrator" and inserting "Area Director" in its place;

(d) In (i)(2) by removing "a Regional Administrator's" and inserting "an Area Director's" in its place;

(e) In (i)(3) by removing "121.11" and inserting "121.1001" in its place; and

(f) In (j), in the first and third sentences, by removing the word "regional" and inserting "area" in its place; and in the first sentence parenthetical by removing "above" and inserting "of this section" in its place.

7. Section 19.508(e) is revised to read as follows:

19.508 Solicitation provisions and contract clauses.

* * * * *

(e) The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the

requirement is to be set aside for small business and the contract amount is expected to exceed \$100,000.

Subpart 19.6—Certificates of Competency and Determinations of Responsibility

8. The heading of Subpart 19.6 is revised to read as set forth above.

9. Section 19.601 is amended by revising paragraph (a); by redesignating (c) as (e); and by adding new paragraphs (c) and (d) to read as follows:

19.601 General.

(a) A Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting) for the purpose of receiving and performing a specific Government contract.

* * * * *

(c) The COC program is applicable to all Government acquisitions. A contracting officer shall, upon determining an apparent successful small business offeror to be nonresponsible, refer that small business to the SBA for a possible COC, even if the next acceptable offer is also from a small business.

(d) When a solicitation requires a small business to adhere to the limitations on subcontracting, a contracting officer's finding that a small business cannot comply with the limitation shall be treated as an element of responsibility and shall be subject to the COC process. When a solicitation requires a small business to adhere to the definition of a nonmanufacturer, a contracting officer's determination that the small business does not comply shall be processed in accordance with subpart 19.3.

* * * * *

10. Section 19.602-1 is amended by revising the introductory text of paragraphs (a) and (a)(2), (c) introductory text, and (c)(2); and by adding (e) to read as follows:

19.602-1 Referral.

(a) Upon determining and documenting that an apparent successful small business offeror lacks certain elements of responsibility (including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting), the contracting officer shall—

* * * * *

(2) Refer the matter to the cognizant SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located, in accordance with agency procedures, except that referral is not necessary if the small business concern—

* * * * *

(c) The referral shall include—

* * * * *

(2) If applicable, a copy of the following:

- (i) Solicitation.
- (ii) Final offer submitted by the concern whose responsibility is at issue for the procurement.
- (iii) Abstract of bids or the contracting officer's price negotiation memorandum.
- (iv) Preaward survey.
- (v) Technical data package (including drawings, specifications and statement of work).
- (vi) Any other justification and documentation used to arrive at the nonresponsibility determination.

* * * * *

(e) Contract award shall be withheld by the contracting officer for a period of 15 business days (or longer if agreed to by the SBA and the contracting officer) following receipt by the appropriate SBA Area Office of a referral that includes all required documentation.

11. Section 19.602-2 is revised to read as follows:

19.602-2 Issuing or denying a Certificate of Competency (COC).

Within 15 business days (or a longer period agreed to by the SBA and the contracting agency) after receiving a notice that a small business concern lacks certain elements of responsibility, the SBA Area Office will take the following actions:

(a) Inform the small business concern of the contracting officer's determination and offer it an opportunity to apply to the SBA for a COC. (A concern wishing to apply for a COC should notify the SBA Area Office serving the geographical area in which the headquarters of the offeror is located.)

(b) Upon timely receipt of a complete and acceptable application, elect to visit the applicant's facility to review its responsibility.

(1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer.

(2) The SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but may presume responsibility exists as to elements other than those cited as deficient.

(c) Consider denying a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(d) When the Area Director determines that a COC is warranted (for contracts valued at \$25,000,000 or less), notify the contracting officer and provide the following options:

(1) Accept the Area Director's decision to issue a COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale for the decision; or

(2) Ask the Area Director to suspend the case for one or more of the following purposes:

(i) To permit the SBA to forward a detailed rationale for the decision to the contracting officer for review within a specified period of time.

(ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file and to attempt to resolve any issues.

(iii) To submit any information to the SBA Area Office that the contracting officer believes the SBA did not consider (at which time the SBA Area Office will establish a new suspense date mutually agreeable to the contracting officer and the SBA).

(iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under 19.602-3. However, there is no contracting officer's appeal when the Area Office proposes to issue a COC valued at \$100,000 or less.

(e) At the completion of the process, notify the concern and the contracting officer that the COC is denied or is being issued.

(f) Refer recommendations for issuing a COC on contracts greater than \$25,000,000 to SBA Headquarters.

12. Section 19.602-3 is revised to read as follows:

19.602-3 Resolving differences between the agency and the Small Business Administration.

(a) *COCs valued between \$100,000 and \$25,000,000.* (1) When disagreements arise about a concern's ability to perform, the contracting officer and the SBA shall make every effort to reach a resolution before the SBA takes final action on a COC. This shall be done through the complete exchange of information and in accordance with agency procedures. If agreement cannot be reached between the contracting officer and the SBA Area Office, the contracting officer shall request that the Area Office suspend action and refer the matter to SBA Headquarters for review. The SBA Area

Office shall honor the request for a review if the contracting officer agrees to withhold award until the review process is concluded. Without an agreement to withhold award, the SBA Area Office will issue the COC in accordance with applicable SBA regulations.

(2) SBA Headquarters will furnish written notice to the procuring agency's Director, Office of Small and Disadvantaged Business Utilization (OSDBU) or other designated official (with a copy to the contracting officer) that the case file has been received and that an appeal decision may be requested by an authorized official.

(3) If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a time period agreed upon by both agencies) that it intends to appeal the issuance of the COC.

(4) The appeal and any supporting documentation shall be filed by the procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a period agreed upon by both agencies) after SBA Headquarters receives the agency's notification in accordance with paragraph (a)(3) of this subsection.

(5) The SBA Associate Administrator for Government Contracting will make a final determination, in writing, to issue or to deny the COC.

(b) *SBA Headquarters' decisions on COCs valued over \$25,000,000.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency and offer it the following options:

(i) To request that the SBA suspend case processing to allow the agency to meet with SBA Headquarters personnel and review all documentation contained in the case file; or

(ii) To submit to SBA Headquarters for evaluation any information that the contracting agency believes has not been considered.

(2) After reviewing all available information, the SBA will make a final decision to either issue or deny the COC.

(c) *Reconsideration of a COC after issuance.* (1) The SBA reserves the right to reconsider its issuance of a COC, prior to contract award, if—

(i) The COC applicant submitted false information or omitted materially adverse information; or

(ii) The COC has been issued for more than 60 days (in which case the SBA may investigate the firm's current circumstances).

(2) When the SBA reconsiders and reaffirms the COC, the procedures in subsection 19.602-2 do not apply.

(3) Denial of a COC by the SBA does not preclude a contracting officer from awarding a contract to the referred concern, nor does it prevent the concern from making an offer on any other procurement.

[FR Doc. 97-21494 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Part 19

[FAC 97-01; FAR Case 97-008; Item X]

RIN 9000-AH65

**Federal Acquisition Regulation;
Economically Disadvantaged
Individuals**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to update the definition of "small disadvantaged business concern" for conformance with Small Business Administration regulations. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 97-01, FAR case 97-008.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the definition of "small disadvantaged business concern" at FAR 19.001 to update the categories of individuals considered to be socially and economically