

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

**48 CFR Parts 2, 5, 6, 13, 14, 15, 19, 33,
36, and 52**

[FAC 2001–23; FAR Case 2004–002]

RIN 9000–AJ92

**Federal Acquisition Regulation;
Procurement Program for Service-
Disabled Veteran-Owned Small
Business Concerns**

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 (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 308 of the Veterans Benefits Act of 2003, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans (Pub. L. 108–183). The law provides for set-aside and sole source procurement authority for service-disabled veteran-owned small business (SDVOSB) concerns. This interim rule is published in conjunction with the interim rule proposed by the Small Business Administration.

DATES: *Effective Date:* May 5, 2004.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before July 6, 2004, to be considered in the formulation of a final rule.

ADDRESSES: Submit electronic comments via the Internet to—farcase.2004-002@gsa.gov or <http://www.regulations.gov>. Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405. Please submit comments only and cite FAC 2001–23, FAR case 2004–002, in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff,

Procurement Analyst, at (202) 501–0044. Please cite FAC 2001–23, FAR case 2004–002.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 308 of the Veterans Benefits Act of 2003, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans (Pub. L. 108–183) provides that the contracting officer may—

- Award contracts on the basis of competition restricted to SDVOSB concerns if there is a reasonable expectation that two or more SDVOSB concerns will submit offers for the contracting opportunity and that the award can be made at a fair market price; or
- Award a sole source contract to a responsible SDVOSB concern if there is not a reasonable expectation that two or more SDVOSB concerns will submit an offer, the anticipated contract price (including options) will not exceed \$5 million (for manufacturing) or \$3 million otherwise, and the contract award can be made at a fair and reasonable price.

The law limits use of SDVOSB procurement authority to procurements that would not otherwise be made from Federal Prison Industries (section 4124 or 4125 of title 18, United States Code) or the Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. 46 *et seq.*).

The interim rule amends the FAR to—

- Establish the SDVOSB set-aside and sole source procurement authority;
- Correct an ambiguity in the definition of SDVOSB at FAR 2.101, 52.212–3, 52.219–1 and 52.219–8;
- Correct appropriate references to all authorized small business categories at FAR 5.206;
- Require the use of a numbered note when setting aside for SDVOSB at FAR 5.207(d). A new note to accomplish this task has been provided to FedBizOpps;
- Identify SDVOSB set-asides as another method of providing for full and open competition after exclusion of sources, without the need for a separate justification or determination and findings at FAR Subpart 6.2;
- Recognize that SDVOSB set-asides above the micro-purchase threshold, but below the simplified acquisition threshold are at the sole discretion of the contracting officer and are not subject to review by the Small Business Administration (SBA) Procurement Center Representatives, FAR 13.003 and 19.1405;
- Add correct references in FAR 19.301 regarding penalties for misrepresentations and false statements;

- Add FAR 19.307 to address the procedures for protesting a firm's status as an SDVOSB and cross-reference this subpart in FAR 33.102;

- Add FAR Subpart 19.14 to incorporate policy and procedures for the SDVOSB Procurement Program consistent with SBA regulations;
- Revise FAR 36.501 to identify SDVOSB procurements (FAR Subpart 19.14) and awards pursuant to FAR Subpart 19.11 or FAR Subpart 19.13. SBA requested this technical correction regarding FAR Subparts 19.11 and 19.13; and

- Add FAR clause 52.219–27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, to cover both sole source and competitive awards pursuant to this authority.

The Federal Procurement Data System-Next Generation (FPDS-NG) will be updated to reflect SDVOSB procurement authorities.

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.

B. Regulatory Flexibility Act

The changes 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 the law provides that the contracting officer may use the set-aside and sole source procurement authority when contracting with SDVOSB concerns. Therefore, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001–23, FAR case 2004–002), in correspondence. The analysis is as follows:

This Initial Regulatory Flexibility Analysis has been prepared in accordance with section 603, title 5, of the United States Code.

1. Description of the reasons why action by the agency is being considered. This interim rule revises the Federal Acquisition Regulation in order to comply with recently enacted Public Law 108–183, Veterans Benefits Act of 2003 (Dec. 16, 2003), section 308, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans. This legislation provides for discretionary set-aside and sole source procurement authority for service-

disabled veteran-owned small business (SDVOSB) concerns. It expands upon existing legislation that provides assistance and support to SDVOSBs to better equip them to form and expand small business enterprises and to increase procurement opportunities, thereby enabling them to realize the American dream that they fought to protect, becoming disabled while serving our country.

2. Succinct statement of the objectives of, and legal basis for, the interim rule. This interim rule implements section 308 of Public Law 108-183 and provides for discretionary set-aside and sole source procurement authority for SDVOSB concerns. The objective is to provide Federal contracting officials a means to improve their performance toward the statutorily mandated 3% government-wide goal for procurement from service-disabled veteran-owned small business concerns.

3. Description of, and, where feasible, estimate of the number of small entities to which the interim rule will apply. The changes 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 the law provides that the contracting officer may use the set-aside and sole source procurement authority when contracting with SDVOSB concerns. Specifically, a query of the Central Contractor Registration system indicates there are 198,732 small businesses registered, but only 4,714 (or 2.3%) of these small businesses are categorized as SDVOSBs. Further, a search of the web site maintained by the Veterans Administration only resulted in the identification of 775 SDVOSBs. However, these numbers may not be accurate as terminology has not always been used consistently in all databases and regulations. Although the percentage is less than 2.5% it will undoubtedly impact the contracting dollars and opportunities afforded small business entities in the various small business categories as well as service-disabled veteran-owned small business entities.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the interim 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 recordingkeeping requirements on large or small entities.

5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the interim rule. The companion interim rule by SBA will be published at the same time as the FAR interim rule.

6. Description of any significant alternatives to the interim rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the interim rule on small entities. There are not any alternatives to publishing this interim rule that will accomplish the stated objectives of Public Law 108-183, Veterans Benefits Act of 2003 (Dec. 16, 2003), Section 308. The rule

includes only FAR text revisions required to implement the statute cited herein.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that 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 because this interim rule includes FAR text revisions required to implement recently enacted Public Law 108-183, Veterans Benefits Act of 2003 (December 16, 2003), Section 308, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans.

However, pursuant to Public Law 98-577 and FAR 1.501, the Councils 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 2, 5, 6, 13, 14, 15, 19, 33, 36, 52

Government procurement.

Dated: April 26, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Federal Acquisition Circular (FAC) 2001-23 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-23 are effective May 5, 2004.

Dated: April 23, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: April 23, 2004.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: April 21, 2004.

Tom Luedtke,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 is revised 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b) in the definition "Service-disabled veteran-owned small business concern" by revising paragraph (1)(ii) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Service-disabled veteran-owned small business concern—

(1) * * *

(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.

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.206 by revising the introductory text of paragraph (a) to read as follows:

5.206 Notices of subcontracting opportunities.

(a) The following entities may transmit a notice to the GPE to seek competition for subcontracts, to increase participation by qualified HUBZone small business, small, small disadvantaged, women-owned small business, veteran-owned small business and service-disabled veteran-owned small business concerns, and to meet established subcontracting plan goals:

* * * * *

■ 4. Amend section 5.207 by revising paragraph (d) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(d) *Set-asides.* When the proposed acquisition provides for a total or partial small business set-aside, very small business set aside, HUBZone small business set-aside, or a service-disabled veteran-owned small business set-aside, the appropriate Numbered Note will be cited.

* * * * *

PART 6—COMPETITION REQUIREMENTS

■ 5. Add section 6.206 to read as follows:

6.206 Set-asides for service-disabled veteran-owned small business concerns.

(a) To fulfill the statutory requirements relating to the Veterans Benefits Act of 2003 (15 U.S.C. 657f), contracting officers may set-aside solicitations to allow only service-disabled veteran-owned small business concerns to compete (see 19.1405).

(b) No separate justification or determination and findings are required under this part to set aside a contract action for service-disabled veteran-owned small business concerns.

■ 6. Amend section 6.302-5 by adding paragraph (b)(7) to read as follows:

6.302-5 Authorized or required by statute.

* * * * *

(b) * * *

(7) Sole source awards under the Veterans Benefits Act of 2003 (15 U.S.C. 657f).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 7. Amend section 13.003 by revising paragraph (b)(2) to read as follows:

13.003 Policy.

* * * * *

(b) * * *

(2) The contracting officer may 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 not exceeding the simplified acquisition threshold. The contracting officer's decision not to set aside an acquisition for HUBZone small business or service-disabled veteran-owned small business concerns participation below the

simplified acquisition threshold is not subject to review under Subpart 19.4.

* * * * *

PART 14—SEALED BIDDING

■ 8. Amend section 14.502 by redesignating paragraph (b)(6) as (b)(7) and adding a new paragraph (b)(6) to read as follows:

14.502 Conditions for use.

* * * * *

(b) * * *

(6) The use of a set-aside for service-disabled veteran-owned small business concerns (see Subpart 19.14).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 9. Amend section 15.503 in paragraph (a)(2) by—

- a. Removing “or” from the end of paragraph (a)(2)(i)(B);
- b. Removing the period from the end of paragraph (a)(2)(i)(C) and adding “; or” in its place;
- c. Adding a new paragraph (a)(2)(i)(D); and
- d. Revising paragraph (a)(2)(ii)(C) to read as follows:

15.503 Notifications to unsuccessful offerors.

* * * * *

(a) * * *

(2) * * *

(i) * * *

(D) When using the service-disabled veteran-owned small business procedures in 19.1405.

(ii) * * *

(C) That no response is required unless a basis exists to challenge the small business size status, disadvantaged status, HUBZone status, or service-disabled veteran-owned status of the apparently successful offeror.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 10. Amend section 19.000 by revising paragraph (a)(3); removing “and” from the end of paragraph (a)(10); revising paragraph (a)(11); and adding paragraph (a)(12) to read as follows:

19.000 Scope of part.

(a) * * *

(3) Setting acquisitions aside for exclusive competitive participation by small business, HUBZone small business, and service-disabled veteran-owned small business concerns;

* * * * *

(11) The use of veteran-owned small business concerns; and

(12) Sole source awards to HUBZone small business and service-disabled veteran-owned small business concerns.

* * * * *

■ 11. Amend section 19.201 by revising paragraph (d)(10) to read as follows:

19.201 General policy.

* * * * *

(d) * * *

(10) Make recommendations in accordance with agency procedures as to whether a particular acquisition should be awarded under Subpart 19.5 as a small business set-aside, under Subpart 19.8 as a Section 8(a) award, under Subpart 19.13 as a HUBZone set-aside, or under Subpart 19.14 as a service-disabled veteran-owned small business set-aside;

* * * * *

- 12. Amend section 19.202-6 by—
- a. Removing “and” from the end of paragraph (a)(3);
- b. Removing the period from the end of paragraph (a)(4) and adding “; and” in its place; and
- c. Adding paragraph (a)(5) to read as follows:

19.202-6 Determination of fair market price.

(a) * * *

(5) Service-disabled veteran-owned small business set-asides (see Subpart 19.14).

* * * * *

■ 13. Amend section 19.301 by revising paragraph (d) to read as follows:

19.301 Representation by the offeror.

* * * * *

(d) If the SBA determines that the status of a concern as a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business has been misrepresented in order to obtain a set-aside contract, an 8(a) subcontract, a subcontract that is to be included as part or all of a goal contained in a subcontracting plan, or a prime or subcontract to be awarded as a result, or in furtherance of any other provision of Federal law that specifically references Section 8(d) of the Small Business Act for a definition of program eligibility, the SBA may take action as specified in Sections 16(a) or 16(d) of the Act. If the SBA declines to take action, the agency may initiate the process. The SBA's regulations on penalties for misrepresentations and false statements are contained in 13 CFR 121.108 for

small business, 13 CFR 124.501 for 8(a) small business, 13 CFR 124.1011 for small disadvantaged business, 13 CFR 125.29 for veteran or service-disabled veteran-owned small business, and 13 CFR 126.900 for HUBZone small business.

■ 14. Redesignate section 19.307 as section 19.308 and add a new section 19.307 to read as follows:

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

(a) For sole source acquisitions, the SBA or the contracting officer may protest the apparently successful offeror's service-disabled veteran-owned small business status. For service-disabled veteran-owned small business set-asides, any interested party may protest the apparently successful offeror's service-disabled veteran-owned small business concern status.

(b) Protests relating to whether a service-disabled veteran-owned small business concern is a small business for purposes of any Federal program are subject to the procedures of Subpart 19.3. Protests relating to small business size status for the acquisition and the service-disabled veteran-owned small business status requirements will be processed concurrently by SBA.

(c) All protests must be in writing and must state all specific grounds for the protest. Assertions that a protested concern is not a service-disabled veteran-owned small business concern, without setting forth specific facts or allegations, are insufficient. An offeror must submit its protest to the contracting officer. The contracting officer and the SBA must submit protests to SBA's Associate Administrator for Government Contracting. The SBA regulations are found at 13 CFR 125.24 through 125.28.

(d) An offeror's protest must be received by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror (in negotiated acquisitions). Any protest received after these time limits is untimely. Any protest received prior to bid opening or notification of intended award, whichever applies, is premature and shall be returned to the protester.

(e) Except for premature protests, the contracting officer must forward to SBA by mail or facsimile transmission (202-205-6390) any protest received, notwithstanding whether the contracting officer believes that the protest is insufficiently specific or untimely. The protest must be

accompanied by a referral letter, with the notation on the envelope or facsimile cover sheet: "Attn: Service-Disabled Veteran Status Protest," and be sent to Associate Administrator for Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(f) The referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including the solicitation number; the name, address, telephone number and facsimile number of the contracting officer; whether the contract was sole-source or set-aside; whether the protester submitted an offer; whether the protested concern was the apparent successful offeror; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted; and whether a contract has been awarded.

(g) The Associate Administrator for Government Contracting will notify the protester and the contracting officer of the date the protest was received and whether the protest will be processed or dismissed for lack of timeliness or specificity.

(h) All questions about service-disabled veteran-owned small business size or status must be referred to the SBA for resolution. When making its determinations of veteran or service-disabled veteran's status, the SBA will rely upon existing Department of Veteran's Affairs or Department of Defense determinations. SBA will determine the service-disabled veteran-owned small business status of the protested concern within 15 business days after receipt of a protest. If SBA does not contact the contracting officer within 15 business days, the contracting officer may award the contract to the apparently successful offeror, unless the contracting officer has granted SBA an extension. The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest.

(i) SBA will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Associate Deputy Administrator for Government Contracting and Office of Hearings and Appeals (OHA) pursuant to 13 CFR part 134.

(j) The protested service-disabled veteran-owned small business concern, the protester, or the contracting officer

may file appeals of protest determinations with SBA's OHA. The OHA must receive the appeal no later than 5 business days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the 5-day period.

(k) The appeal must be in writing. The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the decision is erroneous or what significant fact the Office of Government Contracting (OGC) failed to consider.

(l) The party appealing the decision must provide notice of the appeal to the contracting officer and either the protested service-disabled veteran-owned small business concern or the original protester, as appropriate. SBA will not consider additional information or changed circumstances that were not disclosed at the time of the OGC's decision or that are based on disagreement with the findings and conclusions contained in the determination.

(m) The OHA will make its decision within 5 business days of the receipt of the appeal, if practicable, and will base its decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested service-disabled veteran-owned small business concern. The SBA decision, if received before award, will apply to the pending acquisition. SBA rulings received after award will not apply to that acquisition. The OHA's decision is the final decision.

■ 15. Amend section 19.501 by redesignating paragraphs (d) thru (h) as paragraphs (e) thru (i), respectively; adding a new paragraph (d); and revising the second sentence of newly designated paragraph (e) to read as follows:

19.501 General.

* * * * *

(d) The small business reservation and set-asides requirements at 19.502-2 do not preclude award of a contract to a service-disabled veteran-owned small business concern under Subpart 19.14.

(e) * * * The contracting officer shall document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless a HUBZone or service-disabled veteran-owned small business set-aside or HUBZone or service-disabled veteran-owned small business sole source award is anticipated. * * *

* * * * *

19.800 General.

- 16. Amend section 19.800 in the first sentence of paragraph (e) by removing "19.5 or 19.13," and adding "19.5, 19.13, or 19.14," in its place.
- 17. Amend section 19.804-2 by revising paragraph (a)(9) to read as follows:

19.804-2 Agency offering.

(a) * * *

(9) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business, HUBZone, or service-disabled veteran-owned small business set-aside and that no other public communication (such as a notice through the Governmentwide point of entry (GPE)) has been made showing the contracting agency's clear intention to set-aside the acquisition for small business, HUBZone small business, or service-disabled veteran-owned small business concerns.

* * * * *

- 18. Amend section 19.1007 by revising paragraphs (b)(2) and (c)(1)(i) to read as follows:

19.1007 Procedures.

* * * * *

(b) * * *

(2) Acquisitions in the designated industry groups must continue to be considered for placement under the 8(a) Program (see Subpart 19.8), the HUBZone Program (see Subpart 19.13), and the Service-Disabled Veteran-Owned Small Business Procurement Program (see Subpart 19.14).

(c) * * *

(1) * * *

(i) For acquisitions \$25,000 or less, proceed in accordance with Subpart 19.5, 19.8, 19.13, or 19.14; or

* * * * *

- 19. Amend section 19.1102 by redesignating paragraphs (b)(5) and (b)(6) as (b)(6) and (b)(7), respectively; and adding a new paragraph (b)(5) to read as follows:

19.1102 Applicability.

* * * * *

(b) * * *

(5) That are set-aside for service-disabled veteran-owned small business concerns;

* * * * *

- 20. Amend section 19.1202-2 by revising paragraph (b)(1) to read as follows:

19.1202-2 Applicability.

* * * * *

(b) * * *

(1) Small business set-asides (see Subpart 19.5), HUBZone set-asides (see

Subpart 19.13), and service-disabled veteran-owned small business set-asides (see Subpart 19.14);

* * * * *

- 21. Add Subpart 19.14, consisting of sections 19.1401 through 19.1407, to read as follows:

Subpart 19.14—Service-Disabled Veteran-Owned Small Business Procurement Program

Sec.

- 19.1401 General.
- 19.1402 Applicability.
- 19.1403 Status as a service-disabled veteran-owned small business concern.
- 19.1404 Exclusions.
- 19.1405 Service-disabled veteran-owned small business set-aside procedures.
- 19.1406 Sole source awards to service-disabled veteran-owned small business concerns.
- 19.1407 Contract clauses.

19.1401 General.

(a) The Veterans Benefit Act of 2003 (15 U.S.C. 657f) created the procurement program for small business concerns owned and controlled by service-disabled veterans (commonly referred to as the "Service-Disabled Veteran-owned Small Business (SDVOSB) Procurement Program").

(b) The purpose of the Service-Disabled Veteran-Owned Small Business Program is to provide Federal contracting assistance to service-disabled veteran-owned small business concerns.

19.1402 Applicability.

The procedures in this subpart apply to all Federal agencies that employ one or more contracting officers.

19.1403 Status as a service-disabled veteran-owned small business concern.

(a) Status as a service-disabled veteran-owned small business concern is determined in accordance with 13 CFR parts 125.8 through 125.13; also see 19.307.

(b) At the time that a service-disabled veteran-owned small business concern submits its offer, it must represent to the contracting officer that it is a—

- (1) Service-disabled veteran-owned small business concern; and
- (2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the procurement.

(c) A joint venture may be considered a service-disabled veteran owned small business concern if—

- (1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

- (3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101; and
- (4) The joint venture meets the requirements of 13 CFR 125.15(b).

(d) Any service-disabled veteran-owned small business concern (nonmanufacturer) must meet the requirements in 19.102(f) to receive a benefit under this program.

19.1404 Exclusions.

This subpart does not apply to—

(a) Requirements that can be satisfied through award to—

- (1) Federal Prison Industries, Inc. (see Subpart 8.6);
- (2) Javits-Wagner-O'Day Act participating non-profit agencies for the blind or severely disabled (see Subpart 8.7);

(b) Orders under indefinite delivery contracts (see Subpart 16.5);

(c) Orders against Federal Supply Schedules (see Subpart 8.4);

(d) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) Program, unless SBA has consented to release the requirements from the 8(a) Program; or

(e) Requirements for commissary or exchange resale items.

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

(a) The contracting officer 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. The contracting officer shall consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards (see 19.1406).

(b) To set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the contracting officer must have a reasonable expectation that—

- (1) Offers will be received from two or more service-disabled veteran-owned small business concerns; and
- (2) Award will be made at a fair market price.

(c) If the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern. If the contracting

officer receives no acceptable offers from service-disabled veteran-owned small business concerns, the service-disabled veteran-owned set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (see Subpart 19.5).

(d) The procedures at 19.202-1 and, except for acquisitions not exceeding the simplified acquisition threshold, at 19.402 apply to this section. When the SBA intends to appeal a contracting officer's decision to reject a recommendation of the SBA procurement center representative to set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 working days of receiving the contracting officer's notice of rejection. Upon receipt of notice of SBA's intent to appeal, the contracting officer shall suspend action on the acquisition unless the head of the contracting activity makes a written determination that urgent and compelling circumstances, which significantly affect the interests of the Government, exist. Within 15 working days of SBA's notification to the contracting officer, SBA shall file its formal appeal with the head of the contracting activity, or that agency may consider the appeal withdrawn. The head of the contracting activity shall reply to SBA within 15 working days of receiving the appeal. The decision of the head of the contracting activity shall be final.

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 19.501(d) and 6.302-5), provided—

(1) Only one service-disabled veteran-owned small business concern can satisfy the requirement;

(2) The anticipated award price of the contract (including options) will not exceed—

(i) \$5 million for a requirement within the NAICS codes for manufacturing; or
(ii) \$3 million for a requirement within any other NAICS code;

(3) The service-disabled veteran-owned small business concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The SBA has the right to appeal the contracting officer's decision not to make a service-disabled veteran-owned small business sole source award.

19.1407 Contract clauses.

The contracting officer shall insert the clause 52.219-27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, in solicitations and contracts for acquisitions under 19.1405 and 19.1406.

PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 22. Amend section 33.102 by revising the last sentence of paragraph (a) to read as follows:

33.102 General.

(a) * * * (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, and 19.307 for protests of service-disabled veteran-owned small business status.)

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.501 [Amended]

■ 23. Amend section 36.501 in the first sentence of paragraph (b) by removing “19.5 or 19.8,” and adding “19.5, 19.8, 19.11, 19.13, or 19.14” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-3 Offeror Representations and Certifications—Commercial Items.

■ 24. Amend section 52.212-3 by revising the date of the provision to read “(May 2004)”; and in paragraph (a) of the provision in the definition “Service-disabled veteran-owned small business concern”, paragraph (1)(ii), by removing “case of a” and adding “case of a service-disabled” in its place.

■ 25. Amend section 52.212-5 by—

■ a. Revising the date of the clause;

■ b. Removing “(Oct 2000)” from paragraph (b)(7) and adding “(May 2004)” in its place;

■ c. Redesignating paragraphs (b)(13) through (b)(33) as (b)(14) through (b)(34), respectively;

■ d. Adding a new paragraph (b)(13); and

■ e. Removing “(Oct 2000)” from paragraph (e)(1)(i) and adding “(May 2004)” in its place. The revised and added text reads as follows:

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 (May 2004)

* * * * *

(b) * * *
(13) 52.219-27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (May 2004).

* * * * *

52.213-4 [Amended]

■ 26. Amend section 52.213-4 by revising the date of the clause to read “(May 2004)”; and by removing “(Apr 2003)” from paragraph (a)(2)(vi) of the clause and adding “(May 2004)” in its place.

52.219-1 [Amended]

■ 27. Amend section 52.219-1 by—
■ a. Revising the date of the provision to read “(May 2004)”;
■ b. Removing “case of a” from paragraph (c), in the definition “Service-disabled veteran-owned small business concern”, paragraph (1)(ii), and adding “case of a service-disabled” in its place; and
■ c. Removing “19.307(a)(2)” from Alternate I and adding “19.308(a)(2)” in its place.

52.219-2 [Amended]

■ 28. In the introductory text of section 52.219-2, remove “19.307(c)” and add “19.308(c)” in its place.

52.219-8 [Amended]

■ 29. Amend section 52.219-8 by revising the date of the clause to read “(May 2004)”; and in paragraph (c) in the definition “Service-disabled veteran-owned small business concern”, remove “case of a” from paragraph (1)(ii) and add “case of a service-disabled” in its place.

52.219-22 [Amended]

■ 30. Amend section 52.219-22 by removing “19.307(b)” from the introductory paragraph and the introductory paragraph of Alternate I and adding “19.308(b)” in their place.

■ 31. Add section 52.219-27 to read as follows:

52.219-27 Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside.

As prescribed in 19.1407, insert the following clause:

Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (May 2004)

(a) *Definition. 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).

(b) *General.* (1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation will be made to a service-disabled veteran-owned small business concern.

(c) *Agreement.* A service-disabled veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for—

(1) Services (except construction), at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other service-disabled veteran-owned small business concerns;

(2) Supplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other service-disabled veteran-owned small business concerns;

(3) General construction, at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other service-disabled veteran-owned small business concerns; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other service-disabled veteran-owned small business concerns.

(d) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations: That it is a service-disabled veteran-owned small business concern, and that it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement; and

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation.

(4) The joint venture meets the requirements of 13 CFR 125.15(b)

(e) Any service-disabled veteran-owned small business concern (nonmanufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this program.

(End of Clause)

52.244-6 [Amended]

■ 32. Amend section 52.244-6 by revising the date of the clause to read "(May 2004)"; and by removing "(Oct 2000)" from paragraph (c)(1)(i) of the clause and adding "(May 2004)" in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2001-23 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001-23 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact Ms. Rhonda Cundiff at (202) 501-0044.

* Procurement Program for Service-Disabled Veteran-Owned Small Business Concerns (FAR Case 2004-002)

This interim rule amends FAR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 to implement Section 308 of the Veterans Benefits Act of 2003, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans (Pub. L. 108-183). The law provides for set-aside and sole source procurement authority for service-disabled veteran-owned small business (SDVOSB) concerns. This interim rule is published in conjunction with the interim rule proposed by the Small Business Administration.

Dated: April 26, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

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