OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION AND TECHNOLOGY

August 6, 1998

DP(DAR)

In reply refer to
DFARS Case: 98-D007
D. L. 98-018

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT, ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Reform of Affirmative Action in Federal Procurement

We have amended the Defense Federal Acquisition Regulation Supplement (DFARS) guidance concerning programs for small disadvantaged business concerns. These amendments conform to a Department of Justice (DoJ) proposal to reform affirmative action in Federal procurement and are consistent with the changes to the Federal Acquisition Regulation made in Federal Acquisition Circular 97-06, dated June 30, 1998, effective October 1, 1998. DoJ's proposal is designed to ensure compliance with the constitutional standards established by the Supreme Court in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

This interim DFARS rule is effective October 1, 1998.

Eleanor Spector

Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir

DFARS Case 98-D007, Reform of Affirmative Action in Federal Procurement - Interim Rule.

PART 205--PUBLICIZING CONTRACT ACTIONS

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205.207 Preparation and transmittal of synopsis.

(d) ~~(i) For small disadvantaged business set-asides under 219.502-2-70, use CBD Numbered Note 4.~~

~~(ii) For acquisitions being considered for small disadvantaged business set-aside, use CBD Numbered Note 6.~~

~~(iii)~~ **[(i)]** * * *

~~(iv)~~ **[(ii)]** * * *

~~(v)~~ **[(iii)]** * * *

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PART 206--COMPETITION REQUIREMENTS

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206.203 Set-asides for small business ~~and labor surplus area~~ concerns.

(b) Also no separate justification or determination and findings is required for contract actions processed ~~as small disadvantaged business set-asides (219.502-2-70) or~~ as historically black college and university and minority institution set-asides (**[see]** 226.7003).

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PART 217--SPECIAL CONTRACTING METHODS

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217.401 General.

[(1)] When leader company contracting is to be considered, take special effort to select a small disadvantaged business (SDB) concern as the follower company **[if--**

(i) The follower company will be a subcontractor; or

(ii) The follower company will be a prime contractor and the Standard Industrial Classification (SIC) Major Group of the acquisition is one in which use of a price evaluation adjustment is currently authorized (see FAR 19.201(b)).

(2) If the follower company will be a subcontractor, or if a price evaluation adjustment in the SIC Major Group is authorized, and] ~~Where other than~~ an SDB is **[not]** selected as the follower company, the contracting officer shall document the contract file to reflect--

(~~1~~**[i]**) The extent of actions taken to identify SDB concerns for participation in the acquisition; and

(~~2~~**[ii]**) The rationale for selection of a non-SDB as the follower company.

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PART 219--SMALL BUSINESS PROGRAMS

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219.001 Definitions.

~~The definition of "small disadvantaged business concern" to be used for DoD contracts is in the provision at 252.219-7000 and is more restrictive than the definition in FAR 19.001.~~
["Small disadvantaged business concern," as used in Subpart 217.4 (if the follower company will be a prime contractor), Subpart 219.11, and Subpart 236.6 (if the small disadvantaged business concern is a prime contractor or a participant in a joint venture at the prime contract level), is defined at FAR 19.001, paragraph (b) of the definition of "small disadvantaged business concern." As used elsewhere in the DFARS, the term "small disadvantaged business concern," for both prime contractors and subcontractors, is as defined at FAR 19.001, paragraph (b) of the definition of "small disadvantaged business concern," except that the firm need not have received certification as a small disadvantaged business concern by the Small Business Administration or be listed on the register of small disadvantaged business concerns maintained by the Small Business Administration.]

219.201 General policy.

(a) The DoD will use the Section 8(a) program, small disadvantaged business ~~set-asides and~~ evaluation preferences, advance payments, outreach, and technical assistance to meet its five percent goal for contract and subcontract awards to small disadvantaged businesses.

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[(f) The Directors, Office of Small and Disadvantaged Business Utilization, of the military departments and defense agencies are responsible for determining whether use of the price evaluation adjustment to achieve a small disadvantaged business goal has caused non-SDB firms in a particular Standard Industrial Classification Major Group to bear an undue burden or other inappropriate effect. A copy of each determination shall be forwarded to the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition and Technology), simultaneously with submittal to the Office of Federal Procurement Policy.]

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219.202-5 Data collection and reporting requirements.

Determine the premium percentage to be entered in Item D4E of the Individual Contract**[ing]** Action Report (DD Form 350), (see 253.204-70), as follows--

(1) For small disadvantaged business or historically black college and university/minority institution set-asides, divide the difference between the fair market price and the award price by the fair market price.

(2) For ~~219.7000~~ **[price]** evaluation ~~preference~~ **[adjustment]** awards **[(see FAR Subpart 19.11)]**, divide the difference between the low responsive offer and the award price by the low responsive offer.

(3) For ~~219.502-3~~ **[partial small business set-asides with]** preferential consideration **[for small disadvantaged business concerns]** ~~awards~~, divide the difference between the award price on the non-set-aside portion and the award price on the set-aside portion by the award price on the non-set-aside portion.

(b) Within 60 days after the end of each fiscal year, departments and agencies shall submit the report to the

Secretary of Defense, who will report to the SBA on behalf of all DoD departments and agencies. Reports must include--

(i) Justification for failure to meet goals established by the Office of the Secretary of Defense; and

(ii) Planned actions for increasing participation by such firms in future contract awards.

~~**SUBPART 219.3--DETERMINATION OF STATUS AS A SMALL BUSINESS CONCERN**~~

~~**219.301 Representation by the offeror.**~~

~~(a) A concern must qualify as a small disadvantaged business (SDB) on the date of submission of its initial offer including price to be eligible for--~~

~~(i) Award under a small disadvantaged business set-aside;~~

~~(ii) Preferential consideration as an SDB under a partial set-aside; or~~

~~(iii) An evaluation preference for SDBs.~~

~~(b) The contracting officer shall protest an offeror's representation that it is a small disadvantaged business concern when--~~

~~(i) There is conflicting evidence;~~

~~(ii) The offeror represents that the Small Business Administration previously determined the concern to be non-disadvantaged; or~~

~~(iii) The offeror represents its ownership as other than Black American, Hispanic American, Native American (including Indian tribes and Native Hawaiian organizations), Asian Pacific American, or Subcontinent Asian American; unless the offeror represents that--~~

~~(A) It currently is in the Section 8(a) program; or~~

~~(B) Within the 6 months preceding submission of its offer, the offeror was determined by the Small Business Administration to be socially and economically disadvantaged; and no circumstances have changed to vary that determination.~~

~~**219.302 Protesting a small business representation.**~~

~~**219.302-70 Protesting a small disadvantaged business representation.**~~

~~This section applies to protests of a small business concern's status as socially and economically disadvantaged. Protests of a concern's size are processed under FAR 19.302. Any offeror, the contracting officer, or the Small Business Administration (SBA) may protest a concern's representation of disadvantaged status.~~

~~(a) An offeror may protest a concern's representation of disadvantaged status by filing a protest with the contracting officer. The protest --~~

~~(1) Must be filed within the times specified in FAR 19.302(d)(1); and~~

~~(2) Must contain specific detailed evidence supporting the basis of protest.~~

~~(b) The contracting officer or the SBA may protest a concern's representation of disadvantaged status at any time.~~

~~(1) If a contracting officer's protest is based on information brought to his/her attention by a party ineligible to protest directly or ineligible to protest under the timeliness standard, the contracting officer must be persuaded by the evidence presented before adopting the grounds for protest as his or her own.~~

~~(2) The SBA protests a concern's representation of disadvantaged status by filing directly with its Office of Program Eligibility and notifying the contracting officer.~~

~~(c) The contracting officer shall return untimely protests to the protestor. This includes protests filed before bid opening or notification of apparent successful offeror.~~

~~(d) Upon receipt of a timely protest, the contracting officer shall withhold award and forward the protest to the SBA Office of Program Eligibility, Office of Minority Small Business and Capitol Ownership Development, 409 3rd Street, SW., Washington, D.C. 20416. Send SBA--~~

~~(1) The protest;~~

~~(2) The date the protest was received and a determination of timeliness; and~~

~~(3) The date of bid opening or date on which notification of apparent successful offeror was sent to unsuccessful offerors.~~

~~(e) Do not withhold award when --~~

~~(1) The contracting officer makes a written determination that award must be made to protect the public interest or~~

~~(2) The offeror represents that within the 6 months preceding submission of its offer, the SBA has determined the concern to be socially and economically disadvantaged, and no circumstances have changed to vary that determination.~~

~~(f) The SBA Director, Office of Program Eligibility, will determine the disadvantaged status of the challenged offeror and notify the contracting officer, the challenged offeror, and the protestor. Award may be made on the basis of that determination. The determination is final for purposes of the instant acquisition, unless --~~

~~(1) It is appealed; and~~

~~(2) The contracting officer receives the appeal decision before award.~~

~~(g) If the contracting officer does not receive an SBA determination within 15 working days after the SBA's receipt of the protest, the contracting officer shall presume that the challenged offeror is socially and economically disadvantaged. Do not use the presumption as a basis for award without first inquiring as to when a determination can be expected and waiting for the determination, unless further delay in award would be disadvantageous to the Government.~~

~~(h) An SBA determination may be appealed by --~~

~~(1) The interested party whose protest has been denied;~~

~~(2) The concern whose status was protested; or~~

~~(3) The contracting officer.~~

~~The appeal must be filed with the SBA's Associate Administrator for Minority Small Business and Capital Ownership Development within five working days after receipt of the determination. If the contracting officer receives the SBA's decision on the appeal~~

~~before award, the decision shall apply to the instant acquisition. If the decision is received after award, it will apply to future acquisitions.~~

~~219.304 Solicitation provisions.~~

~~(b) Use the provision at 252.219-7000, Small Disadvantaged Business Concern Representation (DoD Contracts) instead of the provision at FAR 52.219-2, Small Disadvantaged Business Concern Representation.~~

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~~219.501 General.~~

~~(g) This repetitive set-aside procedure applies to DoD.~~

~~(S-70) When a product or service has been acquired successfully by a contracting office as a small disadvantaged business set-aside, all future requirements of that office for that product or service shall be acquired as small disadvantaged business set-asides, except those—~~

~~(1) Processed under small purchase procedures; or~~

~~(2) For which the contracting officer determines there is no reasonable expectation that the criteria for a small disadvantaged business set-aside can be met (see 219.502-2-70(a)).~~

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~~219.502-2-70 Total set-asides for small disadvantaged business concerns.~~

~~(a) Except as provided in paragraphs (b) and (c), the contracting officer shall set aside an acquisition for small disadvantaged businesses when there is a reasonable expectation that—~~

~~(1) Offers will be received from at least two responsible small disadvantaged business (SDB) concerns who—~~

~~(i) Can comply with the FAR 52.219-14 limitations on subcontracting; or~~

~~(ii) In the case of an SDB regular dealer owned by an Indian tribe, including an Alaska Native Corporation, will provide the supplies of a small business for contracts~~

~~awarded during fiscal years 1994 and 1995, as provided in Section 8051 of Pub. L. 103-139 and Section 8012 of Pub. L. 103-335; or,~~

~~(iii) In the case of other SDB regular dealers, will provide the supplies of SDBs (except as provided in Alternate I of the clause at 252.219-7002, Notice of Small Disadvantaged Business Set-Aside).~~

~~(2) Award will be made at not more than ten percent above fair market price; and~~

~~(3) Scientific and/or technological talent consistent with the demands of the acquisition will be offered.~~

~~(b) Do not set aside acquisitions for SDBs when --~~

~~(1) The product or service has been successfully acquired as a small business set-aside (see FAR 19.501(g));~~

~~(2) The acquisition is for construction, including maintenance and repairs, and is under $2 million, or is for dredging under $1 million;~~

~~(3) The acquisition is for architect-engineer services or construction design for military construction projects, without regard to dollar value;~~

~~(4) The acquisition is reserved for the 8(a) program;~~

~~(5) The acquisition is processed under small purchase procedures; or~~

~~(6) The acquisition is for commissary or exchange resale items.~~

~~(c) Pursuant to 10 U.S.C. 2323(g), the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition and Technology), is responsible for determining whether use of small disadvantaged business (SDB) set-asides has caused a particular industry category to bear a disproportionate share of the contracts awarded by a particular contracting activity to achieve its SDB goal. Upon making a determination that a particular industry is bearing a disproportionate share, the OUSD(A&T)SADBU shall limit the use of total SDB set-asides in the affected industry category, at the contracting activity. This limitation shall not apply to solicitations that already had been~~

~~synopsized as SDB set-asides. Forward requests for a determination through agency channels to OUSD(A&T)SADBU and include--~~

~~(1) The standard industrial (SIC) code(s) affected;~~

~~(2) Supporting information to justify the request, including dollars and percentages by the contracting activity, under the affected SIC code(s) for the previous two fiscal years and current fiscal year to date for--~~

~~(i) Total awards;~~

~~(ii) Total awards to small businesses;~~

~~(iii)Total awards to SDBs; and~~

~~(iv) Awards to SDBs under the SDB set-aside program.~~

219.502-3 Partial set-asides.

~~When a portion of an acquisition is to be set aside for small business concerns, except acquisitions for commissary or exchange resale, the contracting officer shall give small disadvantaged business concerns preferential consideration by using the procedures in 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business (SDB) Concerns.~~

[(c)(1) If the Standard Industrial Classification Major Group of the acquisition is one in which use of a price evaluation adjustment for small disadvantaged business concerns is currently authorized (see FAR 19.201(b)), the adjustment shall be applied to the non-set-aside portion.]

~~**219.502-4 Methods of conducting set-asides.**~~

~~(b) Offers on a small disadvantaged business (SDB) set-aside from concerns that do not qualify as SDB concerns shall be considered nonresponsive and shall be rejected.~~

~~**219.504 Set-aside program order of precedence.**~~

~~(b) The order of precedence for DoD is (except see 219.803(c) and 226.71)--~~

~~(i) Total set-aside for small disadvantaged business concerns;~~

~~(ii) Total set-aside for small business concerns;~~

~~(iii) Partial set-aside for small business concerns with preferential consideration for small disadvantaged business concerns.~~

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~~**219.506 Withdrawing or modifying set-asides.**~~

~~(a) Do not withdraw small disadvantaged business set-asides for reasons of price reasonableness unless the low responsive responsible offer exceeds fair market price by more than ten percent.~~

~~**219.508 Solicitation provisions and contract clauses.**~~

~~(d) Use the clause at 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns, instead of the clause in FAR 52.219-7, Notice of Partial Small Business Set-Aside. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.~~

~~(e) Use the clause at 52.219-14, Limitations on Subcontracting, also in small disadvantaged business set asides.~~

~~**219.508-70 Solicitation provisions and contract clauses.**~~

~~Use the clause at 252.219-7002, Notice of Small Disadvantaged Business Set-Aside, in solicitations and contracts for small disadvantaged business set-asides. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.~~

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219.703 Eligibility requirements for participating in the program.

(a) * * *

(2)(A) To be eligible as an SDB subcontractor, a concern must meet the definition in **[219.001]** ~~the provision at 252.219-7000,~~

~~Small Disadvantaged Business Concern Representation (DoD Contracts)~~.

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219.705-4 Reviewing the subcontracting plan.

(d) Challenge any subcontracting plan that does not contain positive goals and consider the extent to which an offeror plans to use competition restricted to ~~small disadvantaged business concerns,~~ historically black colleges and universities~~,~~ or minority institutions. A small disadvantaged business goal of less than five percent must be approved two levels above the contracting officer.

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219.803 Selecting acquisitions for the 8(a) Program.

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(c) Before considering ~~the~~ **[a small business]** set-aside ~~order of precedence in 219.504(b)~~, review the acquisition for offering under the 8(a) Program.

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219.804-1 Agency evaluation.

~~When SBA asks for a requirement for the 8(a) Program, offer the requirement if appropriate, and do not use the small disadvantaged business set-aside procedure. If an acquisition, other than a repetitive acquisition (as described in FAR 19.804-4), was synopsized using either of the notices in 205.207(d)(i) or (ii) before receipt of the SBA request, the request does not have to be honored.~~

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219.1005 Applicability.

(a)(3)(A) Architect-engineering services in support of military construction projects or military family housing projects are exempt from the Small Business Competitiveness Demonstration Program, except for the emerging small business (ESB) set-aside requirements. Accordingly, these shall--

(1) Be reviewed for possible award under the 8(a) ~~p~~**[P]**rogram regardless of dollar value.

(2) Not be set-aside for small business ~~or small disadvantaged business~~ if the estimated value is $85,000 or more (including indefinite delivery-indefinite quantity contracts if the value of all anticipated orders exceeds $85,000).

(3) Be considered for ESB set-aside if the estimated value is both less than the emerging small business reserve amount and less than $85,000.

(4) Be considered for small business set-aside ~~(but not SDB set-aside)~~ if the estimated value is less than $85,000, regardless of whether small business set-asides for other architect-engineer services are prohibited under the Small Business Competitiveness Demonstration Program, when an ESB set-aside is not appropriate.

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219.1006 Procedures.

(b) ~~(1) During the period when small business set-asides cannot be considered for acquisitions in the four designated industry groups--~~

~~(A) The restrictions at 219.502-2-70(b)(1) and (2) do not apply and the acquisitions shall be considered for small disadvantaged business set-asides; and~~

~~(B) The evaluation preference at 219.70 shall not be used. However, note the test program at 219.72 for construction acquisitions.~~

(2) The Director, Small and Disadvantaged Business Utilization, Office of the ~~Deputy~~ Under Secretary of Defense (~~International & Commercial Programs~~ **[Acquisition and Technology]**), will determine whether reinstatement of small business set-asides are necessary to meet the agency goal and will recommend reinstatement to the Director, Defense Procurement. Military departments and defense agencies shall not reinstate small business set-asides unless directed by the Director, Defense Procurement.

(d) Reporting requirements are at 204.670-9.

~~**219.1007 Solicitation provisions.**~~

~~Do not use the clause at 252.219-7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns, in solicitations or contracts for the four designated industry groups.~~

[SUBPART 219.11—PRICE EVALUATION ADJUSTMENT FOR SMALL DISADVANTAGED BUSINESS CONCERNS

219.1102 Applicability.

(b) The price evaluation adjustment also shall not be used in acquisitions that are for commissary or exchange resale.]

SUBPART 219.70--~~EVALUATION PREFERENCE FOR SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS~~ [RESERVED]

~~**219.7000 Policy.**~~
~~Offers from small disadvantaged business concerns shall be given an evaluation preference in accordance with this subpart.~~

~~**219.7001 Applicability.**~~

~~(a) The evaluation preference shall be used in competitive acquisitions except as provided in paragraph (b) of this section and in 219.1006(b)(1)(B).~~

~~(b) Do not use the evaluation preference in acquisition which--~~

~~(1) Use small purchase procedures;~~

~~(2) Are set aside for small disadvantaged businesses;~~

~~(3) Are set-aside for small businesses;~~

~~(4) Are for commissary or exchange resale; or~~

~~(5) Are for long distance telecommunications services.~~

~~**219.7002 Procedures.**~~

~~(a) Give offers from small disadvantaged business concerns a preference in evaluation by adding a factor of ten percent to the price of all offers, except--~~

~~(1) Offers from small disadvantaged business concerns, which have not waived the evaluation preference;~~

~~(2) Offers from historically black colleges and universities or minority institutions, which have not waived the evaluation preference;~~

~~(3) Otherwise successful offers of--~~

~~(i) Eligible products under the Trade Agreements Act when the acquisition equals or exceeds the dollar threshold in FAR 25.402; or~~

~~(ii) Qualifying country end products (see definition in 225.101); and~~

~~(4) Offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government.~~

~~(b) Apply the factor on a line item by line item basis or apply it to any group of items on which award may be made. Add other evaluation factors such as transportation costs or rent-free use of Government facilities to the offers before applying the ten percent factor.~~

~~(c) Do not evaluate offers using the preference when it would cause award to be made at a price which exceeds fair market price by more than ten percent.~~

~~(d) In partial small business set-asides, use the evaluation preference procedures set forth in the clause at 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns, instead of the procedures in paragraphs (a) through (c) of this section.~~

~~219.7003 Solicitation provisions and contract clauses.~~

~~Use the clause at 252.219-7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns, in solicitations and contracts involving the evaluation preference, except those which include the clause at 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.~~

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~~**SUBPART 219.72--EVALUATION PREFERENCE FOR SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS IN CONSTRUCTION ACQUISITIONS--TEST PROGRAM**~~

~~**219.7200 Policy.**~~
~~DoD policy is to ensure that, during this test program, offers from small disadvantaged business (SDB) concerns shall be given an evaluation preference in construction acquisitions.~~

~~**219.7201 Administration of the test program.**~~

~~The test program will be conducted over a 36-month period. The test program will be conducted by all DoD contracting activities that award construction contracts. The focal point for the test program is the Director, Small and Disadvantaged Business Utilization (SADBU), Office of the Deputy Under Secretary of Defense (International and Commercial Programs). The military departments and defense agencies shall submit status reports to the Director, SADBU. The first status report shall be submitted 18 months after initiation of the test program; the second status report shall be submitted 36 months after initiation of the test program. These reports shall specify the impact of the evaluation preference over each of the reporting periods of the test program, and shall provide recommendations with respect to continuation and/or modification of the evaluation preference.~~

~~**219.7202 Applicability.**~~

~~(a) The evaluation preference shall be used in competitive acquisitions for construction (see definition in FAR Subpart 36.1) when work is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.~~

~~(b) Do not use the evaluation preference in acquisitions which—~~

~~(1) Are less than or equal to the simplified acquisition threshold;~~

~~(2) Are set aside for small businesses; or~~

~~(3) Are awarded under section 8(a) procedures.~~

~~(c) The evaluation preference need not be applied when the head of the contracting activity determines that the evaluation preference is having a disproportionate impact on non-SDB concerns or non-disadvantaged small business concerns.~~

~~**219.7203 Procedures.**~~

~~(a) Solicitations that require bonding shall require offerors to separately state bond costs in the offer. Bond costs include the costs of bid, performance, and payment bonds.~~

~~(b) Evaluate total offers. If the apparently successful offeror is an SDB concern, no preference-based evaluation is required under this subpart.~~

~~(c) If the apparently successful offeror is not an SDB concern, evaluate offers excluding bond costs. If, after excluding bond costs, the apparently successful offeror is an SDB concern, add bond costs back to all offers, and give offers from SDB concerns a preference in evaluation by adding a factor of 10 percent to the total price of all offers, except--~~

~~(1) Offers from SDBs which have not waived the evaluation preference; and~~

~~(2) Offers from historically black colleges and universities or minority institutions, which have not waived the evaluation preference.~~

~~(d) When using the procedures in 236.303-70, Additive or deductive items, the evaluation preference in this subpart shall be applied.~~

~~**219.7204 Contract clause.**~~

~~Use the clause at 252.219-7008, Notice of Evaluation Preference for Small Disadvantaged Business Concerns--Construction Acquisitions--Test Program, in all solicitations--~~

~~(1) That involve the evaluation preference of this subpart; and~~

~~(2) Where work is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.~~

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PART 225--FOREIGN ACQUISITION

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225.403 Exceptions.

~~(b) The evaluation preference for small disadvantaged businesses in Subpart 219.70 does not displace an offer of an eligible product.~~

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PART 226--OTHER SOCIOECONOMIC PROGRAMS

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226.7004 ~~Evaluation preference for HBCUs and MIs.~~ [Reserved]

~~In acquisitions which use the evaluation preference described in Subpart 219.70 for small disadvantaged business concerns, the preference also applies to offers from HBCUs or MIs.~~

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226.7008 Solicitation provision and contract clause.

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(b) Use the provision at ~~252.226-7001, Historically Black College or University and Minority Institution Status,~~ **[FAR 52.226-2, Historically Black College or University and Minority Institution Representation,]** in solicitations set-aside for HBCU/MIs and in solicitations ~~which~~ **[that]** contain the clause at ~~252.219-7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns~~ **[FAR 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns].**

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226.7103 Procedure.

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(c) If offers can be expected from business concerns in the vicinity--

(1) Consider section 8(a) only if the 8(a) contractor is located in the vicinity.

~~(2) Set aside the acquisition for small disadvantaged business only if one of the expected offers is from a small disadvantaged business located in the vicinity.~~

(~~3~~**[2]**) Set aside the acquisition for small business only if one of the expected offers is from a small business located in the vicinity.

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PART 236--CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

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236.602-1 Selection criteria.

(a)(i) Establish the evaluation criteria before making the public announcement required by FAR 5.205(c) and include the criteria and their relative order of importance in the announcement. The evaluation criteria should be project specific. Use the information in the DD Form 1391, FY__ Military Construction Project Data, when available, and other pertinent project data in preparing the evaluation criteria.

(4) Use performance evaluation data from the central data base identified in 236.201.

(6) The primary factor in A-E selection is the determination of the most highly qualified firm. Also consider secondary factors such as geographic proximity and equitable distribution of work, but do not attribute greater significance to the secondary factors than to qualifications and past performance. Do not reject the overall most highly qualified firm solely in the interest of equitable distribution of contracts.

(A) Consider the volume of work awarded by DoD during the previous 12 months. In considering equitable distribution of work among A-E firms, include small ~~and small disadvantaged business firms and~~ **[business concerns; historically black colleges and universities and minority institutions;]** firms that have not had prior DoD contracts**[; and small disadvantaged business concerns and joint ventures with small disadvantaged business participants if the Standard Industrial Classification Major Group of the acquisition is one in which use of a price evaluation adjustment is currently authorized (see FAR 19.201(b)).]**

(1) Use data extracted from the Defense Contract Action Data System (DCADS) compiled from DD Form 350, Individual Contracting Action Report. DCADS data may be obtained from the central data base identified in 236.201(c)(1).

(2) Do not consider awards to overseas offices for projects outside the United States, its territories and possessions. Do not consider awards to a subsidiary if the subsidiary is not normally subject to management decisions, bookkeeping, and policies of a holding or parent company or an incorporated subsidiary that operates under a firm name different from the parent company. This allows greater competition.

(B) Consider as appropriate superior performance evaluations on recently completed DoD contracts.

(C) Consider the extent to which potential contractors identify and commit to small business and to small disadvantaged business, historically black college and university, or minority institution performance of the contract~~,~~ ~~whether~~ as ~~a joint venture, teaming arrangement, or~~ subcontractor**[s]**.

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PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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252.212-7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

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CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO DEFENSE ACQUISITIONS OF COMMERCIAL ITEMS ~~(MAR 1998)~~ **[(OCT 1998)]**

* * * * *

(b) The Contractor agrees to comply with any clause that is checked on the following list of DFARS clauses which, if checked, is included in this contract by reference to

implement provisions of law or Executive Orders applicable to acquisitions of commercial items or components.

* * * * *

~~____252.219-7001 Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns (____Alternate I) (Section 9004, Pub. L. 101-165 (10 U.S.C. 2301 (repealed) note)).~~

~~____252.219-7002 Notice of Small Disadvantaged Business Set-Aside (____Alternate I) (15 U.S.C. 644).~~

* * * * *

~~____252.219-7006 Notice of Evaluation Preference for Small Disadvantaged Business Concerns (____Alternate I) (15 U.S.C. 644).~~

* * * * *

252.219-7000 [Removed and Reserved]

252.219-7001 [Removed and Reserved]

252.219-7002 [Removed and Reserved]

* * * * *

252.219-7006 [Removed and Reserved]

* * * * *

252.219-7008 [Removed and Reserved]

* * * * *

PART 253--FORMS

* * * * *

253.204-70 DD Form 350, Individual Contracting Action Report.

* * * * *

(c) * * *

(4) * * *

(viii) BLOCK C8, SOLICITATION PROCEDURES.

* * * * *

(B) * * *

(8) Code K - Set-Aside. Enter code K if the action resulted from any—

(i) * * *

(ii) Set-aside for small disadvantaged business concerns ~~(see 206.203)~~.

* * * * *

(d) * * *

(5) * * *

(iv) BLOCK D4, PREFERENCE PROGRAM.

(A) * * *

(4) Code E - Total SDB Set-Aside. Enter code E if the action was a total set-aside for small disadvantaged businesses ~~(219.502-2-70)~~.

* * * * *

(B) * * *

(3) Code C - Total SDB Set-Aside. Enter code C if the action was an SDB set-aside ~~(219.502-2-70)~~ and award was to an SDB.

(4) Code D - SDB **[Price]** Evaluation ~~Preference~~ **[Adjustment]**- Unrestricted. Enter code D if the action was unrestricted but an SDB received an award as a result of ~~an~~ **[a price]** evaluation ~~preference~~ **[adjustment]** (~~Subpart 219.70~~ **[see FAR Subpart 19.11]**).

(5) Code E - SDB Preferential Consideration - Partial SB Set-Aside. Enter code E if the action was a partial set-aside for small business and preferential consideration resulted in an award to an SDB ~~(219.502-3)~~.

~~(6) Code F - SDB Evaluation Preference in Construction.~~
~~Enter code F if the action was a construction acquisition and preferential consideration resulted in an award to an SDB (Subpart 219.72). If code F applies and Block B13D is blank, complete Blocks E1 and E3.~~

* * * * *

(v) BLOCK D5 - ETHNIC GROUP.

* * * * *

(B) Enter the code from the following list which corresponds to the ethnic group marked by the contractor in the solicitation provision at ~~252.219-7000 (Small Disadvantaged Business Concern Representation (DoD Contracts)~~ **[FAR 52.219-1, Small Business Program Representations, or FAR 52.212-3(c)]**.

* * * * *

(e) * * *

(3) BLOCK E3, NEXT LOW OFFER.

* * * * *

(ii) If Block E1 or E2 is completed~~-~~**[,]**

~~(A) E~~**[e]**nter the offered price from the small business firm that would have been the low offeror if qualified nonprofit agencies employing people who are blind or severely disabled had not participated in the acquisition~~; or~~**[.]**

~~(B) If the evaluation preference for small disadvantaged business concerns in construction acquisitions set forth in Subpart 219.72 is applied, enter the offered price from the non-SDB concern that would have been the successful offeror if the evaluation preference had not been applied. Enter the amount in whole dollars.~~

* * * * *

253.204-71 DD Form 1057, Monthly Contracting Summary of Actions $25,000 or Less.

* * * * *

(g) * * *

(2) * * *

(ii) * * *

(B) Block E2b, SDB Set-Aside/SDB Preference. Enter actions resulting from--

(1) A set-aside for small disadvantaged business (SDB) ~~(219.502-2-70)~~;

(2) Application of an SDB **[price]** evaluation ~~preference~~ **[adjustment]** (~~Subpart 219.70~~ **[see FAR Subpart 19.11]**); or

(3) SDB preferential consideration ~~(219.502-3)~~.

* * * * *