DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 2005–04; FAR Case 2003–015; Item V]

RIN 9000–AK02

Federal Acquisition Regulation; Applicability of SDB and HUBZone Price Evaluation Factor

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 (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to remove some of the exceptions to the applicability of the Small Disadvantaged Business (SDB) and HUBZone price evaluation factor.

DATES: *Effective Date*: July 8, 2005.

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. Kimberly Marshall, Procurement Analyst, at (202) 219–0986. Please cite FAC 2005–04, FAR case 2003–015.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 19.1103(a) and FAR 19.1307(b) in order to remove the exceptions to the Small Disadvantaged Business (SDB) and HUBZone preference programs that direct the contracting officer not to apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) or where application of the factor would be inconsistent with a Memorandum of Understanding (MOU) or other international agreement.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 53780, September 2, 2004. We received one response, which was entirely favorable to the rule. Therefore, we are converting the proposed rule to a final rule without change.

This is not a significant regulatory action and, therefore, was not 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

This rule is expected to have a significant (beneficial) 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 it will reduce the exceptions to the preference for small disadvantaged businesses and HUBZone small businesses. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

This rule was initiated at the request of the Small Business Administration in order to remove preferential treatment for certain offers of foreign products in acquisitions intending to provide a preference for small disadvantaged business concerns or HUBZone small business concerns. The objective of this rule is to remove exceptions to the Small Disadvantaged Business (SDB) and HUBZone preference programs that direct the contracting officer not to apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act or where application of the factor would be inconsistent with a Memorandum of Understanding (MOU) or other international agreement. The rule applies to all offerors in acquisitions that provide a preference for small disadvantaged business concerns or HUBZone small business concerns. Because of the reduced exceptions to the preferences, this rule will have a beneficial impact on all domestic concerns, especially small entities that are small disadvantaged business concerns or HUBZone small business concerns.

The FAR Secretariat has submitted a copy of the FRFA 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 19 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 2005–04, FAR Case 2003–015), in correspondence.

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.*

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

Dated: May 27, 2005

Julia B. Wise,

Director,Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 19 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19 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 19—SMALL BUSINESS PROGRAMS

19.1103 [Amended]

■ 2. Amend section 19.1103 by—

■ a. Adding ‘‘or’’ to the end of paragraph (a)(1);

■ b. Removing paragraphs (a)(2), (a)(3), and (a)(5); and redesignating paragraph (a)(4) as (a)(2); and

■ c. Removing ‘‘; or’’ from the end of newly redesignated paragraph (a)(2) and adding a period in its place.

19.1307 [Amended]

■ 3. Amend section 19.1307 by—

■ a. Adding ‘‘or’’ to the end of paragraph (b)(1);

■ b. Removing the semicolon from the end of paragraph (b)(2) and adding a period in its place; and

■ c. Removing paragraphs (b)(3) and (b)(4).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–5 [Amended]

■ 4. Amend section 52.212–5 by—

■ a. Revising the date of the clause to read ‘‘(JUL 2005)’’;

■ b. Removing ‘‘(Jan 1999)’’ from paragraph (b)(3) of the clause and adding ‘‘(JUL 2005)’’ in its place; and

■ c. Removing ‘‘(June 2003)’’ from paragraph (b)(10)(i) of the clause and adding ‘‘(JUL 2005)’’ in its place.

52.219–4 [Amended]

■ 5. Amend section 52.219–4 by—

■ a. Revising the date of the clause to read ‘‘(JUL 2005)’’; and

■ b. Adding ‘‘and’’ to the end of paragraph (b)(1)(i) of the clause; removing the semicolon from the end of paragraph (b)(1)(ii) of the clause and adding a period in its place; and removing paragraphs (b)(1)(iii) and (b)(1)(iv) of the clause.

■ 6. Amend section 52.219–23 by revising the date of the clause and paragraph (b)(1) to read as follows:

52.219–23 Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

* * * * *

NOTICE OF PRICE EVALUATION ADJUSTMENT FOR SMALL DISADVANTAGED BUSINESS CONCERNS (JUL 2005)

* * * * *

(b) *Evaluation adjustment.* (1) The Contracting Officer will evaluate offers by adding a factor of ____________________ [*Contracting Officer insert the percentage*] percent to the price of all offers, except—

(i) Offers from small disadvantaged business concerns that have not waived the adjustment; and

(ii) For DoD, NASA, and Coast Guard acquisitions, an otherwise successful offer from a historically black college or university or minority institution.

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[FR Doc. 05–11187 Filed 6–7–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 52, and 53

[FAC 2005–04; FAR Case 2002–004; Item VI]

RIN 9000–AJ79

Federal Acquisition Regulation; Labor Standards for Contracts Involving Construction

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 (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement the revised definitions of ''construction'' and ''site of the work'' in the Department of Labor (DoL) regulations. In addition, the Councils have clarified several definitions relating to labor standards for contracts involving construction and made requirements for flow down of labor clauses more precise.

DATES: *Effective Date*: July 8, 2005.

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. Linda Nelson, Procurement Analyst, at (202) 501–1900. The TTY Federal Relay Number for further information is 1–800–877–8973. Please cite FAC 2005–04, FAR case 2002–004.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule constitutes the implementation in the FAR of the DoL rule revising the terms ''construction, prosecution, completion or repair'' (29 CFR 5.2(j) and ''site of the work'' (29 CFR 5.2(l)). The DoL final rule (65 FR 80268) was published on December 23, 2000, and became effective on January 19, 2001. In addition, the Councils have clarified several definitions relating to labor standards for contracts involving construction and made requirements for flow down of labor clauses more precise.

The proposed rule was published in the **Federal Register** at 68 FR 74403, December 23, 2003. The Councils received comments in response to the proposed rule from 161 respondents. Responses to the more significant comments are as follows:

1. Support extension of Davis-Bacon Act (DBA) to secondary sites of the work.

The first category includes general comments in support of extending the DBA to secondary sites for various reasons. Among the reasons under this category given by the respondents in support of the rule are because it:

- Helps workers;
- Prevents companies from circumventing the DBA;
- Addresses the realities of new construction techniques in the construction industry;
- Correctly implements DoL final rule, which is not inconsistent with previous court cases.

The Councils concur. No further response is necessary.

2. *Oppose the extension of the DBA to secondary sites.*

Many respondents opposed extension of the DBA to a secondary site, because—

- It is too difficult to administer-confusing, burdensome, beyond logistic capability;
- It will increase costs of construction;
- Court decisions demonstrate that the DoL rule is invalid;
- The Councils have the authority to reject the DoL rule; or
- The respondent opposes the DBA entirely. Let the market prevail.

The Councils do not concur. It is apparent that many of the respondents misunderstood the concept of the ''secondary site of the work''. This concept only includes a site where ''a significant portion of the building or work is constructed.'' This does not cover the manufacture or sale of construction material to be used at the site, but only actual construction that is unique and integrally related to the final building or work. The Councils anticipate that very few construction projects will have a secondary site of the work.

With regard to increased cost to the contractor, this is not necessarily the case because the contractor should take all the labor costs into consideration in submitting his offer. With regard to increased cost to the Government, this is a benefit to the workers that the Government is willing to provide in accordance with the law.

Questions as to the validity of the DoL rule are outside the scope of this case. This rule implements the DoL rule, which has already been subject to notice and comment.

Comments regarding the benefits and value of the DBA itself are also outside the scope of this case.

3. *Oppose retroactive application of wage rates at secondary site, without change in contract price or estimated cost.*

Many respondents considered that this so-called ''retroactive'' aspect of the FAR rule was unfair to contractors, and goes beyond the DoL rule. These respondents were concerned about the term ''retroactive application'' which was used in the preamble to the proposed rule. These respondents mistakenly interpreted ''retroactive'' in this context to mean that the DBA rates would be applied retroactively to secondary sites on existing contracts. One respondent stated that the rule would require back pay through the year 2000 (effective date of the DoL rule) for secondary sites of current projects and pay in future payrolls at secondary sites through the remainder of the term of the contract. Combined with the misapprehension about what constitutes a secondary site, the small businesses fear bankruptcy with the implementation of the DoL rule in the FAR.

The Councils do not concur. The FAR rule is not retroactive. It does not apply to existing contracts or projects. It only applies to new solicitations or contracts entered into after the effective date of the FAR rule. See FAR 1.108(d). If these clauses were incorporated into a contract retroactively, then there would be an appropriate adjustment to the contract price. In new solicitations issued after the effective date of this rule, the contractor is forewarned that the DBA is applicable to the secondary site of the work pursuant to the solicitation provision 52.222–5, Davis-Bacon Act—Secondary Site of the Work. Moreover, the contract clause 52.222–6,