

**TITLE: CIB 98-27 Implementation of FACs 97-06 and 97-08, Reform of Affirmative Action in Federal Procurement, and Reporting Requirement**

MEMORANDUM FOR ALL CONTRACTING OFFICERS AND NEGOTIATORS TO: DISTRIBUTION LIST FAC FROM: M/OP, Marcus L. Stevenson, PROCUREMENT EXECUTIVE

SUBJECT: Implementation of FACs 97-06 and 97-08, Reform of Affirmative Action in Federal Procurement, and Reporting Requirement

**CONTRACT INFORMATION BULLETIN 98 - 27**

The purpose of this Contract Information Bulletin is to provide information about and guidance for implementing the subject Federal Acquisition Circulars, which became effective on October 1, 1998. Any solicitations issued on or after this date are subject to the interim rules contained in these FACs; the Federal Register version of FAC 97-06 was electronically transmitted to the CONet list on July 8, 1998, and the Federal Register version of FAC 97-08 was electronically transmitted on October 2, 1998. As of the date of this CIB, we have not received loose-leaf copies of this FAC for distribution. However, GSA's on-line version of the FAR includes both FACs; the loose-leaf versions of both FACs are also available on-line, as are other recent FACs, and can be printed from the internet at

<http://www.arnet.gov/far/>

Before starting to print the loose-leaf version of FAC 97-06, however, please realize this is a 70 page document and printing it will take some time. Both FACs are summarized below:

**Reform of Affirmative Action in Federal Procurement**

These interim rules amend the FAR to establish a mechanism to benefit small disadvantaged business concerns at the prime contract level. This mechanism is a price evaluation adjustment of up to ten percent in certain Standard Industrial Classification (SIC) Major Groups determined by the Department of Commerce. FAC 97-08 adds a regional component to the SIC Major Group designations. This price evaluation adjustment conforms to the Department of Justice proposal to reform affirmative action in Federal procurement and to regulations issued by the Small Business Administration regarding small disadvantaged business programs, and is mandatory for those competitive procurements to which it applies. It does not, however, apply to several major categories of competitive acquisitions, including acquisitions within the simplified acquisition threshold, acquisitions set aside for small business, and acquisitions conducted pursuant to the 8(a) program.

**Discussion:**

The background for these interim rules is the Supreme Court's Adarand decision in 1995; the consequence of this decision in Federal procurement is that any Federal program that uses racial or ethnic criteria as a basis for contract decisionmaking must be narrowly tailored to serve a compelling Government interest. The Department of Justice published a Notice in 1996 (61 FR 26042, May 23, 1996) with a proposed model to restructure affirmative action in Federal procurement to ensure compliance with the constitutional standards established by the Supreme Court in Adarand. Numerous proposed and interim rules to implement the Dept. of Justice model have been published by the FAR Councils, SBA, and OMB, including these FACs (which only implement the price evaluation adjustment, including designations of eligible SIC major groups based on regional factors). OMB also published a Notice on the same day as FAC 97-06 announcing the Department of Commerce price evaluation adjustment factors, described below. The regionally-based designations were added to the online version of this SIC list on 10/1/98; at this time, the regional designations apply only to construction (see the attached list, which is also available on-line at

<http://www.arnet.gov/References/sdbadjustments.htm>

**Industries Eligible for the 100/o Price Evaluation Adjustment-Oct 1998**

[View & Print "Price Evaluation" from Adobe Acrobat](#)

FAC 97-07, published July 1, 1998, and effective on January 1, 1999, implements a mechanism providing a monetary incentive for subcontracting with Small Disadvantaged Businesses and will be addressed in a separate CIB. The primary impact Government-wide of these FACs is expected to be an increase in the number of contracts awarded to qualified Small Disadvantaged Businesses (SDBs) and a corresponding decrease in contracts awarded to firms that are not qualified SDBs. What this means to USAID's contracting staff is that solicitations issued using full and open competition under SIC major industry groups 73, 81, 82, 83, 87, and 89, the SIC groups used in most USAID technical services contracts, are subject to the price evaluation adjustment. Summary of the FAR changes to implement the Price Evaluation Adjustment for Small Disadvantaged Business Concerns (SDBs) The significant changes to the FAR are in Parts 19 and 52. The most significant of these changes for USAID procurements are the following:

- The definition of a small disadvantaged business (SDB) concern in 19.001 is revised to distinguish between an SDB as a subcontractor and an SDB as a prime contractor. This distinction is necessary because the offeror who does not waive the price evaluation adjustment (PEA) described in FAR 19.11 must meet the eligibility requirements in paragraph (b) of the definition of a "small disadvantaged business concern" in FAR 19.001. A small disadvantaged business being proposed as a subcontractor does not need to meet these eligibility requirements (see paragraph (a) of the same definition, which is basically the previous definition of a small disadvantaged business).

FAR Subpart 19.3, "Determination of Status as a Small Disadvantaged Business Concern or a Small Business Concern", contains more complete coverage; please read particularly new section 19.304 "Disadvantaged business status". An offeror must be certified by SBA as an SDB prior to receiving an award if the award is due to the application of the PEA (see the eligibility requirements in paragraph (b) of the definition of a small disadvantaged business in FAR 19.001, and FAR 19.304). FAR 19.304 contains procedures the Contracting Officer must follow to verify the SDB status of offerors; further, paragraph (d) of that section allows the Contracting Officer to presume that the offeror is not disadvantaged and "shall make award accordingly" if he or she doesn't receive an SBA certification within the time frame specified in section 19.304.

- New Subpart 19.11 "Price Evaluation Adjustment for Small Disadvantaged Business Concerns" and the new clause at FAR 52.219-23, "Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns", describes the evaluation procedures. Paragraph (b) of the clause requires the Contracting Officer to insert the percentage of the adjustment factor that applies to the procurement; at this time, based on the Department of Commerce determination as published by the Office of Federal Procurement Policy (OFPP), the applicable percentage is ten (10%). Therefore, in applicable acquisitions (i.e., those over the simplified acquisition threshold, not to be awarded under the 8(a) program, and not set aside for small business concerns), the Contracting Officer must add 10% to the price of all offers except offers from small disadvantaged business concerns that have not waived the adjustment; or, if a price evaluation adjustment for small disadvantaged business concerns is authorized on a regional basis, offers from small disadvantaged business concerns, whose address is in such a region, that have not waived the evaluation adjustment. (Other exceptions for applying the factor are listed in 19.1103(a) and in the clause, but since they are unlikely to apply to most USAID technical assistance procurements, they are not included here.)

A small disadvantaged business that does not waive the adjustment is thereby agreeing to comply with certain terms stated in paragraph (d) of the clause. If the SDB elects to waive the evaluation adjustment by checking the indicated space in paragraph (c), then the agreements in paragraph (d) do not apply but the 10% adjustment is added to their offer.

**To summarize in simpler language:**

When an RFP is issued using full and open competition for a designated SIC group, any offer received from a business:

- that did not certify itself as an SDB eligible to receive a benefit based on its disadvantaged status, or

- that checked the block in section 52.219-23 of its offer to waive this benefit, must have its price adjusted upwards by 10%.

After this adjustment is made, and an SDB is then considered to be the apparent successful offeror due to the adjustment, the Contracting Officer must:

- verify the SBA certification (per FAR 19.304), then

- award to that SDB offeror as long as the price does not exceed by more than 10% the fair market price, as so determined in accordance with the reasonable price guidelines in FAR 15.404-1(b). If the Contracting Officer does not receive verification of the SBA certification within the specified timeframe, the award is made to the next apparent successful offeror (if this is an SDB receiving the benefit of the adjustment, then the SBA certification status must also be verified before award can be made. Contracting Officers are to request verification of SDB status at the same time for all offerors claiming the price adjustment benefit). Further, if the award would exceed the fair market price by more than 10%, the adjustment is not made and award would be made accordingly (FAR 19.1103(c)).

#### Reporting Requirement

The Federal Procurement Data System (FPDS) will be collecting data on the use of the SDB price evaluation adjustment provisions. Since FPDS and OFPP are working on reporting requirements to cover a number of changes at the same time, it will be a while before the report form is revised and the A&A system can accommodate the changes. In the meantime, OFPP has requested that agencies manually track the contract actions and dollars awarded under the SDB price evaluation adjustment program. Therefore, when you award a contract to an SDB using the price evaluation adjustment, please send an e-mail providing the award number and dollar amount to Judy Britt, M/OP/SPU/CIMS. Any questions about these FACs or this CIB may be directed to Ms. Diane Howard, M/OP/POL, at 202-712-0206 or internet [dhoward@usaid.gov](mailto:dhoward@usaid.gov). Attachment: Industries Eligible for the 10% Price Evaluation Adjustment, October 1998