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August 3, 1987

Defense Acquisition  
Regulatory Council  
ATTN: Charles W. Lloyd  
Executive Secretary  
ODASD(P)DARS  
c/o OASD(P&L)(M&MR)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

RE: DAR Case 87-33 -- Department of Defense Federal  
Acquisition Regulation Supplement; Implementation of  
Section 1207 of Pub. L. 99-661; Set Asides for Small  
Disadvantaged Business Concerns

Dear Mr. Lloyd:

This letter is submitted in response to the Defense Acquisition Regulatory (DAR) Council's solicitation of public comments on the interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act For Fiscal Year 1987 (Pub. L. 99-661), entitled "Contract Goal for Minorities", published in the Federal Register on Monday, May 4, 1987.

The Department of Defense, in implementing Public Law 99-661, Section 1207 was asked by Congress to increase to five percent minority small business procurements through DOD. If this five percent goal is not achieved, it appears to be the clear intent of Congress to make the five percent minority small business goal a mandatory requirement. This would be

# TIGHE, CURHAN & PILIERO

Defense Acquisition Regulatory Council  
August 3, 1987  
Page Two

appropriate and consistent with other set-aside laws on the federal, state, and local levels.<sup>1/</sup>

I am sure the Defense Department is fully aware that Congressman Dymally is chairing a new task force established by the Speaker of the House to look into all set-aside programs. The trend is ever increasing for a rational, sensible minimum 5 percent of the government budget to be allocated to minority small businesses.

The underpinnings of the Small Disadvantaged Business (SDB) program of the DOD is basically flawed because it presumes that there should be competition among minority small businesses from the initial stage of their development. If minority small businesses were able to compete soon after entering the government contracting arena by preparing technical and price bids and proposals, it would indicate a level of maturity which simply does not in many instances exist among minority small businesses. Current minority small businesses programs recognize this reality.

While it is clear minority small businesses can perform effectively on government contracts, it is not appropriate to presume that minority small businesses can compete effectively at their early "inception" stages. For this reason, the SDB program,

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<sup>1/</sup> For instance, under the Surface Transportation Assistance Act of 1982, not less than 10 percent of authorized federal funds must be set-aside for federal highway construction work. Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (1983). Under the Public Works Employment Act of 1977, not less than 10 percent of authorized federal government funds must be set aside for federal public works projects. Pub. L. No. 97-28, 42 U.S.C. § 6705(f)(2).

Further, Section 1207's minority goal of 5 percent for small business is modest in comparison to minority set-asides in certain parts of the country. For instance, in Washington, D.C. 35 percent of government contracts must be set-aside for minority businesses. D.C. Code §1-1146 (1983). Similarly, Philadelphia has a 15 percent goal for contracting with minority small businesses, Atlanta a 35 percent goal, Los Angeles has a 21 percent goal and the Commonwealth of Pennsylvania has a 10 percent goal for contracting with minority small businesses. Philadelphia Code §12-503; City of Atlanta Administrative Order No. 85-1 (1985); Los Angeles City Affirmative Action Plan.

# TIGHE, CURHAN & PILIERO

Defense Acquisition Regulatory Council  
August 3, 1987  
Page Three

which is essentially an attempt to eliminate the Section 8(a) program by requiring the contracting officer to set-aside the requirement for the SDB program whenever two Section 8(a) firms are interested, is fatally flawed and must be changed.

A proper approach encouraging minority small business participation and achieving the 5 percent goal is thoroughly reviewed in H.R. 2972, introduced by Congressman Richardson. This bill currently enjoys bi-partisan support from 26 co-sponsors.

A properly developed SDB program should include all of the relevant provisions of H.R. 2972, including discipline of the Defense Department as it relates to its profit policy, changes to its prime contractor/subcontractor and fair market pricing requirements, and effective overall utilization of the Section 8(a) program, the Small Business Administration and the SDB program to ensure minority small business contracting consistent with Congress' five percent goal.

As currently drafted, the SDB program appears to have been developed as an attempt to eliminate the Section 8(a) program and substitute in its place competition in the government procurement process for minority small businesses. If it were the will of Congress to eliminate the Section 8(a) program it would have taken such steps. For the Defense Department, which provides two-thirds of minority small businesses procurement activity, to unilaterally eliminate the Section 8(a) program is inappropriate. Congress apparently is taking steps to see to it that the Defense Department reverses this course of action.

A further basic consideration and problem of the SDB program is DOD's use of SIC Codes similar to the SIC Codes of the Section 8(a) program. This is inappropriate.

The determination of size of a concern as small or other than small for purposes of the SDB program should be structured so that size considerations function as a post-Section 8(a) or graduation phase set-aside program. By using the identical size standards for both the small disadvantaged business program and the Section 8(a) program, the Defense Department is ensuring that minority small business programs will shrink, rather than expand, available minority small business activity.

The Defense Department should formulate a definition of size for the small disadvantaged business program which increases the definition of size as compared to the Section 8(a) program. This will allow larger but still basically small businesses to take

# TIGHE, CURHAN & PILIERO

Defense Acquisition Regulatory Council  
August 3, 1987  
Page Four

advantage of the program after a period in which they have developed an infrastructure enabling them to compete.

Therefore, the most important changes which can be made to the rule to increase to five percent the procurement activity of minority small businesses is to increase the definition of small by either using a different measure of size for each procurement or by mandating that for each procurement in the SDB program a firm will be considered small if it has less than 1,000 employees. It is basically and fundamentally wrong for the small disadvantaged business program to "hijack" existing contracts from the Section 8(a) program.

The term which has been used in Congress during our visits with various congressional offices is "affront" when describing Congress' perception of the initial implementation plan for the small disadvantaged business program. Simply stated, it appears to Congress as though the Department of Defense was attempting to "affront" Congress by in fact reducing the amount of procuring dollars for small disadvantaged businesses and eliminating the Section 8(a) negotiated procurement program without congressional authority to do so.

We respectfully request that the DAR Council give serious consideration to revising these major defects in the small disadvantaged business program. We also request that the fair market pricing proposal of the SDB program be changed as set forth in the Richardson bill, and that the other steps recommended by the Richardson bill, H.R. 2972, be implemented to the extent practicable by the Defense Department.

We would be available to meet with the Defense Acquisition Regulatory Council in order to work closely with it as well as the congressional offices representing the Black and the Hispanic Caucuses in order to assist in the development of a truly meaningful SDB program.

The coalition of minority small businesses which has been developed to support changes in existing minority procurement laws is available to provide assistance to the DAR Council. We

# TIGHE, CURHAN & PILIERO

Defense Acquisition Regulatory Council  
August 3, 1987  
Page Five

respectfully request that a meeting be arranged in order that we may provide that assistance in a meaningful fashion.

Thank you for your time and attention to this matter.

Very truly yours, ,



Daniel J. Piliero II

## List of Attachments:

H.R. 2972  
List of co-sponsors of  
H.R. 2972  
Section-by-Section Analysis  
of H.R. 2972  
Fact Sheet on H.R. 2972  
Summary of "Minority Enterprise  
Enhancement Act"  
Summary of Major Provisions of  
Mavroules/Conte Amendment in  
the Nature of a Substitute to  
H.R. 1807  
Summary of Provisions of Mavroules/  
Conte Amendment  
Competition White Paper  
Minority Business Ownership  
White Paper

100TH CONGRESS  
1ST SESSION

# H. R. 2972

To provide for a 10-year fixed term participation period for socially and economically disadvantaged small business concerns under the Small Business Act, to provide for expedited certification of such concerns, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 20, 1987

Mr. RICHARDSON (for himself, Mr. HOYER, Mr. DELLUMS, Mr. DIOGUARDI, Mr. LEWIS of California, Mr. MATSUI, and Mr. TORRES) introduced the following bill; which was referred jointly to the Committees on Small Business and Armed Services

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## A BILL

To provide for a 10-year fixed term participation period for socially and economically disadvantaged small business concerns under the Small Business Act, to provide for expedited certification of such concerns, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Minority Small Business  
5 Development Act of 1987".

1 SEC. 2. 10-YEAR FIXED PARTICIPATION TERM AND PHASED  
2 WITHDRAWAL.

3 (a) IN GENERAL.—(1) Section 7(j)(10)(A)(i) of such Act  
4 is amended by inserting “, but in no case less than ten  
5 years,” after “period of time”.

6 (2) In the case of any small business concern certified  
7 under section 8(a) on or after April 21, 1982, and whose  
8 participation in the program under such section was in effect  
9 on January 1, 1987, such concern shall continue to be eligi-  
10 ble to participate for a period which will bring the total par-  
11 ticipation of such concern to not less than 10 years, unless  
12 the Administration determines that the concern not longer  
13 meets the eligibility criteria for certified socially and eco-  
14 nomically disadvantaged small business concerns under sec-  
15 tion 8(a) of the Small Business Act or whose participation  
16 may otherwise be terminated under such Act.

17 (3) In the case of any concern certified under such sec-  
18 tion before April 21, 1982, and whose participation was in  
19 effect on January 1, 1987, such concern shall continue to be  
20 eligible under such section for three-year period following the  
21 date on which such concern would have been graduated from  
22 the program, but in no event for a total participation period  
23 of less than 10 years, unless its eligibility is otherwise termi-  
24 nated in a manner described in paragraph (2) .

1 (b) OPTIONS AND MODIFICATIONS.—Section 8(a) of the  
2 Small Business Act (15 U.S.C. 637(a)) is amended by adding  
3 at the end thereof the following new paragraph:

4 “(15) Each Federal agency may honor options and  
5 modifications on contracts executed pursuant to section 8(a)  
6 of the Small Business Act (15 U.S.C. 637(a)) if such options  
7 or modifications are within the scope of work of the contract  
8 entered into when the contractor participated under section  
9 8(a) and otherwise was eligible to enter into the contract.  
10 Following graduation or termination from the program under  
11 such section, the Administration shall not be required to par-  
12 ticipate in contracting activities relating to options or modifi-  
13 cations to any such contract. The procuring agency and the  
14 firm may directly enter into such options or modifications in  
15 accordance with the procuring agency’s standard procedures.  
16 Existing contracts may be performed to conclusion in accord-  
17 ance with the procuring agency’s policies.”

18 (c) PARTICIPATION AFTER GRADUATION.—Section  
19 7(j)(10) of such Act (15 U.S.C. 636(j)(10)) is amended by  
20 adding at the end thereof the following new subparagraph:

21 “(D) Concerns that participated in the Program that  
22 remain minority-owned after graduation from the Program  
23 may, on a negotiated procurement basis, contract directly  
24 with procuring agencies for, and continue performance on,  
25 new contracts involving the same activities as the incumbent



1 contract for a maximum period not to exceed 3 years follow-  
2 ing graduation from the Program.”.

3 SEC. 3. PROVISIONS PERTAINING TO SIZE STANDARDS AND  
4 BUSINESS PLANS.

5 Section 8(a) of the Small Business Act (15 U.S.C.  
6 637(a)) is further amended by adding at the end thereof the  
7 following new paragraphs:

8 “(16) Standards established by the Administration in  
9 parts 121 and 124 of chapter 1 of title 13 of the Code of  
10 Federal Regulations (restricting program support to a limited  
11 number of standard industrial classification codes in an ap-  
12 proved business plan) shall not apply to small business con-  
13 cerns applying under this subsection.

14 “(17) No portion of the gross receipts or employment of  
15 a business concern attributable to the performance of a con-  
16 tract or contracts awarded pursuant to this subsection shall  
17 be included in determining the size of such concern for any  
18 program or activity conducted under the authority of this Act  
19 or the Small Business Investment Act of 1958.

20 “(18) The Administration shall not impose any limita-  
21 tion on sales made by any small business concern under this  
22 subsection which exceed levels approved under the business  
23 plan submitted by such concern.

1 SEC. 4. REQUIREMENTS FOR INCREASING SECTION 8(a)  
2 CONTRACTS.

3 (a) INCREASE IN NUMBER AND DOLLAR VALUE OF  
4 CONTRACTS UNDER SECTIONS 8(a) AND 15.—Each Federal  
5 agency with procurement powers shall establish policies and  
6 procedures which shall ensure an increase in the number and  
7 dollar value of contracts awarded under sections 8(a) and 15  
8 of the Small Business Act (15 U.S.C. 637(a), 644) for 3 fiscal  
9 years beginning after the date of the enactment of this Act  
10 above the number and dollar value applicable in fiscal year  
11 1987. Such policies and procedures shall be implemented in a  
12 manner to increase the number of contracts otherwise award-  
13 ed under minority set-aside goals applicable to such agency  
14 above fiscal year 1987 levels.

15 (b) SUSPENSION OF INTERIM RULE.—If, at the end of  
16 fiscal year 1988, the number and dollar value of contracts  
17 awarded under sections 8(a) and 15 of the Small Business  
18 Act have not increased, the interim rule published in the Fed-  
19 eral Register on Monday, May 4, 1987, to implement section  
20 1207(a) of Public Law 99-661 shall be suspended until such  
21 time as there is an increase in the number and dollar value of  
22 such contracts.

23 SEC. 5. SIX-MONTH CERTIFICATION PERIOD.

24 The Administration shall establish regulations, proce-  
25 dures, or guidelines for prompt, simultaneous processing of  
26 Phase I and Phase II applications for certification into the

1 program established under section 8(a) of the Small Business  
2 Act. Six months after an applicant for certification has sub-  
3 mitted appropriate forms to the Administration, the applicant  
4 shall be certified under section 8(a) unless the Administration  
5 has rejected the application for a valid reason.

6 **SEC. 6. 10-DAY PERIOD FOR APPROVAL OF CONTRACTS.**

7       Following negotiation, Defense Contract Audit Agency  
8 and procuring agency approval and submission to the Admin-  
9 istration of a completed proposal (including necessary repre-  
10 sentations and warranties) for a subcontract under section  
11 8(a) of the Act, the contract shall be deemed to be approved,  
12 unless the Administration, within 10 days after submission  
13 has an objection for a specific, valid reason.

14 **SEC. 7. REFERENCES TO SECTION 8(a) PROGRAM.**

15       The Administration shall, in all future references to the  
16 program under section 8(a) of the Small Business Act (15  
17 U.S.C. 637(a)), substitute the term "section 8(a) negotiated  
18 procurement program", for the term "section 8(a) set-aside  
19 program", where appropriate.

20 **SEC. 8. OBJECTIVES FOR CONTRACT OFFICERS AND PRIME**  
21 **CONTRACTORS.**

22       The last sentence of Section 15 of the Small Business  
23 Act (15 U.S.C. 644) is amended—

24               (1) by inserting "(1)" after "(g)";

1 (2) by redesignating paragraphs (1) and (2) as sub-  
2 paragraphs (A) and (B), respectively; and

3 (3) by inserting at the end thereof the following  
4 new paragraphs:

5 “(2) In order to maximize such participation, the head of  
6 each Federal agency shall provide, in the performance ap-  
7 praisal of the contracting officers of such agency, that a criti-  
8 cal factor in such appraisal shall be the performance of such  
9 officer in satisfying the minority set-aside objectives of such  
10 agency and the effective utilization of the negotiated procure-  
11 ment program under section 8(a) and the minority set-aside  
12 program under this section.

13 “(3) Each such agency head shall establish procedures  
14 or guidance for contracting officers—

15 “(A) to set goals which the agency’s prime con-  
16 tractors should meet in awarding subcontracts to firms  
17 owned and controlled by socially and economically dis-  
18 advantaged individuals with a minimum goal of 5 per-  
19 cent for each contractor required to submit a subcon-  
20 tracting plan under section 8(d)(4)(B) of this Act; and

21 “(B) to provide incentives, including a minimum  
22 of 5 additional points out of a possible score of 100  
23 points of the prime contractor’s total evaluation score  
24 (or the equivalent benefit), for such firms in order to

1 facilitate achievement of the minority set-aside objec-  
2 tives of the agency.”.

3 **SEC. 9. FAIR MARKET PRICE DETERMINATIONS.**

4 Section 8(a)(3) of the Small Business Act (15 U.S.C.  
5 637(a)(3)) is amended to read as follows:

6 “(3)(A) Any small business concern selected by  
7 the Administration to perform any contract to be let  
8 pursuant to this subsection shall, when practicable,  
9 participate in any negotiation of the terms and condi-  
10 tions of such contract.

11 “(B) For purposes of paragraph (1)(A) a ‘fair  
12 market price’ shall be based on reasonable costs under  
13 normal competitive conditions.

14 “(i) The estimate of a current fair market  
15 price for a new procurement requirement, or a re-  
16 quirement that does not have a satisfactory pro-  
17 curement history, shall be derived from a price or  
18 cost analysis conducted by the agency offering the  
19 requirement to the Administration. Such analysis  
20 may take into account prevailing market condi-  
21 tions, commercial prices for similar products or  
22 services, or data obtained from any other agency.  
23 Such analysis shall consider such cost or pricing  
24 data as may be submitted by the Administration

1 and the small business concern selected by the  
2 Administration to perform the contract.

3 “(ii) The estimate of a current fair market  
4 price for a procurement requirement that has a  
5 satisfactory procurement history shall be formulat-  
6 ed by the agency offering the requirement to the  
7 Administration and shall be based on recent  
8 award prices adjusted to insure comparability.  
9 Such adjustments shall take into account differ-  
10 ences in quantities, performance times, plans,  
11 specifications, transportation costs, packaging and  
12 packing costs, labor and material costs, overhead  
13 costs, and any other additional cost which may be  
14 deemed appropriate.

15 “(C) The Administration shall, upon its request,  
16 promptly receive all information, studies, analyses, and  
17 other data used by any agency to estimate the current  
18 fair market price of any requirement offered to the Ad-  
19 ministration pursuant to this subsection.

20 “(D) A small business concern selected by the  
21 Administration to perform or negotiate a contract to be  
22 let pursuant to this subsection shall—

23 “(i) be entitled, upon its request, to a written  
24 statement detailing the method used by the

1 agency to estimate the current fair market price  
2 for such contract; and

3 “(ii) within such time limits as may be pre-  
4 scribed by the Administrator, be entitled to pro-  
5 test the use of such method to the Administrator  
6 if such concern has reason to believe that the pro-  
7 visions of this paragraph have been violated. The  
8 Administrator shall consider such protest and  
9 shall have ten days (exclusive of Saturdays, Sun-  
10 days, and legal holidays) from the receipt of such  
11 protest to render a final decision. If the Adminis-  
12 trator finds in favor of the concern, an appeal  
13 shall be filed by the Administrator pursuant to  
14 section 8(a)(1)(A). The agency who is the subject  
15 of any appeal filed pursuant to such section shall  
16 not award the contract to any other party pending  
17 the disposition of the appeal unless the contract-  
18 ing officer determines, in writing, that an award  
19 must be made to protect the public interest.”

20 **SEC. 10. AUTHORITY OF DIRECTORS OF SMALL AND DISAD-**

21 **VANTAGED BUSINESS UTILIZATION OFFICES.**

22 Section 15(k) of the Small Business Act is amended—

23 (1) by striking “and” at the end of paragraph (6);

24 (2) by striking the period at the end of paragraph

25 (7) and inserting “, and”; and

1           (3) by adding at the end thereof the following new  
2 paragraph:

3           “(8) make determinations as to whether a particu-  
4 lar procurement shall be administered under this sec-  
5 tion or under section 8.”

6 **SEC. 11. REPRESENTATIONS AND WARRANTIES.**

7       (a) **IN GENERAL.**—Contracting officers shall require  
8 representations and warranties from all firms submitting pro-  
9 posals for Department of Defense contracts under rules es-  
10 tablished by the Department to implement section 1207(a) of  
11 Public Law 99-661. Such representations and warranties  
12 shall be submitted along with all proposals and shall repre-  
13 sent and warrant that—

14           (1) the concern is at least 51-percent owned by a  
15 socially and economically disadvantaged individual or  
16 individuals;

17           (2) such individual or individuals manage and con-  
18 trol the concern on a daily basis; and

19           (3) the concern is small under the size standards  
20 established by the Administration in part 121 of chap-  
21 ter 1 of title 13 of the Code of Federal Regulations.

22       (b) **REGULATIONS.**—In addition, the Administration  
23 shall, within 60 days after the date of the enactment of this  
24 Act, issue regulations providing for discovery by both parties  
25 to an appeal under section 1207 of Public Law 99-661 and



1 the regulations adopted thereunder including depositions and  
2 document production of the parties and interested third par-  
3 ties modeled after Rules 11, 26, 30, 34, 37, and 45 of the  
4 Federal Rules of Civil Procedure which discovery must be  
5 completed within 30 days.

6 **SEC. 12. DOD PROFIT OBJECTIVES.**

7 The prenegotiation profit objectives set forth in the in-  
8 terim rule published in the Federal Register on December 1,  
9 1986, by the Department of Defense (affecting 48 C.F.R.  
10 parts 204, 215, 230, and 253) shall not apply to any concern  
11 which is a small business concern under part 121 of chapter  
12 1 of title 13 of the Code of Federal Regulations.

13 **SEC. 13. MANDATORY 5-PERCENT REQUIREMENT.**

14 If the Department of Defense fails to meet the five per-  
15 cent goal established in section 1207(a) of Public Law 99-  
16 661, by the end of fiscal year 1989, the five-percent goal  
17 shall become a mandatory five-percent requirement.

○

U.S. HOUSE OF REPRESENTATIVES

100 Congress

7/30/87

Pursuant to Clause 4 of rule XXII of the rules of the House of Representatives, the following cosponsors are hereby added to

H.R. 2972 Richardson Bill H. Con. Res. \_\_\_\_\_

H. Res. \_\_\_\_\_ H.J. Res. \_\_\_\_\_

- |                              |                                   |
|------------------------------|-----------------------------------|
| 1. MR. GARCIA                | 21. MR. MATSUI                    |
| 2. MR. LUJAN                 | 22. MR. TORRES                    |
| 3. MR. COELHO                | 23. MR. LEWIS                     |
| 4. MR. EDWARDS OF CALIFORNIA | 24. MR. DiGURRO                   |
| 5. MR. TOWNS                 | 25. <u>Dwight A. Slahn (LAKE)</u> |
| 6. MR. LEWIS OF GEORGIA      | 26. MR. Roybal                    |
| 7. MR. FAUNTROY              | 27.                               |
| 8. MR. HUNTER                | 28.                               |
| 9. MS. SAIKI                 | 29.                               |
| 10. MR. STOKES               | 30.                               |
| 11. MR. ROSE                 | 31.                               |
| 12. MR. MCEWEN               | 32.                               |
| 13. MR. SOLOMON              | 33.                               |
| 14. MR. PEPPER               | 34.                               |
| 15. MR. LELAND               | 35.                               |
| 16. MR. MARTINEZ             | 36.                               |
| 17. MR. ORTIZ                | 37.                               |
| 18. MR. Richardson           | 38.                               |
| 19. MR. Bellums              | 39.                               |
| 20. Mr. Noyer                | 40.                               |

Signature of original sponsor

Section-By-Section Analysis of H.R. 2972  
"Minority Enterprise Enhancement Act"

Section 1. This section provides the short title for the Act, the "Minority Enterprise Enhancement Act".

Section 2. Subsection (a) of Section 2 amends Section 7(j)(10)(A)(i) of the Small Business Act by eliminating the current 5 year maximum FPPT and extensions of up to a maximum 7 year participation period (Fixed Program Participation Term) of all participants in the Section 8(a) program by replacing the maximum 7 year FPPT with a 10 year participation term for any small business concern certified under the program on or after April 21, 1982 and whose participation in the Section 8(a) program was in effect on January 1, 1987, unless the SBA determines that the small business concern no longer meets the eligibility criteria for firms certified under the Section 8(a) program or whose participation may otherwise be terminated under the Small Business Act. Extension of the ten year participation for these concerns should only be granted by the SBA under extenuating circumstances.

SBA regulations already provide a self-graduating mechanism based upon SIC code designations and size standards. Every minority small business is continually "graduating" and losing eligibility from certain types of work as it grows larger. This already existing staged graduation process is adequate as a self-executing mechanism. It does not need to be supplemented. The SBA would not be losing any amount of control over the participating concerns with an automatic 10 year FPPT as the SBA has in place regulations to prevent any Section 8(a) firm which reaches the point of competitive viability from remaining in the program and obtaining contracts for which they are no longer qualified to perform. These regulations permit the SBA to graduate a firm prior to expiration of its participation period if the firm has achieved the goals set forth in its business plan. In addition, SBA authority includes institution of a program completion action against the firm. Size standard requirements further limit the eligibility of firms to perform particular contracts and prevent them from receiving 8(a) program support once they reach a certain size.

Subparagraph (a) also provides, within the context of the existing self-executing graduation mechanism, a transition rule to allow a total participation period of not less than 10 years for small business concerns

entering the Section 8(a) program before April 21, 1982 and whose participation in the program was in effect on January 1, 1987 by providing for an automatic 3 year extension of the concern's participation in the program past the graduation date established for the concern by the SBA, unless the Administration determines that the concern no longer meets the eligibility criteria of the Section 8(a) program or whose participation might otherwise be terminated under the Small Business Act. Extension of the ten year participation of these concerns will only be granted by the SBA under extenuating circumstances.

Under the FPPT program as currently administered, the majority of small business concerns do not receive the maximum 7 year FPPT. Therefore, the period of participation for the majority of firms which entered the Section 8(a) program after 1982 is shorter than 7 years. The recently released findings of the Senate Committee on Small Business and its national survey of graduated Section 8(a) firms indicates that up to 30 percent of graduated firms had not survived as ongoing business concerns. A majority of respondents cited one reason for this failure rate as an inadequate period of participation in the Section 8(a) program. Most respondents suggested a fixed participation period of 10 years.

The setting of an automatic 10 year FPPT would enable the SBA to assist Section 8(a) firm's to reach their business development goals and fulfill the original intent of Congress in developing the Section 8(a) program: promoting the competitive viability of small business firms to provide opportunities for full participation in the free enterprise system by socially and economically disadvantaged persons in order to obtain social and economic equality for such persons and improve the function of the national economy. Further, an automatic 10 year participation term for all Section 8(a) firms which entered the program on or after April 21, 1982 would be more beneficial to Section 8(a) firms and will increase their chances of achieving the competitive viability which is the purpose of the program by reducing the administrative burdens and amount of monetary and personnel resources which Section 8(a) firms must expend on FPPT settings and FPPT extension requests under the current FPPT Program. In addition, SBA resources would be saved.

Subsection (2) also amends Section 8(a) of the Small Business Act to permit federal agencies to honor options and modifications on contracts awarded under the negotiated procurement process of the Section 8(a)

program when the option or modification is within the scope of work of the contract originally entered into when the contractor was a member of the Section 8(a) program and the contractor is otherwise eligible to enter into the option or modification. A contractor and a procuring agency may enter into options or modifications to contracts executed pursuant to the negotiated procurement process of the Section 8(a) program directly, in accordance with the procedures of the procuring agency. Contracts in progress when a Section 8(a) concern graduates or is terminated from the program may be performed to their conclusion in accordance with the procuring agency's policies.

This provision codifies the existing, sound policy of the SBA which has been approved by the U.S. District Court for the District of Columbia, see Systems and Applied Sciences Corp. v. Sanders, 544 F. Supp. 576 (D.D.C. 1982); Amex Systems v. Cardenas, 519 F. Supp. 537 (D.D.C. 1981), and the Government Accounting Office, see Gallegos Research Corporation - Reconsideration, Comptroller General B-209992.2, B-209992.3 (1983); Wespercorp, Inc., Comptroller General B-220665 (February 18, 1986), allowing procuring agencies to exercise options and modifications to contracts executed under the Section 8(a) program even if the 8(a) firm is no longer eligible to receive new contracts under the specified standard industrial classification (SIC) code or following the Section 8(a) firm's graduation or termination from the program in accordance with the standard procedures of the procuring agency. Contracts in progress when a firm graduates or is voluntarily or involuntarily terminated from the Section 8(a) program may continue until completion of the contract in accordance with the procuring agency's policies and procedures. These principles would also apply to the SDB program.

Section 2 also amends Section 7(j)(10) of the Small Business Act by adding a new paragraph providing that existing firms in the 8(a) program may have a phased withdrawal for a maximum period of three years following graduation by permitting 8(a) concerns to negotiate directly with procuring agencies on new contracts involving the same activities as performed previously by the concern before graduation. Section 8(a) concerns will also be encouraged to participate as an SDB concern during this phased withdrawal.

Section 3. Amends Section 8(a) of the Small Business Act by adding three new paragraphs.

Paragraph (15) provides that the restrictions on program

support limiting the number of standard industrial classification codes in an approved business plan of a small business concern, as established in part 121 of Chapter I of Title 13 of the Code of Federal Regulations, shall be eliminated. Paragraph (15) implements affirmative changes to the Section 8(a) program consistent with the goals and purposes of the program in fostering competitive viability of small business concerns and providing opportunities for full participation in the free enterprise system by socially and economically disadvantaged persons by eliminating unnecessary and impeding restrictions on the natural growth and diversification of Section 8(a) through removal of the limitations on the number of standard industrial classification codes under which a Section 8(a) is approved by the SBA, as long as the Section 8(a) concern can demonstrate that it has the technical capabilities and facilities to perform contracts under the standard industrial classification. These provisions and the issues addressed by the two following provisions (Paragraphs 16 and 17) were recently revised or adopted by the former Acting Administrator with the sole intention of limiting growth and program access for minority small business even though the firms would otherwise be eligible to conduct the contracts. The purpose of these regulations is contrary to the intent of the Congress as expressed in Section 1207 of Public Law 99-661. Accordingly, these regulations should be revised by this Act.

Paragraph (16) provides that no portion of the gross receipts or employment of a business concern attributable to the performance of Section 8(a) contracts shall be taken into account when computing the size of the concern. Inclusion of gross receipts or employment of an 8(a) concern attributable to performance of 8(a) contracts currently creates an artificial determination of sizes because 8(a) contracts are only available for a limited period of time. The provision makes affirmative changes to the Section 8(a) program consistent with its goals and purposes by eliminating the artificiality in size standards for minority small businesses to allow 8(a) firms to achieve a size that will increase the possibility of competitive viability following graduation. (This provision is identical to provisions of H.R. 1807).

Paragraph (17) provides for elimination of the SBA regulation that prohibits approval of contract support above 25% of the level in the concern's approved business plan. The current restriction requires an owner of an 8(a) concern to accurately project its amount of 8(a) sales for a five year period upon entry into the 8(a) program

and submission of an approved business plan. Under existing SBA regulations, these estimated levels of required 8(a) support may only be adjusted under certain circumstances and requires submission of a new business plan. Unless these adjustments are made and approved, contracts are lost. This is unnecessary because, under existing regulations, the firm is small only if it is eligible to perform under the SIC code specified for the contract. This overlay of regulation solely designed to deny contract support to eligible minority small business is bad policy and is contrary to the intent of Section 1207 of Public Law 99-661, and the goals of the Section 8(a) program. Paragraph (17) encourages the growth and competitive viability of Section 8(a) concerns by eliminating the restriction on Section 8(a) sales beyond the program support levels approved in the business plan of the concern assuming the firm is otherwise small and remains eligible for such contract.

Section 4. Provides that Federal agencies with procurement powers must establish policies and procedures to ensure increases in the number and dollar value of contracts awarded under Sections 8(a) and 15 of the Small Business Act for 3 years following the date of enactment of this Act above the number and dollar value applicable to fiscal year 1987. These policies and procedures must be designed to increase the number of contracts otherwise awarded under minority set-aside goals applicable to the agency above fiscal year 1987 levels.

Subparagraph (b) provides that if the number and dollar value of contracts awarded under Sections 8(a) and 15 of the Small Business Act have not increased at the end of fiscal year 1988, the interim rule implementing Section 1207(a) of Public Law 99-661, published in the Federal Register on May 4, 1987, shall be suspended until the number and dollar value of such contracts does increase above fiscal year 1987 levels. This provision must be read in the context of Section 13 of this Act which provides that if the overall goal of Section 1207 is not met, the 5% goal for minority small business will become mandatory. This does not reflect a desire to limit the SDB program, but to have it serve as it was intended as a supplement, not a substitute for the 8(a) program.

Section 4 ensures that specific procedures are implemented to be certain that the small and disadvantaged business set-aside program and 5% contracting goal established by Section 1207(a) of Public Law 99-661 does not interfere with or diminish contracting under the Section 8(a) and small business set-aside programs and achieving

the Department of Defense's 5% minority business goal. Both programs should work in harmony to achieve the 5% goal of Section 1207.

- Section 5. Amends the Minority Small Business and Capital Ownership Development program to require the SBA to establish regulations, procedures, or guidelines for prompt and simultaneous processing of Phase I and Phase II applications for certification into the Section 8(a) program. Six months after an applicant to the Section 8(a) program has submitted the appropriate forms and information to the SBA, applicants will automatically be certified into the Section 8(a) program unless the SBA has rejected the application for a valid reason.

Currently, applicants for Phase I of the Section 8(a) program experience a delay of up to six months before approval of the Phase I application. Applicants for Phase II of the certification process experience delays of up to two years before certification into the Section 8(a) program. Section 5 combines the two-stage application process into a one-stage application process and ensures prompt processing of applications by the SBA to remove the administrative burdens and costs to both the applicants and the government caused by the delays in processing. Enactment of Section 5 will permit more qualified minority small businesses to participate in the Section 8(a) program and will facilitate achieving the goals of increased government contracts to minority small businesses. Implementation by SBA would be simple and could be achieved within existing staff limits if the fixed participation period is adopted as contained in Section 2 of this bill. Further, SBA can and should eliminate one of the three present review processes at the District, Region and Central offices and certain steps within the process.

- Section 6. Amends the Minority Small Business and Capital Ownership Development program by providing that ten (10) days following submission of a completed proposal for a subcontract under Section 8(a) of the Small Business Act and compliance with all necessary representations and warranties and approval by the Defense Contract Audit Agency (DCAA) and the procuring agency, the SBA will be deemed to have approved the contract unless the SBA has given a specific, valid reason for objecting to the award.

Under the program as currently administered, Section 8(a) firms are waiting up to six months for approval of subcontracting proposals by the SBA. During this period of delay, small business concerns may be forced to bear the sometimes significant financial burdens



of interest costs, salaries and benefits for personnel not performing on the contract while the SBA is processing the subcontracting proposal. A ten day maximum processing period is reasonable because both the procuring agency and the DCAA approve proposals after negotiation with the 8(a) subcontractor but prior to submission for SBA approval. While the SBA is the "Prime Contractor", this will ensure that SBA staff review, which is largely unnecessary, can be eliminated and SBA staff can devote effort to much needed business development activity. Section 6 ensures that small business concerns will not suffer the adverse consequences associated with delays in subcontracting approval by providing a ten day period for approval on subcontracts.

Section 7. Amends the Minority Small Business and Capital Ownership Development Program established by Section 8(a) of the the Small Business Act by substituting the phrase "Section 8(a) negotiated procurement program" for the phrase "Section 8(a) set-aside program" in all statutory and regulatory language regarding the Section 8(a) program.

This amendment will assist in alleviating the incorrect perception that Section 8(a) contracts are awarded without negotiation and in the absence of controls over the price of the contract.

Section 8. Amends Section 15 of the Small Business Act by adding two new paragraphs.

Paragraph (2) provides that in attempting to maximize the participation of small business concerns and Section 8(a) concerns, the critical factor in the performance appraisal of contracting officers shall be their performance in satisfying the minority set-aside objectives of the procuring agency and effectively utilizing the Section 8(a) program and the small business set-aside program.

Paragraph (3) provides that the agency head is responsible for establishing procedures or guidance so that contracting officers can set goals which the agency's prime contractors should meet in awarding subcontracts in Section 8(a) firms, with a minimum goal of 5% for each contractor required to submit a subcontracting plan to the agency. Agency heads are also required to establish procedures and guidance to contracting officers to provide incentives, including a minimum of five additional points out of a possible score of 100 points, to prime contractors on their total evaluation score, or equivalent benefits, and to provide incentives

for the prime contractors to increase subcontractor awards to the Section 8(a) firms. Section 8 provides a mechanism for facilitating achievement of the minority set-aside objectives of each federal agency and effectively utilizing the Section 8(a) negotiated procurement, small business set-aside and small disadvantaged business set-aside programs by tying contracting officers' performance ratings to achievement of the agency's minority set-aside objectives. Institution of a more participatory role by agency contracting officers in achievement of the minority set-aside objectives of the agency will be facilitated by providing prime contractors with additional credit to their total evaluation score when they utilize minority subcontractors. Rather than penalizing contracting officers for failing to achieve the agency's minority set-aside objectives or penalizing prime contractors for failing to utilize minority small businesses, Section 4 encourages achievement of these greater participatory roles by small and minority small businesses by providing incentives to the contracting officers and prime contractors for utilizing small and minority small businesses.

In effect, Public Law 95-507 has not been implemented because no mechanism of accountability was created. This long needed accountability will give life to the minority small business program.

Section 9. Amends Section 8(a)(3) of the Small Business Act to provide that small business concerns selected by the Small Business Administration to perform a contract under the Section 8(a) program shall participate in negotiation of the terms and conditions of the contract when practicable. (This provision is identical to provisions of H.R. 1807).

Paragraph (3)(B) provides that a fair market price for the award of an 8(a) contract shall be based on "reasonable costs under normal competitive conditions". If a procurement selected for the Section 8(a) program is new or does not have a satisfactory procurement history, a price or cost analysis is to be conducted by the offering agency for the purpose of estimating a current fair market price. The price or cost analysis may consider prevailing market conditions, commercial prices for similar products or services, or data available from other agencies. The analysis must consider data provided by the SBA and the Section 8(a) firm.

If the procurement has a satisfactory procurement history, the agency shall base its estimate of a current

fair market price on recent award prices. The agency is further directed, however, that such recent award prices are to be adjusted to insure comparability. Factors to be considered in the adjustment are: differences in quantities, performance time, plans, specifications, transportation costs, packaging and packing costs, labor and materials costs, overhead costs, and any other appropriate costs. In addition, the SBA is permitted to request and receive information and data upon which an agency has established its fair market price estimate. Further, a statutory right is created for the concern to receive a detailed written statement of the method used by the agency to establish the fair market price (FMP) and the concern may submit a protest to the SBA Administrator if the firm believes that the statutory guidelines pertaining to FMP's were not appropriately applied. The Administrator has 10 days to decide such a protest. If the decision is in favor of the concern, the SBA must file an appeal with the head of the buying agency. The contract action is to be suspended pending the disposition of the appeal unless the contracting officer determines that award must be made to protect the public interest.

Section 9 institutes affirmative changes to the Section 8(a) program by establishing more objective procedures for determining fair market price, providing a mechanism for appeal of FMP determinations and providing Section 8(a) concerns with a more participatory role in contract negotiations with procuring agencies in order to further decrease the possibilities for arbitrary or inconsistent decision-making in the procurement process.

Section 10. Amends Section 15(k) of the Small Business Act by adding a new paragraph providing that the Office of Small and Disadvantaged Business Utilization (SADBU) in each procuring agency shall be responsible for determining whether a particular procurement is administered under the small business, Section 8(a) or small disadvantaged business set-aside programs. Contracting officers will, of course, continue to participate in technical evaluations. SADBU officers who are advocates responsible for all small disadvantaged business programs, will, for the first time, have the authority to make determinations as to the type of small business set-aside program a particular procurement should be contracted under to ensure that the small disadvantaged business program established by Section 1207(a) of Public Law 99-661 does not interfere with or diminish contracting under the small business or Section 8(a) programs of the Small Business Act.

This change is needed because no advocacy exists today and poor results stem from lack of contracting officer commitment to minority small business.

Section 11. Provides that contracting officers shall require representations and warranties from all firms submitting proposals for Department of Defense contracts under the rules established by the Department of Defense to implement Section 1207(a) of Public Law 99-661. These representations and warranties must be submitted with all proposals stating that the concern is at least 51% owned by a socially and economically disadvantaged individual or individuals, that such individual(s) manages and controls the concern on a daily basis and that the concern is small under the size standards established by the SBA in Part 121 of Chapter I of Title 13 of the Code of Federal Regulations. Discovery procedures will be instituted to strengthen the appeal process and will be modeled after Rules 11, 26, 34, 37 and 45 of the Federal Rules of Civil Procedure.

Section 11 ensures that the goals of Section 1207(a) of Public Law 99-661 of encouraging the participation of small disadvantaged businesses in the procurements of the Department of Defense are met by providing mechanisms for preventing the award of contracts to businesses which are not small, run by individuals who are socially and economically disadvantaged or actually managed and controlled, on a daily basis, by such individuals. Requiring representations and warranties with penalties for misrepresentations will decrease the likelihood that the SDB set-aside program will create opportunities for "fronting". Also, providing discovery on appeal will ensure that a meaningful challenge is conducted to dissuade those who would abuse this program. The SBA shall model its discovery procedures after Rules 11, 26, 34, 37 and 45 of the Federal Rules of Civil Procedure.

Section 12. Provides that the profit policy set forth in the interim rule published in the Federal Register on December 1, 1986 by the Department of Defense will not apply to a firm which is a small business concern under part 121 of Chapter I of Title 13 of the Code of Federal Regulations. This provision prohibits application of the pre-negotiation profit policy of the Department of Defense interim rule to prevent the serious adverse effects this rule, and its emphasis on facilities capital in determining pre-negotiation profit objectives, will have on Section 8(a) and small business concerns, especially those concerns in the professional, high-technology service industries. Preliminary calculations find that high-technology

## FACT SHEET

### IN SUPPORT OF THE RICHARDSON BILL, H.R. 2972 "MINORITY ENTERPRISE ENHANCEMENT ACT"

We urge you to call Congressman Bill Richardson (D-NM) (225-6190) and become a co-sponsor of the Minority Enterprise Enhancement Act. Congressmen Ron Dellums (D-CA), Steny Hoyer (D-MD), Robert Matsui (D-CA), Esteban Torres (D-CA), Robert Garcia (D-NY), Manuel Lujan (R-NM), Jerry Lewis (R-CA), and Joseph DioGuardi (R-NY) have already co-sponsored H.R. 2972.

1. Did you know that approximately 70 percent of the Department of Defense's (DoD) budget presently reflects contracts procured through the sole-source method of procurement?
2. Did you know that only 1.8 percent of the DoD budget goes to minority small business, either through the Small Business Administration's Section 8(a) program, which are "negotiated procurements" supervised by the SBA, or through competitive subcontracting?
3. Did you know that within the 1.8 percent of the DoD budget which goes to minority small businesses, many of the significant procurements at the Department of the Navy and other procuring offices within the DoD already have competition or a technical run-off, and in some cases a price competition either on a formal or informal basis? These procedures are already part of the so-called sole-source or negotiated procurement process of the 8(a) program.
4. Did you know that congressional hearings on fraud, waste, and abuse conducted last year and in previous years by the Congress resulted not from concerns with sole-source procurements within the 8(a) program, but rather from some activities arising out of competitive bidding and sole-source contracting involving nonminority firms?
5. Did you know that sole-source contracting was not abolished in the nonminority area as a result of the fraud, abuse, and waste discovered during congressional hearings?
6. Did you know that there is no legislative requirement that contractors who have sole-source contracts perform the contracts to conclusion, thereby preventing firms from changing ownership during performance of the contract? Neither competition nor representations preventing transfer of ownership during performance of sole-source contracts was required of nonminority businesses. The nonminority procurement programs were simply strengthened. Why should there be discrimination established for minority owners who receive sole-source contracts, on a negotiated basis under the supervision of the SBA 8(a) program, and not for nonminority businesses?

7. Did you know that there are few, if any, examples of fraud, waste, or abuse arising out of the Section 8(a) program? Why should the 20-year history of effective sole-source contracting for minority business be abolished or compromised? Does this seem fair?
8. Did you know that the minority goal of 5 percent for small business is modest in comparison to the reality of minority set-asides in certain parts of the Country?
  - a. Did you know that under the Surface Transportation Assistance Act of 1982, not less than 10 percent of authorized federal government funds must be set-aside for federal highway construction work? 1/
  - b. Did you know that under the Public Works Employment Act of 1977, not less than 10 percent of authorized federal government funds must be set aside for federal public works projects? 2/
  - c. Did you know that in Washington, D.C. 35 percent of government contracts must be set-aside for minority businesses? 3/
  - d. Did you know that Philadelphia, Pennsylvania has a 15 percent goal for contracting with minority small businesses? 4/
  - e. Did you know that Atlanta, Georgia has a 35 percent goal for contracting with minority small businesses? 5/
  - f. Did you know that Los Angeles, California has a 21 percent goal for contracting with minority small businesses? 6/
  - g. Did you know that the Commonwealth of Pennsylvania has a 10 percent goal for contracting with minority small businesses? 7/
9. Don't you think it is time that we enhance minority small business programs and support and co-sponsor the Richardson bill?
10. Don't you think some of the proposals currently being considered by Congress could be viewed as less than even-handed when one looks at the facts as they exist?
11. Is there any reason why the federal government should be less supportive of minority business than in the cities of Philadelphia, Atlanta, and Los Angeles?
12. Is there any reason why the federal government cannot enhance the present minority business program in order to provide, through the SBA Section 8(a) program and the SDB program, a meaningful 5 percent of contracting dollars of the DoD and other federal agencies to minority small businesses?

We don't think so!

We ask you to support the Richardson bill, the "Minority Enterprises Enhancement Act" (H.R. 2972), to achieve this reasonable goal and to send to the minority community and those who support the minority community a proper signal of support for minority small enterprise in this Country.

Please urge co-sponsorship of the "Minority Enterprise Enhancement Act" (H.R. 2972), and encourage inclusion of all its provisions in any legislation being considered by the House Small Business Committee.

- 1/ Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (1983).
- 2/ Pub. L. No. 97-28, 42 U.S.C. § 6705(f)(2).
- 3/ D.C. Code §1-1146 (1983).
- 4/ Philadelphia Code §17-503.
- 5/ City of Atlanta Administrative Order No. 85-1 (1985).
- 6/ Los Angeles City Affirmative Action Plan.
- 7/ We have been informed this is an unwritten policy.

## **SUMMARY OF "MINORITY ENTERPRISE ENHANCEMENT ACT"**

The Minority Enterprise Enhancement Act ("the Act") provides an affirmative thrust for improvement of the Small Business Administration's (SBA) Section 8(a) program and the Department of Defense's (DoD) Small Disadvantaged Business (SDB) set-aside program. Without this positive thrust, the goals established to benefit minority small businesses including the goals of the Section 8(a) program — to foster business ownership by individuals who are socially and economically disadvantaged and to promote the competitive viability of such firms — will not be accomplished. Similarly, the goals of the DoD's SDB program — to contract 5 percent of all DoD procurement dollars to minority small business concerns — will not be met.

Accordingly, the following sections of the Minority Enterprise Enhancement Act are critical to improvement of the SBA's Section 8(a) program and the DoD's SDB set-aside program:

- ★ Establish a maximum 10-year fixed participation term for all concerns in the Section 8(a) program. Firms will automatically phase out under existing regulations in a much shorter period by the self-graduating mechanism of the existing SIC code size limitations. Increasing the possible period of participation from the current maximum of 5 years plus a possible extension for a maximum total period of 7 years to a maximum statutory 10-year period will eliminate the guesswork and uneven administration of FPPT applications which really duplicate the existing graduation program. Under this approach 8(a) firms will have increased opportunities to achieve competitive viability post-graduation and the administrative burdens currently imposed on the SBA by its existing procedures concerning FPPT extensions will be eliminated. (Sections 2(a)(1)-(3))
- ★ Codify the existing law and SBA policy regarding options and modifications exercised by procuring agency contracting officers with 8(a) concerns following their graduation or termination from the 8(a) program. Each federal agency will have the authority to honor options and modifications on contracts executed by Section 8(a) companies, without SBA participation in the contracting activity, provided the options or modifications are within the scope of work of the contract entered into when the contractor was a member of the 8(a) program and otherwise eligible to receive such 8(a) program support. (Section 2(b))
- ★ Provide that existing firms in the 8(a) portfolio may have a phased withdrawal for a maximum period of 3 years following graduation by permitting 8(a) concerns to negotiate directly with procuring agencies on new contracts involving the same activities as performed by the concern before graduation. This provision will enable Section 8(a) graduates to obtain, under limited circumstances, additional assistance in order to achieve a competitive viability post-graduation. Section 8(a) graduates should also be encouraged to participate in the SDB set-aside program. (Section 2(c))



- ★ Eliminate recently adopted, overly restrictive SBA regulations confining firms to a limited family of standard industrial classification codes in which they can contract and prohibiting approval of contract support above 25 percent of the level indicated in the concern's business plan. These amendments eliminate excessive regulations which were passed by the Acting Administrator. Amend the size standards by excluding the amount of 8(a) program support a firm receives in determining the size of the 8(a) concern. Continuation of existing strict SBA regulations limiting the award of contracts to avoid excessive backlog at graduation is unnecessary. The SDB program does not limit SIC code eligibility or volume of business by business plan. These artificial constraints are unnecessary given existing SBA regulations which clearly allow the SBA to control contract award levels to every 8(a) firm. By allowing 8(a) firms to pursue business in areas they are capable of performing and eliminating the artificial barriers of SIC limitations, firms will more readily achieve real world competitive viability. (Section 3)
  
- ★ Implement a requirement that each federal agency with procurement powers must establish policy and procedures to increase in number and dollar value the contracts awarded under the 8(a) program, and achieve the 5 percent goal imposed by Congress on the DoD. With implementation of this requirement, small minority business goals are more likely to be achieved. (Section 4)
  
- ★ Streamline the 8(a) certification process by requiring all applications for certification into the 8(a) program to be processed within 6 months after filing of completed applications with the SBA. The SBA will be required to simply eliminate one level of bureaucracy, i.e., district, regional, or central office review, and streamline the application process. If FPPT review is eliminated, staff time will be more than adequate to handle the streamlined application process and much needed business development activity. This will increase the number of firms entering the 8(a) program. (Section 5)
  
- ★ Provide that the SBA is deemed to have approved all 8(a) contract proposals within 10 days following submission by the firm of its proposal, negotiation of the contract, DCAA and procuring agency approval, and provision of all necessary representations and warranties by the firm, unless the SBA objects for a specific valid reason. Under existing policy even though a contract is fully reviewed and negotiated by the procuring agency, because the SBA is a "prime contractor" its contracting officer spends inordinate time duplicating what the firm and the procuring agency have already accomplished. This provision recognizes what the SDB program recognizes — once the procuring agency has approved the procurement, little or no additional work by the SBA is really needed. This provision will go far in eliminating the procuring agencies' reluctance to request that particular requirements be set-aside for the 8(a) program due to the 4 to 6 month delay in processing contracts which agencies experience when matters are referred to some offices of the SBA. (Section 6)

- ★ Tie contracting officer's performance ratings to achievement of increased contracting with minority small businesses and effective utilization of the Section 8(a) set-aside and SDB set-aside programs in order to increase the number of contracts and contract dollars awarded to minority small businesses. Prime contractors will be provided with additional credit for utilizing small minority businesses as subcontractors. This is a simple implementation many years later of Public Law 95-507 which is largely being ignored because there is no incentive, or there is a disincentive for complying with the laws. (Section 8)
- ★ Provide that fair market price (FMP) analysis be based on reasonable costs under normal competitive conditions, that data provided by the SBA and the 8(a) firm be considered, and that the data be available to the SBA and the concern and be appealable to the Administrator. This establishes objective procedures for determining an FMP and a more participatory role for 8(a) concerns and the SBA in these determinations. This is needed because the "new" game in rejecting minority business includes setting unreasonably low FMPs. (Section 9)
- ★ The SABDU is authorized to make a determination whether a particular requirement will be administered as an SDB or Section 8(a) set-aside. This allows the authorized small business advocate to perform a key function. (Section 10) The contracting officer will require representations and warranties from firms submitting proposals to the DoD verifying that the concern is an SDB to prohibit "front" companies. The possibility of abuse by fronting is addressed by this provision. (Section 11)
- ★ Provide for a mandatory 5 percent contracting requirement for DoD if it fails to achieve its 5 percent goal by the end of fiscal year 1989.

These few steps must be taken by Congress in order to achieve previously established congressional goals for the enhancement of minority small businesses.

SUMMARY OF MAJOR PROVISIONS OF  
MAVROULES/CONTE AMENDMENT  
IN THE NATURE OF A SUBSTITUTE TO  
H.R. 1807

The Mavroules/Conte Amendment provides additional and substituted provisions to H.R. 1807 to alter the Small Business Administration Section 8(a) and 7(j) programs. Some of these provisions propose positive changes to the minority small business program. Most provisions, however, offer changes which will have a serious adverse effect on firms in the 8(a) portfolio.

The following is a summary of the major provisions of the Mavroules/Conte Amendment:

- ° The Small Business Act's purpose would be changed from "promoting the competitive viability of such firms" to making firms "competitive in the marketplace". (Section 1)
- ° Socially and economically disadvantaged individuals applying for certification into the 8(a) program will be ineligible for participation in the program unless the SBA determines that the concern has met a sufficient proportion of competitive criteria prior to entry. (Section 2).
- ° Most concerns in the 8(a) program on the date of enactment of the compromise will be either graduated immediately or forced into the mainstream stage which requires total competition. (Section 4)
- ° Concerns will be ineligible to receive sole source contracts if they received their first sole source contract at least seven years before the date of enactment of the compromise. In addition, concerns will be ineligible to receive competitive contracts under the newly developed competitive 8(a) program if they received their first 8(a) contract at least nine years before the date of enactment of the compromise. (Section 4)
- ° Firms can be terminated for good cause or failure of the concern to make adequate progress toward achieving competitive criteria. A firm can be terminated for (1) failing to make progress within the time limits prescribed or (2) failing to meet a sufficient proportion of "competitive criteria" in any one year. In addition, firms can be graduated prior to the end of the term if the firm has satisfied its "competitive criteria". (Section 4)
- ° The SBA will have to develop objective standards for three stages in the 8(a) program: a developmental stage, a transitional stage, and a mainstreaming stage. During

the concern's yearly support level must be obtained through competition within the 8(a) program. Competition may be among concerns in the developmental and transitional stages. During the transitional stage, which lasts three years, 40% of the concern's yearly support level must be obtained through competition within the 8(a) program. The final stage of the program, called the "mainstreaming stage", lasts two years and requires 100% competition. (Section 5)

- Eliminates Business Development Expense (BDE). Permits the Associate Administrator, on a non-delegable basis, under limited circumstances, to provide financial assistance through purchase by the SBA of "development investments" in a firm. (Section 5)
- Gives additional authority for SBA to appeal to the appropriate agency head a contracting officer's negative decision regarding the selection of a requirement for award under the 8(a) program. (Section 6)
- Provides that fair market price for the award of an 8(a) contract be based on reasonable costs under normal competitive conditions, that data provided by the SBA and the 8(a) firm be considered, and that the data be available to the SBA and the concern and be appealable to the Administrator. This established objective procedures for determining FMP and a more participatory role for 8(a) concerns and the SBA in these determinations. (Section 6)
- Requires that 8(a) support levels contained in a concern's business plan must not exceed its primary size standard during any three (3) period of program participation. Finally, since all 8(a) contracts awarded in the last stage of program participation are competitive, there are no support levels for firms in this last stage.
- If a contract is offered to SBA for award under the 8(a) program and the offering agency nominates a firm to perform that contract, or if a firm identifies the requirement and causes the agency to offer it to SBA for the 8(a) program, SBA is required to designate that firm to negotiate for the requirement if certain conditions are met. In addition, the Associate Administrator is authorized to make equitable allocations of requirements to field offices if no firm has self-marketed the contract, been identified by the offering agency or been nominated to perform the requirement. (Section 8)
- Requires every 8(a) firm to report to the Inspector General, on a quarterly basis, the names and amount of compensation paid to any agents, representatives, attorneys, accountants, or consultants retained by the firm to help it secure

federal contracts. (Section 8)

- ° Section 8(a) owners will be required to certify that they will maintain ownership and control of the concern throughout the performance of all 8(a) contract and options. Section 8(a) owners will therefore be prohibited from freely raising capital or otherwise making corporate changes after graduation or termination from the program. (Section 8)
- ° The penalty for criminal misrepresentations concerning the status of small or small disadvantaged business concerns will be increased from \$50,000 and/or 5 years to \$500,000 and/or 10 years. (Section 9)
- ° Each agency will be required to implement Section 1207 by establishing policies and procedures to ensure no reduction of 8(a) contracts or alteration of the 8(a) program. (Section 11)
- ° The bill would become effective one year after enactment except that employee training requirements and the new graduation rules take effect immediately upon enactment. (Section 16)

SUMMARY OF PROVISIONS OF MAVROULES/CONTE AMENDMENT  
IN THE NATURE OF A SUBSTITUTE TO H.R. 1807

Section 1(a) Eliminates term "sole source" because program is no longer entirely sole source.

(b) Changes Small Business Act's purpose from "promoting the competitive viability of such firms" to making "firms competitive in the marketplace".

Section 2 Socially and economically disadvantaged individuals applying for certification into the 8(a) program will not be eligible for participation unless the business is already successful on a competitive basis. The compromise bill completely changes the current requirement that the SBA make a determination that there would be support for a concern entering the program to now require that the SBA determine that the concern has met a sufficient proportion of competitive criteria prior to entry.

The initial bill specified the exact percent of the criteria of competitiveness that had to be met before a firm could be let into the program. The Mavroules/Conte amendment allows SBA to set that percentage, but requires that it be set at a level which indicates that the firm has the potential to successfully complete the program.

Section 3 Provides for assistance to participating firms in development of comprehensive business plans and by conducting business development training sessions.

Section 4(d) Gives the SBA guidelines as to what "competitive criteria" through (f) of firms should consist of.

(g) Provides that most concerns in the 8(a) program on the date of enactment of the compromise will be either graduated immediately or forced into the mainstream stage which requires total competition.

Concerns will not be eligible to receive sole source contracts if they received their first sole source contract at least seven years before the date of enactment of the bill. In addition, concerns will not be eligible to receive competitive contracts under the bill's newly developed competitive 8(a) program if they received their first 8(a) contract at least nine years before the date of enactment of the bill.

(h) Provides for termination for a firm for good cause or for failure of the concern to make adequate progress toward achieving competitive criteria. A firm can be terminated for (1) failing to make progress within prescribed time limits or (2) failing to meet a sufficient proportion

of the firm's "competitive criteria" in any one year.

- (j) Provides for graduation prior to the end of the concern's participating term if the firm has satisfied "competitive criteria".

Section 5

The section provides that the SBA develop objective standards for three stages in the 8(a) program: a developmental stage, a transitional stage, and a mainstreaming stage. The bill provides that during the developmental stage, which lasts four years, 15% of the concern's yearly support level must be reserved for other concerns in the developmental and transitional stages. During the transitional stage, which lasts three years, 40% of the concern's yearly support level must be reserved for firms in the first two stages. The final stage of the program, called the "mainstream stage", lasts two years and requires 100% competition. Section 5 also provides for certain developmental and training assistance for firms in the first two stages.

Paragraph (13)(A) ELIMINATES Business Development Expense (BDE) and instead permits the Associate Administrator, on a non-delegable basis, under limited circumstances, to provide financial assistance by the SBA by purchasing "development investments".

Additionally, the SBA is authorized to enter into contracts and cooperative agreements to organize and conduct international trade fairs.

Paragraph (16) provides that to the extent practicable, the Administrator is to ensure that the performance appraisal system applicable to Business Opportunity Specialists affords substantial recognition to the progress their respective 8(a) portfolios are making toward competitiveness.

Paragraph (17) provides that the evaluation of loan officers and Business Development Specialists shall be based, in part, on the timely submission and quality of their reports to the Business Opportunity Specialists.

Section 6

Provides additional authority for SBA to appeal to the appropriate agency head a contracting officer's negative decision regarding the selection of a requirement for award under the 8(a) program.

Provides that fair market price for the award of an 8(a) contract shall be based on "reasonable costs under normal competitive conditions."

Section 7

If a procurement selected for the 8(a) program is new or does not have a satisfactory procurement history, a price or cost analysis is to be conducted by the offering agency for the purpose of estimating a current fair market price. The price or cost analysis may consider prevailing market conditions, commercial prices for similar products or services, or data available from other agencies. The analysis must consider data provided by SBA and the 8(a) firm.

If the procurement has a satisfactory procurement history, the agency shall base its estimate of a current fair market price on recent award prices. The agency is further directed, however, that such recent award prices are to be adjusted to insure comparability. Factors to be considered in the adjustment are: differences in quantities, performance time, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other appropriate costs. In addition, SBA is permitted to request and receive information and data upon which an agency has established its fair market price estimate. Further, a statutory right is created for the concern to receive a detailed written statement of the method used by the agency to establish the fair market price (FMP) and the concern may submit a protest to the SBA Administrator if the firm believes that these statutory guidelines pertaining to FMP's were not appropriately applied. The Administrator has 10 days to decide such a protest. If the decision is in favor of the concern, SBA must file a appeal with the Head of the buying agency. The contract action is to be suspended pending the disposition on the appeal unless the contracting officer determines that award must be made to protect the public interest.

Section 8

Paragraph 15 requires that 8(a) support levels be contained in the business plan and that 8(a) dollars, as a percent of total sales, be decreased over the firm's term of participation in the 8(a) program. Further, this amendment specifies that no 8(a) contract may be awarded to other than a small business and that the dollar value of the award must be within the approved level of support. In addition, the support level cannot be set so high that it would, by itself, result in the firm exceeding the applicable size standard during any three (3) period of program participation. Finally, since all 8(a) contracts awarded in the last stage of program participation are competitive, there are no support levels for firms in this last stage.

Paragraph (16) provides that if a contract is offered to SBA for award under the 8(a) program and the offering



agency nominates a firm to perform that contract, or if a firm identifies the requirement and causes the agency to offer it to SBA for the 8(a) program, SBA is required to designate that firm to negotiate for the requirement if the following conditions are met:

- 1) the concern is a responsible concern for the proposed award;
- 2) the award would be in accordance with the targets, objectives, and goals of the concern's approved business plan; and
- 3) the completion of the proposed award will either further the concern's progress against its competitive criteria or prevent its failure to make progress against such criteria.

Paragraph (17) provides that if requirements are offered to SBA for potential award under the 8(a) program and no eligible small business has either been nominated to perform the requirement or caused the agency to offer the requirement to SBA, such requirement has to be equitably allocated among the various SBA field offices. The field office in receipt of the requirement is to designate a firm to negotiate for the award as long as the firm meets the three requirements described in paragraph (16). In addition, the field office is to afford priority to the following concerns in descending order of priority:

- 1) a concern that, upon receipt or completion of the requirement will have accumulated a sufficient proportion of competitive criteria that would allow it to graduate from the program;
- 2) a concern that needs the requirement in order to avoid termination from the program due to failure to make adequate progress towards its competitive criteria, but only if a diligent effort has been made by the concern to make progress towards competitiveness; and
- 3) a concern that, when compared with other eligible concerns, has achieved the lowest percentage of its 8(a) contract support level for the relevant year, as contained in its business plan.

Paragraph (18) prohibits any SBA employee from owning stock in any 8(a) firm that was in the program during that employee's term of employment. This prohibition also extends for two (2) years after the employee terminates his/her employment with SBA. Any present or

former employee who violates this prohibition is subject to a civil penalty, assessed by the Attorney General, equal to the maximum amount of gain that the employee realized or could have realized by trading in the 8(a) firm's stock.

Paragraph (19) would provide that the Administrator and the Deputy Administrator are to be the only two political appointees within the employ of the agency that can manage or participate in the management of the 8(a) or 7(j) programs.

Paragraph (20) would preclude any SBA employee who has authority to take, direct others to take, recommend, or approve any action with respect to 8(a) or 7(j), from exercising that authority or threatening to exercise that authority on the basis of the political activity or affiliation of any party. Every SBA employee would also be under an obligation to report to the Inspector General any such action for which the employee's participation had been solicited. A violation of this prohibition would make the employee subject to disciplinary action; however, if the Administrator or Deputy Administrator violate this provision, separation from service would be mandatory. These penalties are in addition to and not in lieu of any others that may be imposed under other provisions of law dealing with this subject matter.

Paragraph (21) would require every 8(a) firm to report to the Inspector General, on a quarterly basis, the names and amount of compensation paid to any agents, representatives, attorneys, accountants, or consultants retained by the firm to help it secure federal contracts. The reporting firm must also provide a description of the activities performed by such individuals in return for the compensation received.

The Associate Administrator is required to immediately report to the Inspector General any suspicion of improper activity based on these reports and make a request to Congress within 30 calendar days after reports are due naming the concerns if a firm fails to make such a report.

Paragraph 22(A) provides that Section 8(a) owners will not be permitted to freely raise capital or otherwise make corporate changes after graduation or termination from the program. Section 8(a) owners will be required to certify that they will maintain ownership and control of the concern throughout the performance of all 8(a) contract and options.

Paragraph 23(A) provides that a small business concern will not be denied the opportunity to submit and have considered an offer for a contract for the supply of a product solely because the concern is not the actual manufacturer or processor of the product to be supplied under the contract.

Under SBA Regulations it is required that, in order to be considered a "small business concern" for small business set-asides or 8(a) contracts, it is necessary that the concern supply the government with an end-product made by a domestic small business concern. In those cases where there are no small business manufacturers, the government is effectively precluded from issuing a set-aside or 8(a) contracts. The amendment, therefore, would permit set-asides and 8(a) contracts for those items for which there are not small business manufacturers but would still require that the product be domestically manufactured.

- Section 9      Increases the penalty for criminal misrepresentations concerning the status of small or small disadvantaged business concerns from \$50,000 and/or 5 years to \$500,000 and/or 10 years.
- Section 10     The Mavroules bill text required the I.G. to conduct an investigation at the request of the Committee. The amendment would change the requirement to a request but would further impose upon the I.G. a duty to state why he or she may have failed to conduct an investigation requested by the Committee.
- Section 11     Contains two provisions from the Richardson amendment to the Defense Authorization Act. Each agency required to implement Section 1207 must establish policies and procedures to ensure no reduction in 8(a) contracts occurs or implementation of Section 1207 in a manner that will alter the 8(a) program.
- Subsection (2) of Section 11 authorizes procurement center representatives to monitor performance of procurement activities and increases the number of 8(a) and 1207 contracts.
- Section 12(g)   Provides for a public comment period and time frames for the SBA to develop regulations to implement the act. Additionally, the bill provides for a five day training period for SBA employees with special emphasis on evaluation and measurement of competitive criteria and business administration.
- Section 13     Requires annual GAO reports on the operations of the 8(a) and 7(j) programs.

- Section 14 Repeals powers of the SBA which are contradictory to this act.
- Section 15 Authorizes funds to implement SBA employee training and other provisions of the act including the hiring of Procurement Center Representatives and Business Opportunity Specialists.
- Section 16 Provides that this bill would become effective one year after enactment except that employee training requirements and the new graduation rules would take effect immediately upon enactment.

Addendum

On Tuesday, July 28, 1987 the House Subcommittee on Procurement, Innovation and Minority Enterprise Development marked-up the Mavroules/Conte bill. The only amendment to the bill which was passed by the subcommittee provided that a provision be incorporated into government contracts which provides for liquidated damages in the event that a prime contractor fails to comply in good faith with the subcontractor requirements for minority small businesses. Prime contractors must set goals for subcontracting that are not unreasonably below their actual past performance.

THE MINORITY ENTERPRISE ENHANCEMENT ACT (H.R. 2972), PROVIDES REAL OPPORTUNITY FOR MINORITY SMALL BUSINESS AND MUST BE ADOPTED TO "REFORM" PROGRAM FAILURES AT THE SAME TIME THAT "REFORM" OF PROGRAM ABUSES IS ADDRESSED. THE CLARITY OF VISION NEEDED TO ADDRESS ABUSE IS ADMIRABLE. THE CLARITY OF VISION NEEDED TO ADDRESS PROGRAM FAILURE AND TO PROVIDE REAL OPPORTUNITY IS THE TRUE CHALLENGE.

PROPOSALS TO REQUIRE THE INTRODUCTION OF "COMPETITION" INTO THE SMALL BUSINESS ADMINISTRATION SECTION 8(a) NEGOTIATED PROCUREMENT PROCESS, INCLUDING PROVISIONS OF H.R. 2269 (THE CONTE BILL) AND H.R. 1807 (THE MAVROULES BILL) TO CORRECT PERCEIVED ABUSES OF THE PROGRAM ARE INAPPROPRIATE AND UNNECESSARY BECAUSE THE FEDERAL GOVERNMENT AND THE SMALL BUSINESS ADMINISTRATION HAVE STATUTES, PROCEDURES AND REGULATIONS IN PLACE TO HANDLE THESE SITUATIONS WHICH NEED ONLY BE PROPERLY ENFORCED

COMPETITION SHOULD BE INTRODUCED DURING A PHASED WITHDRAWAL AFTER A 10 YEAR PERIOD OF PARTICIPATION IN THE PROGRAM  
DURING WHICH COMPETITION IS NOT REQUIRED

Some have the clarity of vision to recognize the reforms which are needed to prevent the relatively few but well publicized instances of program abuse in the minority small business program. The real challenge, however is to have the vision to recognize the reforms which are needed to enhance the opportunities of minority small businesses.

For more than 17 years, the Small Business Administration's (SBA's) Section 8(a) program has functioned well. During the last five years over 4,000 firms have participated in the Section 8(a) program and its sole-source negotiated method of procurement. Program abuses have been few. In spite of one well-publicized exception and innuendo about other problems, when compared to other federal procurement programs and the abuses occurring in these programs, the Section 8(a) program is an overwhelming success.

The only clear obstacles to the continued success of the program are the overly restrictive limitations currently existing in the program, including the very limited period of participation, the arbitrariness of the FPPT setting and extension process, the prohibition on approval of 8(a) program support above 25% of the level established in the concern's "business plan", the limitations on the number of Standard Industrial Classification codes a concern may be approved under, the current method of determining the size of small business concerns, and the continuing introduction of further regulatory obstacles by the SBA and Congress, such as some provisions of H.R. 2269 and H.R. 1807.

True reform to improve the Section 8(a) program, not just

reform for the sake of reform, must implement changes which allow small minority business to grow and increase in size. Such reform includes elimination of overly restrictive regulatory limitations, establishment of a 10 year period of participation in the program, preservation of the negotiated procurement process and introduction of a phased withdrawal period to enhance, not constrain, the opportunities of minority small businesses.

Recently, however, because of the alleged improper conduct of Wedtech employees and certain public officials, in addition to a few other isolated, but also well-publicized instances, a perception has developed that the SBA's 20 year old method of negotiated procurement is unwise and unworkable. The record simply does not justify such a conclusion. If one compares allegations of abuse, fraud and waste in the federal government in general, the Section 8(a) program, on balance, is exemplary. The abuse of the \$700 hammer did not occur in the minority small business program; outlandish cost overruns did not begin within the minority small business program, and allegations of bribery and graft were not concerned with the minority small procurement program.

The reason the Section 8(a) program has been conducted on a sole-source negotiated procurement basis for the past 20 years is sound and should not be disturbed. Upon entry into the program and during the participant's term in the program, minority small businesses do not have the skills, time and resources necessary to prepare successful, competitive proposals and to go through a

competitive process. However, these minority small businesses are thoroughly capable of performing the work.

Some who are now proposing to initiate competition into the Section 8(a) sole-source negotiated procurement process are the long-time critics of the program who have sought to kill it for many years. These critics are capitalizing on one or two isolated but well-publicized incidents of abuse and innuendo of other alleged abuse to advance their long-standing goal of introducing further debilitating restrictions into the Section 8(a) program. Overwhelmingly, the SBA has been successful in running a proper program.

While its regulations may be in need of revision because of past poor policy decisions, the personnel on staff at SBA have, with some limited but notable exceptions, tried to apply the law and regulations as they have been adopted to help minority small business. In the very isolated instances of abuse where public officials within the SBA or elsewhere are guilty of fraud, public corruption or some other abuse of their authority, enforcement of existing federal criminal statutes, SBA statutes, SBA regulations and the SBA Code of Conduct is the appropriate answer. It is important to note that no such finding has yet been made, only allegations of wrongdoing exist. Sadly the allegations of wrongdoing are not limited to SBA staff.

Similarly, if a Section 8(a) owner, its officers, directors or employees are found guilty of bribing public officials, making false statements or other improper conduct, enforcement of these existing statutes and regulations is the solution.



Congress does not need to introduce "competition" to achieve honesty in the Section 8(a) program. On the contrary, early competition will encourage abuse and "fronting". Where does a minority person go to have a competitive proposal written? What does the business owner use to pay for the service? What does the owner do to "influence" the competitive arena? The real result of early competition will be something none of us want.

As indicated, enforcement of existing statutes and regulations is the solution to program abuse, not introduction of early competition. For example, existing criminal statutes subject individuals who make false, fictitious or fraudulent statements to federal agencies to a fine of \$10,000 and/or imprisonment for not more than 5 years.<sup>1/</sup> Individuals would also be subject to criminal penalties for giving, offering, or promising anything of value to a public official with the intent to influence an official act or induce the official to do or omit to do an act in violation of the official's lawful duty.<sup>2/</sup> Public officials can also be subject to criminal penalties for improper conduct including instances where they demand, seek, receive, accept or agree to receive or accept anything of value in return for being influenced in an official act or induced to do or omit to do any act in violation of his or her lawful duty.<sup>3/</sup>

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<sup>1/</sup> 18 U.S.C. § 1001.

<sup>2/</sup> 18 U.S.C. § 201.

<sup>3/</sup> 18 U.S.C. § 203. Violation of this provision subjects the public official to a fine of three times the monetary equivalent of the bribe demanded, sought or received.

Similarly, current SBA regulations address instances of abuse of the program involving bribery, graft, or corruption. For example, it is illegal for an SBA official to receive, agree to receive, request or solicit, any gift, gratuity, favor, or any other thing of monetary value from a person who is seeking to obtain SBA assistance or who conducts operations or activities regulated by the SBA. 4/ SBA employees guilty of violating this provision may be subject to disciplinary action involving dismissal or suspension from SBA employment, in addition to other penalties under law. Under current SBA regulations, employees are also prohibited from engaging in any action which results in or creates even the appearance of giving preferential treatment, losing independence or impartiality or engaging in conduct which adversely affects the confidence of the public and the integrity of the government.5/ Violation of this provision is the basis for disciplinary action.

In addition, Small Business Administration Standard Operating Procedures also address abuses of the program. For instance, Section 8(a) concerns may be terminated from the program upon the conviction of the concern or its principals of a criminal offense when the offense is incident to obtaining or attempting to obtain a contract or a subcontract.6/ Section 8(a) concerns may also be terminated for submitting false information or violating any

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4/ 13 C.F.R. § 105.503.

5/ 13 CFR § 105.505.

6/ Standard Operating Procedures 80 05-1, Minority Small Business and Capital Ownership Development Program, § 95 (1987); 13 CFR § 124.112.

of the SBA's "significant" rules and regulations.<sup>7/</sup>

As these criminal statutes and SBA regulations and procedures demonstrate, introduction of competition into the Section 8(a) program is not necessary. Strict enforcement of these existing laws is all that is required to address concerns with program abuse. Further, early competition will have precisely the wrong effect. It will make the minority small business owner hostage to the persons who provide the resources to develop competitive proposals and "influence" the contracting officer's decision. This is bad policy.

Simply stated, preservation of the negotiated method of procurement is essential to achieving the goal of the 8(a) program -- to assist concerns owned by socially and economically disadvantaged individuals to achieve competitive viability. A competitive procurement requires minority small firms to write proposals and wait perhaps one and one half years for a first win. The resources needed to compete even against only other minority firms will be substantial for small firms and represent a waste of critically needed management skills during the early development of a minority firm.

A fixed participation period of 10 years (rather than the existing FPPT of up to five years with a possible extension up to a maximum seven year participation term) followed by competition within the minority small community for three years would further this goal. A recent survey of 8(a) graduates indicates that up to thirty percent of all 8(a) firms do not survive after graduation

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<sup>7/</sup> Id.

survive after graduation from the program. One of the primary reasons cited by the graduates for this high failure rate was inadequate time in the 8(a) program. A fixed ten year participation period would go a long way toward correcting this problem. Introducing competition too early into the process will have precisely the opposite effect and is therefore the wrong answer.

As indicated earlier, another recurring theme for why Section 8(a) firms are not successful is because of the regulatory obstacles imposed on the concerns by the SBA. When asked candidly why the regulations were adopted, the SBA staff's unofficial answer is simple -- these obstacles were imposed to prevent 8(a) concerns from achieving any significant size which was thought to be potentially embarrassing even though the minority small business firm would still be a small business under the SIC code size standard regulations.

This philosophy is inconsistent with the goals of the program because overly restrictive regulations on the size of 8(a) firms prevents those firms from being able to achieve a size enabling a professional infrastructure to develop within the firm. This infrastructure is needed so that competitive viability is achieved when the firm enters the open market after graduation. If small minority firms are in the program for a reasonable period of 10 years they will be able to compete with other non-8(a) firms upon graduation from the program. Therefore, if one is truly concerned with improving the Section 8(a) program and encouraging realization of its goals, imposing additional regulatory obstacles, especially the introduction of competition into the 8(a) procurement process,

prior to the development of a professional infrastructure and the maturing of the firm, is not the answer.

The appropriate response would be to enforce existing statutes and regulations to curtail abusive behavior, introduce a fixed 10 year period of participation within the existing self-graduation system of SIC code size standards and eliminate the key regulatory obstacles which were recently adopted by the prior Acting Administrator to further curtail the minority small business program. At a minimum, the 25% cap on 8(a) program support above the level established in the concern's business plan should be eliminated. No firm can predict its business plan needs. Therefore, the SIC code limits are a self-executing discipline on size. Also, the limitations on the number of standard industrial classification (SIC) codes for which a concern may be approved to obtain 8(a) contract support under the current size standard limitations should be eliminated. The Small Disadvantaged Business (SDB) program has no such limits because none are needed. This is another example of an artificial attempt to stunt the growth of 8(a) firms. It is no small wonder that the five percent DoD goal cannot be met.

Some have pointed to this recently established SDB program of the Department of Defense as an example of how the Section 8(a) program should operate in some respects. This is an inappropriate example to support amending the 8(a) program based on perceived program abuses as the SDB program presents tremendous opportunities for abuse, fraud and "fronting" by non-minorities. Specifically, an SDB firm would not have many of the proposed restrictions placed on Section 8(a) firms. "Fronting" could therefore become a serious

problem in the SDB program. Any individual qualifying under the SDB program could sell or transfer 49% of his or her control in the company to a non-minority and then step away from any real participatory role in the concern's day to day affairs. No regulatory authority such as that existing in the 8(a) program to prevent such activity will oversee fronting activity. Further, no legal discovery or subpoena authority is provided in an SDB protest. As a result, no true facts can be accumulated to pursue if "fronting" is occurring. Hence the "paper" appeal is not a true protection against "fronting". A limited subpoena and discovery process, including document production and depositions within 30 days from commencement of the protest, should therefore be imposed in this area. At the present time, a concern would continue to be eligible for contracts under the SDB program even if undetected fronting existed.

Simply put, despite whatever perceived problems may exist with the Section 8(a) program it is and has been successful for 17 years and will continue to be successful if permitted to do so due to the oversight provided by the SBA, criminal statutes and the regulations and procedures of the Small Business Administration, oversight mechanisms which are sorely lacking in the SDB program.<sup>8/</sup>

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<sup>8/</sup> For example, as currently administered, the only alternative for addressing concerns with program abuse under the SDB program is to protest whether the concern is 51% owned by a minority. However, despite ownership, the minority person need not necessarily be in control of the concern. One possible solution to this problem is to require additional representations and certifications, in addition to the representation that the concern is small, with each proposal certifying that the concern is controlled by a minority individual who participates in the daily affairs and operation of the concern and devotes full-time and attention to the concern.

In conclusion, more than adequate criminal statutes and SBA regulations and procedures exist to prevent program abuse, fraud and corruption within the Section 8(a) program. Therefore, the solution to addressing concerns over program abuse and inappropriate behavior raised by the alleged actions of certain Wedtech employees and public officials is not to introduce further regulatory obstacles into the program, such as early and excessive competition into the procurement process, but to strictly enforce the provisions of existing law and eliminate regulatory obstacles so that the goals and purposes of the 8(a) program are no longer impeded.

Most importantly, minority small business needs a chance to succeed. The current program simply is not providing that opportunity. We must reform the program to eliminate potential for abuse and reform the program to provide these real opportunities.

WHITE PAPER SUPPORTING DELETION OF SECTION 7, PARAGRAPH 22  
OF H.R. 1807 PERTAINING TO CONTINUOUS OWNERSHIP BY MINORITY  
OWNER DURING COMPLETE PERIOD OF PERFORMANCE OF CONTRACTS OR  
OPTIONS AWARDED TO THAT CONCERN UNDER THE SMALL BUSINESS  
ADMINISTRATION'S SECTION 8(a) PROGRAM

TO REQUIRE THAT A MINORITY OWNER OF A SECTION 8(a) CONCERN  
PROVIDE THE SMALL BUSINESS ADMINISTRATION WITH REASONABLE  
ASSURANCES THAT OWNERSHIP BY THAT MINORITY INDIVIDUAL WILL  
CONTINUE THROUGHOUT THE ENTIRE PERIOD OF PERFORMANCE OF  
ANY SECTION 8(a) CONTRACT OR OPTION IS DISCRIMINATORY,  
UNCONSTITUTIONAL, UNWISE AND UNWORKABLE. THEREFORE,  
SECTION 7, PARAGRAPH 22 OF H.R. 1807 SHOULD BE DELETED.



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Some Members of Congress currently perceive a need to require owners of minority small businesses which are members of the Small Business Administration's Section 8(a) program or which have graduated or been terminated from the 8(a) program to maintain majority ownership of the 8(a) concern during the entire period of performance on contracts or options awarded to that concern under the Section 8(a) program. These members believe this requirement is necessary to avoid the "Amex problem" where the owner of a minority, small business sells the company to a large business and that large business is permitted to perform on contracts entered into by the former minority owner under the 8(a) program.

The magnitude of this perceived problem is not large. When Members of Congress and others discuss the sale of an 8(a) concern to a large business which is permitted to perform the "backlog" purchased from the former owner, only one incident is ever identified -- the sale of Amex along with its backlog of 8(a) contracts to Allied Bendix. One isolated incident of an 8(a) owner selling an "excessive" backlog to big business in the seventeen year history of the 8(a) program with over 4,000 firms participating in the 8(a)

portfolio over the past five years alone, does not necessarily justify legislation. The Small Business Administration (SBA) has regulations, which were in place at the time of the Amex sale and which have been strengthened, to insure that owners of 8(a) concerns do not have excessive backlog either during their term in the 8(a) program or upon graduation from the program. Given the seventeen year history of the program with only one sale which raises questions because of a possible excessive backlog, one must concede that the SBA's regulations work very well.

A review of the history of all small businesses in the United States reveals that a very high percentage of small businesses do not retain their original ownership structure for more than ten years. Small firms either merge, are purchased, go public or utilize some other method of developing capital. There is no valid reason to expect an 8(a) owner to behave any differently. One must question whether banks would even make loans to 8(a) companies knowing that the 8(a) owner is not permitted to sell his assets to raise capital.

Despite this background, some Members of Congress would place such a restriction on owners of 8(a) concerns. Section 7, Paragraph 22 of H.R. 1807 requires 8(a) owners to provide the Small Business Administration with reasonable assurances, prior to receipt of an 8(a) contract, that he or she will maintain ownership and control of the concern throughout the entire period of performance of the contract, including all options. In addition to being unwise and unworkable, such a provision is unnecessary given existing SBA regulations and Standard Operating Procedures.

No concern is eligible to participate in the Section 8(a) program unless that concern qualifies as a small business as defined by the SBA size standards and based upon that concern's primary business classification.<sup>1/</sup> Once a concern is certified into the 8(a) program, that concern must be small under the appropriate size standard for each individual contract in order to be eligible to perform that contract.<sup>2/</sup> In addition, under the new SBA regulations, 8(a) concerns are not eligible to perform 8(a) contracts unless those contracts are classified under one of the few Standard Industrial Classification (SIC) Codes that 8(a) concerns are permitted to include in their approved business plans.<sup>3/</sup> These regulations limit the number of 8(a) contracts which a concern is eligible to receive and, by definition, place a limit on the amount of backlog which an 8(a) concern can accumulate.

The Small Business Administration's Standard Operating Procedure (SOP) requires full coordination and cooperation between all SBA offices in identifying, reserving and equitably distributing local and national buy requirements.<sup>4/</sup> In addition, SBA District Offices are required to approve all potential 8(a) contracts

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<sup>1/</sup> 13 C.F.R. §124.102(a).

<sup>2/</sup> "[O]nce a concern is admitted to the program, the concern must certify to SBA that it is a small business concern pursuant to the provisions of §121.4 for the purpose of performing each individual contract which it is awarded. SBA, in turn, will verify such certifications." 13 C.F.R. §124.102(b).

<sup>3/</sup> "[The Section 8(a)] concern will only be permitted to perform 8(a) contracts which are classified according to the [SIC] code numbers which appear in its business plan as established pursuant to ... these regulations." 13 C.F.R. §124.102(c).

<sup>4/</sup> SBA SOP 80-05, Rev. 1, ¶ 34, p. 140 (Effective April 27, 1987).

self-marketed by 8(a) concerns. These contracts will only be approved by SBA if the 8(a) concern needs the requirement to satisfy its business plan projections without exceeding them.<sup>5/</sup>

Finally, the SBA regulations provide a mechanism whereby the SBA may determine that an 8(a) concern has completed its term in the 8(a) program if it has substantially achieved the goals and objectives set forth in its business plan.<sup>6/</sup>

Moreover, current SBA regulations relating to affiliation require the SBA to either terminate a concern from the 8(a) program if that 8(a) concern becomes generally affiliated<sup>7/</sup> with another firm which causes the newly formed concern to be other than small<sup>8/</sup> or to refuse to award 8(a) contracts under a specific SIC code if

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<sup>5/</sup> 13 C.F.R. §124.301(b)(5).

<sup>6/</sup> "When a Section 8(a) business concern has substantially achieved the goals and objectives set forth in its business plan prior to expiration of its Fixed Program Participation Term, and has demonstrated the ability to compete in the marketplace without assistance under the section 8(a) program, its participation within the program shall be determined by SBA to be completed." 13 C.F.R. §124.110(k).

<sup>7/</sup> See 13 C.F.R. §121.3 for general definitions of "affiliation."

<sup>8/</sup> See 13 C.F.R. §124.112(a)(2) (providing for program termination for "[f]ailure by the concern to maintain status as a small business under the Small Business Act, as amended, and the regulations promulgated thereunder for each of the Standard Industrial Code designations contained in the participating concern's business plan."); 13 C.F.R. §124.112(a)(3) (providing for termination for "[f]ailure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership and control by the person(s) who [have] been determined to be socially and economically disadvantaged pursuant to these regulations."); and 13 C.F.R. §124.112(a)(5) (providing for program termination for "[f]ailure by the concern to disclose to SBA the extent to which nondisadvantaged persons or firms participate in the management of the section 8(a) business concern.")

the SBA determines that the 8(a) concern is affiliated with another business which makes the 8(a) concern other than small for purposes of that SIC code.<sup>9/</sup> These affiliation regulations provide adequate control on 8(a) concerns during their tenure in the 8(a) program. Violation of these regulations leads to termination from the program.<sup>10/</sup>

However, upon graduation or termination from the 8(a) program, Small Business Administration policy wisely permits that an owner of an 8(a) concern may sell a portion of his or her business. Government contracting agencies may continue to exercise options and modifications on 8(a) contracts as long as the option or modification is within the scope of the underlying contract executed when the 8(a) concern was small. This policy has been approved by the Government Accounting Office<sup>11/</sup> and the United States District Court for the District of Columbia.<sup>12/</sup>

Existing regulations provide the SBA with more than adequate authority to prevent uneven or unfair accumulation of contract backlog by 8(a) concerns. Section 7, Paragraph 22 of H.R. 1807

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<sup>9/</sup> "If the SBA has made a formal size determination that a particular concern is not small, the concern will not be deemed eligible within such applicable size standard ... unless it is thereafter recertified by SBA as a small business." 13 C.F.R. §121.8(d).

<sup>10/</sup> 13 C.F.R. §124.112(a)(1) provides for program termination of an 8(a) concern for failure "to continue to meet any one of the standards of program eligibility set forth in these [SBA] regulations."

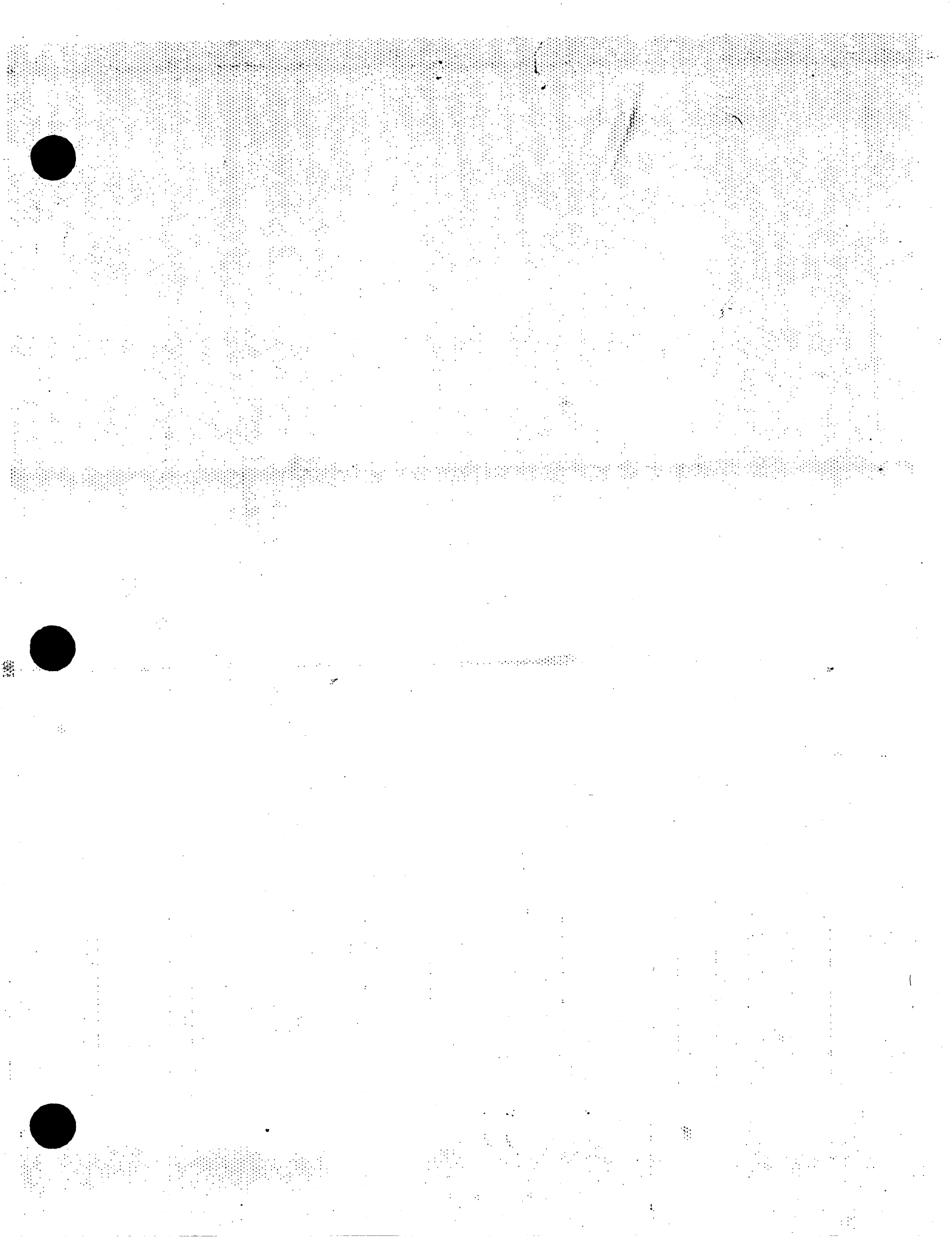
<sup>11/</sup> See Gallegos Research Corporation - Reconsideration, Comptroller General B-209992.2, B-209992.3 (1983).

<sup>12/</sup> See Systems and Applied Sciences Corp. v. Sanders, 544 F. Supp. 576 (D.D.C. 1982); Amex Systems v. Cardenas, 519 F. Supp. 537 (D.D.C. 1981).

is therefore unnecessary and should be deleted as the SBA already has in place and is exercising its authority under existing regulations and procedures to distribute and reallocate backlog administratively to prevent "trafficking" in SBA contracts and options.

This wise policy has worked for the SBA for many years without incident or problem while administering all of the 8(a) firms in the portfolio. It is wise policy because it provides former 8(a)'s with the same rights as other businesses, namely to sell, merge or otherwise use the business to raise capital. It is also sound and sensible business policy cognizant of the realities of today's business world.

In contrast Section 7, Paragraph 22 of H.R. 1807 is unwise and unworkable. More importantly, Section 7, Paragraph 22 of H.R. 1807 is discriminatory and raises serious constitutional considerations. One must question the constitutionality of a law that prohibits minority owners from selling their businesses if those businesses have ongoing contracts that were received as a result of the 8(a) negotiated procurement process. Other programs including the small business set-aside program, the DOD SDB set-aside program, as well as the sole-source provisions of the Competition in Contracting Act, provide contracting opportunities for non-minority owned large and small firms. There has never been any suggestion that the owner of a non-8(a) company should be prohibited from selling a small minority business merely because the owner obtained contracts on a basis other than through full and open competition. It would be discriminatory for Congress to pass legislation that would place this restriction on minority owners of small businesses



while, for example, large companies which receive sole-source contracts are not required to be unreasonably restricted in this fashion.<sup>13/</sup>

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<sup>13/</sup> Sole-source contracts are routinely granted pursuant to exceptions to the Competition in Contracting Act when for example:

- (1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;
- (2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;
- (3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;
- (4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;
- (5) a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale; or
- (6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

41 U.S.C. § 253(c), see also 10 U.S.C. § 2304(c). No restrictions exist on the resale of large businesses performing these sole-source contracts.



Moreover, Section 7, Paragraph 22 of H.R. 1807 is contrary to the purpose of the 8(a) program. As repeatedly expressed by Congress that purpose is to provide opportunities for full participation in the free enterprise system by socially and economically disadvantaged persons in order to obtain social and economic equality for such persons and improve the function of the national economy. See 15 U.S.C. § 631. This goal of economic equality is not intended for anonymous corporate entities, but rather to assist disadvantaged persons to move into the mainstream of a competitive society.<sup>14/</sup>

To argue that the Amex sale was improper and inconsistent with the goals of the Section 8(a) program, one must ignore the true goal of the 8(a) program: to obtain social and economic equality for socially and economically disadvantaged individuals.

At the time when Amex was sold, most of its options were unfunded. Contracting agencies were not required to exercise those options but chose to do so. Perhaps the reason many of the options were exercised was because they would be performed by the existing Amex division effectively. The management team, including minority

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<sup>14/</sup> As stated by the Congress, the purposes of the program are to:

- (A) foster business ownership by individuals who are both socially and economically disadvantaged;
- (B) promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary; and
- (C) clarify and expand the program for procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

employees assembled by the company, performed the contract except where options were not exercised and the business went to another company.

An Administrative Law Judge found that the SBA would probably not succeed in a case challenging the Amex sale. The SBA's own documents involved in the question of Amex's size determination support this contention where the SBA Office of Hearings and Appeals, in granting Amex's motion to stay enforcement of the Associate Administrator's adverse size determination, ruled:

I [Judge Benjamin Usher] find that the Appellant [Amex] has demonstrated a sufficient likelihood of success on the merits of this Appeal, and that the Appellant has demonstrated that it, and not the Agency, endures the balance of hardships in this matter. Although given ample opportunity to do so, the Agency has not shown that it will be harmed to any significant degree by the effect of [the] stay of the [Associate Administrator's adverse size determination of April 24, 1985.]

See Order Granting Appellant's Motion to Stay Enforcement of Determination, Size Appeal of Amex Systems, Inc. (June 13, 1985).

At a later time, the Amex case was settled by the parties without further litigation. There was no evidence in the record to indicate any intended violation of SBA regulations or actions taken other than in good faith. See Stipulation of Discontinuance with Prejudice of the Appeal of Amex Systems, Inc., Size Appeal of Amex Systems, Inc. (October 29, 1985). Accordingly, the single "example" offered to support a need for Section 7, Paragraph 22 of H.R. 1807 is not very persuasive when it is stripped of rhetoric and innuendo.

The goal of the Section 8(a) program--to provide opportunities for full participation in our free enterprise system by socially

and economically disadvantaged persons will only be impeded by Section 7, Paragraph 22 of H.R. 1807.

In conclusion, SBA regulations and procedures already exist to prevent 8(a) owners from "loading up" and then selling all or a portion of their companies. To enact a law restricting the sale of an 8(a) concern while that concern is performing on contracts it received on a negotiated basis while that firm was in the 8(a) portfolio is discriminatory and contrary to the goals of the program.

31 July 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASD(P)DARS  
c/o OASD (P&L) (M&RS)  
RM 3C841, The Pentagon  
Washington, DC 20301-3062

Ref: DAR Case 87-33

Dear Sir,

This is to officially submit the position of the Association of Small Research, Engineering and Technical Service (ASRET) companies in response to the request in the May 4, 1987 Federal Register, page 16263 to provide comments concerning the "interim rule" relative to contracting goals for minorities.

Nearly 80 small hi-technology businesses, which make up the association, have spent considerable time in reviewing and discussing this issue and as a body have come to the following conclusions:

1. ASRET, as an association composed of small disadvantaged as well as non-disadvantaged hi-tech organizations, is highly in favor of supporting small disadvantaged businesses during their early years and has no quarrel with Section 1207 of the 1987 DOD authorization act in principle.
2. However, we do find that the specific omission of the source of funding for the 5% set aside (and the 10% allowable overage of fair market price) leaves it wide open to interpretation as to where the money will come from.
3. Congressional intent regarding DOD awards to section 1207(a) entities, is clearly evidenced by Section 846 of the proposed National Defense Authorization Act for FY 88 and more specifically Paragraph b (7) in which it states that "there shall be no reduction in the number or dollar value of contracts awarded under Section 8(a) of the Small Business Act and under the small business set-aside program established under Section 15(a) of the Small Business Act in order to meet the goal of section 1207 of the DOD Authorization Act of 1987."
4. It appears that DOD and particularly the Navy Department, despite Congress' intent to leave small business set-asides (SBSAs) sacrosanct (see Paragraph 3), has unfortunately implemented the legislation in a manner which is very damaging to many small businesses and could be fatal if not corrected.
5. What has happened recently in NAVSEA, and probably other activities, is that procurements that were originally set-aside for small business as a follow-on to previous SBSAs are being changed to small "disadvantaged" business (SDB) set-asides, thereby shutting out the incumbent small business from competing as the prime contractor. This does a true disservice to the incumbent who earlier had competed and won the contract in the first place.

It also does a disservice to the Government since the technical and managerial skills employed and enhanced on the previous contract would not be available to perform due to reassignment or loss of personnel.

6. Under these conditions, it appears that a reasonable solution until the interim regulation is finalized is to implement the SDB set-aside program on new procurements rather than those already supported by small business incumbents.

With regard to the final regulation, it is recommended, nay urged, that in keeping with congressional intent to help small disadvantaged businesses yet protect the sanctity of its other small and minority programs, DSARC should:

a. Impose on large businesses the requirement to subcontract at least 5% of its contract dollars on each award to small disadvantaged businesses and 5% to other small businesses.

b. Require each large business to justify to the satisfaction of the cognizant Contracting Officer why he can't meet that goal.

c. Ban any reduction in the existing share of small business awards, unless the existing goal is exceeded.

In regard to the above dissertation a report containing a more detailed discussion was hand delivered to Colonel Guenther this past week (Analysis of the Five Percent Disadvantaged Contracting Goal by ASRET), a copy of which is enclosed herein.

Before closing, I would like to offer the services of ASRET and/or its members to participate in any ad hoc discussions or reviews which could have an impact on small business.

Also, please call me any time if you are desirous of impromptu thoughts or opinions on any subject where small business may be involved. I will be only too willing to help.

Very truly yours,

ASRET



R. Kenneth Misner  
President

cc: R. Manderson, ASRET  
Executive Director



ASSOCIATION OF  
SMALL RESEARCH  
ENGINEERING AND  
TECHNICAL SERVICES COMPANIES

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ANALYSIS OF  
THE FIVE PERCENT  
DISADVANTAGED CONTRACTING GOAL  
BY THE ASSOCIATION OF  
SMALL BUSINESS RESEARCH, ENGINEERING  
AND TECHNICAL SERVICES COMPANIES

July 24, 1987

TABLE OF CONTENTS

	<u>PAGE</u>
I. EXECUTIVE SUMMARY.....	1
A. The 1987 DOD Authorization Act Section 1207.....	1
B. Implementation.....	2
II. RECOMMENDATIONS.....	5
A. Preserve Small Business Set Asides.....	5
B. Enforce FAR 19.701.....	5
C. Competition Advocate Review.....	6
D. Preserve Small Business Goals.....	6
E. Public Notice.....	6
III. STATISTICS SHOW THE INTERIM RULE VICTIMIZES SMALL BUSINESS.....	6
A. Statistics Confirm The Small Business Program Will Suffer.....	6
B. Sampling Of Navy Contractors Expose Impending Extinction.....	8
IV. CONGRESS DISAPPROVED DOD'S UNWARRANTED TRADEOFFS AFTER PUBLICATION OF THE INTERIM REGULATIONS.....	9
A. Legislative History.....	9
B. Proposed Sole Source Contracts.....	12
C. Ten Percent Price Preferences.....	12
D. The Defense Budget Cannot Afford To Fund This Ten Percent Subsidy.....	12
E. Self Certification Invites Abuse.....	13

TABLE OF CONTENTS (continued)

- APPENDIX A: Statistics On Navy Contract Awards To Small Business And Disadvantaged Business
- APPENDIX B: Historical Congressional And Executive Branch Commitment To The Set Aside Program
- APPENDIX C: The Interim Rule Amending The Defense Federal Acquisition Regulation Supplement
- APPENDIX D: Section 1207 Of The National Defense Authorization Act For Fiscal Year 1987 And Legislative History
- APPENDIX E: Section 846 Of The Proposed National Defense Authorization Act For Fiscal Year 1988



IMPLEMENTATION OF THE FIVE PERCENT  
DISADVANTAGED CONTRACTING GOAL

I. EXECUTIVE SUMMARY

A. The 1987 DOD Authorization Act Section 1207

- Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law No. 99-661) establishes a five percent goal for DOD contract dollars awarded to small disadvantaged business. Congress placed section 1207 into the Act during the Conference Committee meeting. The Congress directed a report on the impact of this program on small (non-disadvantaged) concerns. Congress intended this rule to put teeth in FAR Subpart 19.7 requiring subcontracting plans for large businesses. Small business concerns harbor no objection to increased subcontracts between large and disadvantaged business.

- In the 1988 DOD Authorization bill, passed one month after release of the DOD interim rules, the House of Representatives expresses its disapproval of small business victimization under the 1987 DOD Authorization Act by mandating:

- (1) no reduction in the number or dollar value of small business set aside contracts due to the five percent initiative;
- (2) large business subcontracting to small disadvantaged business and break-out of contracts from large concerns to meet the five percent goal;
- (3) enforcement of long silent, existing amendments to the Small Business Act (Public Law No. 95-507) requiring large business to implement meaningful small and disadvantaged subcontract plans;
- (4) implementation of the five percent goal without harming the small business set aside program and small businesses developing within the program; and

- (5) designation of section 1207 acquisitions before DOD issues a solicitation, to prevent small business from wasting precious bid and proposal preparation and other precontract costs.

B. Implementation

- On May 4, 1987, the DAR Council issued interim DFARS regulations allowing only small disadvantaged businesses to compete for contracts after June 1, 1987 when the contracting officer determines (1) he, or she, can expect offers from two or more responsible small disadvantaged businesses and (2) contract price remains within ten percent of an elusive "fair market price". On June 2, 1987, the House of Representatives clarified its intention that the five percent program target large business subcontracts rather than work previously performed by small contractors. The DAR Council did not have the benefit of this clarification, nor reflect this intention, in its interim regulations.
- The interim rule of two stands inconsistent with FAR 19.501(g), which requires that small business set aside procurements remain set aside for small business:

Once a product or service has been acquired successfully by a contracting office on the basis of a small business set aside, all future requirements of that office for that particular product or service shall . . . be acquired on the basis of a repetitive set aside.
- The interim rules suffer from internal inconsistencies professing protection for small concerns but failing to obligate any effort by large business. For example, without assigning any role to large contractors, the interim rules seek "to ensure that small businesses as a class are not penalized. . . ." 52 Fed. Reg. 16263 (May 4, 1987). In reality the reverse occurs. See examples, infra pages 5-8; Appendix A.
- Fair market price lacks clear definition. It appears an arbitrary, highly subjective, determination whose inconsistent implementation appears likely.

- The interim rules provide for no technical review of a contractor's qualifications and experience by the SBA or anyone else. Set asides without technical competence lack credibility.
- The new standard reflects the rule of two standard traditionally used in determining whether to set aside a procurement exclusively for small business participation. The ten percent price preference, however, directly threatens the traditional set aside program. Under this laudable, and more liberal, standard for disadvantaged contractors, contracting officers feel compelled to transfer traditional set aside acquisitions to disadvantaged contractors.
- Other proposals, not yet promulgated as regulations, would grant disadvantaged contractors a ten percent preference in acquisitions not set aside for disadvantaged contractors and would allow sole source awards to disadvantaged contractors. This results in a ten percent subsidy out of the defense budget for disadvantaged contractors. These proposals appeared without coordination with the Congressional Budget Office and before the June 1987 clarification concerning the role of big business.
- Naval Sea Systems Command ("NAVSEA") services already contribute approximately 50 percent of available contract actions to disadvantaged concerns. Exemption of NAVSEA services would allow small concerns to survive and continue this generous contribution to the disadvantaged contractor community. See statistics infra pp. 5-8.
- The interim rule and the two proposals will harm small business because:
  - (1) Small business and disadvantaged business generally perform within the same size requirements. The disadvantaged rule of two, unlike the small business rule of two, however, allows a ten percent preference for disadvantaged set asides. This precludes small contractors from competition for work they performed as incumbents. Contrary to congressional intent, contracting officers already

D. Preserve Small Business Goals

Ban a reduction in the existing share of small business awards. This insures a meaningful small business goal. Leave undisturbed that work previously performed by small business pursuant to FAR 19.501, FAR 19.503 and FAR 19.506, which require work already performed by small concern to remain set aside for the small concern that previously performed the work.

E. Public Notice

Make all Commerce Business Daily classifications of solicitations final to prevent a waste of bid and proposal preparation costs. Provide meaningful advance notice to all concerns affected by a removal of an acquisition from the set aside program.

III. STATISTICS SHOW THE INTERIM RULE VICTIMIZES SMALL BUSINESS

A. Statistics Confirm The Small Business Program Will Suffer

- Statistics, in Appendix A, show sample Navy acquisitions, as a representative example, from small contractors and disadvantaged contractors. The statistics bear out that meaningful allocation of contract work to both small business and small disadvantaged business occurs in only the services area. The interim rule of two pits the success of these two important interests against each other -- something Congress explicitly disapproves. See H.R. 1748 § 846(b).
- Finer distinctions expose impending disaster. The two charts located in Appendix A statistically confirm that:
  - (1) focusing on NAVSEA as a representative procuring activity, disadvantaged businesses perform 85.5 percent of their work in the services area (195 contract actions), but less than 15 percent in all other contract areas combined (33 contract actions).
  - (2) Using fiscal year 1986 figures, the five

these two important interests against each other -- something Congress explicitly disapproves. See H.R. 1748 § 846(b).

Finer distinctions expose impending disaster. The two charts located in Appendix A statistically confirm that:

- (1) focusing on NAVSEA as a representative procuring activity, disadvantaged businesses perform 85.5 percent of their work in the services area (195 contract actions), but less than 15 percent in all other contract areas combined (33 contract actions).
- (2) Using fiscal year 1986 figures, the five percent goal in the NAVSEA Contractor Advisory and Assistance Services ("CAAS") subsector will require an additional \$15.9 million in contract actions, nominally averaging \$400,000 each. If the budget is constrained to the 1986 level, the interim rule thus will reduce CAAS set aside actions from 111 to 71 in number, a reduction of 36 percent.
- (3) Applying the five percent goal to the total NAVSEA fiscal year 1986 budget of \$12,036.2 million, and assuming that disadvantaged contractor awards will average \$400,000 each, NAVSEA will remove \$601.8 million and 1505 contract actions from the set aside program. Since 85 percent of these figures are attributable to the services area, \$511.5 million and 1279 contract actions will become disadvantaged contractor set asides in the CAAS area. Thus, 1474 disadvantaged contractor set asides in the services area and 771 in the CAAS area will eclipse small business set asides to satisfy the five percent program without contributions from large contractors.

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<sup>1</sup>The assumption that awards will occur at \$400,000 each is conservative. The average value of past disadvantaged contracts was \$200,000.

- (4) The result changes the existing (1986) 50:50 service contract ratio between small disadvantaged awards and small business awards to a 87.5:12.5 ratio -- precisely the opposite of what Congress intended.
- (5) 771 SDB set aside contract actions in the CAAS subsector, using 1986 figures, will consume \$308 million. The 8(a) and small business programs will cease to exist.

B. A Sampling Of Navy Contractors Exposes Impending Extinction

- A survey of actual Navy service contractors proves that DOD's implementation of section 1207 spells the end for many small businesses:

<u>Contractor Coded No.</u>	<u>Dependence On Small Business Set Aside Contracts</u>	<u>No. Of Employees At Risk</u>
1	100%	140
2	98%	110
3	60%	55
4	84%	105
5	30%	142

- Such severe business loss and layoffs:
  - (1) violate the congressional mandate for the set aside program.
  - (2) hinder competition by small business by increasing indirect cost rates and decreasing technical competence.
  - (3) cause small business to forever lose key employees.
- One NAVSEA example illustrates the problem. One Navy set aside procurement (PMS 312), worth an estimated \$1.1 million annually, remained in the set aside program since 1984 -- until now. The Commerce Business Daily synopsised the procurement on March 11, 1987 as set aside for small business and informed interested small concerns that the

Navy would issue the Request for Proposals on April 3, 1987. In detrimental reliance on the announcement, the incumbent and other small concerns diligently prepared for the competition. The Navy, without notice (or an opportunity to comment), moved the procurement into the new program pursuant to the interim rule. When the Request for Proposals came out several months late in June 1987, small businesses discovered, to their complete astonishment and disappointment, that, as a class, they are all ineligible to compete for the procurement because the Navy set aside the solicitation exclusively for disadvantaged contractors. By such actions, and in an era in which DOD restricts allowability of precontract costs, DOD lulls small business into wasting scarce proposal resources. The reclassification spells disaster, particularly for the incumbent, because the procurement represents a significant part of the incumbent's business. During the past several years the incumbent developed an excellent project team that it now must lay off indefinitely because of its devastating revenue loss.

IV. CONGRESS DISAPPROVED DOD'S UNWARRANTED TRADEOFFS AFTER PUBLICATION OF THE INTERIM REGULATIONS

A. Legislative History

- Congress intended that DOD attempt to meet the five percent goal through large business subcontracting and break-out of work performed by large business.
- DAR Council's misguided efforts lack any support in nearly three decades of enthusiastic congressional support for small business set asides. Indeed, section 921 of the 1987 DOD Authorization Act substantially strengthens the set aside program by requiring DOD to set aside a fair proportion of contracts in each industry category rather than on an overall basis. The interim rules cannot be reconciled with this strengthened congressional mandate.
- Both section 1207 and its scant legislative history lack specificity. See Appendix D. The 1988 Act clarifies congressional intent.

◦ The House of Representatives passed its version of the National Defense Authorization Act for Fiscal Year 1988, H.R. 1748, and introduced the bill on the Senate floor on June 2, 1987.

◦ H.R. 1748 establishes that Congress intended large business subcontracting and break-out of large business contracts to implement section 1207 while maintaining existing set asides:

(1) [T]here shall be no reduction in the number or dollar value of contracts awarded under the ... small business set aside program ... in order to meet the goal of section 1207...." H.R. 1748 §846(b)(7).

(2) DOD must "[e]stablish procedures or guidance for contracting officers to ... set goals which Department of Defense prime contractors should meet in awarding subcontracts to ... section 1207(a) entities, with a minimum goal of 5 percent for each [large] contractor which is required to submit a subcontracting plan under section 8(d)(4)(B)." H.R. 1748 §846(b)(2)(A). Only large concerns submit these subcontract plans.

(3) DOD must "[e]stablish procedures or guidance for contracting officers to ... provide incentives for [large] prime contractors to increase subcontractor awards to section 1207(a) entities." H.R. 1748 §846(b)(2)(b).

(4) DOD must "[p]rovide guidance to Department of Defense personnel on the relationship among the following programs:

(A) The program implementing section 1207 of the Department of Defense Authorization Act, 1987 (Public Law 99-661; 100 Stat. 3973)...

(C) The small business set aside program established under section 15(a) of the Small Business Act (15 U.S.C. 644(a))." H.R. 1748 §846(b)(4).



(5) "With respect to a Department of Defense procurement for which there is reasonable likelihood that the procurement will be set aside for section 1207(a) entities, require to the maximum extent practicable that the procurement be designated as such a set-aside before the solicitation for the procurement is issued." H.R. 1748 §846(b)(6).

(6) Allow partial disadvantaged business set asides. H.R. 1748 §846(b)(11).

- Appendix B explains that set asides remain unscathed after almost three decades of intense congressional and executive branch scrutiny.

- To implement the congressional requirement that agencies award a fair proportion of contracts to small businesses:

The entire amount of an individual acquisition or class of acquisitions ... shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (a) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (b) awards will be made at reasonable prices. FAR 19.502.2.

- Under FAR 19.501(g), quoted supra p. 2, FAR 19.503(d) and FAR 19.506, and well entrenched from years of DOD practice under the DAR and ASPR, once DOD sets aside an acquisition (or class of acquisitions) for exclusive participation by small concerns, it cannot remove the acquisition from the set aside program. This limitation stands as a logical conclusion from the correct application of the rule of two. Taking acquisitions from the set aside program to fuel the new five percent goal contradicts this well planned set aside policy.

B. Proposed Sole Source Contracts

- The DAR Council proposes sole sourcing when the interim rule of two fails and only one disadvantaged contractor exists.
- Agencies would make sole source disadvantaged contractor awards whenever a market survey and a "sources sought" notice in the Commerce Business Daily produces only small disadvantaged business to satisfy solicitation requirements. 52 Fed. Reg. 16289-90 (May 4, 1987).
- This proposal threatens the survival of the traditional small business set aside program and those developing businesses within that class.

C. Ten Percent Price Preferences

- Under another proposal, a ten percent price preference differential would benefit disadvantaged offerors. Agencies would make award to a small disadvantaged offeror whose offer fell within ten percent of the low offer.
- This proposal will skew substantially published evaluation factors, particularly in negotiated acquisitions.
- DAR Council presently studies criteria for applying the differential, and whether agencies should use the procedure only for unrestricted acquisitions, or in both set aside and unrestricted acquisitions.

D. The Defense Budget Cannot Fund This Ten Percent Subsidy

- Both the interim rule and the two proposals pose grave unnecessary consequences for the defense budget. Achievement of the five percent program through large contractor, subcontracts does not require this subsidy.
- An example illustrates the dangers. The 1987 National Defense Authorization Act authorizes the U.S. Navy to spend approximately \$31.7 billion. The Navy could allocate five

percent of this sum -- \$1.58 billion -- to the minority contracting goal. Up to ten percent of \$1.58 billion, or up to \$158.5 million, will subsidize the new program.

- Although subsidization of minority programs advances desirable social goals, the interim rule appears likely to channel up to \$158.5 million from the Navy budget without regard to the availability of competitive small concerns that previously did the same work for ten percent less, and even more significantly, appears likely to remove critical funding from the traditional set aside program.

E. Self Certification Invites Abuse

- DAR Council's interim rule proposes self certification of minority status despite recent exposure of fraud, fronts and misrepresentation in the 8(a) program. Under the interim rule, all an offerer must do to participate in the five percent program is to "represent in good faith that it is a small disadvantaged business (SDB) at the time of written self certification." 52 Fed. Reg. 16265 (May 4, 1987) to be codified at 48 C.F.R. §219.301(1).
- The interim rule provides no check on self certification except a theoretical competitor's protest. Such protests appear unlikely due to the inability of competitors to gain access to the internal business documents of a competitor. Such records, particularly financial records, would establish the true beneficiary of corporate profits.

APPENDIX A: STATISTICS ON NAVY CONTRACT AWARDS TO SMALL  
BUSINESS AND DISADVANTAGED BUSINESS

FISCAL YEAR 1986 STATISTICS  
DEPARTMENT OF NAVY & NAVAL SEA SYSTEMS COMMAND  
SOURCE: PINPOINT DATA SYSTEM  
(IN MILLIONS OF DOLLARS)

TABLE 1\*

8(a) AND SMALL BUSINESS MINORITY AWARDS	NAVY		NAVSEA	
	\$	ACTIONS	\$	ACTIONS
Total Procurement	47,133.4	82,517	12,036.2	3968
Subtotal Minority Proc. % of Total Proc.	568.5 1.2	2,949 3.5	185.3 1.5	228 5.7
Total Proc. (Service)	12,048.8	36,111	2,023.1	2138
Minority Awards (Service) % of Total Proc. Size Min. Awards (Service)	500.3 4.1 204,038	2,452 6.8	77.5 41.8 400,000	195 85.5

TABLE 2\*

CONTRACTOR ADVISORY & ASSISTANCE SERVICES	NAVY		NAVSEA	
	\$	ACTIONS	\$	ACTIONS
Total Proc (CAAS)	2,751.7	6,118	318.9	620
8(a) and Small Business Min. Awards % Of Total Proc. (CAAS)	89.1 3.2	491 8.0	39.8 12.4	102 16.5
Small Business Set Aside % Of Total Proc. (CAAS) Size SB Set Aside (CAAS)	168.6 6.1 150,805	1,118 18.2	41.3 12.6 372,072	111 17.9

\* Summarized from Navy data on succeeding pages.

PINPOINT DATABASE SERVICE  
 FEDERAL CONTRACT AWARDS

ORG: DD DEPARTMENT OF DEFENSE  
 AG : DDNO DEPARTMENT OF THE NAVY

PRODUCT/SERVICE ANALYSIS  
 SMALL BUSINESS COMPARISON

DR : FY88  
 \*\*\*\*\*

	TOTAL		RESEARCH & DEVELOPMENT		SERVICES		EQUIPMENT	
	AMOUNT	%	AMOUNT	%	AMOUNT	%	AMOUNT	%
TOTAL PROCUREMENT	\$47,133,374,000	100%	\$7,354,046,000	100%	\$12,048,888,000	100%	\$27,730,440,000	100%
	82,517	100%	7,298	100%	38,111	100%	39,110	100%
		100%		9%		44%		47%
*****								
SMALL BUSINESS-DISADVANTAGED 8(A) AWA	\$588,285,000	1%	\$13,579,000	2%	\$325,100,000	3%	\$229,608,000	1%
	1,730	2%	85	1%	1,483	4%	182	40%
		100%		5%		85%		11%
*****								
SMALL BUSINESS-MINORITY AWARDS	\$214,581,000	*	\$8,007,000	3%	\$175,243,000	1%	\$33,331,000	*
	1,219	1%	54	1%	989	3%	198	16%
		100%		4%		79%		16%
*****								
OTHER SMALL BUSINESS AWARDS	\$5,240,580,000	11%	\$285,523,000	4%	\$2,811,968,000	23%	\$2,143,071,000	8%
	25,025	30%	1,745	24%	13,857	38%	9,423	41%
		100%		7%		55%		24%
*****								
TOTAL SMALL BUSINESS AWARDS	\$8,023,428,000	13%	\$305,109,000	4%	\$3,312,309,000	27%	\$2,408,008,000	9%
	27,974	34%	1,884	26%	16,289	45%	9,801	40%
		100%		7%		58%		25%
*****								
SMALL BUSINESS SET-ASIDE AWARDS	\$2,804,133,000	6%	\$89,109,000	1%	\$1,932,499,000	16%	\$782,525,000	3%
	13,308	16%	800	11%	9,369	28%	3,139	28%
		100%		6%		70%		8%
		100%		6%		70%		24%

\* - PCT LESS THAN 0.5 %

PINPOINT DATABASE SERVICE  
 FEDERAL CONTRACT AWARDS

ORG: DD DEPARTMENT OF DEFENSE

AG : DDNO DEPARTMENT OF THE NAVY  
 PO : NAVSEA DC AREA OFFICES ONLY

PRODUCT/SERVICE ANALYSIS

SMALL BUSINESS COMPARISON

DR : FY88  
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	TOTAL	RESEARCH & DEVELOPMENT		SERVICES		EQUIPMENT		
TOTAL PROCUREMENT	\$12,038,246,000	100 %	\$1,556,002,000	100 %	\$2,023,130,000	100 %	\$8,457,114,000	100 %
	3,988	100 %	482	13 %	2,138	17 %	1,348	70 %
		100 %		100 %		100 %		100 %
		100 %		12 %		54 %		34 %
*****								
SMALL BUSINESS-DISADVANTAGED 8(A) AWA	\$182,884,000	2 %	\$1,498,000	* %	\$75,576,000	4 %	\$105,500,000	1 %
	223	100 %	4	1 %	192	41 %	27	58 %
		6 %		2 %		9 %		2 %
		100 %		0 %		86 %		12 %
SMALL BUSINESS-MINORITY AWARDS	\$2,663,000	* %	\$0	0 %	\$1,910,000	* %	\$753,000	* %
	5	100 %	0	0 %	3	72 %	2	28 %
		* %		0 %		* %		* %
		100 %		0 %		60 %		40 %
OTHER SMALL BUSINESS AWARDS	\$822,422,000	5 %	\$12,359,000	1 %	\$231,827,000	11 %	\$378,238,000	4 %
	898	100 %	67	2 %	594	37 %	237	61 %
		23 %		14 %		28 %		18 %
		100 %		7 %		66 %		26 %
TOTAL SMALL BUSINESS AWARDS	\$807,749,000	7 %	\$13,857,000	1 %	\$309,313,000	15 %	\$484,579,000	6 %
	1,126	100 %	71	2 %	789	38 %	266	60 %
		28 %		15 %		37 %		20 %
		100 %		6 %		70 %		24 %
*****								
SMALL BUSINESS SET-ASIDE AWARDS	\$409,939,000	3 %	\$6,315,000	* %	\$157,617,000	8 %	\$246,007,000	3 %
	618	100 %	38	2 %	448	38 %	132	60 %
		16 %		8 %		21 %		10 %
		100 %		6 %		72 %		21 %

PINPOINT DATABASE SERVICE  
 FEDERAL CONTRACT AWARDS

ORG: DD DEPARTMENT OF DEFENSE  
 AG: DDNO DEPARTMENT OF THE NAVY

CAAS CONTRACTING ANALYSIS  
 SMALL BUSINESS COMPARISON

DR: FY88  
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	NAVY CAAS	OTHER CAAS RELATED WORK	TOTAL
TOTAL PROCUREMENT	\$1,047,507,000 100 % 38 % 100 % 81 %	\$1,704,168,000 100 % 62 % 100 % 19 %	\$2,751,675,000 100 % 100 % 100 % 100 %
*****			
SMALL BUSINESS-DISADVANTAGED 8(A) AWARDS	\$68,270,000 301 7 % 84 % 6 % 72 %	\$13,154,000 117 1 % 18 % 10 % 28 %	\$81,424,000 418 3 % 100 % 7 % 100 %
SMALL BUSINESS-MINORITY AWARDS	\$8,589,000 70 1 % 88 % 1 % 98 %	\$1,050,000 3 * % 14 % * % 4 %	\$7,639,000 73 * % 100 % 1 % 100 %
OTHER SMALL BUSINESS AWARDS	\$244,268,000 1,830 23 % 88 % 33 % 85 %	\$33,869,000 293 2 % 12 % 28 % 15 %	\$278,135,000 1,923 10 % 100 % 31 % 100 %
TOTAL SMALL BUSINESS AWARDS	\$319,125,000 2,001 30 % 86 % 40 % 83 %	\$49,984,000 418 3 % 14 % 38 % 17 %	\$369,109,000 2,419 13 % 100 % 40 % 100 %
*****			
SMALL BUSINESS SET-ASIDE AWARDS	\$155,249,000 983 15 % 92 % 20 % 88 %	\$13,358,000 135 1 % 8 % 12 % 12 %	\$168,607,000 1,118 6 % 100 % 18 % 100 %



PINPOINT DATABASE SERVICE  
 FEDERAL CONTRACT AWARDS

CAAS CONTRACTING ANALYSIS

SMALL BUSINESS COMPARISON

ORG: DD DEPARTMENT OF DEFENSE

AG : DDNO DEPARTMENT OF THE NAVY  
 PO : NAVSEA DC AREA OFFICES ONLY

DR : FY88

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	NAVY CAAS	OTHER CAAS RELATED WORK	TOTAL
TOTAL PROCUREMENT	\$304,238,000 585 100 % 95 % 91 %	\$14,693,000 55 100 % 5 % 9 %	\$318,931,000 620 100 % 100 % 100 %

\*\*\*\*\*

SMALL BUSINESS-DISADVANTAGED 8(A) AWARDS

	\$38,824,000 99 100 % 18 % 100 %	\$0 0 0 % 0 % 0 %	\$38,824,000 99 100 % 16 % 100 %
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SMALL BUSINESS-MINORITY AWARDS

	\$987,000 2 * % 52 % 87 %	\$923,000 1 8 % 48 % 33 %	\$1,910,000 3 100 % * % 100 %
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OTHER SMALL BUSINESS AWARDS

	\$46,565,000 140 15 % 98 % 25 % 97 %	\$892,000 4 6 % 2 % 7 % 3 %	\$47,457,000 144 15 % 100 % 23 % 100 %
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TOTAL SMALL BUSINESS AWARDS

	\$86,376,000 241 28 % 98 % 43 % 96 %	\$3,678,000 9 25 % 4 % 16 % 4 %	\$90,054,000 250 28 % 100 % 40 % 100 %
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SMALL BUSINESS SET-ASIDE AWARDS

	\$40,991,000 109 13 % 99 % 19 % 98 %	\$300,000 2 2 % 1 % 4 % 2 %	\$41,291,000 111 13 % 100 % 18 % 100 %
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\* - PCT LESS THAN 0.5 %

APPENDIX B: HISTORICAL CONGRESSIONAL AND EXECUTIVE  
BRANCH COMMITMENT TO THE SET ASIDE PROGRAM

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full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns....<sup>2</sup>

The Armed Services Procurement Act contains parallel language: "it is the policy of Congress that a fair proportion of the purchases and contracts entered into under this chapter be placed with small business concerns."<sup>3</sup>

DOD considers the fair proportion mandate as a floor or minimum on the allocation of federal contracts to small business. As explained by the United States Court of Appeals for the Fifth Circuit:

We are unable to conclude that the DOD's apparent decision that the mandate is a floor constitutes an unreasonable construction of the statutory language. The fair proportion standard is not an end in itself, but a means of enforcing the purposes of the Small Business Act and the Armed Services Procurement Act, i.e., the protection of our country in time of national emergency and the promotion of its economic well-being. Given the exceptional deference due decisions of administrative agencies charged with implementing congressional desires and the absence of any evidence of a contrary congressional purpose, we may not overturn the agency determination that Congress intended small businesses to receive at least a fair proportion of government procurement

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<sup>2</sup>Id. § 644(a) (emphasis added).

<sup>3</sup>10 U.S.C. § 2301(c) (emphasis added).

(Footnote Continued)

for Federally Supported Programs: Hearing Before the Subcomm. on Government Procurement and International Trade of the House Permanent Select Comm. on Small Business, 93d Cong., 1st Sess. (1973); Commission on Government Procurement Recommendations and Labor Surplus Area Procurement: Hearings Before the Subcomm on Government Procurement of the Senate Select Comm. on Small Business, 93d Cong., 1st Sess. (1973); House Select Comm. on Small Business, The Position and Problems of Small Business in Government Procurement, HR Rep. No. 1609, 92d Cong., 2d Sess. (1972); The Position and Problems of Small Business in Government Procurement: Hearings before the Subcomm. on Government Procurement of the House Select Comm. on Small Business, 92d Cong., 1st Sess. (1971); Small Business and Labor Surplus Area Set-Asides and 8(a) Contracts: Hearing Before the Subcomm on Government Procurement of the Senate Select Comm on Small Business, 91st Cong., 2d Sess. (1970); Small Business in Government Procurement - Before and After Defense Cutbacks: Hearings Before the Subcomm. on Government Procurement of the House Select Comm. on Small Business, 91st Cong., 2d Sess. (1970); House Select Comm. on Small Business, Small Business in Government - Before and After Defense Cutbacks, HR Rep. No. 1608, 91st Cong., 2d Sess. (1970); The Position of Small Business in Government Procurement: Hearings before Subcomm. No. 2 on Government Procurement and Economic Concentration of the House Select Comm. on Small Business, 90th Cong., 1st & 2d Sess. (1967-1968); House Select Comm. on Small Business, The Position of Small Business in Government Procurement, HR Rep. No. 1975, 90th Cong., 2d Sess. (1968); Government Procurement - 1966: Hearing before the Subcomm. of the Senate Select Comm on Small Business, 89th Cong., 2d Sess. (1966); House Select Comm. on Small Business, Small Business subcontracting and Set-Aside Programs, HR Rep. No. 2341, 89th Cong., 2d Sess. (1966) Small Business Subcontracting and Set-Aside Programs: Hearings Before Subcomm. No. 2 on Government Procurement of the House Select Comm. on Small Business, 89th Cong., 1st Sess. (1965); The Role of Small Business in Government Procurement: Hearings Before the Subcomm of the Senate Select Comm. on Small Business, 88th Cong., 2d Sess. (1964); House Select comm. on Small Business, Government Small Business Procurement Policies and Programs, HR Rep. No. 1937, 88th Cong., 2d Sess. (1964); Government Small Business Procurement Practices and Programs: Hearings Before Subcomm. No. 2 on Government Procurement of the House Select Comm. on Small Business,

(Footnote Continued)

B. Even Before Franklin Roosevelt's New Deal,  
A Fair Proportion Of Federal Contracts Were  
Allocated To Small Business

As early as 1934, Congress was concerned about the future of American small business. In that year, Congress gave the Reconstruction Finance Corporation the power to assist small businesses.<sup>7</sup> During World War II, Congress again expressed grave concern whether the small business community could help meet war time demands, and whether economic concentration inevitably caused by war production would debilitate small business. To allay these concerns, Congress enacted the Small Business Mobilization Act of 1942<sup>8</sup>, which created the Smaller War Plants Corporation to help small business support the war effort. Congress, however, created the Corporation as a temporary agency and the Corporation closed its doors in January 1946.

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(Footnote Continued)

88th Cong., 1st Sess. (1964); The Role of Small Business in Government Procurement - 1962-1963: Hearing Before the Senate Select Comm. on Small Business, 87th Cong., 2d Sess. (1962); House Select Comm. on Small Business, Small Business and Government Procurement, HR Rep. No. 2562, 87th Cong., 2d Sess. (1962); The Role of Small Business in Government Procurement - 1961: Hearings Before the Subcomm. of the Senate Select Comm. on Small Business, 87th Cong., 1st Sess. (1961); Government Procurement - 1960: Hearings Before the Subcomm. of the Senate Select Comm. on Small Business, 86th Cong., 2d Sess. (1960).

<sup>7</sup> § 5d, Reconstruction Finance Corporation Act, formerly 15 U.S.C. § 606b.

<sup>8</sup> 56 Stat. 351 (1942).

After the dissolution of the Corporation, the Reconstruction Finance Corporation received its contract assistance powers.

During the Korean War, Congress created the Small Defense Plants Administration, with functions similar to those of the old Smaller War Plants Corporation.<sup>9</sup> The new agency possessed several acquisition functions, including the power to issue certificates of competency, to contract with procuring agencies and subcontract the work to small businesses, and to advise small businesses about defense contracting.<sup>10</sup> Congress and the Eisenhower Administration dissolved the Small Defense Plants Administration in 1953 to create the SBA and the multitude of small business programs now in existence.<sup>11</sup>

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<sup>9</sup> Defense Production Act of 1950, 65 Stat. 131 (1951).

<sup>10</sup> Id.

<sup>11</sup> See generally, 15 U.S.C. § 631 et seq.

APPENDIX C: THE INTERIM RULE AMENDING THE DEFENSE  
FEDERAL ACQUISITION REGULATION SUPPLEMENT

**PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS**

6. Sections 219.000 and 219.001 are added immediately before Subpart 219.1 to read as follows:

**219.000 Scope of part.**

(a) (S-70) This part also implements the provisions of Section 1207, Pub. L. 99-661, which establishes for DoD a five percent goal for dollar awards during Fiscal Years 1987, 1988 and 1989 to small disadvantaged business (SDB) concerns, and which provides certain discretionary authority to the Secretary of Defense for achievement of that objective.

**219.001 Definitions.**

"Asian-Indian American," means a United States citizen whose origins are India, Pakistan, or Bangladesh.

"Asian-Pacific American," means a United States citizen whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands, the Northern Mariana Islands, Laos, Cambodia, or Taiwan.

"Economically disadvantaged individuals" means socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged.

"Fair Market Price." For purposes of this part, fair market price is a price based on reasonable costs under normal competitive conditions and not on lowest possible costs. For methods of determining fair market price see FAR 19.806-2.

"Native American," means American Indians, Eskimos, Aleuts, and native Hawaiians.

"Small business concern," means a concern including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR Part 121.

"Small disadvantaged business (SDB) concern," as used in this part, means a small business concern that (a) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals, (b) has its management and daily business

controlled by one or more such individuals, and (c) the majority of the earning of which accrue to such socially and economically disadvantaged individuals.

"Socially disadvantaged individuals" means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

7. Section 219.201 is amended by adding paragraph (a) to read as follows:

**219.201 General policy.**

(a) In furtherance of the Government policy of placing a fair proportion of its acquisitions with small business concerns and small disadvantaged business (SDBs) concerns, section 1207 of the FY 1987 National Defense Authorization Act (Pub. L. 99-661) established an objective for the Department of Defense of awarding five percent of its contract dollars during Fiscal Years 1987, 1988, and 1989 to SDBs and of maximizing the number of such concerns participating in Defense prime contracts and subcontracts. It is the policy of the Department of Defense to strive to meet these objectives through the enhanced use of outreach efforts, technical assistance programs, the section 8(a) program, and the special authorities conveyed through section 1207 (e.g., through the creation of a total SDB set-aside). In regard to technical assistance programs, it is the Department's policy to provide SDB concerns technical assistance, to include information about the Department's SDB Program, advice about acquisition procedures, instructions on preparation of proposals, and such other assistance as is consistent with the Department's mission.

8. Section 219.202-5 is amended by designating the existing paragraph as paragraph (a); and by adding a new paragraph (b) to read as follows:

**219.202-5 Data collection and reporting requirements.**

(b) The Contracting Officer shall complete the following report for initial awards of \$25,000 or greater, whenever such award is the result of a Total SDB set-aside (219.502-72). This report shall be completed within three days of award and forwarded through channels to the Departmental or Staff Director of Small and Disadvantaged Business Utilization.

**Total Small Disadvantaged Business (SDB) Set-Aside**

(DFARS 206.203-70)

**Individual Contract Action Report**

(Over \$25,000)

1. Contract Number \_\_\_\_\_

2. Action Date \_\_\_\_\_

Whole dollars

3. Total dollars awarded \_\_\_\_\_

4. Total value of fair market price (See FAR 19.806-2) \_\_\_\_\_

5. Difference ((3) minus (4)) \_\_\_\_\_

9. A new Subpart 219.3, consisting of sections 219.301, 219.302 and 219.304, is added to read as follows:

**Subpart 219.3—Determination of Status as a Small Business Concern**

**219.301 Representation by the offeror.**

(S-70) (1) To be eligible for award under 219.502-72, an offeror must represent in good faith that it is a small disadvantaged business (SDB) at the time of written self certification.

(2) The contracting officer shall accept an offeror's representation in a specific bid or proposal that it is a SDB unless another offeror or interested party challenges the concern's SDB representation, or the contracting officer has reason to question the representation. The contracting officer may presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian Indian Americans and other minorities or any other individual found to be disadvantaged by the SBA pursuant to section 8(a) of the Small Business Act. Challenges of the questions concerning the size of the SDB shall be processed in accordance with FAR 19.302. Challenges of and questions concerning the social or economic status of the offeror shall be processed in accordance with 219.302.

**219.302 Protesting a small business representation.**

(S-70) **Protesting a SDB representation.** (1) Any offeror or other interested party may, in connection with a contract involving a SDB set-aside or otherwise involving award to a SDB based on preferential consideration, challenge the disadvantaged business status of any offeror by sending or delivering a protest to the contracting officer responsible for the particular acquisition. The protest shall contain the basis for the challenge together with



publication of the referenced proposed rule. Comments are invited.

Comments from small entities concerning DFARS Subpart 219.8 will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DAR Case 87-610D in correspondence.

**C. Paperwork Reduction Act**

The interim rule does not impose information collection requirements within the meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., and OMB approval of the interim rule is not required pursuant to 5 CFR Part 1320 et seq.

**D. Determination to Issue an Interim Regulation**

In order to achieve the 5 percent goal established by Congress during FY 1987, DoD has determined pursuant to Pub. L. 99-577 that compelling reasons exist to publish interim DFARS changes without prior public comment, inasmuch as present procurement procedures have been determined inadequate to attain the prescribed goal. Comments received in response to this Notice will be evaluated and incorporated in future revisions to this rule.

List of Subjects in 48 CFR Parts 204, 205, 206, 219 and 252

Government procurement.

Charles W. Lloyd,  
Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, 48 CFR Parts 204, 205, 206, 219 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 204, 205, 206, 219 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

**PART 204—ADMINISTRATIVE MATTERS**

2. Section 204.671-5 is amended by adding at the end of the introductory text and before "Code A" in paragraph (d)(9) the sentence "Small Disadvantaged Business set-asides will use Code K-Set-aside."; by changing the period at the end of paragraph (e)(3)(iii) to a comma and adding the words "unless the action is reportable under code 4 or 5 below."; by adding paragraphs (iv) and (v) to paragraph (e)(3); and by revising paragraph (f), to read as follows:

204.671.5 Instructions for completion of DD Form 350.

- (e)
- (3)

(iv) Enter Code 4 if the award was totally set-aside for small disadvantaged businesses pursuant to 219.502-72.

(v) Enter Code 5, if the award was made to a small disadvantaged business pursuant to 19.7001 an award was made based on the application of a price differential. If award was made to a small disadvantaged business concern without the application of a price differential (i.e., the small disadvantaged business was the lowest offeror without the differential), enter Code 3.

(f) **Part E, DD Form 350.** Data elements E2-E4 shown below are to be reported in accordance with the appropriate departmental or OSD instructions:

(1) **Item E1, Ethnic Group.** If the award was made to a small disadvantaged business firm and the contractor submitted the certification required by 252.219-7005, enter the code below which corresponds to the ethnic group of the contractor:

(i) Enter Code A if the contractor categorizes the firm as being owned by Asian-Indian Americans.

(ii) Enter Code B if the contractor categorizes the firm as being owned by Asian-Pacific Americans.

(iii) Enter Code C if the contractor categorizes the firm as being owned by Black Americans.

(iv) Enter Code D if the contractor categorizes the firm as being owned by Hispanic Americans.

(v) Enter Code E if the contractor categorizes the firm as being owned by Native Americans.

(vi) Enter Code F if the contractor categorizes the firm as being owned by other minority group Americans.

- (2) Reserved for OSD.
- (3) Reserved for OSD.
- (4) Reserved for OSD.

**PART 205—PUBLICIZING CONTRACT ACTIONS**

3. Section 205.202 is amended by adding paragraph (a)(4)(S-70) to read as follows:

205.202 Exceptions.  
(a)(4)(S-70) The exception at FAR 5.202(a)(4) may not be used for contract actions under 206.203-70: (See 205.207(d)(S-72) and (S-73).)

4. Section 205.207 is amended by adding paragraphs (d)(S-72) and (d)(S-73) to read as follows:

205.207. Preparation and transmittal of synopsis.

(d)(S-72) When the proposed acquisition provides for a total small disadvantaged business (SDB) set-aside under 206.203 (S-72), state: "The proposed contract listed here is a 100 percent small disadvantaged business set-aside. Offers from concerns other than small disadvantaged business concerns are not solicited."

(d)(S-73) When the proposed acquisition is being considered for possible total small disadvantaged business set-aside under 206.203 (S-70), state: "The proposed contract listed here is being considered for 100 percent set-aside for small disadvantaged business (SDB) concerns. Interested SDB concerns should, as early as possible but not later than 15 days of this notice, indicate interest in the acquisition by providing to the contracting office above evidence of capability to perform and a positive statement of eligibility as a small socially and economically disadvantaged business concern. If adequate interest is not received from SDB concerns, the solicitation will be issued as \_\_\_\_\_ (enter basis for continuing the acquisition, e.g. 100% small business set-aside, unrestricted, 100% small business set-aside with evaluation preference for SDB concerns, etc.) without further notice. Therefore, replies to this notice are requested from \_\_\_\_\_ (enter all types business to be solicited in the event a SDB set-aside is not made; e.g., all small business concerns, all business concerns, etc.) as well as from SDB concerns."

**PART 206—COMPETITION REQUIREMENTS**

5. A new Subpart 206.2, consisting of sections 206.203 and 206.203-70, is added to read as follows:

**Subpart 206.2—Full and Open Competition After Exclusion of Sources**

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

206.203-70 Set-asides for small disadvantaged business concerns.

(a) To fulfill the objective of section 1207 of Pub. L. 99-861, contracting officers may, for Fiscal Years 1987, 1988, and 1989, set-aside solicitations to allow only small disadvantaged business concerns as defined at 219.001 to compete under the procedures in Subpart 219.3. No separate justification or determination and findings is required under this Part to set-aside a contract action for small disadvantaged business.

§ 95.207 (R/C Rule 7) On what channels may I operate?

(a) Your R/C station may transmit only on the following channels (frequencies):

(1) The following channels may be used to operate any kind of device (any object or apparatus, except an R/C transmitter), including a model aircraft device (any small imitation of an aircraft) or a model surface craft device (any small imitation of a boat, car or vehicle for carrying people or objects, except aircraft): 26.995, 27.015, 27.095, 27.145, 27.195 and 27.255 MHz.

(2) The following channels may only be used to operate a model aircraft device: 72.01, 72.03, 72.05, 72.07, 72.09, 72.11, 72.13, 72.15, 72.17, 72.19, 72.21, 72.23, 72.25, 72.27, 72.29, 72.31, 72.33, 72.35, 72.37, 72.39, 72.41, 72.43, 72.45, 72.47, 72.49, 72.51, 72.53, 72.55, 72.57, 72.59, 72.61, 72.63, 72.65, 72.67, 72.69, 72.71, 72.73, 72.75, 72.77, 72.79, 72.81, 72.83, 72.85, 72.87, 72.89, 72.91, 72.93, 72.95, 72.97 and 72.99 MHz.

(3) The following channels may only be used to operate a model surface craft device: 75.41, 75.43, 75.45, 75.47, 75.49, 75.51, 75.53, 75.55, 75.57, 75.59, 75.61, 75.63, 75.65, 75.67, 75.69, 75.71, 75.73, 75.75, 75.77, 75.79, 75.81, 75.83, 75.85, 75.87, 75.89, 75.91, 75.93, 75.95, 75.97 and 75.99 MHz.

(4) Channels 72.16, 72.32 and 72.96 MHz may also be used to operate a model aircraft device or a model surface craft device until December 20, 1987.

(5) Channels 72.08, 72.24, 72.40 and 75.64 MHz may also be used to operate a model aircraft device until December 20, 1987.

(e) (Reserved.)

[FR Doc. 87-8784 Filed 5-1-87; 8:45 am]  
BILLING CODE 4712-01-M

## DEPARTMENT OF DEFENSE

48 CFR Parts 204, 205, 206, 219 and 252

Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Pub. L. 99-661; Set-Asides for Small Disadvantaged Business Concerns

AGENCY: Department of Defense (DoD).

ACTION: Interim rule and request for comment.

SUMMARY: The Defense Acquisition Regulatory (DAR) Council invites public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement

(DFARS) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), entitled "Contract Goal for Minorities." The statute permits DoD to enter into contracts using less than full and open competitive procedures, when practical and necessary to facilitate achievement of a goal of awarding 5 percent of contract dollars to small disadvantaged business (SDB) concerns during FY 1987, 1988 and 1989, provided the contract price does not exceed fair market cost by more than 10 percent. The interim rule implements the statute by requiring that contracting officers set aside acquisitions, other than small purchases conducted under procedures of Federal Acquisition Regulation (FAR) Part 13, for exclusive competition among SDB concerns, whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns and that the contract award price will not exceed fair market price by more than 10 percent.

**DATES:** Effective Date: June 1, 1987 (effective for all solicitations issued on or after June 1, 1987).

**Comment Date:** Comments concerning the interim rule must be received on or before August 3, 1987, to be considered in formulating a final rule. Please cite DAR Case 87-33 in all correspondence related to these subjects.

**ADDRESS:** Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, ODASD (P) DARS, c/o OASD (P&L) (M&RS), Room 3C841, The Pentagon, Washington, DC 20301-3062.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7286.

### SUPPLEMENTARY INFORMATION:

#### A. Background

As summarized above, section 1207(a), Pub. L. 99-661 established an objective that 5 percent of total combined DoD obligations (i.e., procurement; research, development, test and evaluation; construction; and operation and maintenance) for contracts and subcontracts awarded during FY 1987 through FY 1989, be entered into with (1) small disadvantaged business (SDB) concerns, (2) historically Black colleges and universities, and (3) minority institutions. To facilitate attainment of that goal, Congress permitted DoD, in Section 1207(e) to use less than full and open competitive procedures in awarding contracts, provided contract prices do not exceed fair market price by more than 10 percent. The scope of

the present rule addresses achievement of the goal as it pertains to SDB concerns; other aspects of Section 1207 will be addressed in subsequent issuances.

The interim rule establishes a "rule of two" regarding set-asides for SDB concerns, which is similar in approach to long-standing criteria used to determine whether acquisitions should be set aside for small businesses as a class. Specifically, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns, and that there is a reasonable expectation that the award price will not exceed fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among such SDB firms. The rule provides guidance concerning *Commerce Business Daily* notices to bidders concerning the SDB set-aside reservation, as well as a "sources sought" announcement to ensure that competition is enhanced while also ensuring that non-SDB concerns are not misled in incurring bid or proposal costs. However, should effective competition not materialize or pricing exceed the 10 percent factor, guidance is provided to the contracting officer concerning withdrawal of the set-aside.

In order to ensure that small businesses as a class are not penalized by the new SDB set-aside procedure, it was decided not to apply SDB set-asides to small purchases conducted under FAR Part 13 procedures, upon which heavy reliance is placed in ensuring that small businesses as a class receive a fair proportion of DoD contract dollars. This approach should tend to reduce impact upon non-SDB small businesses resulting from the new procedure, while facilitating attainment of the goal established by Congress.

#### B. Regulatory Flexibility Act

The interim rule may have significant economic impact upon a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and an Initial Regulatory Flexibility Analysis is deemed necessary. However, as another proposed rule will be issued shortly, affecting the same topic, the DoD has determined that it is necessary to delay preparation of that analysis, under authority of 5 U.S.C. 608, in order that the cumulative impact of both rules might be considered. The initial analysis will be provided to the Chief Counsel for Advocacy, U.S. Small Business Administration, at the time of

specific detailed evidence supporting the protestant's claim.

(2) In order to apply to the acquisition in question, such protest must be filed with and received by the contracting officer prior to the close of business on the fifth business day after the bid opening date for sealed bids. In negotiated acquisitions, the contracting officer shall notify the apparently unsuccessful offerors of the apparently successful SDB offeror(s) in accordance with FAR 15.1001 and establish a deadline date by which any protest on the instant acquisition must be received.

(3) To be considered timely, a protest must be delivered to the contracting officer by hand or telegram within the period allotted or by letter post marked within the period. A protest shall also be considered timely if made orally to the contracting officer within the period allotted, and if the contracting officer thereafter receives a confirming letter postmarked no later than one day after the date of such telephone protest.

(4) Upon receipt of a protest of disadvantaged business status, the contracting officer shall forward the protest to the Small Business Administration (SBA) District Office for the geographical area where the principal office of the SDB concern in question is located. In the event of a protest which is not timely, the contracting officer shall notify the protestor that its protest cannot be considered on the instant acquisition but has been referred to SBA for consideration in any future acquisition; however, the contracting officer may question the SDB status of an apparently successful offeror at any time. A contracting officer's protest is always timely whether filed before or after award.

(5) The SBA will determine the disadvantaged business status of the questioned offeror and notify the contracting officer and the offeror of its determination. Award will be made on the basis of that determination. This determination is final.

(6) If the SBA determination is not received by the contracting officer within 10 working days after SBA's receipt of the protest, it shall be presumed that the questioned offeror is a SDB concern. This presumption will not be used as a basis for award without first ascertaining when a determination can be expected from SBA, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government.

#### 219.304 Solicitation provisions.

(b) Department of Defense activities shall use the provision at 252.7005, Small Disadvantaged Business Concern Representation, in lieu of the provision at FAR 52.219-2, Small Disadvantaged Business Concern Representation.

10. Section 219.501 is amended by adding paragraph (b); by adding at the end of paragraph (c) the words "The contracting officer is responsible for reviewing acquisitions to determine whether they can be set-aside for SDBs."; by adding at the end of paragraph (d) the words "Actions that have been set-aside for SDBs are not referred to the SBA representative for review."; by adding at the end of paragraph (g) the words "except that the prior successful acquisition of a product or service on the basis of a small business set-aside does not preclude consideration of a SDB set-aside for future requirements for that product or service."; to read as follows:

#### 219.501 General.

(b) The determination to make a SDB set-aside is a unilateral determination by the contracting officer.

11. Section 219.501-70 is added to read as follows:

#### 219.501-70 Small disadvantaged business set-asides.

As authorized by the provisions of section 1207 of Pub. L. 99-661, a special category of set-asides, identified as SDB set-aside, has been established for Department of Defense acquisitions awarded during Fiscal Years 1987, 1988, and 1989, except those subject to small purchase procedures. The authorization to effect small disadvantaged business set-asides shall remain in effect during these fiscal years, unless specifically revoked by the Secretary of Defense. A "set-aside for SDB" is the reserving of an acquisition exclusively for participation by SDB concerns.

12. Sections 219.502-3 and 219.502-4 are added to read as follows:

#### 219.502-3 Partial set-asides

These procedures do not apply to SDB set-asides. SDB set-asides are authorized for use only when the entire amount of an individual acquisition is to be set-aside.

#### 219.502-4 Methods of conducting set-asides.

(a) SDB set-asides may be conducted by using sealed bids or competitive proposals.

(b) Offers received on a SDB set-aside from concerns that do not qualify as

SDB concerns shall be considered nonresponsive and shall be rejected.

#### 219.502-70 [Amended]

13. Section 219.502-70 is amended by inserting in the second sentence of paragraph (b) between the word "others" and the word "when" the words "except SDB set-asides."

14. Section 219.502-72 is added to read as follows:

#### 219.502-72 SDB set-aside.

(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition shall be set-aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns offering the supplies or services of different SDB concerns and (2) award will be made at a price not exceeding the fair market price by more than ten percent. In making SDB set-asides for R&D or architect-engineer acquisitions, there must also be a reasonable expectation of obtaining from SDB scientific and technological or architectural talent consistent with the demands of the acquisition.

(b) The contracting officer must make a determination under (a) above when any of the following circumstances are present: (1) the acquisition history shows that within the past 12 month period, a responsive bid or offer of at least one responsible SDB concern was within 10 percent of an award price on a previous procurement and either (i) at least one other responsible SDB source appears on the activity's solicitation mailing list or (ii) a responsible SDB responds to the notice in the Commerce Business Daily; or (2) multiple responsible section 8(a) concerns express an interest in having the acquisition placed in the 8(a) program; or (3) the contracting officer has sufficient factual information, such as the results of capability surveys by DoD technical teams, to be able to identify at least two responsible SDB sources.

(c) If it is necessary to obtain information in accordance with (b)(1) above, the contracting officer will include a notice in the synopsis indicating that the acquisition may be set-aside for exclusive SDB participation if sufficient SDB sources are identified prior to issuance of the solicitation (see 205.207(d) (S-73)). The notice should encourage such firms to make their interest and capabilities known as expeditiously as possible. If prior to synopsis, the determination has been

made to set-aside the acquisition for SDB the synopsis should so indicate (see 205.207(d) (S-72)).

(d) If prior to award under a SDB set-aside, the contracting officer finds that the lowest responsive, responsible offer exceeds the fair market price by more than ten percent, the set-aside will be withdrawn in accordance with 219.506(a).

15. Section 219.503 is amended by adding paragraph (S-70) to read as follows:

**219.503 Setting aside a class of acquisitions.**

(S-70) If the criteria in 219.502-72 have been met for an individual acquisition, the contracting officer may withdraw the acquisition from the class set-aside by giving written notice to SBA procurement center representative (if one is assigned) that the acquisition will be set-aside for SDB.

16. Section 219.504 is amended by adding to paragraph (b) a new paragraph (1) and by redesignating paragraphs (1) through (4) as paragraphs (2) through (5) respectively, to read as follows:

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

(b) . . .

(1) Total SDB Set-Aside (219.502-72).

17. Section 219.506 is amended by adding paragraph (a), and by adding at the end of paragraph (b) the words "These procedures do not apply to SDB set-aside.", to read as follows:

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

(a) SDB set-aside determinations will not be withdrawn for reasons of price reasonableness unless the low responsive responsible offer exceeds the fair market price by more than ten percent. If the contracting officer finds that the low responsive responsible offer under a SDB set-aside exceeds the fair market price by more than ten percent, the contracting officer shall initiate a withdrawal.

18. Section 219.507 is added to read as follows:

**219.507 Automatic dissolution of a set-aside.**

The dissolution of a SDB set-aside does not preclude subsequent solicitation as a small business set aside.

19. Section 219.508 is amended by

adding paragraph (S-71) to read as follows:

**219.508 Solicitation provisions and contract clauses.**

(S-71) The contracting officer shall insert the clause at 252.219-7006, Notice of Total Small Disadvantaged Business Set-Aside, in solicitations and contracts for SDB set-asides (see 219.502-72).

20. A new Subpart 219.8, consisting of sections 219.801 and 219.803, is added to read as follows:

**Subpart 19.8—Contracting with the Small Business Administration (the 8(a) Program)**

**219.801 General.**

The Department of Defense, to the greatest extent possible, will award contracts to the SBA under the authority of section 8(a) of the Small Business Act and will actively identify requirements to support the business plans of 8(a) concerns.

**219.803 Selecting acquisitions for the 8(a) Program.**

(c) In cases where SBA requests follow-on support for the incumbent 8(a) firm, the request will be honored, if otherwise appropriate, and will not be placed under a SDB set-aside. When the follow-on requirement is requested for other than the incumbent 8(a) and the conditions at 219.502-72(b)(2) exist, the acquisition may be considered for a SDB set-aside, if appropriate.

21. Section 252.219-7005 and 252.219-7006 are added to read as follows:

**202.219-7005 Small disadvantaged business concern representation.**

As prescribed in 219.304(b), insert the following provision in solicitations (other than those for small purchases), when the contract 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:

**Small Disadvantaged Business Concern Representation**

XXX (1987)

(a) *Certification.* The Offeror represents and certifies, as part of its offer, that it

XXX is, not a small disadvantage business concern.

(b) *Representation.* The offeror represents, in terms of section 8(d) of the Small Business Act, that its qualifying ownership falls in the following category:

\_\_\_\_\_ Asian Indian Americans  
\_\_\_\_\_ Asian-Pacific Americans

\_\_\_\_\_ Black Americans  
\_\_\_\_\_ Hispanic Americans  
\_\_\_\_\_ Native Americans  
\_\_\_\_\_ Other Minority \_\_\_\_\_  
(Specify)

(End of Provision)

**§ 252.219-7006 Notice of total small disadvantaged business set-aside.**

As prescribed in 219.508-71, insert the following clause in solicitations and contracts involving a small disadvantaged business set-aside.

**Notice of Total Small Disadvantaged Business Set-Aside (\_\_\_\_\_ 1987)**

(a) *Definitions.*

"Small disadvantaged business concern," as used in this clause, means a small business concern that (1) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals, (2) has its management and daily business controlled by one or more such individuals and (3) the majority of the earnings of which accrue to such socially and economically disadvantaged individuals.

"Socially disadvantaged individuals" means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

"Economically disadvantaged individuals" means socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged.

(b) *General.*

(1) Offers are solicited only from small disadvantaged business concerns. Offers received from concerns that are not small disadvantaged business concerns shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to a small disadvantaged business concern.

(c) *Agreement.* A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small disadvantaged business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

(End of clause)

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BILLING CODE 3010-01-0

potential contractors, competitive procedures and advance payments. The Secretary of Defense would be required to submit a report to Congress by May 1 of each year on the compliance with this section. The program would terminate in five years.

The Senate bill contained no similar provision with amendments that would replace the mandated 10% set-aside with a goal of 5% of the total combined amount of contracts and subcontracts for the next three years. Further, the amendment would allow the Department of Defense to enter into contracts using less than full and open competitive procedures, but paying a price not to exceed the "fair market" value by more than 10%. The technical assistance program would be further defined to ensure that real strides would be made in assisting these firms.

Penalties would be imposed on any person found misrepresenting the status of a business under this section. They could receive a fine of not less than \$10,000 or imprisonment of not less than one year, or both.

The Secretary would be directed to report to Congress twice a year on this program; once in May of each year on the progress made to date and again in October on the compliance with the goals for that fiscal year.

The conferees further agree that this program needs time to operate before a determination can be made as to its success or failure and the conferees agree that the issue of mandating any specific amount of set aside or increasing the 5% goal from that agreed to in this act shall not be considered by them in the fiscal year 1987, 1988, 1989 Defense Authorization or Defense Appropriations bills or the Continuing Resolutions.

*Manpower reports on major defense acquisition programs (sec. 1208)*

The Senate bill contained a provision (sec. 441) that would require the Secretary of Defense to report to the Committees on Armed Services of the Senate and House of Representatives, at least 90 days in advance of a decision to proceed with full-scale engineering development or with production and deployment of a major weapon system, on the manpower requirements of the system.

The House amendment included no similar provision.

The House recedes with an amendment making the provision applicable only to decisions taken after December 31, 1986.

**ECONOMY AND EFFICIENCY**  
**LEGISLATIVE PROVISIONS ADOPTED**

*Increase in threshold applicable to statutory contracting-out procedures (sec. 1221)*

The Senate bill contained a provision (sec. 1003) that would amend section 502(d) of the Defense Authorization Act, 1981 (10 U.S.C. 2304 note) to raise the threshold for the performance of full cost studies from 40 to 50 or fewer Department of Defense civilian employees.

The House amendment contained no similar provision.

more shall have multiple military department contracting reasons:

construction of solid or committees of Congress in us for exercising such "special access program

(808) that would require advice to conduct inspection at least every six factor. It would also require an annual unclassified factor compliance with es to comply, and identification.

classified material should defense's highest priority material at most the Defense Investigating special access, equiring special access, department responsible

Defense Investigative Administration of Defense at all Department of Defense review would authority inspections contractors.

Secretary of Defense to committees on Armed Services by May 1, representatives of the Defense Secretary of Defense as he deems appropriate.

Director of the Defense Secretary of Defense

ion (sec. 1032) that each of the amounts in procurement; and or small business contractors economically disadvantaged and universities; and technical assistance to

concerns, whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns and that the contract award price will not exceed fair market price by more than 10 percent.

Public comments are invited concerning other procurement methods which can reasonably be used to attain the objective above. Presently, the DAR Council is considering two additional procedures set out below which may form the basis of an additional proposed rule on this topic, tentatively set for publication on or about June 12, 1987. The first proposal would establish, under authority of "exception five" of the Competition in Contracting Act (CICA), 10 U.S.C. 2304(c)(5), entitled "Authorized or Required by Statute" by FAR 6.302-5, a procedure whereby direct award could be made to an SDB firm, without providing for full and open competition (as permitted by Section 1207), in those circumstances where a market survey and a "sources sought" CBD notice identified only one responsible SDB concern which could fulfill DoD's requirements. Use of the authority would be limited to those circumstances where SDB set-aside criteria are not met, where realistic pricing is possible (e.g., through cost and pricing data, or otherwise) and where award without full and open competition is necessary to achieve the 5 percent goal.

A second proposal under consideration involves establishing a 10 percent preference differential for SDB concerns in certain sealed bid competitive acquisitions, when the preference is determined necessary to attain the 5 percent goal. Under this procedure, award would be made to an otherwise responsible SDB concern whose bid is within 10 percent of the low offeror's bid. Consideration is being given to extending this procedure for use in competitive negotiated acquisitions where source selection will be based primarily on price. However, the procedure would not be utilized in acquisitions involving partial or Labor Surplus Area set-asides, or small purchases under FAR Part 13. Consideration is presently being given to the criteria for application of the preference differential and whether it should be employed only when acquisitions are totally unrestricted.

Charles W. Floyd,

Executive Director, Defense Acquisition Regulation Council

REG-87-1000 (R-1) (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100)

## VETERANS ADMINISTRATION

### 48 CFR Part 819

#### Acquisition Regulations for Small Business Concerns

**AGENCY:** Veterans Administration.

**ACTION:** Proposed regulations.

**SUMMARY:** The Veterans Administration (VA) is issuing a proposed rule to the Veterans Administration Acquisition Regulation (VAAR). The proposed rule addresses the procedure for processing Small Business Administration Certificate of Competency appeals and includes Administration Certificate of Competency appeals and includes additional language to increase the emphasis on giving Vietnam era and disabled veteran-owned firms every opportunity to participate in selling items and services to the VA.

**DATES:** Written comments must be submitted no later than June 3, 1987, for consideration in the final regulation. The final regulation will be effective upon approval.

**ADDRESS:** Interested persons are invited to submit written comments, suggestions or objections to the Administrator of Veterans Affairs (271A), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420. All written comments will be available for public inspection only in the Veterans Services Unit, room 132 of the above address, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays) until June 17, 1987.

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Hamilton, Supply Management Representative, Policy Division, Office of Procurement and Supply (91A), (202) 233-3842.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

This proposed rule includes regulatory revisions by providing internal procedures for processing Small Business Administration Certificate of Competency appeals and providing additional language to give the Vietnam era and disabled veteran-owned firms every opportunity to participate in VA business opportunities.

##### II. Executive Order 12291

This proposed rule has been reviewed in conjunction with Executive Order 12291, Federal Regulation, and has been determined not to be a "major rule" as defined in the Executive Order.

### III. Regulatory Flexibility Act (RFA)

Because this proposed rule does not come within the term "rule" as defined in the RFA (5 U.S.C. 601(2)), it is not subject to the requirements of that Act. In any case, this change will not have a significant impact on a substantial number of small entities because the provisions implement the requirements of the Competition in Contracting Act (CICA) as required by the Federal Acquisition Regulation (FAR). The provisions are primarily internal procedures which will not impact the private sector.

### IV. Paperwork Reduction Act

This proposed rule requires no additional information collection or recordkeeping requirement upon the public.

#### List of Subjects in 48 CFR Part 819

Government procurement.

Approved: April 27, 1987.

Thomas K. Turnage,  
Administrator.

Part 819 of title 48 of the Code of Federal Regulations is proposed to be amended as follows:

#### PART 819—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

1. The authority citation for Part 819 continues to read as follows:

Authority: 38 U.S.C. 210 and 40 U.S.C. 406(c).

2. Subpart 819.6, consisting of 819.602-3, is added to read as follows:

#### Subpart 819.6—Certificates of Competency and Determinations of Eligibility

##### 819.602-3 Appealing Small Business Administration's decision to issue Certificates of Competency.

Formal VA appeals of an initial concurrence by the SBA Central Office in an SBA Regional Office decision to issue a (CoC) Certificate of Competency will be processed as follows:

(a) When the contracting officer believes that the VA should formally appeal the concurrence by the SBA Central Office in an SBA Regional Office decision to issue a CoC, the contracting officer will so notify the Director, Office of Procurement and Supply (93B) in writing within five business days after receipt of the SBA Central Office's written confirmation of its determination. Within ten business days of the contracting officer's receipt of the SBA's written confirmation of a

APPENDIX D: SECTION 1207 OF THE NATIONAL DEFENSE AUTHORIZATION  
ACT FOR FISCAL YEAR 1987 AND LEGISLATIVE HISTORY

Not later than 120 days after the Secretary of Defense shall section 2640 of title 10, United States Code, apply only to contracts which are subject to the regulations required

**SYSTEMS ON MILITARY INSTALLATIONS CONVERTING CERTAIN HEATING FACILITIES**

(1) Section 2690 of title 10, United States Code, is amended as follows:

**Section 2690. Prohibition on converting heating facilities.**

(a) No heating facility of a department concerned shall be used in any new heating system under the jurisdiction of the military department for that heating system

unless the regulations prescribed for the effectiveness of a fuel for the purpose

of this section may not convert a heating facility in Europe, Africa, or to any other foreign country.

(A) is required by the government if the facility is located, or (B) is the facility; and

the conversion of the proposed conversion shall be completed following the date on

which is shown in the table of sections at the end of this title as amended to read as follows:

**NOTES AND RESTRICTIONS.**—Section 2690 of the Department of Defense Appropriation Act, 1987, 101(b) of Public Law 99-190, is amended as follows:

**ADMINISTRATION IN DEFENSE INDUSTRIAL SECURITY SPECIAL ACCESS PROGRAMS**

The Secretary shall direct the Director of Defense Security to conduct a review of the security of special access programs at the facilities involved in such programs. The frequency and adequacy of the reviews conducted by the Department

(b) **REPORT.**—(1) The Secretary shall submit to the Committees on Armed Services of the Senate and House of Representatives a report setting forth the results of the review under subsection (a).

(2) The report shall—

(A) identify any shortcoming found to exist in security administration of Department of Defense special access programs at Department of Defense contractors involved in such programs and the actions being taken to correct each such shortcoming;

(B) include recommendations for improvement of Department of Defense oversight of special access programs, if the Secretary considers such improvement necessary; and

(C) include recommendations for such legislation as the Secretary determines is required to correct such deficiencies.

(3) The report shall be submitted in an unclassified form. It shall be submitted not later than May 1, 1987.

(c) **DIS SECURITY INVESTIGATIONS.**—After consulting with the Secretary of Defense, the Director of the Defense Investigative Service may conduct such security inspections of special access programs as the Director considers appropriate, unless otherwise directed by the Secretary of Defense.

**SEC. 1207. CONTRACT GOAL FOR MINORITIES**

(a) **GOAL.**—Except as provided in subsection (d), a goal of 5 percent of the amount described in subsection (b) shall be the objective of the Department of Defense in each of fiscal years 1987, 1988, and 1989 for the total combined amount obligated for contracts and subcontracts entered into with—

(1) small business concerns, including mass media, owned and controlled by socially and economically disadvantaged individuals (as defined by section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and regulations issued under such section), the majority of the earnings of which directly accrue to such individuals;

(2) historically Black colleges and universities; or

(3) minority institutions (as defined by the Secretary of Education pursuant to the General Education Provisions Act (20 U.S.C. 1221 et seq.)).

(b) **AMOUNT.**—The requirements of subsection (a) for any fiscal year apply to the combined total of the following amounts:

(1) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for procurement.

(2) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for research, development, test, and evaluation.

(3) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for military construction.

(4) Funds obligated for contracts entered into with the Department of Defense for operation and maintenance.

(c) **TECHNICAL ASSISTANCE.**—To attain the goal of subsection (a), the Secretary of Defense shall provide technical assistance services to potential contractors described in subsection (a). Such technical assistance shall include information about the program, advice about Department of Defense procurement procedures, instruction in



preparation of proposals, and other such assistance as the Secretary considers appropriate. If Department of Defense resources are inadequate to provide such assistance, the Secretary of Defense may enter into contracts with minority private sector entities with experience and expertise in the design, development, and delivery of technical assistance services to eligible individuals, business firms and institutions, defense acquisition agencies, and defense prime contractors. Department of Defense contracts with such entities shall be awarded annually, based upon, among other things, the number of minority small business concerns, historically Black colleges and universities, and minority institutions that each such entity brings into the program.

(d) **APPLICABILITY.**—Subsection (a) does not apply—

(1) to the extent to which the Secretary of Defense determines that compelling national security considerations require otherwise; and

(2) if the Secretary making such a determination notifies Congress of such determination and the reasons for such determination.

(e) **COMPETITIVE PROCEDURES AND ADVANCE PAYMENTS.**—To attain the goal of subsection (a)—

(1) The Secretary of Defense shall exercise his utmost authority, resourcefulness, and diligence.

(2) To the extent practicable and when necessary to facilitate achievement of the 5 percent goal described in subsection (a), the Secretary of Defense shall make advance payments under section 2307 of title 10, United States Code, to contractors described in subsection (a).

(3) To the extent practicable and when necessary to facilitate achievement of the 5 percent goal described in subsection (a), the Secretary of Defense may enter into contracts using less than full and open competitive procedures (including awards under section 8(a) of the Small Business Act), but shall pay a price not exceeding fair market cost by more than 10 percent in payment per contract to contractors or subcontractors described in subsection (a).

(4) To the extent practicable, the Secretary of Defense shall maximize the number of minority small business concerns, historically Black colleges and universities, and minority institutions participating in the program.

(f) **PENALTIES FOR MISREPRESENTATION.**—Whoever for the purpose of securing a contract or subcontract under subsection (a) misrepresents the status of any concern or person as a small business concern owned and controlled by a minority (as described in subsection (a)), shall be punished by a fine of not less than \$10,000, or by imprisonment for not more than one year, or both.

(g) **ANNUAL REPORTS.**—(1) Between May 1 and May 30 of each year, the Secretary of Defense shall submit to Congress a report on the progress toward meeting the goal of subsection (a) during the current fiscal year.

(2) Between October 1 and October 10 of each year, the Secretary of Defense shall submit to Congress a final report on the progress of the Secretary with the goal of subsection (a) during the preceding fiscal year.



such assistance as the Secretary of Defense resources are inadequate. The Secretary of Defense may enter into contracts with small business concerns, and delivery of technical assistance, business firms and institutions, and defense prime contractors. In such cases, the number of minority-owned Black colleges and universities which such entity brings into the

does not apply—

The Secretary of Defense determines that other considerations require other-

When a determination notifies Congress of the reasons for such determination.

**AND ADVANCE PAYMENTS.—**To

shall exercise his utmost authority.

and when necessary to facilitate the goal described in subsection (a), make advance payments under the United States Code, to contractors de-

and when necessary to facilitate the goal described in subsection (a), enter into contracts using less expensive procedures (including awards under the Small Business Act), but shall pay a cost by more than 10 percent in excess of the cost to contractors or subcontractors described

the Secretary of Defense shall give priority to small business concerns, historically disadvantaged institutions, and minority institutions.

**REPRESENTATION.—**Whoever for the purpose of subsection (a) misrepresents a small business concern (as described in subsection (a)), or a contract value in excess of \$10,000, or by imprisonment or both.

On or before May 1 and May 30 of each year, submit to Congress a report on the progress of subsection (a) during the

On or before October 1 of each year, the Secretary of Defense shall submit a final report on the progress of subsection (a) during the preceding

(3) The reports described in paragraphs (1) and (2) shall each include the following:

(A) A full explanation of any progress toward attaining the goal of subsection (a).

(B) A plan to achieve the goal, if necessary.

(C) A description of the percentage of contracts (actions), the total dollar amount (size of action), and the number of different entities relative to the attainment of the goal of subsection (a), separately for Black Americans, Native Americans, Hispanic Americans, Asian Pacific Americans, and other minorities.

(4) The reports required under paragraph (2) shall also include the following:

(A) The aggregate differential between the fair market price of all contracts awarded pursuant to subsection (e)(3) and the estimated fair market price of all such contracts had such contracts been entered into using full and open competitive procedures.

(B) Detailed information on failure to perform in accordance with contract cost and technical requirements by entities awarded contracts pursuant to subsection (a).

(C) An analysis of the impact that subsection (a) shall have on the ability of small business concerns not owned and controlled by socially and economically disadvantaged individuals to compete for contracts with the Department of Defense.

(5) The first report required by subsection (a) shall be submitted between May 1 and May 30, 1987.

(h) **EFFECTIVE DATE.**—This section applies to each of fiscal years 1987, 1988, and 1989.

**SEC. 1208. MANPOWER ESTIMATES FOR MAJOR DEFENSE ACQUISITION PROGRAMS**

(a) **REQUIREMENT OF MANPOWER ESTIMATES.**—Subsection (a) of section 2434 of title 10, United States Code (as redesignated by section 101(a) of the Goldwater-Nichols Department of Defense Reorganization Act of 1986), is amended to read as follows:

“(a) **REQUIREMENT FOR APPROVAL.**—The Secretary of Defense may not approve the full-scale engineering development, or the production and deployment, of a major defense acquisition program unless—

“(1) an independent estimate of the cost of the program is first submitted to (and considered by) the Secretary; and

“(2) the Secretary submits a manpower estimate of the program to the Committees on Armed Services of the Senate and the House of Representatives at least 90 days in advance of such approval.”

(b) **DEFINITIONS.**—Subsection (b) of such section is amended—

(1) by inserting “**DEFINITIONS.**—” before “In this section”;

(2) by striking out “(1) ‘Major’ and inserting in lieu thereof

“(1) The term ‘major’;

(3) by striking out “(2) ‘Independent’ and inserting in lieu thereof

“(2) The term ‘independent’;

(4) by striking out “(3) ‘Cost’ and inserting in lieu thereof

“(3) The term ‘cost’; and

(5) by adding at the end the following new paragraph:

British thermal units input per hour or more shall have multiple fuel capability unless the Secretary of the military department concerned waives this requirement for the following reasons:

- (1) Local restrictions, or
- (2) Costs make the installation or construction of solid or dual fuel equipment infeasible, and
- (3) He notifies the appropriate committees of Congress in writing of the waiver and the reasons for exercising such waiver authority.

The Senate recesses.

*Defense Investigative Service investigation of special access program contractors (sec. 1206)*

The House bill contained a provision (sec. 808) that would require the Director of the Defense Investigative Service to conduct inspections of the classified documents control system at least every six months of each special access program contractor. It would also require the Secretary of Defense to submit an annual unclassified report to Congress that would certify contractor compliance with established procedures, would describe failures to comply, and identify planned corrective action.

The Senate bill contained no similar provision.

The Senate recesses with an amendment.

The conferees agreed the protection of classified material should be considered among the Department of Defense's highest priorities. While oversight of the security of classified material at most defense contractors is the responsibility of the Defense Investigative Service, for programs designated as requiring special access, oversight is retained within the military department responsible for such programs.

The Senate amendment would require the Defense Investigative Service conduct a one-time review of security administration of Department of Defense special access programs at all Department of Defense contractors involved in such programs. The review would include the frequency and adequacy of security inspections conducted by the Department of Defense of these contractors.

The amendment would also require the Secretary of Defense to provide an unclassified report to the Committees on Armed Services of the Senate and the House of Representatives by May 1, 1987.

Finally, the amendment authorizes the Director of the Defense Investigative Service, after consultation with the Secretary of Defense, to conduct inspections of such programs as he deems appropriate, unless otherwise directed by the Secretary.

*Contract goal for minorities (sec. 1207)*

The House amendment contained a provision (sec. 1032) that would provide for not less than ten percent of each of the amounts appropriated for the Department of Defense in procurement; research, development, test and evaluation; military construction; and operations and maintenance to be set-aside for small business concerns owned and controlled by socially and economically disadvantaged individuals, historically Black colleges and universities; and minority institutions. It would provide for technical assistance to

APPENDIX E:

SECTION 846 OF THE PROPOSED NATIONAL DEFENSE  
AUTHORIZATION ACT FOR FISCAL YEAR 1988

1 (b) EFFECTIVE DATE.—Section 2324(e)(1)(K) of title  
2 10, United States Code, as added by subsection (a), shall  
3 apply to any contract entered into on or after October 1,  
4 1987.

5 SEC. 846. REQUIREMENT FOR SUBSTANTIAL PROGRESS ON MI-  
6 NORITY AND SMALL BUSINESS CONTRACT  
7 AWARDS.

8 (a) REQUIREMENT FOR SUBSTANTIAL PROGRESS.—  
9 The Secretary of Defense shall ensure that substantial  
10 progress is made in increasing awards of Department of De-  
11 fense contracts to section 1207(a) entities.

12 (b) REGULATIONS.—The Secretary shall carry out the  
13 requirement of subsection (a) through the issuance of regula-  
14 tions which do the following:

15 (1) Provide guidance to contracting officers for  
16 making advance payments under section 2307 of title  
17 10, United States Code, to section 1207(a) entities.

18 (2) Establish procedures or guidance for contract-  
19 ing officers to—

20 (A) set goals which Department of Defense  
21 prime contractors should meet in awarding sub-  
22 contracts, including subcontracts to minority-  
23 owned media, to section 1207(a) entities, with a  
24 minimum goal of 5 percent for each contractor  
25 which is required to submit a subcontracting plan

1 under section 8(d)(4)(B) of the Small Business Act  
2 (15 U.S.C. 637(d)(4)(B)); and

3 (B) provide incentives for such prime con-  
4 tractors to increase subcontractor awards to sec-  
5 tion 1207(a) entities.

6 (3) Require contracting officers to emphasize  
7 awards to section 1207(a) entities in all industry cate-  
8 gories, including those categories in which section  
9 1207(a) entities have not traditionally dominated.

10 (4) Provide guidance to Department of Defense  
11 personnel on the relationship among the following  
12 programs:

13 (A) The program implementing section 1207  
14 of the Department of Defense Authorization Act,  
15 1987 (Public Law 99-661; 100 Stat. 3973).

16 (B) The program established under section  
17 8(a) of the Small Business Act (15 U.S.C.  
18 637(a)).

19 (C) The small business set-aside program es-  
20 tablished under section 15(a) of the Small Busi-  
21 ness Act (15 U.S.C. 644(a)).

22 (5) Require that a business which represents itself  
23 as a section 1207(a) entity in seeking a Department of  
24 Defense contract maintain such status at the time of  
25 contract award.

1           (6) With respect to a Department of Defense pro-  
2           curement for which there is a reasonable likelihood  
3           that the procurement will be set aside for section  
4           1207(a) entities, require to the maximum extent practi-  
5           cable that the procurement be designated as such a  
6           set-aside before the solicitation for the procurement is  
7           issued.

8           (7) Establish policies and procedures which will  
9           ensure that there shall be no reduction in the number  
10          or dollar value of contracts awarded under the program  
11          established under section 8(a) of the Small Business  
12          Act and under the small business set-aside program es-  
13          tablished under section 15(a) of the Small Business Act  
14          in order to meet the goal of section 1207 of the De-  
15          partment of Defense Authorization Act, 1987.

16          (8) Implement section 1207 of the Department of  
17          Defense Authorization Act, 1987, in a manner which  
18          shall not alter the procurement process under the pro-  
19          gram established under section 8(a) of the Small Busi-  
20          ness Act.

21          (9) Require that one factor used in evaluating the  
22          performance of contracting officers shall be the ability  
23          of the officer to increase contract awards to section  
24          1207(a) entities.



1 (10) Allow a contract with a section 1207(a)  
2 entity to be awarded at a price not exceeding fair  
3 market cost by more than 10 percent, regardless of the  
4 method of procurement used in awarding the contract.

5 (11) Provide for partial set-asides for section  
6 1207(a) entities.

7 (12) Establish a procedure for awarding a contract  
8 to a section 1207(a) entity, without providing for full  
9 and open competitive procedures, in circumstances  
10 where a market survey and Commerce Business Daily  
11 sources sought notice resulted in the identification of  
12 only one responsible section 1207(a) entity.

13 (13) Provide for increased technical assistance to  
14 section 1207(a) entities.

15 (14) Require that a concern may not be awarded  
16 a contract under section 1207 of the Department of  
17 Defense Authorization Act, 1987, unless the concern  
18 agrees to comply with the requirements of section  
19 15(o)(1) of the Small Business Act.

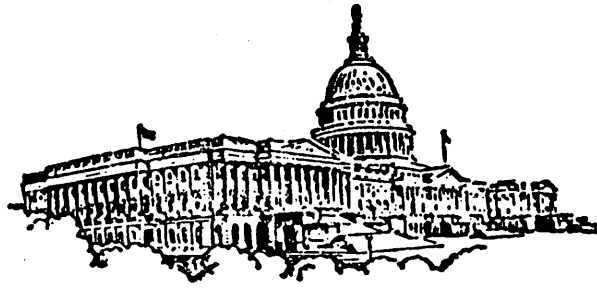
20 (c) DEFINITION OF SECTION 1207(a) ENTITIES.—For  
21 purposes of this section, the term “section 1207(a) entities”  
22 means the small business concerns, historically Black col-  
23 leges and universities, and minority institutions described in  
24 section 1207(a) of the Department of Defense Authorization  
25 Act, 1987 (Public Law 99-661; 100 Stat. 3973).

CHARLIE ROSE  
7TH DISTRICT, NORTH CAROLINA

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Congress of the United States  
House of Representatives  
Washington, D.C. 20515

COMMITTEE ON AGRICULTURE  
SUBCOMMITTEES:  
CHAIRMAN, TOBACCO AND PEANUTS  
COTTON, RICE, AND SUGAR  
DEPARTMENT OPERATIONS, RESEARCH,  
AND FOREIGN AGRICULTURE  
LIVESTOCK, DAIRY AND POULTRY

COMMITTEE ON  
HOUSE ADMINISTRATION  
SUBCOMMITTEES:  
CHAIRMAN, OFFICE SYSTEMS  
ELECTIONS

August 11, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
C/O, OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20310-3062

Dear Mr. Lloyd:

I write in support of Mr. Waddell J. Timpson and his letter of July 16, regarding his objections to the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal.

It is important that Small Disadvantaged Businesses are encouraged to be involved in the contracting process and that they are not limited or restricted in any manner. Subcontracting is also important to the small business owners and some provisions should be contained in the revision of these regulations.

I appreciate your support of Small Disadvantaged Businesses and hope that you will examine the issues that Mr. Timpson's letter addressed. Thank you for your attention to this matter.

Sincerely,

Charlie Rose

CR:cam

87-33  
EXOC SEC

# United States Senate

WASHINGTON, DC 20510-2003

August 19, 1987

*Comments  
received so they  
have already been  
revised 8/27/87*

Defense Acquisition Regulatory Council  
ATTN: Charles W. Lloyd  
Executive Secretary ODASD (P) DARS  
c/o OASD (P&L)(M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am contacting you concerning the proposed Interim Rules implementing Section 1207 of the 1987 Defense Appropriation Bill.

As you may know, I support Section 1207 as a means to assure the inclusion of small and disadvantaged firms in the procurement process. I look forward to the implementation of rules that provide the greatest opportunity for the minority community to participate in defense procurement.

I have enclosed for your review a position paper on the proposed rule changes to Section 1207 submitted to me by the Coalition to Improve DOD Minority Contracting. The Coalition is a group of small businesspersons with first hand knowledge of the problems with current law and program practices. Please give these comments your most serious consideration as you develop your final rules.

Thank you.

Sincerely,

*Barbara A. Mikulski*  
Barbara A. Mikulski  
United States Senator

BAM/fst



# NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

806 15th Street, N.W. • Suite 340 • Washington, D.C. 20005 • (202) 347-8259

July 31, 1987

Mr. Charles Lloyd  
Executive Secretary  
Defense Acquisition Regulatory  
Council (DAR)  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
Washington, D.C. 20301-3062

Re: Comments on DAR 87-33: DOD's Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Pub. L 99-661; Set-Asides for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

The following are the comments of the National Association of Minority Contractors (NAMC) with regard to the above-referenced subject:

## INTRODUCTION

The Department of Defense (DOD) has invited public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement (DAFRS) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661).

Such statute permits (DOD) to enter into contracts using less than full and open competitive procedures, when practical and necessary, to facilitate achievement of a goal of awarding 5 percent of contract dollars to small disadvantaged business (SDB) concerns during FY 1987, 1988, and 1989 provided the contract price does not exceed fair market cost by more than 10 percent.

The interim rule implements the statute by requiring that contracting officers set aside acquisitions, other than small purchases conducted under procedures of Federal Acquisition Regulation (FAR) Part 13, for exclusive competition among SDB concerns, whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns and that the contract award price will not exceed fair market price by more than 10 percent.

The National Association of Minority Contractors (NAMC) fully supports the DOD's interim rule as a most effective method to implement Section 1207 and meet the five (5) percent SDB goal. As will be explained below, such action is justifiable from both a practical as well as a legal standpoint.

Under this program, SBA is empowered to provide small business concerns which are owned and controlled by socially and economically disadvantaged individuals such management, technical, financial, and contract assistance as may be necessary to promote competitive viability within a reasonable period of time. Central to this program effort is the provision of set-aside contracts, usually non-competitive, through the SBA to 8(A) program participants.

In fiscal year 1984, only 1.6% of federal purchases were awarded under the 8(a) program. Over the 16-year history of the program, only 1% of federal purchases were awarded as 8(a) contracts. Nevertheless, it is estimated that well over 60 percent of all federal prime contract awards to minority businesses come through the 8(a) program. More important is the fact that almost two-thirds of all DOD prime contracts to minority business are awarded under 8(a).

Unfortunately, only about 3000 of the estimated 700,000 minority businesses in America are in the 8(a) program. There are numerous other small disadvantaged firms, outside the 8(a) program, that could perform excellent work for the DOD. In order for DOD to meet its 5% SDB goal such non-8(a) firms will have to be utilized. From a practical standpoint then, DOD's interim rule provides the most proven effective method for increasing DOD utilization of capable minority firms.

#### LEGAL RATIONALE

Several organizations representing predominantly majority-owned business concerns will argue that the DOD's interim rule is unconstitutional and will unduly injure their constituents. Nothing could be further from the truth, however.

The DOD interim rule is no more than an allocation of benefits by the government to a predetermined class of eligibles. Such action is legally valid so long as such allocation is reasonable and is designed to achieve a legitimate government purpose.

Within the constraints cited above the government has historically implemented, and is currently implementing, procurement programs which not only give preferences but which also restricts competition on certain government contracts in order to achieve desired economic results. The Buy American Act (41 U.S.C. Sec. 10a, Et Seq.), for example, often requires that American business firms be given a bid preference of either 6 or 12 percent over foreign firms when competing for federal contracts.

Also, Public Law 85-804 authorizes the military to pay extraordinary contractual relief to essential defense contractors, if such payments are needed to keep them in business--even though such contractors are not otherwise entitled to such funds under the terms of their contracts. Moreover, the tax laws have allowed the largest defense contractors in the U.S. to postpone the payment of federal income taxes pending the total completion of a defense system.

All of the above examples restrict free and open competition and give preferences to a select group of businesses.

However, the purpose of the Buy American Act is to preserve the domestic mobilization base in America. Although the law clearly gives American firms a distinct competitive advantage over foreign firms, it is almost universally recognized that such law is necessary to address a legitimate purpose of the United States government.

With regard to Public Law 85-804 it is also a legitimate purpose of the federal government to insure that contractors essential to the national security receive reasonable amounts of assistance to remain in business.

It was that same rationale which led to the enactment of the Small Business Act in 1953 under which the small business set-aside program, discussed earlier, was derived. Through small business set-asides, the federal government seeks to insure that, through its purchasing system, the U.S. government does not create a situation where there are so few producers of government-needed services and goods that such firms can virtually dictate the terms and conditions of all sales. Such restriction of competition is reasonable because 99 percent of all businesses are classified as small. Thus, a small business set-aside precludes only one percent of the universe of all firms competing for these awards.

The extension of this rationale to small disadvantaged businesses is hardly difficult. Through its enactment of Section 2(e) of the Small Business Act, Congress made what amounted to an investigatory finding that there exists in the United States a correlation between ethnicity and social and economic disadvantage. The Congress also found that it is in the national interest to expeditiously ameliorate this situation in order to obtain social and economic equality and to improve the functioning of the national economy. The promotion of minority business ownership through the use of federal resources (e.g., contract awards) was the means chosen by the Congress to effect these goals. One would be hard pressed to argue that such effort does not achieve a legitimate government purpose.

Furthermore, the DOD's implementation of the "Rule of Two" set-aside system to achieve the 5% minority contracting goal is not an unreasonable method to attain such goal. Of the total DOD domestic purchases only 5% will be awarded to small disadvantaged firms, if they are available, while at least 95% of DOD dollars will still be available to firms possessing an economic advantage.

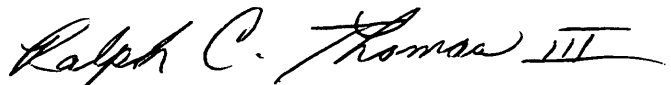
Also, it should be noted that in order to insure that small businesses as a class are not penalized by the SDB set-aside procedure, the DOD will not apply SDB set asides to small purchases conducted under FAR Part 13 procedures upon which heavy reliance is placed in insuring that small businesses as a class receive a fair proportion of DOD contract dollars. This approach should tend to reduce impact upon non-SDB small businesses resulting from the new procedures, while facilitating attainment of the goal established by Congress.

In light of the legitimate government purpose the SDB set-aside will achieve, as well as the fact that the limit to competition will be a slight and reasonable one, the DOD's interim rule is ably supported by congressional intent and legal precedent.

#### CONCLUSION

The DOD interim rule to effect the 5% SDB contract goal is based on sound practical and legal rationale. It should be fully implemented with all due speed.

Respectfully submitted,



Ralph C. Thomas, III  
Executive Director



# NATIONAL CONSTRUCTORS ASSOCIATION

1101 15th Street, N.W., Suite 1000, Washington, D.C. 20005 (202) 466-8880

August 3, 1987

Mr. Charles W. Lloyd, Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Subject: DAR Case 87-33

Dear Mr. Lloyd:

On behalf of the member companies of the National Constructors Association (NCA), I would like to express our concern over the practical impact of DOD's interim acquisition regulation regarding set-asides for small disadvantaged business concerns on the construction industry.

First, we question the implementation of this interim regulation before it has received public comment. In view of the fact that the mechanical nature of the application of the Rule of Two often leads to near total set-asides, it only seems prudent to solicit comments beforehand as to the likely impact of such a significant change to the set-aside regulations.

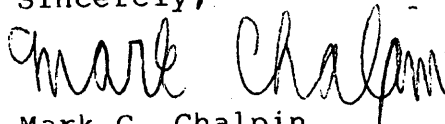
Second, use of the Rule of Two to govern small business set-asides for the construction industry by DOD since the late 1970s has effectively excluded construction companies not classified as small businesses from even bidding on most DOD projects. This experience leads us to believe that use of the Rule of Two to govern small disadvantaged business set-asides by DOD will likewise foreclose construction companies not classified as small disadvantaged business concerns from being eligible to compete on many DOD projects. It is difficult to see how such a result comports with Congress' goal that DOD award 5 percent of its contract dollars to small disadvantaged business concerns over the next three fiscal years.



Mr. Charles W. Lloyd  
August 3, 1987  
Page 2

We believe that the interim regulation is a fundamentally flawed rule which will adversely affect the construction industry in a way that Congress did not intend. We hope that you will quickly reconsider this misguided regulation.

Sincerely,



Mark G. Chalpin  
Vice President, International  
and Government Affairs

MGC/pdb

Suite 900  
450 Spring Park Place  
Herndon, Va. 22070  
(703) 471-8327

July 27, 1987

Mr. Charles W. Lloyd, Executive Secretary  
Defense Acquisition Regulatory Council  
ODASP(P)DARS, c/o OASD(P&L) (M&RS)  
Room 3C841  
The Pentagon, Washington, DC 20301-3062

Dear Mr. Lyoyd:

The purpose of this letter is to provide comment on the interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for Fiscal 1987 (Public Law 99-661), entitled "Contract Goal for Minorities", DAR Case 87-33.

It is apparent from reading the interim rule and from experience with its implementation and from reviewing a change to the Air Force Acquisition Circular (87-16), that this interim rule will have far reaching impact on both small disadvantaged businesses and small businesses.

Federal Information Technologies, Inc. is a qualified small business under the criteria and size standards set forth in 13 CFR 121 that provides system engineering and integration services to the Federal Government as a prime contractor with special emphasis with the Department of Defense. We deal with many other small businesses as subcontractors, a number of which qualify as small disadvantaged businesses.

Federal Information Technologies has no objection with the goals set forth in section 19.201 to further the participation of small disadvantaged businesses. However, we take strenuous exception to the creation of small disadvantaged business set-asides as envisioned in the following paragraphs and the way that the program is to be implemented.

In the highly sophisticated communications (voice and data) integration market with the Federal Government, successful firms must be aware of the anticipated needs of the users, participate in the development of the requirements and specifications, and determine which particular projects meet the technical and resource capabilities of the firm. This must be done far in advance of any advertisement in the Commerce Business Daily. Small firms, like ours must carefully analyze the potential business and must carefully husband our scarce resources to provide professional responses to a limited number of RFIs/RFPs where there is a reasonable chance of success.

*Federal Information Technologies, Inc.*

July 27, 1987  
Page 2  
DAR Case 87-33

As proposed, the contracting officer may make the determination that a particular contract is reserved for total small disadvantaged business participation, at any stage of the process, up to and including bid opening. This is an intolerable burden on small businesses.

We envision a number of results if this interim rule is put into effect, none of which are good for small businesses and several of which will be counter productive for small disadvantaged businesses and in combination will be disadvantageous for the Federal Government. First, many small business will not bid on a great number of jobs which there is a potential that their bids will be declared nonresponsive because two or more small disadvantaged concerns express interest in the at any stage of the process.

Second, for contracts where small disadvantaged participation is expected and such participation either does not materialize or both or all of the expected or interested small disadvantaged participants withdraw, choose not to bid, or provide nonresponsive bids either due to cost, technical compliance, or ability to provide all goods and services through qualifying small disadvantaged firms, the contracting process is thrown into confusion. It appears that the contract will then be awarded to one of the remaining firms which, despite the warnings in the bid solicitation chose to bid or the process will have to be restarted.

Third, except in Research and Development and Architecture and Engineering contracts, there is no provision for the contracting officer to make any inquiry into the qualification of the small disadvantaged business or to the qualifications of any of the sub contractors either as to their qualification as a small disadvantaged business or as to their technical competence to perform the required tasks. This provision begs for bid protests and potential litigation. Contracts will be stalled needlessly and the Small Business Administration will be hopelessly backlogged. Without some form of preaward qualification of the prime contractor and the subcontractors may open the flood gates for truly unqualified firms participating particularly as subcontractors which they add to their team to meet the requirements. It will also place small disadvantaged firms, acting as prime contractors at risk if they bid contracts with subcontractors or suppliers who are shown to be unqualified.

July 27, 1987  
Page 3  
DAR Case 87-33

We envision two other events occurring that will be highly detrimental to small businesses, small disadvantaged businesses, the Government and to the taxpayers. Contracting Officers faced with this confused environment will do one of two things. They will either segment contracts so that they will qualify as small purchases under the Federal Acquisition Regulations, Part 13 procedures. This will undoubtedly increase costs, overburden the limited contract supervision capability of the contracting offices, and lead to less than optimal results or they will combine logically unrelated or marginally related contracts into omnibus projects that will be the province of large businesses.

We see further confusion and disaster on the horizon upon reading Air Force Acquisition Circular (AFAC) 87-16, Section 19.501, paragraph (g) as amended, states that even ongoing contracts with small businesses are not exempt from conversion to total small disadvantaged business set-asides. We recognize that there is no guarantee that an existing contractor, even one who has provided quality service and/or products has any guarantee of renewal. However, under this change, they may not even have the chance to compete. Further, in the past, many small businesses, who were unsuccessful bidders in a contract renewal have been able to employ some of their people and to recover some of their investment in equipment and materials by participating as a subcontractor for the new successful bidder. This has also worked to the advantage of the new contractor, often a small disadvantaged business, by providing an immediately available source of expertise and capability to perform the contract. Under the interim rule as implemented neither will benefit. The small contractor will be excluded because the new contract will be a total small disadvantaged business set-aside. The small disadvantaged business will be unable to use the expertise of the prior contractor and will have to replicate this capability. We cannot conceive of how this will not be more costly to the Government both in terms of dollars and reduced performance until the new contractor can develop the necessary performance capability.

We believe that this interim rule benefits neither the small disadvantaged businesses, other small businesses, or the Federal Government. This interim rule will not have the intended effect of ensuring that five percent of the contract dollars are awarded to small disadvantaged businesses and, in fact, may ultimately

July 27, 1987  
Page 4  
DAR Case 87-33

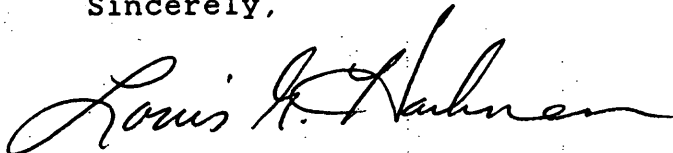
reduce the percentage of contract award dollars going to small disadvantaged businesses. We are certain that it will reduce the amount available for other small businesses and is likely to result in a smaller percentage for all small (small and small disadvantaged) businesses.

Our suggestion would be to revoke the interim rule and replace it with one that increases the proportion of all defense contracts available to all small businesses and then to add contract requirements in all contracts which will increase the participation of small disadvantaged businesses. This will open participation for small disadvantaged firms in a wider range of contract opportunities and not unduly penalize those small firms who do not qualify as small disadvantaged concerns.

Failing the above, there are several steps that must be taken immediately to rectify some of the most grievous flaws in the interim rule. First, contracts to be identified as small disadvantaged business set-asides must be identified at the earliest stage, certainly before bid solicitation. Second, the solicitations must include requirements that the bidders provide sufficient information for the contracting officer to determine if the bidder, to include all sub-contractors and suppliers, are in fact bonafide small disadvantaged businesses and have the expertise/capability to provide the product/service required. Third, the contracting officer must have the authority to make a determination of the capabilities of the bidders prior to contract award. Lastly renewal contracts should not be subject to total small disadvantaged business set-aside procedures.

Thank you for the opportunity to provide comment to this proposed rule. We would appreciate a response to our concerns and a copy of any and all revised interim rules and/or the final rule.

Sincerely,



Louis G. Harkness  
Vice President/General Counsel



30 July 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASP(P) DARS  
c/o OASD(P&L) (M&RS)  
Room 3D139, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

An Association of Small Business Research, Engineering and Technical Services Company (ASRET) Committee met with Secretary Costello on 20 July concerning Section 1207 of the Fiscal Year 1987 Defense Appropriation Act and the interim rule. Colonel Otto Guenther had our draft ASRET Analysis which he indicated he would pass to you. We indicated we were refining the report and would want to substitute the revised report to the DAR Council.

We are attaching:

- a. The ASRET Analysis, dated July 24, 1987 and request that you substitute it for our draft, and
- b. Addendum one to the report covering "Breakout of Work from Unrestricted Procurements", dated July 29, 1987.

We wanted to be certain that our material was in your hands as required by the Federal Register and reached you by 3 August. With this letter may we ask that you substitute the ASRET Analyses in your files and officially consider our comments. Also, we request that you consider our Addendum One in your review. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "John J. Bennett".

John J. Bennett  
Chairman of the Board and  
Chief Executive Officer

Copy to:  
Mr. R. Kenneth Misner  
President, ASRET



30 July 1987

Defense Acquisition Regulatory Council  
Attn Mr. Charles Lloyd, Executive Secretary  
ODASP(P) DARS  
c/o OASD(P&L) (M&RS)  
Room 3D139, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

By the Federal Register, Volume 52, Number 85, May 4, 1987, the Defense Acquisition Regulatory (DAR) Council invites public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, entitled "Contract Goals for Minorities". Comments are required by August 3, 1987.

ANADAC, Inc. is a small publicly-owned engineering management and technical services company. We employ approximately 150 people. Under an ESOP (Employee Stock Ownership Plan), the employees own in excess of 20 percent of the publicly held stock. Our major customer is the Department of the Navy and, more particularly, the Naval Sea Systems Command (NAVSEA). We are one of perhaps 50 companies in the Washington area that compete for NAVSEA service contracts, particularly contractor support services (now defined as CAAS: Contractor Advisory and Assistance Services). There are at least 10 small disadvantaged 8A-certified companies who also participate in NAVSEA CAAS procurements.

ANADAC, Inc. and most of the other small businesses performing NAVSEA technical services/CAAS contracts depend to a large extent on competitive small business set-aside awards to sustain our business base. As part of the Federal Government Small Business Program, we as a group support the 8A and small disadvantaged business (SDB) programs. We cannot, however, condone OSD implementation of SEC 1207 as it now stands. It is inequitable and unfair and will severely damage many companies in our business community.

As a basic premise, ANADAC, Inc. questions the legality of the interim rule as it is written and being implemented. We believe it to be in conflict with the Small Business Act as it pertains to protecting the interests of small business concerns and with the Armed Services Procurement Act as it pertains to fairness in allocating federal contracts to small business. In addition, the Section 1207 language does not appear to be permissive. Therefore, unless either Section 1207 or CICA is amended, it would seem that SDB set-asides made without justifications and approvals would be subject to challenge. We request that a legal opinion in all three instances be

obtained and published, and during the period of inquiry, implementation of the interim rule be suspended.

Under FAR 19.501(g), DOD requires that once a product or service has been successfully acquired by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service be acquired on the basis of a repetitive set-aside. Section 1207 offers no such protection to small business set-asides. As a result NAVSEA and other Services/Commands are reclassifying previous small business set-asides to restricted small disadvantaged business set-asides at an alarming rate -- one calculated to do immediate and irreparable damage to the companies impacted and to the overall Federal Government Small Business Program.

Our company took part in an ASRET Study of Section 1207 implementation furnished you under separate cover. Study statistics show that 85.5 percent of the NAVSEA 8A and SDB contract actions for FY 86 occurred in the service industry. Because of the NAVSEA industrial structure, little short-term action can be taken to reverse that situation. We believe this situation to be the same within other Services/Commands. In fact, Section 1207 implementation can be expected to increase the heavy dependence on the service sector for 8A and SDB awards and goals. At the three levels within Navy and OSD with whom we held discussions, procurement officials acknowledge this situation to be generally true. Many informally agreed that, if carried to the letter of the law, DOD support services would be disrupted and harmed. As such, implementation of Section 1207 as it now stands will be inequitable. Given the expected economic impact on DOD support services, we feel further investigation is necessary before proceeding. No one would consider changing the profit or other high impact policy without economic impact analysis, so why do it here? Accordingly, we request that you consider holding the interim rule in abeyance until an economic impact analysis has been completed, assessed, and can serve as the basis for DOD-wide implementation.

Currently, NAVSEA CAAS procurements are actively meeting 8A goals. During FY 86, of \$318.9 million obligated for CAAS procurements within NAVSEA, \$39.8 million and 102 contract actions were set aside for 8A and SDB awards and \$41.3 million and 111 contract actions awarded as small business set-asides. Disadvantaged businesses represent 12.5 percent of the total NAVSEA CAAS business today and 49.1 percent of the CAAS set-aside program dollars. Thus, in the NAVSEA CAAS area, small disadvantaged businesses have exceeded their goal by more than two and share equally with other small businesses in set-aside programs. While it is not our intent to do so, one could argue that the existing 50-50 split of CAAS set-aside awards already treats non-minority small business unfairly in this area. Yet, this is one of the specific services area that will be severely impacted by your Section 1207 implementation. We find nothing in Section 1207 that prohibits categorization and sectioning of the small disadvantaged business goals. In the interest of equity and to protect erosion of the existing small business base, we respectfully request that Section 1207 implementation (i) provide for partition of goals by industrial or DOD funding categories; or (ii) apply

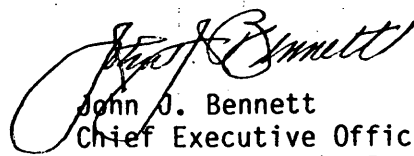


exemptions when previous and existing subsectors are found to significantly exceed the SDB five percent goal.

This program is already having a significant negative impact on small businesses. Since implementation of Section 1207, NAVSEA has already reclassified the PMS 312 small business award from "small business" to a "small disadvantaged business" set-aside, thereby totally eliminating the current incumbent from even bidding for the follow-on work. Our business community is aware of at least four more previously classified small business set-asides that are expected to be reclassified small disadvantaged business in the near future. Our best estimate is that, within one year, up to 30 percent of the previously classified CAAS small business set-asides under FAR 19.501(g) will have been reclassified. Rather than promoting free and open competition, this will restrict all non-minority contractors from bidding and denies them the right to work. No one can claim this approach is fair and equitable. Not only goals but parity between SDB and small business in NAVSEA CAAS set-asides has been attained. We think this situation is occurring Service-wide. Accordingly, we request that Section 1207 implementation include a section giving protection to FAR 19.501(g), by restricting reclassification of previous set-aside repetition when it can be shown that the SDB goal of five percent has or will be met for a fiscal year or reporting period.

The question of Congressional intent is essential. Did Congress mean to mandate reward of one segment of small business at the direct expense of another segment of small business? We think not. As we understand it, the Congressional Black Caucus and other supporters, rightfully so, acted through its House of Representative channels to ensure fairness and equity in DOD procurement awards to minority firms. Most Congressmen and other observers would agree that DOD implementation of PL 95-507 resulted in very little progress toward these objectives. We were told that Section 1207 was initiated by the House of Representatives so that implementation of existing legislation could be aided and abetted by minority goals. Now comes along Section 846 of the proposed National Defense Authorization Act for Fiscal Year 1988 which mandates (a) no reduction in the small business set-aside program and (b) enforcement of PL 95-507, among other corrective actions. In our discussions with OSD officials, there was a reluctance on their part to admit or give any credibility to Section 846 of the new appropriation act since it has not passed the Senate. Clearly, Section 846 emanated from the same place that Section 1207 originated. We think it obvious that the legislative sponsors did not intend to harm other small business set-asides, but rather to put teeth into implementing PL 95-507. In the interest of reputable business practices, we sincerely request that you acknowledge and act on Congressional intent and stop this unnecessary and unwanted rape of developing small business enterprises.

Respectfully yours,

  
John J. Bennett  
Chief Executive Officer and  
Chairman of the Board

July 29, 1987

ADDENDUM ONE TO ASRET REPORT  
Analysis of the Five Percent Disadvantaged Contract Goal  
dated July 24, 1987

SECTION II. RECOMMENDATIONS

Add Paragraph "F" as follows:

F. Reaffirm DOD's Directive for Break Out of  
Work from Unrestricted Procurements for  
Small and Small Disadvantaged Businesses

- o Reemphasize the DOD program to break out work from unrestricted procurements and set it aside for performance by small and small disadvantaged business concerns.
- o By his Memorandum of 1 June 1982, Deputy Secretary of Defense Frank Carlucci directed the Secretaries of Military Departments and Directors of the Defense Agencies to break out work from unrestricted procurements and package future solicitation "so as not to preclude performance by small and small disadvantaged concerns as prime contractors."
- o Further he said, "The following policy statements are intended to resolve the inherent conflicts between our consolidation efforts and their potential impact on the small and small disadvantaged business programs. Please see that they are appropriately implemented:
  - (1) Functions that are currently being performed by small business, including those won in open competition on the basis of a set-aside or by 8(a) contract, shall not be considered for consolidation."
- o There are many instances where the Government has reclassified a procurement as unrestricted even though the work has been performed satisfactorily by small businesses though creating the illusion that the nature of the work had changed through addition of tasks not contained in the previous procurement. In fact, in some instances companies that had won the procurements and successfully performed the work as small businesses were the successful offerors for the same work contracted for on unrestricted procurements after they had turned big business.
- o A current example of this latter practice can be made for the Navy's SNAP program in SPAWAR 10K for which services are currently being planned for procurement under an unrestricted solicitation where the incumbent contractor, who performed the work as a small business, is now a large business.

Magnavox Electronic Systems Company  
1313 PRODUCTION ROAD  
FORT WAYNE, INDIANA 46808

S. H. NEWNAM  
VICE PRESIDENT  
DIRECTOR OF MATERIAL OPERATIONS

August 21, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd, Executive Secretary  
ODASD(P)/DARS, c/o OUSD(A) Mail Room  
Room 3D139, The Pentagon  
Washington, DC 20301-3062

Reference: DAR Case 87-33

Gentlemen:

Magnavox Electronic Systems Company has been, and will continue to be, a supporter of Public Law 95-507. Our support has been demonstrated over the years by a steady growth in the use of minority suppliers. The growth from FY 82 to FY 86 shows the percentage increasing from 1% to 3% in FY 86. The amount of purchases has increased from \$843,000 in FY 82 to \$8,297,000 in FY 86. This improvement has taken place because of our management's commitment and through the dedication and hard work of many employees.

The driving force of our program is our Minority Business Development Council. This council was established by our management and is directed by our Vice President, Director of Material Operations. Members of the council are representatives from Purchasing, Quality, Manufacturing and two Minority Liaison Engineers. Representatives from Marketing, Contract Administration, Personnel and the Law Department attend when requested. The result of this effort is that we have developed our minority suppliers to a point where one is one of our top ten suppliers while another is one of our top 25 suppliers. Our efforts have included training operating personnel, providing technical assistance, the developing of quality standards, and we have provided financial assistance.

Being a manufacturer of electronic products, we use a significant amount of solid state devices and we also utilize Subcontractors with specific expertise in the systems business. These two areas represent approximately 35% of our total procurements. This requires that our opportunity for minority procurement from all other areas must exceed 4-1/2% for us to average 3% for the fiscal year.

Page Two

To: Defense Acquisition Regulatory Council

Public Law 99-661 sets a 5% goal for the DoD to purchase from Small Disadvantaged Concerns. As I have read in the Federal Contracts Report dated May 25, 1987, the House has passed an amendment to the Defense Authorization Bill to:

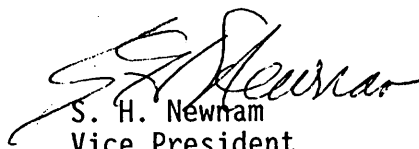
"Establish procedures or guidance for contracting officers to -  
(A) Set goals which Department of Defense prime contractors should meet in awarding contracts . . . . with a minimum goal of 5% . . . ."

We feel that these goals are attainable on some programs. We do not feel they are as attainable across the board. As we have outlined, it has taken Magnavox four years to increase the minority participation by 2%; however, much of this increase is on a few contracts which provided subcontracting opportunities. In addition to our Minority Business Development Council, our Buyers are tasked with locating viable minority vendors. Our experience has found a limited number of minority businesses in the manufacturing field; yet the manufacturing field contributes the most potential for increased subcontracting business.

It is our opinion and recommendation that any minimum goal for all defense contractors must be balanced with the subcontracting opportunities of the Government contracts involved, i.e. systems contracts, R&D contracts, and production contracts.

Sincerely,

MAGNAVOX ELECTRONIC SYSTEMS COMPANY



S. H. Newnam  
Vice President  
Director of Material Operations

cc: Senator Dan Quayle



Science & Engineering Associates, Inc.  
P.O. Box 3722  
Albuquerque, New Mexico 87190  
(505) 884-2300

17 August 1987

Defense Acquisition Regulatory Council  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, DC 20301-3062

ATTENTION: Mr. Charles Lloyd, Executive Secretary

Dear Mr. Lloyd:

SEA is a non-disadvantaged small business providing technical professional services. We have a proven track record in competing for and successfully accomplishing DoD and DoE projects in a competitive environment.

This letter is written in response to the Dod implementation of Section 1207 of the 1987 Authorization Act - Public Law 99-661. We have had ongoing dialogue with our Congressional delegation because we are concerned about the continual erosion of the amount of contract dollars available for competition among small businesses.

Our congressional delegation continually states to us that is is legislative intent not to award contracts to Small Disadvantaged Businesses (SDB's) at the expense of other small businesses; however, that is precisely what is happening. At the Kirtland AFB Contracting Center, we were recently quoted a figure of \$50M out of \$400M in contract awards going to 8(a) firms. Some of these firms are larger than we, and are providing the same services. In the interest of fairness, one must question the need for special preference.

To continue to foster a competitive environment, we strongly recommend the following:

- (1) A graduation level or limit of \$5M in annual government contracts be imposed on SDB, i.e., when an SDB firm reaches that level of contracts they should no longer be eligible for preferential treatment and they ought to be required to stand the test of competition.
- (2) An absolute time limit of seven years (five years plus a two year extension) be imposed on any SDB, and that no extension past this time limit be allowed under any circumstances.

Defense Acquisition Regulatory Council  
17 August 1987  
Page 2

- (3) No reduction in the number or dollar value of contracts under the small business set aside program established under Section 15(a) of the Small Business Act.
- (4) Renewals and recompetition of existing contracts being performed by non-disadvantaged small businesses should not be set-aside for SDB's.

These suggestions are made in the interest of fair and equal competition among all small businesses.

Thank you for the opportunity to respond to the proposed rule making.

Sincerely,

SCIENCE AND ENGINEERING ASSOCIATES, INC.



Gregory R. Woods  
President

GRW/sm

# Contract Services Association



August 17, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary  
OASD (P&L) (MARS)  
Pentagon - 3C841  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

The Contract Services Association is the major trade association exclusively representing the companies which provide technical and support services to Federal Government agencies. We are vitally interested in any regulatory development which affects the marketplace of our member companies, such as the DFARS interim rule published on May 4, 1987 under DAR Case 87-33. We were not aware of this interim rule until it began to impact our membership, and appreciate the opportunity to submit these comments belatedly.

The service contract industry is uniquely affected by any initiative to reserve prime contracts for a specific segment of the industry, particularly when the initiative includes a "goal" based on total Defense procurement. The largest segment of the Defense procurement budget is major system acquisition, which is not suitable for setaside for small business although it is part of the base used to establish the goal. This distortion produces disproportionate emphasis on setting service contracts aside for small business, and has resulted in decisions to setaside base support contracts which exceed \$10 million annually exclusively for small business. There are serious disadvantages to this development, including:

- o Small business firms are tempted to seek, and accept, contracts for which they lack the experience and resources, risking default and bankruptcy.
- o When they are successful, three years of performance will push them out of the small business category and they are unable to compete for renewal. At the time they lose the major portion of their business base, they are ineligible to bid on small business setasides.
- o Large companies in the service industry are leaving the base support A-76 market. These companies, which are the only ones that have the resources to convert a large base support activity to contract performance, will not make the investment if they are denied the opportunity to compete for continuation of the service.

These developments are seriously restraining competition in the service industry and threaten the viability of the Defense Commercial Activities Program under OMB Circular A-76, which has produced very substantial cost

savings in the Defense budget. They also create instability in the small business program, where viable small firms can be seriously damaged by undertaking overly ambitious contracts - even if they succeed, they are propelled out of the program before they are ready to meet unrestricted competition.

I am sure you are aware of the concern over the interim rule in the non-minority, small business community, which includes some of our member companies. They have already seen business that is normally reserved for all small business now restricted to that small segment which meets the definition of "small disadvantaged business". They are understandably distressed over a Government action which denies them the opportunity to compete for renewal of contracts which they are currently performing. The legitimate concerns of these companies will lead to increased pressure to set aside large service contracts for small business, thus exacerbating the problems already described.

It does not appear that development of this interim rule included full consideration of its potential economic impact on the Defense budget. Total Defense procurement for FY-88 will surely exceed \$160 billion. If 5% of that amount is devoted to prime contracts with SDB firms, with a premium of 10% above "fair market price", this would result in unnecessary expenditure of \$800 million at a time when the Defense budget is under unprecedented stress. Regardless of the good intentions behind this interim rule, we do not feel that this represents the best use of scarce funds appropriated for the Defense of our country.

The Contract Services Association is not opposed to small business or small disadvantaged business firms. Our objective is to serve the best interests of the service industry and all companies in that industry that seek business in the Government market. We also recognize the concerns of Congress that led to Section 1207 of P.L. 99-661, and feel that all those interests can be served in a manner that will be less disruptive to the service marketplace, less hazardous to small and disadvantaged businesses, and less wasteful of Defense appropriations.

Section 1207 places equal emphasis on "contracts and subcontracts" to be awarded to SDB firms and other minority institutions. It has been our experience in working with companies that seek to do business with the Government that they are primarily interested in business which offers an opportunity to earn a reasonable profit, and that prime contracts and subcontracts are equally welcome. We feel strongly that inordinate emphasis has been placed on prime contracts in the implementation of all legislation which seeks to ensure a fair share of Government procurement dollars for specific economic groups. We find the interim rule for implementation of Section 1207 devoted exclusively to award and reporting of prime contracts, disregarding the extensive potential for subcontracting which would minimize the serious problems identified earlier.

The primary reason for establishing setaside programs for small business and small disadvantaged business firms is that these companies lack the capital, management expertise, and/or business experience necessary to compete in the open market for Government business. These deficiencies have resulted in a failure rate on Government contracts awarded under setaside procedures that is



higher than experienced under unrestricted competition. Despite the best efforts and intentions of Government personnel who are assigned to assist these firms, they frequently are overextended and lack the business experience necessary to assure success.

A more effective route to provide business opportunities to these firms, and also assure competent business assistance necessary for development, is through subcontracting with an experienced prime contractor. Under this approach:

- o Prime contracts can be awarded competitively, providing optimum economy in the expenditure of scarce Defense resources.
- o The prime contractor is responsible for performance, minimizing risks for the contracting agency.
- o The prime contractor can provide business and technical assistance to the small firm, insulating it from the complexity of Government regulations.
- o Base support and other multiple requirement activities can be consolidated for efficiency and to reduce workload for Government procurement personnel.
- o Experienced large service contractors will be encouraged to participate in Government business where their capabilities will be most effectively utilized.

Subcontracting as an approach to providing business opportunities for small firms has been grossly underutilized due to lack of a proper reporting system to ensure full credit, inadequate implementation of subcontracting procedures, and lack of authority for prime contractors to restrict competition to targeted groups. Appropriate regulatory action, within existing statutory authority, could overcome these problems and significantly expand business opportunities for small and small disadvantaged businesses without adversely affecting the competitive marketplace or the Defense effort.

The Contract Services Association submits the following recommendations for implementation of Section 1207 in service contracting, recognizing that they might be less effective or even unnecessary in procurement of supplies and equipment available from small firms.

- o Establish an effective reporting system for subcontracts, indentifying subcontracts awarded to small and small disadvantaged firms.
- o The Competition in Subcontracting clause, FAR 52.244-5, should be revised to authorize prime contractors to setaside procurements for small or small disadvantaged businesses when reasonable prices and satisfactory performance can be expected.
- o In all negotiated procurements, include a requirement for submission of a small/disadvantaged business subcontracting plan, and place significant weight on the extent and quality of this plan in the evaluation factors for source selection.

Page 4  
August 17, 1987

- o In all unrestricted sealed bid procurements, include an appropriate minimum requirement, as a percentage of total contract value, for subcontracting to small and small disadvantaged businesses.

We feel that this approach would be far more effective in promoting business for minority firms, and meeting the intent of Congress, than the interim rule published on May 4, 1987. Representatives of CSA would be very pleased to meet with you and others involved in the implementation of this policy to answer any questions and assist in the implementation of these recommendations.

Sincerely,



Gary D. Engebretson  
Executive Director

Congress of the United States

House of Representatives

Washington, D.C. 20515

August 3, 1987

*DADS Complete*

*Copy from Bill Pollock 1310 lws 8/5/87*

The Honorable Casper Weinberger  
Secretary  
Department of Defense  
The Pentagon  
Washington, D.C. 20301-3062

Dear Secretary Weinberger:

As members of Congress concerned about the success and proper implementation of the Department of Defense's minority set-aside program, we are writing this letter to propose specific regulatory language for the final regulations implementing Section 1207 of P.L. 99-661.

Section 205.207 -- Preparation of bids.

The regulations should not prohibit non-small disadvantaged businesses from submitting unsolicited proposals, provided they know in advance that the procurement may be set-aside. Although the regulations should be clear in seeking proposals from SDBs only, they should not specifically prohibit unsolicited proposals from non-SDBs. Therefore, we would amend the language of Section 205.207(d) (S-73) by substituting the following language in place of the last sentence:

"Therefore, replies to this notice are requested at this time from small disadvantaged business concerns only. Replies received from other than small disadvantaged business concerns will not be considered, unless adequate interest is not received from SDB concerns, and the solicitation is issued as a \_\_\_\_\_ (enter basis for continuing the acquisition, e.g. 100% small business set-aside with evaluation preference for SDB concerns, etc.)."

Section 206.203-70 -- Set-asides for small disadvantaged business concerns.

Even assuming that the Competition in Contracting Act does not require a contracting officer to prepare a written justification for a set-aside award under the 5% program, we would amend Section 206.203-70 by deleting the last sentence and substituting the following language:

"All justifications, determinations, findings, and approvals in connection with the set-aside of a procurement under this program shall conform with the requirements of P.L. 99-661 and DoD procurement practices."

We would also recommend that Federal Acquisition Regulation 52.219-9 (d)(11)(iii) be amended to read as follows:

"Records on each subcontract solicitation resulting in an award of more than \$10,000, indicating (A) whether small business concerns were solicited and if not, why not, (B) ~~whether small disadvantaged business concerns were solicited and~~ if not, why not, and (C) if applicable, the reason the award was not made to a small business concern."

Section 219.001 -- Definitions.

The definition of "fair market price" should be amended to read:

"For purposes of this part, fair market price is a price based on reasonable costs under normal competitive conditions and not on lowest possible costs. For new procurement requirements, or requirements that lack satisfactory procurement history, the estimate shall be based upon recent award prices adjusted to insure compatibility. Such adjustments shall take into account differences in quantities, performance times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any additional cost which may be deemed appropriate."

Section 219.201 -- Technical assistance.

The regulations fail to make specific proposals regarding the technical assistance requirements under Section 1207. Therefore, we suggest that the following language be incorporated in the final regulations:

In the amendment to 219.201(a), the phrase ", pursuant to section 1207(c)," should be inserted after the phrase "It is the policy of the Department of Defense" and before "to strive to meet these objectives".

A new 219.202-6 should be added to read as follows:

"19.202-6 Technical assistance.

"(a) Contracting officers shall provide projections of DoD requirements up to 18 months in advance of publication. Such projections shall include a description of what will be purchased, who should be contacted and the anticipated capabilities necessary to fulfill the requirement.

"(b) Each military facility with procurement activities shall conduct annual technical assistance seminars, funded by DoD, using contracting officers and other related personnel. This subsection applies to military procurement personnel at the facilities of prime contractors as well. These seminars shall include discussions regarding information about the minority contracting program in general and at particular military bases or prime contractor facilities, advice about DoD procurement procedures, instruction on preparation of proposals, and other

Accordingly, 219.302(5) should be deleted.

Finally, 219.302(6) should be amended to read:

"(5) If the DoD determination is not issued within 10 days after the contracting officer's receipt of the protest, it shall be presumed that the questioned offeror is a SDB concern. This presumption will not be used as a basis for an award without first ascertaining when a determination can be expected, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government."

Section 219.502-3 -- Partial set-asides.

Provision should be made for partial set-asides under the 58 program. Therefore, we would amend section 219.502-3 to track the language of the Federal Acquisition Regulations to read as follows:

"(a) The contracting officer shall set aside a portion of an acquisition for exclusive small disadvantaged business participation when--

"(1) A total set-aside is not appropriate;

"(2) The requirement is severable into two or more economic production runs or reasonable lots;

"(3) One or more small disadvantaged business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a reasonable price;

"(4) The acquisition is not subject to small purchase procedures; and

"(5) A class of acquisitions may be partially set aside. Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures.

"(b)(1) When the contracting officer determines that a portion of an acquisition is to be set aside, the requirement shall be divided into a set-aside portion and a non-set-aside portion, each of which shall (i) be an economic production run or reasonable lot and (ii) have terms and a delivery schedule comparable to the other. When practicable, the set-aside portion should make maximum use of small disadvantaged business capacity.

"(b)(2) The contracting officer shall also encourage the participation of small disadvantaged concerns in the non-set-aside portion of an acquisition.

"(c)(1) The contracting officer shall award the non-set-aside

portion using normal contracting procedures.

(2) (i) After all awards have been made on the non-set-aside portion, the contracting officer shall negotiate with eligible concerns on the set-aside portion, as provided in the solicitation, and make an award. ~~Negotiations shall be conducted~~ with small disadvantaged business concerns in the order of priority as indicated in the solicitation (but see (ii) below). The set-aside portion shall be awarded as provided in the solicitation. An offeror entitled to receive the award for quantities of an item under the non-set-aside portion and who accepts the award of additional quantities under the set-aside portion shall not be requested to accept a lower price because of the increased quantities of the award, nor shall negotiation be conducted with a view to obtaining such a lower price based solely upon receipt of award of both portions of the acquisition. This does not prevent acceptance by the contracting officer of voluntary reductions in the price from the low eligible offeror before award, acceptance of voluntary refunds, or the change of prices after award by negotiation of a contract modification.

"(ii) If equal low offers are received on a non-set-aside portion from concerns eligible for the set-aside portion, the concern that is awarded the non-set-aside part of the acquisition shall have first priority with respect to negotiations for the set-aside."

This approach would be consistent with Undersecretary Godwin's statement that "partial set-asides will be included when changes are made as a result of public comment." (See Attachment)

Section 219.502-72 -- SDB set-aside.

Taken literally, this provision would require an SDB to offer the services of another SDB in order to have a procurement set-aside. This would effectively eliminate minority wholesalers and distributors from the program. In addition, procurement regulations should not carry an implicit presumption that SDB firms are less than qualified to perform on R&D or architect-engineering contracts. And finally, DoD should follow through on its intent to develop a proposed rule allowing an SDB set aside where a market survey and a "sources sought" CDB notice identify only one responsible SDB concern which could fulfill DoD's requirements. Therefore section 219.502-72 (a) should be amended to read as follows, succeeded by a new paragraph "(b)" as indicated. Further, the paragraph formerly labeled "(b)" should be changed to "(c)", "(c)" should be changed to "(d)", and "(d)" to "(e)."

"(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition shall be set-aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be

obtained from at least two responsible SDB concerns offering the supplies or services of different SDB concerns or of any domestic small business and (2) an award will be made at a price not exceeding the fair market price by more than ten percent.

~~(b) A direct award also may be made to an SDB firm without full and open competition, as permitted by section 1207, when a market survey and CBD notice identify only one responsible SDB concern which could fulfill DoD's requirements.~~

Section 219.502-72(b) -- We believe that multiple 8(a) firms expressing an interest in having an acquisition placed in their 8(a) program should not be a basis for examining whether the acquisition should be set aside in the 5% program. In fact, the 8(a) program and the 5% program should not compete for contracts at any level. Therefore, we recommend that the following language contained in Section 219.502-72(b)(2) should be deleted: "multiple responsible section 8(a) concerns express an interest in having the acquisition placed in the 8(a) program; or". In addition, the letter "(b)" should be changed to "(c)" as stated above, and the numeral "(3)" should be changed to the numeral "(2)".

Section 219.801 -- In light of the equally compelling mandate for Section 1207 of P.L. 99-661, this section should be written to avoid stating any preference between the 8(a) program and the 5% program. Therefore, we would amend this section to add the following:

"No preference shall exist, however, between the 8(a) program and the program established pursuant to section 1207 of P.L. 99-661."

Section 252.232-12 -- Advance payments.

The interim regulations failed to make any provision for advance payments. Section 1207 specifically calls for the mandatory usage of advance payments "to the extent practicable and when necessary to facilitate achievement of the 5 percent goal...."

Therefore, the regulations should be amended to allow advanced payments pursuant to Section 2307 of title 10, United States Code, to Section 1207 entities. It should be noted that Undersecretary Godwin had agreed to clarify the procedure for obtaining advanced payments under Section 1207. In addition, because the Undersecretary stressed the Department of Defense's preference for progress payments, the regulations should also clarify the procedures for obtaining progress payments and state criteria by which such payments will be made.

Beyond advance and progress payments, DoD should consider more aggressive schemes for providing financial assistance to SDBs. DoD and numerous interested minority contractors have pointed out that the benefits afforded through section 2307 are modest. Yet

it is clear that adequate financial assistance must be a central link in the success of P.L. 99-661. Since access to capital is a key problem of SDB enterprises, expanding contract opportunities will be of little avail if firms cannot gather the resources to take advantage of those opportunities.

Accordingly, DoD should explore, in conjunction with Congress, two financial assistance programs that could help realize the 5% goal. First, a debt financing program could be modeled after the DOT loan program for SDBs unable to obtain financing from conventional sources. DOT has entered into an agreement with a named bank to provide short and long term loans. Using funds appropriated by Congress, DOT advances 75% of the loan while the named bank advances the remaining 25%. Seventy-five percent of all repaid principle is then set aside in certificates of deposit that comprise a "DOT account", and serve as a continuing pool of funds for future loans. The Director of the OSDBU Office acts as the DOT representative in all matters related to the agreement.

DoD could pioneer a similar effort, but could keep its operation "off budget" by structuring it as a loan guaranty program instead of directly mirroring the program at DOT. Under such a scheme, DoD could provide a Federal guarantee covering 75% of the face value of SDB loans made by a named bank.

Although debt capital can be beneficial to some SDBs, many others are operating on margins too thin to absorb loan costs while still allowing for profits. In response, DoD should also explore an equity financing program.

Currently, Minority Enterprise Small Business Investment Corporations (MESBICs) provide a limited source of long term venture capital to minority businesses. A campaign is underway to privatize and expand the funding base for MESBICs by establishing the Corporation for Small Business Investment (COSBI). If successful, MESBICs, through COSBI, could become fruitful sources for financing the large numbers of SDBs contracting with DoD as well as with other government agencies.

However, because the expansion of MESBICs through COSBI is not assured, and even if achieved may not be adequate to meet the full range of SDB capital needs, DoD should explore the development of its own MESBIC-like, privately funded equity financing program.

One such program has already be outlined under the rubric of the National Security Investment Fund (NSIF). The NSIF would act essentially as an intermediary providing capital to SDBs contracting with DoD. Initial capitalization for the NSIF could be provided by successful minority and non-minority defense contractors who would be asked or required to purchase stock in the NSIF, perhaps in proportion to relative aggregate amounts of federal payments received within the past five years.



Proceeds from this capitalization would be used to leverage loans and create a larger pool of capital with which to purchase preferred stock in active and qualified SDBs contracting with DoD. Some of the proceeds of the NSIF would be reserved to purchase ~~other financial instruments that would round out the~~ Fund's portfolio, and to provide working capital. Under normal circumstances, Fund dividends would be reinvested.

Minority contractors would be required to repurchase the preferred stock held in their companies by the NSIF after a period of time, or to allow that stock to be converted to common stock with full voting rights.

After operation of the NSIF has been established, the Fund's stock could be marketed to a broader clientele to increase the pool of capital available for investment.

As investors in the NSIF, major prime contractors would have a material interest in the success of minority defense contractors.

This scheme is clearly ambitious, but it -- or something like it -- ultimately will be required to get to the most pressing financial assistance needs of a broad range of SDBs. Meeting those needs will be crucial to the success of the DoD 5% goal program.

#### Section 19.704 -- Subcontracting

The interim regulations make no provision for the subcontracting efforts of prime contractors pursuant to section 1207 of P.L. 99-661. Moreover, the DoD profit policy offers insufficient incentive to increase the efforts of major prime contractors to do business with minority firms. The policy neither identifies subcontracting with SDBs specifically nor attaches significant weight to such efforts. Therefore, Federal Acquisition Regulation Section 19.704 should be modified by adding a new section "(c)" to read as follows:

"(c) (1) Contract solicitations should contain a suggested goal representing the DoD expectation of the level of SDB participation in subcontracting. The expectation will vary with the discretion of the contracting officer, but shall be set at 5% or at such higher level as may be appropriate given the past performance of the apparent successor offeror or bidder and/or the contracting officer's analysis of market conditions.

(2) The solicitation should advise that the successful offeror may need initially to submit two alternative types of goals. The first goal would represent the offeror's maximum practicable opportunity for SDB's at the originally submitted price offered to the government. The second goal would be set at the DoD's expectation level (presuming that is higher than the first goal) and must be supported by evidence indicating how much in increased costs would be borne by the contractor if

required to meet the higher goal.

(3) In order to verify the differential, it would be necessary to obtain comparable subcontract bids or offers from ~~non-SDB firms and SDB firms~~ for the same subcontract item.

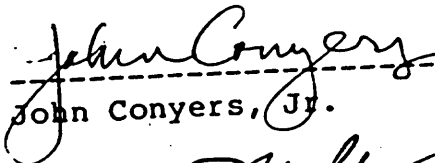
(4) DoD shall utilize the authority established in section 1207(e)(3) of P.L. 99-661 to pay any differential cost between the first and the second goal described in (2) above as long as that differential is not greater than 10%. The successful offeror would then be required to meet the second, presumably higher, SDB subcontracting goal.

(5) If the prime contractor breaches the agreement to meet the higher goal, the DoD shall deduct from the contract price twice the differential agreed upon to reach the higher goal.

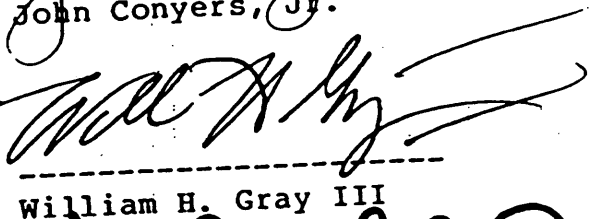
Size Standards -- Restrictive size standards pose a serious threat to achieving the 5% goal established by P.L. 99-661. A number of minority firms -- often those most capable of performing successfully in the expanded areas of DoD SDB contracting envisioned under Section 1207 -- may be barred from participating in the SDB set aside because they have grown past their size standard ceilings. Yet at the same time, these firms remain far short of being "dominant in their field of operation" as described in FAR 19.001.

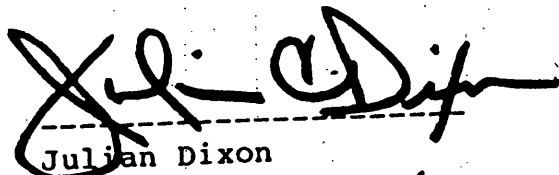
DoD, in conjunction with Members of Congress, should petition the SBA to set size standards at a level that facilitates reaching the 5% SDB contracting goal while still limiting participation in the SDB set aside program to firms that are not dominant in their field of operation.

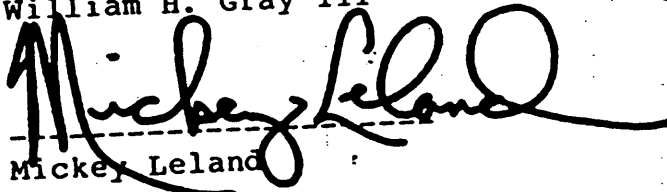
Sincerely,

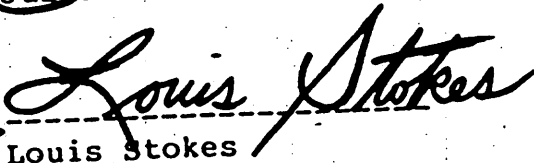
  
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John Conyers, Jr.

  
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Nicholas Mavroules

  
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William H. Gray III

  
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Julian Dixon

  
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Mickey Leland

  
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Louis Stokes

*C. B. Ranger*  
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Charles B. Ranger

*Edolphus Towns*  
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Edolphus Towns

*Major Owens*  
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Major Owens

*Augustus Hawkins*  
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Augustus Hawkins

*John Lewis*  
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John Lewis

*Kweisi Mfume*  
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Kweisi Mfume

*George W. Crockett, Jr.*  
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August 3, 1987

HAND-DELIVERED

Defense Acquisition Regulatory Council  
ATTN. Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Re: DAR Case 87-33

Dear Mr. Lloyd:

We are a law firm that represents a large number of clients in connection with Government contracts matters. We are writing to submit comments on the interim rule amending the Defense Federal Acquisition Regulation Supplement ("DFARS") that was published in the May 4, 1987 edition of the Federal Register. See 52 Fed. Reg. 16,263 (1987) (a copy of which is enclosed). The stated purpose of the interim rule is "to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), [the "Act"], entitled 'Contract Goal for Minorities.'" However, it is our view that in one material respect -- the rule's definition of a small disadvantaged business -- the interim rule imposes a restriction that goes far beyond the provisions of Pub. L. 99-661.

Section 1207 of the Act (a copy of which is enclosed) sets a goal for the Department of Defense ("DOD") for the expenditure of funds for contracts with small disadvantaged business concerns, historically Black colleges and universities, and minority institutions. In effect, Section 1207 authorized a DOD program of total small disadvantaged business set aside procurements. This DOD program is similar to the "8(a) Program" of the Small Business

Administration ("SBA"). Under the 8(a) Program SBA enters into prime contracts with agencies of the Federal Government, and then awards a sole-source subcontract to a small disadvantaged business concern for the performance of the work under the prime contract. Thus the 8(a) Program and the DOD program provide an important incentive for small disadvantaged business concerns to participate in Government procurements, and confer benefits that can be the life blood of such concerns. The identification of firms who are entitled to receive these benefits, i.e., the definition of a small disadvantaged business concern, is, therefore, all important.

The interim rule would add to the DFARS a Section 19.001 (48 C.F.R. § 219.001) containing, inter alia, the following definition of a small disadvantaged business concern:

"Small disadvantaged business (SDB) concern, "... means a small business concern that ... is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 Percent of its stock owned by one or more socially and economically disadvantaged individuals....

Many publicly held companies have two or more classes of stock. One is voting stock, which gives its owner both ownership and the power of direct control over the company; the other is non-voting stock, which confers some of the advantages of ownership, but does not confer any control over the company. The interim rule quoted above makes no distinction between the voting stock and the non-voting stock of a company. To be eligible for the DOD program, the stock of a small company -- and not just the voting stock -- must be at least 51 percent owned by individuals who are socially and economically disadvantaged. The interim rule's failure to make this distinction is improper. For the following reasons the interim rule is more restrictive than was intended by Congress.

First, Section 1207 of the Act states that small disadvantaged business concerns are concerns "owned and controlled by socially and economically disadvantaged individuals (as defined by Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and regulations issued under such section )...." The SBA regulations that are issued under Section 8(d) of the Small Business Act are set forth at 13 C.F.R. Part 124 (a copy of which is enclosed). At the time that the Act was passed -- indeed both before and since the Act was passed by Congress -- the SBA regulations have

defined the ownership requirements for a small concern to be considered a small disadvantaged business as follows:

In the case of an applicant concern which is a corporation, 51 percent of all classes of voting stock must be owned by individual(s) determined to be socially and economically disadvantaged.

13 C.F.R. § 124.103(b) (emphasis supplied). Thus the regulations that are expressly referenced in the Act clearly apply the 51 percent stock ownership requirement only to voting stock.

Second, the interim rule itself reflects a Congressional intent to be consistent with the SBA regulations. For example, the interim rule's definition of a "small business concern" explicitly references the SBA size regulations that apply to the 8(a) Program, 13 C.F.R. Part 121. See DFARS 19.001, 48 C.F.R. Part 219.001, 52 Fed. Reg. 16,265 (1987). Further, the interim rule states that "[i]t is the policy of the [DOD] to strive to meet [the goal established by § 1207 of the Act] through the enhanced use of ... the section 8(a) program, and the special authority conveyed through section 1207 (e.g. through the creation of a total [small disadvantaged business] set aside)." DFARS 19.201(a), 48 C.F.R. § 219.201, 52 Fed. Reg. 16,265 (1987). Again, the interim rule expressly references the 8(a) Program. Indeed, it states that the DOD seeks to "enhance" the use of the 8(a) Program. The use of an overly restrictive definition of a small disadvantaged business concern is patently inconsistent with this goal.

Lastly, the purpose of both the 8(a) Program and the DOD program is to help small disadvantaged business concerns get a foothold in the marketplace so that they can compete and thrive in the future without Government aid. One way such companies are able to continue to compete and thrive is by "going public" and raising additional capital for investment and expansion. However, the effect of the restrictive definition in the interim rule is to provide a disincentive to "go public." The interim rule, therefore, undermines the goals of the program and statute it purports to implement.

The 8(a) Program and the DOD program have participants (who may well make up a minority of all participants in these programs) that are publicly held companies, 51 percent or more of whose voting stock is owned by socially and economically disadvantaged individuals, but who also have non-voting shareholders. For some of these companies, when the voting and non-voting stock is added together, the percentage of the total that is owned by socially and economically disadvantaged individuals falls below 51

percent. These companies meet the SBA regulations' definition of a small disadvantaged business concern, and participate fully in the 8(a) Program. However, under the interim rule these companies would not be eligible to participate in the DOD program. Yet the benefits of keeping these companies in the DOD program are as great as the benefits of keeping these companies in the 8(a) Program.

If the interim rule is not amended to make it consistent with the 8(a) regulations, a group of companies will be severely prejudiced: they will be able to enjoy the benefits of the SBA 8(a) Program, but they will not be permitted to enjoy the benefits of the DOD program. Since a company's participation in the 8(a) Program is for a fixed period of time, when a company graduates from the 8(a) Program it will be unable to participate in the DOD Program and will be at a severe competitive disadvantage. That situation would not only be unjust and unfair, it also would be contrary to the requirements of the law. We respectfully suggest that the interim rule's definition of a small disadvantaged business concern be amended to read as follows:

"Small disadvantaged business (SDB) concern," as used in this part, means a small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its voting stock owned by one or more socially and economically disadvantaged individuals.

In addition to the requirement concerning stock ownership, the interim rule's definition of a small disadvantaged business concern requires that the majority of the earnings of a small business concern accrue to the socially and economically disadvantaged owners. We believe that this requirement is unnecessary. The ownership requirements will ensure that socially and economically disadvantaged individuals control the company, including its earnings. It is the question of control with which the 8(a) Program requirements are concerned, and it is the question of control with which the DOD program requirements should be concerned. Accordingly, we respectfully request that the interim rule's definition of "small disadvantaged business concern" be amended to exclude the requirement that the majority of the earnings accrue to the socially and economically disadvantaged owners.

In light of the prejudicial impact of the interim rule on certain small disadvantaged business concerns, we request that, pending issuance of a final rule, the 8(a) Program

definition of small disadvantaged business concerns apply to the DOD program.

We appreciate your consideration of these comments.

Respectfully submitted,

ROPES & GRAY

By Patrick Simchak  
Matthew S. Simchak  
Patrick K. O'Keefe



Congress of the United  
Representatives

20515

Charles W. Lloyd,  
Defense Acquisition Regulatory Council  
OSASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-8062

Dear Mr. Lloyd:

Consider these comments on the interim rule implementing Section 1207 of P.L. 99-661 "Contract Goal for Minorities."

My comments reflect my views and the views of constituents who responded to my request for their comments. These constituents are minority-owned firms in the Denver Metro area.

1. 219.001 Definitions

The category "Asian-Pacific American" does not include the countries of Burma, Thailand, Malaysia, Brunei, and Indonesia. These countries should be included.

There has been enough immigration from countries further south in the Pacific Rim to warrant inclusion. Immigrants from these countries must overcome extraordinary obstacles in pursuing a livelihood here.

I suggest splitting the category two ways: Southeast Asian Americans (Burma, Cambodia, South Vietnam, Laos, Thailand, Malaysia, Singapore, Brunei, Indonesia, and Phillipines) and Asian-Americans (Japan, China, Korea, Samoa, Guam, U.S. Trust Territories of the Pacific Islands, Northern Mariana, Taiwan).

2. Commerce Business Daily

The cost of publishing in the Commerce Business Daily is prohibitive to many small businesses. Publishing in high public libraries is also restrictive.

Suggested alternatives include publishing notices in local newspapers, especially papers catering to minority populations in the geographic area of the proposed procurement.

Many commented that by the time notice appeared in the CBD, there would not enough time to prepare adequate response for the contracting officer.

better plan and let the contracting officer  
area firms. This would make the "rule of two" easier to meet.  
Language encouraging frequent community forums should be added.

3. 219.3 Determination of Status

Most respondents thought that definitions of SDBs was adequate. But some saw room for abuse since the contracting officer will assume a firm qualifies as a SDB. Only when a protest is filed will a review be done. How a contracting officer can quickly check a firm's eligibility may be needed.

One respondent said the five day limit for protest was too short.

4. 219.502 Rule of Two

The rule seemed reasonable when the SBA 8(a) approach was not used. Concern was raised about how a contracting officer will balance the two set-aside programs.

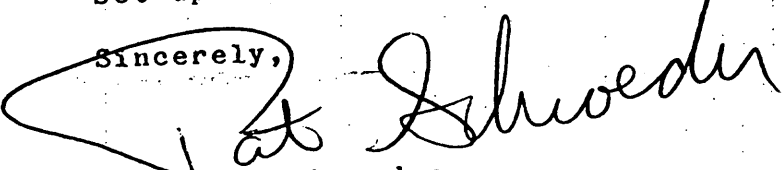
5. Oversight

My own opinion concerns compliance inspection. Congress will have no idea if the program is achieving its goal. One respondent pointed out, for example, that in some procurement areas, no SDBs exist. Other areas have an abundance. So to come to an average goal of 5%, higher goals will have to be set in some procurement areas.

I urge you to add some monitoring mechanism to the final rule.

I have addressed comments about the perceived lack of high level support for the program in general to the respective service secretaries. I sense that without that support, this is a program set up to fail.

Sincerely,

  
Patricia Schroeder  
Congresswoman

2100 Harwood Drive  
WASHINGTON, DC 20515  
(202) 225-2661

CARLOTTA SCOTT  
ADMINISTRATIVE ASSISTANT

ROBERT BRAUER  
SPECIAL COUNSEL

July 30, 1987

Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS  
c/o OASD (P&L) (DARS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

RE: DAR Case ~~87-11~~

ATTN: Charles W. Lloyd  
Executive Secretary

Dear Mr. Lloyd:

I am enclosing my comments regarding the Department's Interim Regulation to implement Section 1207 of Public Law 99-661.

It is my hope ~~that~~ these comments will be considered in the drafting of a ~~Final~~ rule regarding Section 1207. As well, I would direct your attention to the revisions of Section 1207 contained in the pending National Defense Authorization Act for Fiscal Years 1988/1989 (H.R. 1748). The relevant portions of H.R. 1748 may provide some guidance in areas where there is any doubt as to Congressional intent as stated in P.L. 99-661.

Thank you for your attention to this matter.

Sincerely,

  
Ronald V. Dellums  
Member of Congress

COMMENTS OF REP. RONALD V. DELLUMS (D-CA)  
REGARDING INTERIM RULE TO IMPLEMENT SECTION 1207  
OF PUBLIC LAW 99-661  
DAR CASE 87-33

My contact with military bases and DoD prime contractors has shown a significant misunderstanding as to the intent of Congress in implementing Section 1207 of P.L. 99-661. This misunderstanding is largely based upon the regulations as proposed and which stand as DoD's Interim Rule to implement 1207. These regulations do not come close to expressing the full intent of Congress.

The House of Representatives has expressed its dissatisfaction with the Interim Rule by passing H.R. 1748, now under consideration in the Senate. These comments express the same dissatisfaction, but within the framework of the request for comments in the May 4, 1987 Federal Register.

One concern is that SDBs not be restricted to set-asides. The primary objective should be to give SDBs increased opportunities to compete. Set-asides should be seen as one way to get a foot in the door, but by no means the exclusive way. As mentioned in Part 219.201, General policy of DoD's Interim Rule, efforts to increase contracting opportunities for minorities should include: "outreach efforts, technical assistance programs, [and] the section 8(a) program. . ."

The entire regulations speak to set-asides. There are no provisions for meeting the goal any other way. This is not a correct interpretation of congressional intent.

"Technical Assistance" needs to be specifically defined, particularly as it pertains to the duties of SBDU officers. Individuals may interpret goals and objectives in varying ways; accountability can be better upheld if there are clear-cut guidelines for personnel to follow. Suggestions include: written authority from the branch (e.g. Air Force) to the SBDU officer at his/her location; the development of mailing lists (known as "industrial reviews" in DoD talk); seminars held by the SBDU officer in addition to or in conjunction with those held by other parties (the rationale being that who better knows the contracting process than those directly involved with it); funding for seminar locations within the community - this funding must come from DoD as it will be unrealistic to expect the prime contractor (in the case of subcontracts) to finance this expenditure; specific times must be given to the SBDU officers as to when the seminars should be held, how many, what should be discussed, etc. The regulations should apply to each compliance officer at each facility.

Section 1207(c) defines the objectives of a technical assistance program very clearly. These objectives should be incorporated word-for-word in the regulations because field personnel implementing such a program should know what their responsibilities are.

*MW. Lloyd*

ROPES & GRAY  
1001 TWENTY-SECOND STREET, N.W.  
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August 6, 1987

HAND-DELIVERED

Horace Crouch  
Deputy Director  
OSD/USD(A) SADB  
Small and Disadvantaged Business  
Utilization Program  
Office of the Secretary of Defense  
Room 2A340  
The Pentagon  
Washington, D.C. 20301

Re: DAR Case 87-33  
Interim Rule Implementing The  
DOD Small Disadvantaged Business Program

We have enclosed a copy of the comments we submitted to the Defense Acquisition Regulatory Council concerning the interim rule implementing Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661) (the "Act") (a copy of which is enclosed).

The interim rule was published in the May 4, 1987 edition of the Federal Register. See 52 Fed. Reg. 16,263 (1987) (a copy of which is enclosed). The section of the act which it tries to implement establishes a program under which the Department of Defense ("DOD") may set-aside procurements exclusively for participation by small disadvantaged businesses. The interim rule, which amends the Defense Federal Acquisition Regulation Supplement ("DFARS"), would impose the following definition of a small disadvantaged business for the DOD Program:

"Small disadvantaged business (SDB) concern, "... means a small business concern that ... is at least 51 percent

owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 Percent of its stock owned by one or more socially and economically disadvantaged individuals....

DFARS 19.001, 48 C.F.R. § 219.001, 52 Fed. Reg. 16,265 (1987).

This interim definition differs from the definition used by the Small Business Administration ("SBA") for its 8(a) program, which also confers benefits on small disadvantaged businesses. The SBA definition is as follows:

In the case of an applicant concern which is a corporation, 51 percent of all classes of voting stock must be owned by individual(s) determined to be socially and economically disadvantaged.

13 C.F.R. § 124.103(b) (emphasis supplied) (a copy of which is enclosed). Thus the SBA regulations apply the 51 percent ownership requirement only to a company's voting stock; the interim rule applies the 51 percent ownership requirement to all of a company's stock, for purposes of the DOD set-aside program.

On August 4, 1987 the undersigned Mr. O'Keefe was advised by Mr. Robert Wren of your office that the intention of the Department of Defense is that a company which is small and disadvantaged under the SBA's 8(a) program will also be considered small and disadvantaged under the DOD set-aside program. If this is not the case, please advise us in writing immediately. The interim rule published in the Federal Register is not consistent with the DOD intention, as expressed by Mr. Wren. Specifically, a small company that has both voting and non-voting stock will be eligible for the 8(a) Program if at least 51 percent of the company's voting stock is owned by socially and economically disadvantaged individuals. However, if, for the same company, less than 51 percent of all of the company's stock is owned by socially and economically disadvantaged individuals, the same company will not be eligible for the DOD set-aside program under the interim rule.


Since the clear intention of the DOD program is not reflected in the interim rule, we respectfully urge you to

contact Mr. Charles W. Lloyd of the DAR Council immediately so that this discrepancy can be removed.

Respectfully submitted,

ROPES & GRAY

By

  
Matthew S. Simchak  
Patrick K. O'Keefe

cc: Charles W. Lloyd  
Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

COMMUNICATIONS INTERNATIONAL, INC.

A Telecommunications Corporation

Atlanta  
Washington  
Corpus Christi  
Los Angeles  
Chicago  
New York

August 3, 1987

Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd, Executive Secretary  
ODASD(P) DARS, c/o ODASD  
(P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Ref: DAR Case 87-33:  
DOD FAR Supplement;  
Implementation of Section 1207,  
PL99-661 Set-Asides for SDB concerns

Dear Mr. Lloyd:

These comments are submitted for your consideration on behalf of Communications International, Inc., an 8(a) contractor pursuant to the Small Business Act as amended, and the Region IV, Contractors Association, representing some three hundred and fifty 8(a) firms located throughout the Southeastern United States.

A: Background

While specific language provides for not penalizing small businesses as a class, it appears that no such concern is expressed in the interest of 8(a) firms that might be negatively impacted by the procedures set forth under 219-502-72, notwithstanding the language under 219.601. It is submitted that the long history of DOD's positive relationship with, and support of procurements let under section 8(a) should not be ignored, and indeed could be increased in furtherance of the 5 percent goal established by the act. In summary, the absence of SDB interest in procurements for specific industry sectors, should not release contracting officers from setting aside under 8(a) requirements that would otherwise not be let for want of "rule of two" entities under 219.502-72. This is particularly important where requirements are relatively large, and may lend themselves to partial set-asides under section 8(a), but not under 219.502-72.





# RESEARCH, ANALYSIS & MANAGEMENT CORPORATION

2555 RESEARCH BOULEVARD • ROCKVILLE, MARYLAND 20850 • PHONE (301) 840-5960

July 29, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, DC 20301-3062

Dear Mr. Lloyd:

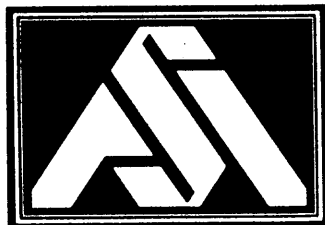
Your action is urgently needed now to prevent further erosion of the small business set-aside base and the possible demise of many small businesses.

What is happening is that DOD, particularly the Navy, is implementing Section 1207 of the 1987 DOD Authorization Act (Public Law 99-661), which assigned a goal to DOD to award 5% of its contract dollars to small disadvantaged businesses (SDB), by taking away long-term existing contracts from qualified small businesses and setting them aside for SDBs rather than using those contract dollars available to large business.

As noted in Appendix E, paragraph b(7) of the attached document, Congress is trying to correct this situation by requiring DOD to "establish policies and procedures which will ensure that there shall be no reduction in the number or dollar value of contracts awarded under the program established in Section 8(a) of the Small Business Act and under the small business set-aside program established under Section 15(a) of the Small Business Act in order to meet the goal of Section 1207 of the DOD Authorization Act of 1987."

An interim rule amending the DFAR supplement which implemented Section 1207 was issued by the Defense Acquisition Regulatory Council, effective 1 June 1987. At that time comments were requested from interested parties by 3 August 1987 so that a final rule could be promulgated.

If this rule is not changed as recommended in the enclosure, we and others in the small business community who serve the Department of Defense and depend almost 100% on the small business set-aside program, will surely be driven out of business within a very short period of time. Recent inquiries to the



August 1, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles Lloyd  
Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Re: Implementation of Section 1207 of Public Law 99-661; Set-Asides for Small Disadvantaged Business Concerns (52 Fed. Reg. 16263 (1987))

Gentlemen:

The American Subcontractors Association is a national trade association with more than 7,000 firms representing all major construction trades in 55 chapters. Many ASA members perform construction for the federal government. Sometimes they serve as prime contractors, contracting directly with the federal government. More often, they serve as subcontractors, dealing with the government only through a prime contractor. In both situations, these specialty trade contractors have a direct and real interest in the proper implementation of Section 1207 of Public Law 99-661.

Section 1207 requires the Department of Defense to attempt to award five percent of the total value obligated for (a) procurement; (b) research, development, test, and evaluation (RDT&E); (c) military construction; and (d) operation and maintenance in contracts and subcontracts to eligible participants. Eligible participants include, among others, small business concerns owned and controlled by socially and economically disadvantaged individuals, the majority of the earnings of which directly accrue to such individuals (SDBs).

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.  
1004 DUKE STREET, ALEXANDRIA, VA 22314-3512  
(703) 684-3450

Impact of Section 921 in Achieving the Goal of Section 1207

The interim rule implementing Section 1207 comes at a time of change in the procurement system, particularly with respect to encouraging participation in the system by small and disadvantaged businesses. The change that will, perhaps, have the greatest impact on the implementation of Section 1207 will be Section 921 of Public Law 99-661. Section 921 will reduce the small business size standard in most construction trades to ensure that a fair proportion of contracts per industry category (Standard Industrial Classifications), rather than overall contracts, are awarded to small businesses.

Implementation of Section 921 will substantially reduce the number of businesses defined as small and thus the number of SDBs available for DOD work. This, in turn, will reduce the amount of military construction performed by SDBs.

At the same time, Section 921 will enhance DOD's ability to measure the number of SDBs performing as subcontractors on military construction. This is true since many businesses, who will no longer be classified as small businesses, will have to comply with the subcontracting plan requirements of Public Law 95-507.

Comments on the Interim Rule on Section 1207

ASA believes four points should be kept in mind when this regulation is being finalized:

- (1) Section 1207 establishes a goal, not a mandatory set-aside program;
- (2) The program should be designed so that it does not have an inordinate impact on any one industry;
- (3) The program should be designed so that small businesses, other than SDBs, are not eliminated from the military construction market; and
- (4) Subcontracts performed by SDBs should be taken into consideration when determining whether the five percent goal is being met.

The construction industry consistently has exceeded the five percent goal for SDBs in DOD procurement. For example, in

August 1, 1987  
Page Three

fiscal year 1985, nine percent of military construction was performed by SDBs. Yet the total award to SDBs during fiscal year 1985 was only 2.1 percent. It appears then construction SDBs are more numerous, more willing, or more able to perform DOD work than SDBs in other industry segments. ASA believes that all three circumstances are true. ASA further believes that, without substantial effort on the part of DOD, construction will carry an inordinate and unnecessary burden in DOD's efforts to achieve its aggregate five percent goal of SDB participation in DOD procurement.

Therefore, ASA urges DOD to make every effort to assure that the five percent goal is reached in every procurement category and that no one category is inordinately impacted by DOD's efforts to meet the aggregate goal.

We believe this objective can be achieved by giving each contracting officer the flexibility and the authority to determine whether a particular construction contract should be set-aside for SDBs. For example, a contracting officer should take into account (1) the amount being set-aside in the total military construction program, (2) the amount being set-aside in the geographic area of the project being considered and its impact on non-SDB small businesses, and (3) the availability of subcontracting opportunities for SDBs on the project being considered. This flexibility can be achieved by amending 219.502-72(a) of the interim rule as follows:

(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition ~~shall~~ may be set-aside for exclusive SDB participation . . . .

This flexibility certainly is permitted under the statutory language, which makes clear that Congress intended to establish a goal for SDBs of five percent not a mandatory set-aside program or quota.

Such flexibility also is important if small businesses other than SDBs are not to be locked out of the military construction market. ASA recognizes that Congress excluded "small purchases" from the five percent goal in an effort to reduce the impact of Section 1207 on non-SDB small businesses. Nonetheless, if every project which a defined small business is capable of performing is set-aside for SDBs alone, many years of encouraging small participation in the government market will be negated. This certainly was not the intent of Congress nor, we believe, of DOD. It could, however, be the real effect if the interim rule were implemented fully without granting the contracting officer some flexibility.

August 1, 1987  
Page Four

ASA believes that the five percent goal can easily be met in military construction, even with the implementation of Section 921, if subcontracts performed by SDBs are counted toward the five percent goal. Historically, there have been many more SDBs in the construction specialty trades, which usually serve as subcontractors rather than prime contractors on military construction, than in the various prime contracting categories. As noted above, participation by SDBs as subcontractors on military construction will be much easier to measure by DOD since more prime contractors will be required to comply with the subcontracting plan requirements of Public Law 95-507, under the new definition of "small business" required by Section 921.

#### Summary and Conclusion

When implementing Section 1207 of Public 99-661, DOD should take into consideration that Section 921 of the same statute will have on its procurement system. At the same time, DOD should make every effort to ensure that implementation of its regulation does not inordinately or adversely impact any one industry or participation by non-SDB small businesses. ASA urges DOD to reevaluate and restructure the final rule to meet these objectives. We believe this can be achieved by granting the contracting officer greater flexibility in determining whether a particular project is appropriate for the set-aside program.

Sincerely,



E. Colette Nelson  
Director of Government Relations

# G and M Oil Company, Inc.

1549 N. WARWICK AVE.

301-728-0333

BALTIMORE, MARYLAND 21216



July 31st, 1987

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 30139  
The Pentagon  
Washington, D. C. 20301-3062

Re: DAR Case 87-33  
Comments

Handcarry To:  
1211 S. Fern Street  
Room C 102

Dear Mr. Lloyd:

The purpose of this letter is to comment on the interim and proposed rules regarding Department of Defense Federal Acquisition Regulation Supplement: Implementation of Section 1207 of Public Law 99-691: Set-Asides for Small Disadvantaged Business Concerns (SDB).

*( the goal of the awarding to SDB firms  
five percent (5%) of contract dollars )*

Firstly, as to price:

We agree with the concept formulated in the interim rules that an award to a SDB firm could be let at a contract amount not to exceed one hundred ten percent (110%) of the market price of the goods or services. Why market price? The cost of goods and services to a responsible SDB firm will be based on normal market conditions.

But we disagree with the concept formulated in the proposed rules that the ten percent (10%) price differential apply to the low offeror's bid. Why? This would place a SDB at a potential terrible risk of having its (the SDB firm) price based on an extraordinarily unrealistic low bid, possibly by a low bidder (1) who is dumping products to upset the normal marketplace, or (2) who is near bankruptcy and is selling goods at any price, or (3) who has placed a low bid due to error or other reasons.

July 31st, 1987

page 2

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary

Re: DAR Case 87-33  
Comments

Certainly, the market price method is the most fair and realistic way for SDB firms to participate, and for the Department of Defense to achieve the five percent (5%) goals.

Secondly, as to competition:

We agree with the concept formulated in the proposed rules that an award could be made to one SDB firm in those circumstances where, after the conclusion of a good faith market survey, only one SDB firm could be found. Why would one be fair? By always requiring at least two competing SDB firms, some SDB firms in certain geographical areas or in certain business classes may be left out of the program altogether only because that one SDB firm just so happens to be the only firm in that geographical area or in that particular class of business.

Conversely, we disagree with the concept formulated in the interim rules that require that bids need to be anticipated from at least two or more SDB firms. Why? This could preclude SDB firms from obtaining any awards under this program if those SDB firms were not located in areas populated with other SDB firms or if some SDB firms were involved in unique classes of trade [unique to SDB firms].

Thirdly, as to source of end items [term: disadvantaged ]:

We disagree with the source of end items provision which reads as follows:

"A manufacturer or regular dealer submitting an offer in its own name, agrees to furnish, in performing the contract, only end items manufactured or produced by small disadvantaged business concerns in the United States, its territories and .....

Why is this provision unfair? This provision is unfair because it is self-defeating to the entire concept of minority participation. It is true that the intentions of this provision are excellent; nevertheless, as a matter of practicality, this provision is often and usually impossible to attain.

July 31st, 1987

page 3

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary

Re: **DAR Case 87-33**  
**Comments**

In the case of petroleum products, absolutely no disadvantaged manufacturers (refiners of petroleum products) exist anywhere in the United States. [ Probably no disadvantaged manufacturers of computers or cranes exist. ] But the provision states the term "disadvantaged." This makes an award to a SDB firm completely impossible. This therefore obliterates totally the five percent (5%) goal enacted by Congress.

Fourthly, as to source of end items [term: small ]:

We further disagree with the source of end items provision (exerpted on the previous page hereto) because of the inclusion of the word "small". Why?

(1) Small manufacturers, because of the economies of scale, must charge a price for their products that is greater than that of non-small manufacturers. The price charged by small manufacturers does not represent the normal market. The prices charged by SDB firms to the Federal Government are based on market prices. Therefore, even with the ten percent (10%) price differential, for SDB firms to purchase from small manufacturers, SDB firms would be paying a price above market, based on a small refiner, but receiving a price at market, based on a price mechanism controlled by major oil companies. This creates a loss position for the SDB firms, and precludes SDB firms from obtaining contracts with normal profit margins.

(2) Quite usually, it is difficult or just completely impossible to identify small manufacturers. In the case of petroleum products, only about thirty-five (35) small refiners of petroleum products exist in the United States, of which approximately twenty-five (25) are on the West Coast or in the Western States.

(3) Too often, small manufacturers are unable to service a SDB firm, either voluntarily or involuntarily, because of:

- (a) the lack of rigid government specifications, or
- (b) the lack of specific product types, or
- (c) the lack of required volumes, or
- (d) the lack of a manufacturing facility (refinery of petroleum products) which is located within the geographical operating sphere of the SDB firm.



July 31st, 1987

page 4

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary

Re: **DAR Case 87-33**  
**Comments**

In the latter case, transportation costs from the manufacturing facility to the location of the SDB firm are prohibitively unbearable, thereby causing a loss situation for the SDB firm. This certainly was not the intention of Congress, that SDB firms be priced out of business.

Fifthly, as to source of end items [ escape clause ]:

Notwithstanding the legitimate and practical concerns we voiced in the third and fourth major paragraphs of this letter, should our suggestions not be accepted, we would propose an escape clause, whereby a SDB firm, ( after having made a good faith and thorough search to identify a small and/or [depending on the outcome of the final rules] disadvantaged manufacturer with the required capabilities of specifications, product types, desire to service, reasonable transportation costs, and with products priced at or near market ), would be able to waive the small and/or disadvantaged manufacturer provision by representation.

As a matter of reference, our firm is a small and disadvantaged dealer in petroleum products and located in the Middle Atlantic States.

We thank you for the opportunity to comment on the five percent (5%) set-aside law enacted by Congress.

Should you need any clarification or have any questions, please call us at (301) 728-0333.

Sincerely yours,

*Rudolph C. Gustus C*

Rudolph C. Gustus  
President

RCG:JPB:NLK

**HAND CARRY**

C 693



COMPUTER  
SYSTEMS  
DEVELOPMENT  
CORP.

28 July 1987

Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD, (P&L) (M&RS), Room 3C841  
The Pentagon  
Washington, DC 20301-3062

Ref: DAR Case 87-33

Dear Mr. Lloyd:

This is to provide our comments regarding the interim rule for Implementation of Section 1207 of Pub. L. 99-661; Set Asides for Small Disadvantaged Business (SDB) Concerns, as published in the Federal Register, Vol. 52, No. 85 of 4 May 1987:

1. The proposed regulation is clear in its intent to provide additional opportunities for the minority small business community interested in pursuing defense procurements. The legislation set forth in Section 1207 clearly states that the objective is to realize five percent (5%) of the defense procurement dollars through Government procurement with qualified minority business enterprises, historically black colleges and universities and other minority institutions.

The Department of Defense implementation of the said legislation, while timely, has some deficiencies which if not corrected, will:

(a) adversely affect any chances of achieving the 5% goal;  
and

(b) increase the possibility of abuse by "front companies".

2. ADVERSE EFFECT ON THE 5% GOAL - The interim rule establishes a "rule of two" regarding set asides for SDB concerns wherein contracting officers make the final determination based on this rule, and a "reasonable expectation" that the award price under an SDB competition will not exceed fair market price by more than 10 percent.

28 July 1987

This has created one major problem - THE REPLACEMENT OF 8(a) CONTRACT OPPORTUNITIES BY SDB SET-ASIDES. Contrary to the instructions in the proposed regulation (219.801) and instructions from the Secretary of Defense regarding contracting under Section 8(a) of the Small Business Act - contracting Officers are already making arbitrary determinations regarding SDB set-asides. Specifically, (1) they are disregarding requirements committed to the 8(a) program and (2) are implementing the new SDB set-aside program by ruling against potential 8(a) set-asides. CSDC has experienced both of these situations:

- o In one case a self-marketed requirement was offered to and accepted by SBA not once, but twice, prior to publishing of the interim rule of 4 May 1987 (see exhibits A & B). Despite the fact that the requirement was committed to the 8(a) program, the cognizant contracting activity officer attempted to make it an SDB set-aside under the proposed regulation.
- o In another case, CSDC requested through SBA an opportunity to reserve for the 8(a) program a requirement compatible with our business plan and capacity. Prior to giving CSDC an opportunity to demonstrate its technical capacity, and review the benefits of performing the proposed requirements under the 8(a) program, the cognizant agency decided to make the requirement an SDB set-aside (Exhibit C).

Both of the above cases exemplify how the contracting agencies are "reacting" to the interim rule. Without a doubt, such actions are against the 5% DoD initiative. How can the 5% goal be achieved if the new program is used as a substitute for 8(a) set-asides? Furthermore, this is against the intent of the new legislation - to provide additional opportunities for qualified minority firms.

Possible solutions for eliminating arbitrary and uncontrolled determinations which are against the purpose of the 5% DoD initiative are:

- o Maintain the sole-source procurement method of the 8(a) program. The "8(a) negotiated procurement program" should be complemented, not replaced, by the competitive minority set-aside program. This complementary competitive minority set-aside program will facilitate the achievement of the DoD five percent contracting goal;

28 July 1987

- o Institute specific procedures to ensure that the DoD small disadvantaged business (SDB) set-aside program implementing the DoD five percent contracting goal does not interfere with or diminish the use of the 8(a) program in meeting the DoD five percent minority business goal.
- o Provide that Small and Disadvantaged Business Utilization (SADBU) Officers, rather than contracting officers, are responsible for the determination as to whether a particular procurement will be an 8(a) set-aside or an SDB set-aside;
- o Provide prime contractors with additional credits when they utilize minority subcontractors to facilitate the achievement of the DoD five percent minority contracting goal; and
- o Establish more objective procedures for determining fair market price. Create a Fair Market Price Determination Panel composed of SBA and DoD pricing specialists to resolve disputes over fair market price.

3. THE POSSIBILITY OF ABUSE BY FRONT COMPANIES. Recently published abuses by firms participating in the 8(a) program has created a rush of "reform legislation" that would substantially change the 8(a) program. As a new participant in the 8(a) program, we at CSDC strongly agree that some reform legislation is necessary to eliminate the possibility of abuse by "fronting". We are concerned, however, that after experiencing the hard reality that abuses are possible despite a formal certification process, DoD is proposing to implement a less restrictive certification and contracting process. Specifically, the DoD implementation does not adequately address:

- o at least a streamlined certification process that makes use of SBA or the agency's SADBU representative to ensure the "legitimacy" of the SDB offeror(s).
- o the degree of subcontracting which SDB firms will be permitted to pursue under an SDB set-aside procurement.

4. In summary, the proposed regulation lacks the necessary emphasis and procedures to reasonably expect that the 5% goal will be achieved. In fact, the implementation as described in the two real-life examples provided herein, clearly undermines the purpose of the legislation as set forth in Section 1207 of P.L. 99-661. Furthermore, while the DoD policy statement<sup>1</sup> clearly

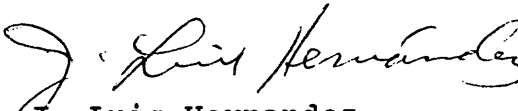
28 July 1987

established a commitment for continual support of the 8(a) program and establishes SDB responsibilities to various SADBUs representatives for implementation, the authority that should accompany this policy is nonexistent in the proposed DoD procedures.

I appreciate having the opportunity to offer these comments regarding the implementation of this legislation. I firmly believe that Section 1207 of P.L. 99-661, if properly implemented, can have a significantly positive impact on the minority business community.

Sincerely,

COMPUTER SYSTEMS DEVELOPMENT CORP.

  
J. Luis Hernandez  
President

JLH/mlm

Enclosures

NOTE: 1. OSD Memorandum for Secretaries of Military Departments Directors of the Defense Agencies, dated 18 March 1987.

H/8

Harbor Eight (8) Stevedores Inc.

P.O. Box 15655  
Houston, Texas 77220-5655  
713/673-6611

Houston  
Galveston  
Beaumont

July 28, 1987

Mr. Charles W. Lloyd  
Defense Acquisition Regulatory Council  
ODSAD (CP)DARS  
Room 3C841  
Washington, DC 20301-3062

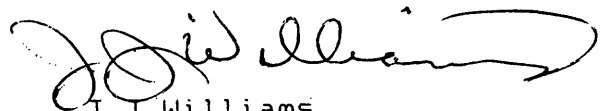
Dear Sir:

In response to DAR case 87-33, the proposal which would establish under authority of "exception five" of the Competition in Contracting Act (CICA) 10 USC 2304(c)(5) allowing for a direct award to be made to an small disadvantaged business firm. When only one firm can be identified to fulfill DOD requirements.

Harbor (8) would like for this proposal to be accepted. It has been our experience that a single source firm could be placed at a disadvantage if only the rule of 2 existed.

Harbor (8) would also like for consideration to be given to the application of preference differential when acquisitions are totally unrestricted.

Sincerely



J.J. Williams  
Vice President

JJW:ar

# HENRI ENTERPRISES

P.O. Box 41170  
Washington, D.C. 20018  
(202) 832-9098

July 30, 1987

Mr. Charles W. Lloyd, Executive Sec.  
ODASD (P)DARS c/o OASD(P&L)(M&RS)  
Defense Acquisition Regulatory Council  
Room 3c841  
The Pentagon  
Washington, D.C. 20301-3062

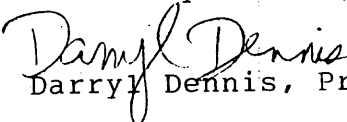
Dear Mr. Lloyd:

Recently your office released an interim rule for implementation of Section 1207 of Public Law 99-661. While I applaud your overall efforts for such a task, I am economically compelled to suggest modifications.

My company, HENRI ENTERPRISES, is engaged in the seafood & fish industry. We procure the majority of our products from processors in the states of Louisiana and/or Mississippi. Feasibility studies have concluded, that too few processors are located in either state and none are SDB concerns. Your requirement that a SDB purchase its goods from another SDB in my opinion has the effect of preventing a SDB from selling its products to the Federal Government. I strongly believe that in certain industries ( i.e. seafood & fish) an exception of this requirement should be made. It is further noted that I appreciate DOD's interest in procuring from the manufacturer, but in this instance an unreasonable hardship would result should your agency disregard the fact that few processors exist in the industry, none of which are SDB concerns. Ultimately, we intend to have a fully-intergrated enterprise whereby processing and distribution would be conducted under the same umbrella.

We also recommend the adoption of proposed rule which authorizes the contracting officer to award a contract sole source to an SDB concern in instances where only one SDB can be indentified. We further suggest the adoption of proposed rule that authorizes the contracting officer to make an award to an SDB if the concern comes within 10 percent of the fair market price on an unrestricted procurement or a small business set-aside. These methods are vital in industries where there is only one SDB concern.

Sincerely,

  
Darryl Dennis, President

DD/eh



# Bridge Enterprises Inc.

A Business Development Company

July 29, 1987

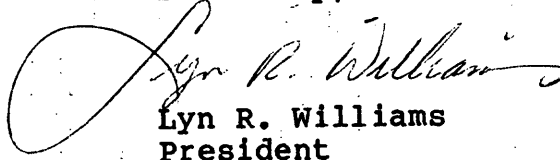
Mr. Charles W. Lloyd  
Secretary  
ODASD (D) DARS  
c/o QASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington D.C. 20301-3082

RE: BRIDGE GROUP POSITION

Dear Mr. Lloyd:

Bridge has the privilege of being retained by six influential minority firms in Virginia to work in regards to the revision and implementation of the Five Percent Defense Authorization Bill. From our information gathering process, we have ascertained several problematic areas and we request as well as urge that changes in the Interim Rule, implementing Public Law 99-661, be consistent with the proposal of the Bridge Group, which is attached.

Sincerely,



Lyn R. Williams  
President






# Bridge Enterprises Inc.

A Business Development Company

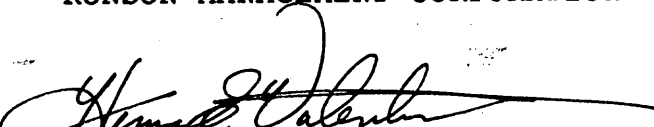
  
AUTOMATED SCIENCE GROUPS, INC.

  
C & W AND ASSOCIATES, INC.

  
GRACE INDUSTRIES, INC.

  
GRAPH-TECH, INC.

  
RONSON MANAGEMENT CORPORATION

  
SYSTEMS MANAGEMENT AMERICAN CORP.

cc: Honorable Casper Weinberger  
Honorable James Abdnor  
Honorable Gus Savage  
Honorable Norma Leftwich

## POSITION PAPER

Date: July 29, 1987

From: Bridge Group Members

Bridge Group Members commend the timely response of the Department of Defense (DoD) in implementing Section 1207 of Public Law 99-661 (P.L. 99-661), the National Defense Authorization Act for the Fiscal Year of 1987. Upon review of the legislation, it is clear that Congress in passing this Act was attempting to enhance minority community participation in realizing the five percent goal of the defense procurement dollars through government procurement with qualified minority business enterprises, historically Black colleges and universities and other minority institutions.

Although the program has been implemented in a timely fashion, it does not possess the necessary aggressiveness to realize the five percent goal, especially in light of the reliance on 15 U.S.C. 637 of the Small Business Act. Therefore, the Bridge Group Members set forth the following proposal to rectify the problems that exist.

A. It has been established that contract officers will be providing the procurement opportunities/contracts for 8(a) firms and section 1207(a) firms. Allowing contract officers to maintain the procurement contracts for both programs has and will continue to have an adverse effect on the 8(a) firm. There is an incentive for the contract officer to set aside certain opportunities for a section 1207 firm

in light of the fact that the contract officer's performance is evaluated under the Five Percent Defense Authorization Program, thereby granting the contracting officer the authority to take from an 8(a) firm certain opportunities, if said firm does not adhere to certain specifications or negotiated prices, and placing the opportunity in the Five Percent Program if more than two section 1207(a) firms are capable of bidding on the project.

Bridge Group Members support Section 812(b)(7) of the Richardson Amendment which requires policies and procedures to ensure that no reduction in the number or dollar value of contracts awarded under 8(a) of the Small Business Act or under the small business set-aside program pursuant to 15(a) of the Small Business Act in order to meet the goal of Section 1207 of the Department of Defense Authorization Act, 1987.

B. The Bridge Group feels that DoD should not rely on the 8(d) definition under the Small Business Act to determine eligible participants for this program. Only 2.3 percent of the eligible participants (small and disadvantaged) are in actuality utilizing this program. The vast majority of 8(a) firms who are eligible for the Five Percent Program do not possess the necessary capability or technical experience to perform the contracts provided under this Act.

Secondly, the 8(a) and the section 1207 programs have an entirely different orientation. The program under 8(a) of the Small Business Act has the purpose of development for small and disadvantaged firms, whereas, section 1207 of P.L. 99-661 has

the intent and purpose of procurement. Therefore, it is obvious that because they are not sufficiently developed, a substantial number of 8(a) firms would be unable to implement the contracts of the magnitude provided under section 1207.

In order to effectuate the five percent goal, it is necessary to increase the size standards imposed by the 8(d) definition of the Small Business Act. As the program currently exists, the five percent goal will never be realized because the minority firms, who can perform the contracts, have graduated from the 8(a) program and although disadvantaged are ineligible under certain sic codes. These firms, if allowed to participate, have the technical capability, experience and track records to realize the mandated five percent goal. Secondly, during the act of participation, these graduated firms would be in a better position to give technical assistance and subcontracting opportunities to the 8(a) firms unable to compete due to a lack of the above.

Therefore, the Bridge Group advocates new legislation defining eligible participants under section 1207 of P.L. 99-661. Section 8(d) of the Small Business Act was enacted by Congress for a totally different reason than the program under section 1207. If Congressional intent and purpose for these programs are different, then the eligibility requirements need to reflect these differences. Under section 8(d) "small and disadvantaged" is the criteria. Bridge proposes that in the new legislation "small or disadvantaged" needs to be the basis for determining participants.



# NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

806 15th Street, N.W. • Suite 340 • Washington, D.C. 20005 • (202) 347-8259

July 31, 1987

Mr. Charles Lloyd  
Executive Secretary  
Defense Acquisition Regulatory  
Council (DAR)  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
Washington, D.C. 20301-3062

Re: Comments on DAR 87-33: DOD's Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Pub. L 99-661; Set-Asides for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

The following are the comments of the National Association of Minority Contractors (NAMC) with regard to the above-referenced subject:

## INTRODUCTION

The Department of Defense (DOD) has invited public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement (DAFRS) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661).

Such statute permits (DOD) to enter into contracts using less than full and open competitive procedures, when practical and necessary, to facilitate achievement of a goal of awarding 5 percent of contract dollars to small disadvantaged business (SDB) concerns during FY 1987, 1988, and 1989 provided the contract price does not exceed fair market cost by more than 10 percent.

The interim rule implements the statute by requiring that contracting officers set aside acquisitions, other than small purchases conducted under procedures of Federal Acquisition Regulation (FAR) Part 13, for exclusive competition among SDB concerns, whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns and that the contract award price will not exceed fair market price by more than 10 percent.

The National Association of Minority Contractors (NAMC) fully supports the DOD's interim rule as a most effective method to implement Section 1207 and meet the five (5) percent SDB goal. As will be explained below, such action is justifiable from both a practical as well as a legal standpoint.

Under this program, SBA is empowered to provide small business concerns which are owned and controlled by socially and economically disadvantaged individuals such management, technical, financial, and contract assistance as may be necessary to promote competitive viability within a reasonable period of time. Central to this program effort is the provision of set-aside contracts, usually non-competitive, through the SBA to 8(A) program participants.

In fiscal year 1984, only 1.6% of federal purchases were awarded under the 8(a) program. Over the 16-year history of the program, only 1% of federal purchases were awarded as 8(a) contracts. Nevertheless, it is estimated that well over 60 percent of all federal prime contract awards to minority businesses come through the 8(a) program. More important is the fact that almost two-thirds of all DOD prime contracts to minority business are awarded under 8(a).

Unfortunately, only about 3000 of the estimated 700,000 minority businesses in America are in the 8(a) program. There are numerous other small disadvantaged firms, outside the 8(a) program, that could perform excellent work for the DOD. In order for DOD to meet its 5% SDB goal such non-8(a) firms will have to be utilized. From a practical standpoint then, DOD's interim rule provides the most proven effective method for increasing DOD utilization of capable minority firms.

#### LEGAL RATIONALE

Several organizations representing predominantly majority-owned business concerns will argue that the DOD's interim rule is unconstitutional and will unduly injure their constituents. Nothing could be further from the truth, however.

The DOD interim rule is no more than an allocation of benefits by the government to a predetermined class of eligibles. Such action is legally valid so long as such allocation is reasonable and is designed to achieve a legitimate government purpose.

Within the constraints cited above the government has historically implemented, and is currently implementing, procurement programs which not only give preferences but which also restricts competition on certain government contracts in order to achieve desired economic results. The Buy American Act (41 U.S.C. Sec. 10a, Et Seq.), for example, often requires that American business firms be given a bid preference of either 6 or 12 percent over foreign firms when competing for federal contracts.

Also, Public Law 85-804 authorizes the military to pay extraordinary contractual relief to essential defense contractors, if such payments are needed to keep them in business--even though such contractors are not otherwise entitled to such funds under the terms of their contracts. Moreover, the tax laws have allowed the largest defense contractors in the U.S. to postpone the payment of federal income taxes pending the total completion of a defense system.

All of the above examples restrict free and open competition and give preferences to a select group of businesses.

However, the purpose of the Buy American Act is to preserve the domestic mobilization base in America. Although the law clearly gives American firms a distinct competitive advantage over foreign firms, it is almost universally recognized that such law is necessary to address a legitimate purpose of the United States government.

With regard to Public Law 85-804 it is also a legitimate purpose of the federal government to insure that contractors essential to the national security receive reasonable amounts of assistance to remain in business.

It was that same rationale which led to the enactment of the Small Business Act in 1953 under which the small business set-aside program, discussed earlier, was derived. Through small business set-asides, the federal government seeks to insure that, through its purchasing system, the U.S. government does not create a situation where there are so few producers of government-needed services and goods that such firms can virtually dictate the terms and conditions of all sales. Such restriction of competition is reasonable because 99 percent of all businesses are classified as small. Thus, a small business set-aside precludes only one percent of the universe of all firms competing for these awards.

The extension of this rationale to small disadvantaged businesses is hardly difficult. Through its enactment of Section 2(e) of the Small Business Act, Congress made what amounted to an investigatory finding that there exists in the United States a correlation between ethnicity and social and economic disadvantage. The Congress also found that it is in the national interest to expeditiously ameliorate this situation in order to obtain social and economic equality and to improve the functioning of the national economy. The promotion of minority business ownership through the use of federal resources (e.g., contract awards) was the means chosen by the Congress to effect these goals. One would be hard pressed to argue that such effort does not achieve a legitimate government purpose.

Furthermore, the DOD's implementation of the "Rule of Two" set-aside system to achieve the 5% minority contracting goal is not an unreasonable method to attain such goal. Of the total DOD domestic purchases only 5% will be awarded to small disadvantaged firms, if they are available, while at least 95% of DOD dollars will still be available to firms possessing an economic advantage.

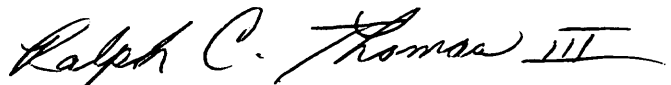
Also, it should be noted that in order to insure that small businesses as a class are not penalized by the SDB set-aside procedure, the DOD will not apply SDB set asides to small purchases conducted under FAR Part 13 procedures upon which heavy reliance is placed in insuring that small businesses as a class receive a fair proportion of DOD contract dollars. This approach should tend to reduce impact upon non-SDB small businesses resulting from the new procedures, while facilitating attainment of the goal established by Congress.

In light of the legitimate government purpose the SDB set-aside will achieve, as well as the fact that the limit to competition will be a slight and reasonable one, the DOD's interim rule is ably supported by congressional intent and legal precedent.

#### CONCLUSION

The DOD interim rule to effect the 5% SDB contract goal is based on sound practical and legal rationale. It should be fully implemented with all due speed.

Respectfully submitted,



Ralph C. Thomas, III  
Executive Director





# NATIONAL CONSTRUCTORS ASSOCIATION

1101 15th Street, N.W., Suite 1000, Washington, D.C. 20005 (202) 466-8880

August 3, 1987

Mr. Charles W. Lloyd, Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Subject: DAR Case 87-33

Dear Mr. Lloyd:

On behalf of the member companies of the National Constructors Association (NCA), I would like to express our concern over the practical impact of DOD's interim acquisition regulation regarding set-asides for small disadvantaged business concerns on the construction industry.

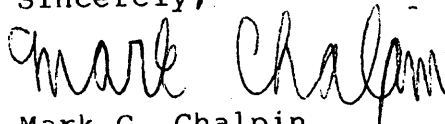
First, we question the implementation of this interim regulation before it has received public comment. In view of the fact that the mechanical nature of the application of the Rule of Two often leads to near total set-asides, it only seems prudent to solicit comments beforehand as to the likely impact of such a significant change to the set-aside regulations.

Second, use of the Rule of Two to govern small business set-asides for the construction industry by DOD since the late 1970s has effectively excluded construction companies not classified as small businesses from even bidding on most DOD projects. This experience leads us to believe that use of the Rule of Two to govern small disadvantaged business set-asides by DOD will likewise foreclose construction companies not classified as small disadvantaged business concerns from being eligible to compete on many DOD projects. It is difficult to see how such a result comports with Congress' goal that DOD award 5 percent of its contract dollars to small disadvantaged business concerns over the next three fiscal years.

Mr. Charles W. Lloyd  
August 3, 1987  
Page 2

We believe that the interim regulation is a fundamentally flawed rule which will adversely affect the construction industry in a way that Congress did not intend. We hope that you will quickly reconsider this misguided regulation.

Sincerely,



Mark G. Chalpin  
Vice President, International  
and Government Affairs

MGC/pdb

Suite 900  
450 Spring Park Place  
Herndon, Va. 22070  
(703) 471-8327

July 27, 1987

Mr. Charles W. Lloyd, Executive Secretary  
Defense Acquisition Regulatory Council  
ODASP(P)DARS, c/o OASD(P&L) (M&RS)  
Room 3C841  
The Pentagon, Washington, DC 20301-3062

Dear Mr. Lyoyd:

The purpose of this letter is to provide comment on the interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for Fiscal 1987 (Public Law 99-661), entitled "Contract Goal for Minorities", DAR Case 87-33.

It is apparent from reading the interim rule and from experience with its implementation and from reviewing a change to the Air Force Acquisition Circular (87-16), that this interim rule will have far reaching impact on both small disadvantaged businesses and small businesses.

Federal Information Technologies, Inc. is a qualified small business under the criteria and size standards set forth in 13 CFR 121 that provides system engineering and integration services to the Federal Government as a prime contractor with special emphasis with the Department of Defense. We deal with many other small businesses as subcontractors, a number of which qualify as small disadvantaged businesses.

Federal Information Technologies has no objection with the goals set forth in section 19.201 to further the participation of small disadvantaged businesses. However, we take strenuous exception to the creation of small disadvantaged business set-asides as envisioned in the following paragraphs and the way that the program is to be implemented.

In the highly sophisticated communications (voice and data) integration market with the Federal Government, successful firms must be aware of the anticipated needs of the users, participate in the development of the requirements and specifications, and determine which particular projects meet the technical and resource capabilities of the firm. This must be done far in advance of any advertisement in the Commerce Business Daily. Small firms, like ours must carefully analyze the potential business and must carefully husband our scarce resources to provide professional responses to a limited number of RFIs/RFPs where there is a reasonable chance of success.

*Federal Information Technologies, Inc.*

July 27, 1987  
Page 2  
DAR Case 87-33

As proposed, the contracting officer may make the determination that a particular contract is reserved for total small disadvantaged business participation, at any stage of the process, up to and including bid opening. This is an intolerable burden on small businesses.

We envision a number of results if this interim rule is put into effect, none of which are good for small businesses and several of which will be counter productive for small disadvantaged businesses and in combination will be disadvantageous for the Federal Government. First, many small business will not bid on a great number of jobs which there is a potential that their bids will be declared nonresponsive because two or more small disadvantaged concerns express interest in the at any stage of the process.

Second, for contracts where small disadvantaged participation is expected and such participation either does not materialize or both or all of the expected or interested small disadvantaged participants withdraw, choose not to bid, or provide nonresponsive bids either due to cost, technical compliance, or ability to provide all goods and services through qualifying small disadvantaged firms, the contracting process is thrown into confusion. It appears that the contract will then be awarded to one of the remaining firms which, despite the warnings in the bid solicitation chose to bid or the process will have to be restarted.

Third, except in Research and Development and Architecture and Engineering contracts, there is no provision for the contracting officer to make any inquiry into the qualification of the small disadvantaged business or to the qualifications of any of the sub contractors either as to their qualification as a small disadvantaged business or as to their technical competence to perform the required tasks. This provision begs for bid protests and potential litigation. Contracts will be stalled needlessly and the Small Business Administration will be hopelessly backlogged. Without some form of preaward qualification of the prime contractor and the subcontractors may open the flood gates for truly unqualified firms participating particularly as subcontractors which they add to their team to meet the requirements. It will also place small disadvantaged firms, acting as prime contractors at risk if they bid contracts with subcontractors or suppliers who are shown to be unqualified.

July 27, 1987  
Page 3  
DAR Case 87-33

We envision two other events occurring that will be highly detrimental to small businesses, small disadvantaged businesses, the Government and to the taxpayers. Contracting Officers faced with this confused environment will do one of two things. They will either segment contracts so that they will qualify as small purchases under the Federal Acquisition Regulations, Part 13 procedures. This will undoubtedly increase costs, overburden the limited contract supervision capability of the contracting offices, and lead to less than optimal results or they will combine logically unrelated or marginally related contracts into omnibus projects that will be the province of large businesses.

We see further confusion and disaster on the horizon upon reading Air Force Acquisition Circular (AFAC) 87-16, Section 19.501, paragraph (g) as amended, states that even ongoing contracts with small businesses are not exempt from conversion to total small disadvantaged business set-asides. We recognize that there is no guarantee that an existing contractor, even one who has provided quality service and/or products has any guarantee of renewal. However, under this change, they may not even have the chance to compete. Further, in the past, many small businesses, who were unsuccessful bidders in a contract renewal have been able to employ some of their people and to recover some of their investment in equipment and materials by participating as a subcontractor for the new successful bidder. This has also worked to the advantage of the new contractor, often a small disadvantaged business, by providing an immediately available source of expertise and capability to perform the contract. Under the interim rule as implemented neither will benefit. The small contractor will be excluded because the new contract will be a total small disadvantaged business set-aside. The small disadvantaged business will be unable to use the expertise of the prior contractor and will have to replicate this capability. We cannot conceive of how this will not be more costly to the Government both in terms of dollars and reduced performance until the new contractor can develop the necessary performance capability.

We believe that this interim rule benefits neither the small disadvantaged businesses, other small businesses, or the Federal Government. This interim rule will not have the intended effect of ensuring that five percent of the contract dollars are awarded to small disadvantaged businesses and, in fact, may ultimately

July 27, 1987  
Page 4  
DAR Case 87-33

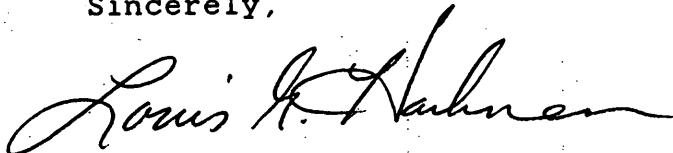
reduce the percentage of contract award dollars going to small disadvantaged businesses. We are certain that it will reduce the amount available for other small businesses and is likely to result in a smaller percentage for all small (small and small disadvantaged) businesses.

Our suggestion would be to revoke the interim rule and replace it with one that increases the proportion of all defense contracts available to all small businesses and then to add contract requirements in all contracts which will increase the participation of small disadvantaged businesses. This will open participation for small disadvantaged firms in a wider range of contract opportunities and not unduly penalize those small firms who do not qualify as small disadvantaged concerns.

Failing the above, there are several steps that must be taken immediately to rectify some of the most grievous flaws in the interim rule. First, contracts to be identified as small disadvantaged business set-asides must be identified at the earliest stage, certainly before bid solicitation. Second, the solicitations must include requirements that the bidders provide sufficient information for the contracting officer to determine if the bidder, to include all sub-contractors and suppliers, are in fact bonafide small disadvantaged businesses and have the expertise/capability to provide the product/service required. Third, the contracting officer must have the authority to make a determination of the capabilities of the bidders prior to contract award. Lastly renewal contracts should not be subject to total small disadvantaged business set-aside procedures.

Thank you for the opportunity to provide comment to this proposed rule. We would appreciate a response to our concerns and a copy of any and all revised interim rules and/or the final rule.

Sincerely,



Louis G. Harkness  
Vice President/General Counsel



30 July 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASP(P) DARS  
c/o OASD(P&L) (M&RS)  
Room 3D139, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

An Association of Small Business Research, Engineering and Technical Services Company (ASRET) Committee met with Secretary Costello on 20 July concerning Section 1207 of the Fiscal Year 1987 Defense Appropriation Act and the interim rule. Colonel Otto Guenther had our draft ASRET Analysis which he indicated he would pass to you. We indicated we were refining the report and would want to substitute the revised report to the DAR Council.

We are attaching:

- a. The ASRET Analysis, dated July 24, 1987 and request that you substitute it for our draft, and
- b. Addendum one to the report covering "Breakout of Work from Unrestricted Procurements", dated July 29, 1987.

We wanted to be certain that our material was in your hands as required by the Federal Register and reached you by 3 August. With this letter may we ask that you substitute the ASRET Analyses in your files and officially consider our comments. Also, we request that you consider our Addendum One in your review. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "John J. Bennett".

John J. Bennett  
Chairman of the Board and  
Chief Executive Officer

Copy to:  
Mr. R. Kenneth Misner  
President, ASRET



30 July 1987

Defense Acquisition Regulatory Council  
Attn Mr. Charles Lloyd, Executive Secretary  
ODASP(P) DARS  
c/o OASD(P&L) (M&RS)  
Room 3D139, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

By the Federal Register, Volume 52, Number 85, May 4, 1987, the Defense Acquisition Regulatory (DAR) Council invites public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, entitled "Contract Goals for Minorities". Comments are required by August 3, 1987.

ANADAC, Inc. is a small publicly-owned engineering management and technical services company. We employ approximately 150 people. Under an ESOP (Employee Stock Ownership Plan), the employees own in excess of 20 percent of the publicly held stock. Our major customer is the Department of the Navy and, more particularly, the Naval Sea Systems Command (NAVSEA). We are one of perhaps 50 companies in the Washington area that compete for NAVSEA service contracts, particularly contractor support services (now defined as CAAS: Contractor Advisory and Assistance Services). There are at least 10 small disadvantaged 8A-certified companies who also participate in NAVSEA CAAS procurements.

ANADAC, Inc. and most of the other small businesses performing NAVSEA technical services/CAAS contracts depend to a large extent on competitive small business set-aside awards to sustain our business base. As part of the Federal Government Small Business Program, we as a group support the 8A and small disadvantaged business (SDB) programs. We cannot, however, condone OSD implementation of SEC 1207 as it now stands. It is inequitable and unfair and will severely damage many companies in our business community.

As a basic premise, ANADAC, Inc. questions the legality of the interim rule as it is written and being implemented. We believe it to be in conflict with the Small Business Act as it pertains to protecting the interests of small business concerns and with the Armed Services Procurement Act as it pertains to fairness in allocating federal contracts to small business. In addition, the Section 1207 language does not appear to be permissive. Therefore, unless either Section 1207 or CICA is amended, it would seem that SDB set-asides made without justifications and approvals would be subject to challenge. We request that a legal opinion in all three instances be



obtained and published, and during the period of inquiry, implementation of the interim rule be suspended.

Under FAR 19.501(g), DOD requires that once a product or service has been successfully acquired by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service be acquired on the basis of a repetitive set-aside. Section 1207 offers no such protection to small business set-asides. As a result NAVSEA and other Services/Commands are reclassifying previous small business set-asides to restricted small disadvantaged business set-asides at an alarming rate -- one calculated to do immediate and irreparable damage to the companies impacted and to the overall Federal Government Small Business Program.

Our company took part in an ASRET Study of Section 1207 implementation furnished you under separate cover. Study statistics show that 85.5 percent of the NAVSEA 8A and SDB contract actions for FY 86 occurred in the service industry. Because of the NAVSEA industrial structure, little short-term action can be taken to reverse that situation. We believe this situation to be the same within other Services/Commands. In fact, Section 1207 implementation can be expected to increase the heavy dependence on the service sector for 8A and SDB awards and goals. At the three levels within Navy and OSD with whom we held discussions, procurement officials acknowledge this situation to be generally true. Many informally agreed that, if carried to the letter of the law, DOD support services would be disrupted and harmed. As such, implementation of Section 1207 as it now stands will be inequitable. Given the expected economic impact on DOD support services, we feel further investigation is necessary before proceeding. No one would consider changing the profit or other high impact policy without economic impact analysis, so why do it here? Accordingly, we request that you consider holding the interim rule in abeyance until an economic impact analysis has been completed, assessed, and can serve as the basis for DOD-wide implementation.

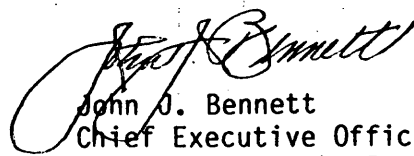
Currently, NAVSEA CAAS procurements are actively meeting 8A goals. During FY 86, of \$318.9 million obligated for CAAS procurements within NAVSEA, \$39.8 million and 102 contract actions were set aside for 8A and SDB awards and \$41.3 million and 111 contract actions awarded as small business set-asides. Disadvantaged businesses represent 12.5 percent of the total NAVSEA CAAS business today and 49.1 percent of the CAAS set-aside program dollars. Thus, in the NAVSEA CAAS area, small disadvantaged businesses have exceeded their goal by more than two and share equally with other small businesses in set-aside programs. While it is not our intent to do so, one could argue that the existing 50-50 split of CAAS set-aside awards already treats non-minority small business unfairly in this area. Yet, this is one of the specific services area that will be severely impacted by your Section 1207 implementation. We find nothing in Section 1207 that prohibits categorization and sectioning of the small disadvantaged business goals. In the interest of equity and to protect erosion of the existing small business base, we respectfully request that Section 1207 implementation (i) provide for partition of goals by industrial or DOD funding categories; or (ii) apply

exemptions when previous and existing subsectors are found to significantly exceed the SDB five percent goal.

This program is already having a significant negative impact on small businesses. Since implementation of Section 1207, NAVSEA has already reclassified the PMS 312 small business award from "small business" to a "small disadvantaged business" set-aside, thereby totally eliminating the current incumbent from even bidding for the follow-on work. Our business community is aware of at least four more previously classified small business set-asides that are expected to be reclassified small disadvantaged business in the near future. Our best estimate is that, within one year, up to 30 percent of the previously classified CAAS small business set-asides under FAR 19.501(g) will have been reclassified. Rather than promoting free and open competition, this will restrict all non-minority contractors from bidding and denies them the right to work. No one can claim this approach is fair and equitable. Not only goals but parity between SDB and small business in NAVSEA CAAS set-asides has been attained. We think this situation is occurring Service-wide. Accordingly, we request that Section 1207 implementation include a section giving protection to FAR 19.501(g), by restricting reclassification of previous set-aside repetition when it can be shown that the SDB goal of five percent has or will be met for a fiscal year or reporting period.

The question of Congressional intent is essential. Did Congress mean to mandate reward of one segment of small business at the direct expense of another segment of small business? We think not. As we understand it, the Congressional Black Caucus and other supporters, rightfully so, acted through its House of Representative channels to ensure fairness and equity in DOD procurement awards to minority firms. Most Congressmen and other observers would agree that DOD implementation of PL 95-507 resulted in very little progress toward these objectives. We were told that Section 1207 was initiated by the House of Representatives so that implementation of existing legislation could be aided and abetted by minority goals. Now comes along Section 846 of the proposed National Defense Authorization Act for Fiscal Year 1988 which mandates (a) no reduction in the small business set-aside program and (b) enforcement of PL 95-507, among other corrective actions. In our discussions with OSD officials, there was a reluctance on their part to admit or give any credibility to Section 846 of the new appropriation act since it has not passed the Senate. Clearly, Section 846 emanated from the same place that Section 1207 originated. We think it obvious that the legislative sponsors did not intend to harm other small business set-asides, but rather to put teeth into implementing PL 95-507. In the interest of reputable business practices, we sincerely request that you acknowledge and act on Congressional intent and stop this unnecessary and unwanted rape of developing small business enterprises.

Respectfully yours,

  
John J. Bennett  
Chief Executive Officer and  
Chairman of the Board

July 29, 1987

ADDENDUM ONE TO ASRET REPORT  
Analysis of the Five Percent Disadvantaged Contract Goal  
dated July 24, 1987

SECTION II. RECOMMENDATIONS

Add Paragraph "F" as follows:

F. Reaffirm DOD's Directive for Break Out of  
Work from Unrestricted Procurements for  
Small and Small Disadvantaged Businesses

- o Reemphasize the DOD program to break out work from unrestricted procurements and set it aside for performance by small and small disadvantaged business concerns.
- o By his Memorandum of 1 June 1982, Deputy Secretary of Defense Frank Carlucci directed the Secretaries of Military Departments and Directors of the Defense Agencies to break out work from unrestricted procurements and package future solicitation "so as not to preclude performance by small and small disadvantaged concerns as prime contractors."
- o Further he said, "The following policy statements are intended to resolve the inherent conflicts between our consolidation efforts and their potential impact on the small and small disadvantaged business programs. Please see that they are appropriately implemented:
  - (1) Functions that are currently being performed by small business, including those won in open competition on the basis of a set-aside or by 8(a) contract, shall not be considered for consolidation."
- o There are many instances where the Government has reclassified a procurement as unrestricted even though the work has been performed satisfactorily by small businesses though creating the illusion that the nature of the work had changed through addition of tasks not contained in the previous procurement. In fact, in some instances companies that had won the procurements and successfully performed the work as small businesses were the successful offerors for the same work contracted for on unrestricted procurements after they had turned big business.
- o A current example of this latter practice can be made for the Navy's SNAP program in SPAWAR 10K for which services are currently being planned for procurement under an unrestricted solicitation where the incumbent contractor, who performed the work as a small business, is now a large business.

Magnavox Electronic Systems Company  
1313 PRODUCTION ROAD  
FORT WAYNE, INDIANA 46808

S. H. NEWNAM  
VICE PRESIDENT  
DIRECTOR OF MATERIAL OPERATIONS

August 21, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd, Executive Secretary  
ODASD(P)/DARS, c/o OUSD(A) Mail Room  
Room 3D139, The Pentagon  
Washington, DC 20301-3062

Reference: DAR Case 87-33

Gentlemen:

Magnavox Electronic Systems Company has been, and will continue to be, a supporter of Public Law 95-507. Our support has been demonstrated over the years by a steady growth in the use of minority suppliers. The growth from FY 82 to FY 86 shows the percentage increasing from 1% to 3% in FY 86. The amount of purchases has increased from \$843,000 in FY 82 to \$8,297,000 in FY 86. This improvement has taken place because of our management's commitment and through the dedication and hard work of many employees.

The driving force of our program is our Minority Business Development Council. This council was established by our management and is directed by our Vice President, Director of Material Operations. Members of the council are representatives from Purchasing, Quality, Manufacturing and two Minority Liaison Engineers. Representatives from Marketing, Contract Administration, Personnel and the Law Department attend when requested. The result of this effort is that we have developed our minority suppliers to a point where one is one of our top ten suppliers while another is one of our top 25 suppliers. Our efforts have included training operating personnel, providing technical assistance, the developing of quality standards, and we have provided financial assistance.

Being a manufacturer of electronic products, we use a significant amount of solid state devices and we also utilize Subcontractors with specific expertise in the systems business. These two areas represent approximately 35% of our total procurements. This requires that our opportunity for minority procurement from all other areas must exceed 4-1/2% for us to average 3% for the fiscal year.

Page Two

To: Defense Acquisition Regulatory Council

Public Law 99-661 sets a 5% goal for the DoD to purchase from Small Disadvantaged Concerns. As I have read in the Federal Contracts Report dated May 25, 1987, the House has passed an amendment to the Defense Authorization Bill to:

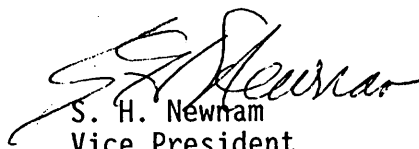
"Establish procedures or guidance for contracting officers to -  
(A) Set goals which Department of Defense prime contractors should meet in awarding contracts . . . . with a minimum goal of 5% . . . ."

We feel that these goals are attainable on some programs. We do not feel they are as attainable across the board. As we have outlined, it has taken Magnavox four years to increase the minority participation by 2%; however, much of this increase is on a few contracts which provided subcontracting opportunities. In addition to our Minority Business Development Council, our Buyers are tasked with locating viable minority vendors. Our experience has found a limited number of minority businesses in the manufacturing field; yet the manufacturing field contributes the most potential for increased subcontracting business.

It is our opinion and recommendation that any minimum goal for all defense contractors must be balanced with the subcontracting opportunities of the Government contracts involved, i.e. systems contracts, R&D contracts, and production contracts.

Sincerely,

MAGNAVOX ELECTRONIC SYSTEMS COMPANY



S. H. Newnam  
Vice President  
Director of Material Operations

cc: Senator Dan Quayle



Science & Engineering Associates, Inc.  
P.O. Box 3722  
Albuquerque, New Mexico 87190  
(505) 884-2300

17 August 1987

Defense Acquisition Regulatory Council  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, DC 20301-3062

ATTENTION: Mr. Charles Lloyd, Executive Secretary

Dear Mr. Lloyd:

SEA is a non-disadvantaged small business providing technical professional services. We have a proven track record in competing for and successfully accomplishing DoD and DoE projects in a competitive environment.

This letter is written in response to the Dod implementation of Section 1207 of the 1987 Authorization Act - Public Law 99-661. We have had ongoing dialogue with our Congressional delegation because we are concerned about the continual erosion of the amount of contract dollars available for competition among small businesses.

Our congressional delegation continually states to us that is is legislative intent not to award contracts to Small Disadvantaged Businesses (SDB's) at the expense of other small businesses; however, that is precisely what is happening. At the Kirtland AFB Contracting Center, we were recently quoted a figure of \$50M out of \$400M in contract awards going to 8(a) firms. Some of these firms are larger than we, and are providing the same services. In the interest of fairness, one must question the need for special preference.

To continue to foster a competitive environment, we strongly recommend the following:

- (1) A graduation level or limit of \$5M in annual government contracts be imposed on SDB, i.e., when an SDB firm reaches that level of contracts they should no longer be eligible for preferential treatment and they ought to be required to stand the test of competition.
- (2) An absolute time limit of seven years (five years plus a two year extension) be imposed on any SDB, and that no extension past this time limit be allowed under any circumstances.

Defense Acquisition Regulatory Council  
17 August 1987  
Page 2

- (3) No reduction in the number or dollar value of contracts under the small business set aside program established under Section 15(a) of the Small Business Act.
- (4) Renewals and recompetition of existing contracts being performed by non-disadvantaged small businesses should not be set-aside for SDB's.

These suggestions are made in the interest of fair and equal competition among all small businesses.

Thank you for the opportunity to respond to the proposed rule making.

Sincerely,

SCIENCE AND ENGINEERING ASSOCIATES, INC.



Gregory R. Woods  
President

GRW/sm

# Contract Services Association



August 17, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary  
OASD (P&L) (MARS)  
Pentagon - 3C841  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

The Contract Services Association is the major trade association exclusively representing the companies which provide technical and support services to Federal Government agencies. We are vitally interested in any regulatory development which affects the marketplace of our member companies, such as the DFARS interim rule published on May 4, 1987 under DAR Case 87-33. We were not aware of this interim rule until it began to impact our membership, and appreciate the opportunity to submit these comments belatedly.

The service contract industry is uniquely affected by any initiative to reserve prime contracts for a specific segment of the industry, particularly when the initiative includes a "goal" based on total Defense procurement. The largest segment of the Defense procurement budget is major system acquisition, which is not suitable for setaside for small business although it is part of the base used to establish the goal. This distortion produces disproportionate emphasis on setting service contracts aside for small business, and has resulted in decisions to setaside base support contracts which exceed \$10 million annually exclusively for small business. There are serious disadvantages to this development, including:

- o Small business firms are tempted to seek, and accept, contracts for which they lack the experience and resources, risking default and bankruptcy.
- o When they are successful, three years of performance will push them out of the small business category and they are unable to compete for renewal. At the time they lose the major portion of their business base, they are ineligible to bid on small business setasides.
- o Large companies in the service industry are leaving the base support A-76 market. These companies, which are the only ones that have the resources to convert a large base support activity to contract performance, will not make the investment if they are denied the opportunity to compete for continuation of the service.

These developments are seriously restraining competition in the service industry and threaten the viability of the Defense Commercial Activities Program under OMB Circular A-76, which has produced very substantial cost



savings in the Defense budget. They also create instability in the small business program, where viable small firms can be seriously damaged by undertaking overly ambitious contracts - even if they succeed, they are propelled out of the program before they are ready to meet unrestricted competition.

I am sure you are aware of the concern over the interim rule in the non-minority, small business community, which includes some of our member companies. They have already seen business that is normally reserved for all small business now restricted to that small segment which meets the definition of "small disadvantaged business". They are understandably distressed over a Government action which denies them the opportunity to compete for renewal of contracts which they are currently performing. The legitimate concerns of these companies will lead to increased pressure to set aside large service contracts for small business, thus exacerbating the problems already described.

It does not appear that development of this interim rule included full consideration of its potential economic impact on the Defense budget. Total Defense procurement for FY-88 will surely exceed \$160 billion. If 5% of that amount is devoted to prime contracts with SDB firms, with a premium of 10% above "fair market price", this would result in unnecessary expenditure of \$800 million at a time when the Defense budget is under unprecedented stress. Regardless of the good intentions behind this interim rule, we do not feel that this represents the best use of scarce funds appropriated for the Defense of our country.

The Contract Services Association is not opposed to small business or small disadvantaged business firms. Our objective is to serve the best interests of the service industry and all companies in that industry that seek business in the Government market. We also recognize the concerns of Congress that led to Section 1207 of P.L. 99-661, and feel that all those interests can be served in a manner that will be less disruptive to the service marketplace, less hazardous to small and disadvantaged businesses, and less wasteful of Defense appropriations.

Section 1207 places equal emphasis on "contracts and subcontracts" to be awarded to SDB firms and other minority institutions. It has been our experience in working with companies that seek to do business with the Government that they are primarily interested in business which offers an opportunity to earn a reasonable profit, and that prime contracts and subcontracts are equally welcome. We feel strongly that inordinate emphasis has been placed on prime contracts in the implementation of all legislation which seeks to ensure a fair share of Government procurement dollars for specific economic groups. We find the interim rule for implementation of Section 1207 devoted exclusively to award and reporting of prime contracts, disregarding the extensive potential for subcontracting which would minimize the serious problems identified earlier.

The primary reason for establishing setaside programs for small business and small disadvantaged business firms is that these companies lack the capital, management expertise, and/or business experience necessary to compete in the open market for Government business. These deficiencies have resulted in a failure rate on Government contracts awarded under setaside procedures that is

higher than experienced under unrestricted competition. Despite the best efforts and intentions of Government personnel who are assigned to assist these firms, they frequently are overextended and lack the business experience necessary to assure success.

A more effective route to provide business opportunities to these firms, and also assure competent business assistance necessary for development, is through subcontracting with an experienced prime contractor. Under this approach:

- o Prime contracts can be awarded competitively, providing optimum economy in the expenditure of scarce Defense resources.
- o The prime contractor is responsible for performance, minimizing risks for the contracting agency.
- o The prime contractor can provide business and technical assistance to the small firm, insulating it from the complexity of Government regulations.
- o Base support and other multiple requirement activities can be consolidated for efficiency and to reduce workload for Government procurement personnel.
- o Experienced large service contractors will be encouraged to participate in Government business where their capabilities will be most effectively utilized.

Subcontracting as an approach to providing business opportunities for small firms has been grossly underutilized due to lack of a proper reporting system to ensure full credit, inadequate implementation of subcontracting procedures, and lack of authority for prime contractors to restrict competition to targeted groups. Appropriate regulatory action, within existing statutory authority, could overcome these problems and significantly expand business opportunities for small and small disadvantaged businesses without adversely affecting the competitive marketplace or the Defense effort.

The Contract Services Association submits the following recommendations for implementation of Section 1207 in service contracting, recognizing that they might be less effective or even unnecessary in procurement of supplies and equipment available from small firms.

- o Establish an effective reporting system for subcontracts, indentifying subcontracts awarded to small and small disadvantaged firms.
- o The Competition in Subcontracting clause, FAR 52.244-5, should be revised to authorize prime contractors to setaside procurements for small or small disadvantaged businesses when reasonable prices and satisfactory performance can be expected.
- o In all negotiated procurements, include a requirement for submission of a small/disadvantaged business subcontracting plan, and place significant weight on the extent and quality of this plan in the evaluation factors for source selection.

Page 4  
August 17, 1987

- o In all unrestricted sealed bid procurements, include an appropriate minimum requirement, as a percentage of total contract value, for subcontracting to small and small disadvantaged businesses.

We feel that this approach would be far more effective in promoting business for minority firms, and meeting the intent of Congress, than the interim rule published on May 4, 1987. Representatives of CSA would be very pleased to meet with you and others involved in the implementation of this policy to answer any questions and assist in the implementation of these recommendations.

Sincerely,



Gary D. Engebretson  
Executive Director

Congress of the United States

House of Representatives

Washington, D.C. 20515

August 3, 1987

*DADS Complete*

*Copy from Bill Pollock 1310 lws 8/5/87*

The Honorable Casper Weinberger  
Secretary  
Department of Defense  
The Pentagon  
Washington, D.C. 20301-3062

Dear Secretary Weinberger:

As members of Congress concerned about the success and proper implementation of the Department of Defense's minority set-aside program, we are writing this letter to propose specific regulatory language for the final regulations implementing Section 1207 of P.L. 99-661.

Section 205.207 -- Preparation of bids.

The regulations should not prohibit non-small disadvantaged businesses from submitting unsolicited proposals, provided they know in advance that the procurement may be set-aside. Although the regulations should be clear in seeking proposals from SDBs only, they should not specifically prohibit unsolicited proposals from non-SDBs. Therefore, we would amend the language of Section 205.207(d) (S-73) by substituting the following language in place of the last sentence:

"Therefore, replies to this notice are requested at this time from small disadvantaged business concerns only. Replies received from other than small disadvantaged business concerns will not be considered, unless adequate interest is not received from SDB concerns, and the solicitation is issued as a \_\_\_\_\_ (enter basis for continuing the acquisition, e.g. 100% small business set-aside with evaluation preference for SDB concerns, etc.)."

Section 206.203-70 -- Set-asides for small disadvantaged business concerns.

Even assuming that the Competition in Contracting Act does not require a contracting officer to prepare a written justification for a set-aside award under the 5% program, we would amend Section 206.203-70 by deleting the last sentence and substituting the following language:

"All justifications, determinations, findings, and approvals in connection with the set-aside of a procurement under this program shall conform with the requirements of P.L. 99-661 and DoD procurement practices."

We would also recommend that Federal Acquisition Regulation 52.219-9 (d)(11)(iii) be amended to read as follows:

"Records on each subcontract solicitation resulting in an award of more than \$10,000, indicating (A) whether small business concerns were solicited and if not, why not, (B) ~~whether small disadvantaged business concerns were solicited and~~ if not, why not, and (C) if applicable, the reason the award was not made to a small business concern."

Section 219.001 -- Definitions.

The definition of "fair market price" should be amended to read:

"For purposes of this part, fair market price is a price based on reasonable costs under normal competitive conditions and not on lowest possible costs. For new procurement requirements, or requirements that lack satisfactory procurement history, the estimate shall be based upon recent award prices adjusted to insure compatibility. Such adjustments shall take into account differences in quantities, performance times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any additional cost which may be deemed appropriate."

Section 219.201 -- Technical assistance.

The regulations fail to make specific proposals regarding the technical assistance requirements under Section 1207. Therefore, we suggest that the following language be incorporated in the final regulations:

In the amendment to 219.201(a), the phrase ", pursuant to section 1207(c)," should be inserted after the phrase "It is the policy of the Department of Defense" and before "to strive to meet these objectives".

A new 219.202-6 should be added to read as follows:

"19.202-6 Technical assistance.

"(a) Contracting officers shall provide projections of DoD requirements up to 18 months in advance of publication. Such projections shall include a description of what will be purchased, who should be contacted and the anticipated capabilities necessary to fulfill the requirement.

"(b) Each military facility with procurement activities shall conduct annual technical assistance seminars, funded by DoD, using contracting officers and other related personnel. This subsection applies to military procurement personnel at the facilities of prime contractors as well. These seminars shall include discussions regarding information about the minority contracting program in general and at particular military bases or prime contractor facilities, advice about DoD procurement procedures, instruction on preparation of proposals, and other

Accordingly, 219.302(5) should be deleted.

Finally, 219.302(6) should be amended to read:

"(5) If the DoD determination is not issued within 10 days after the contracting officer's receipt of the protest, it shall be presumed that the questioned offeror is a SDB concern. This presumption will not be used as a basis for an award without first ascertaining when a determination can be expected, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government."

Section 219.502-3 -- Partial set-asides.

Provision should be made for partial set-asides under the 58 program. Therefore, we would amend section 219.502-3 to track the language of the Federal Acquisition Regulations to read as follows:

"(a) The contracting officer shall set aside a portion of an acquisition for exclusive small disadvantaged business participation when--

"(1) A total set-aside is not appropriate;

"(2) The requirement is severable into two or more economic production runs or reasonable lots;

"(3) One or more small disadvantaged business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a reasonable price;

"(4) The acquisition is not subject to small purchase procedures; and

"(5) A class of acquisitions may be partially set aside. Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures.

"(b)(1) When the contracting officer determines that a portion of an acquisition is to be set aside, the requirement shall be divided into a set-aside portion and a non-set-aside portion, each of which shall (i) be an economic production run or reasonable lot and (ii) have terms and a delivery schedule comparable to the other. When practicable, the set-aside portion should make maximum use of small disadvantaged business capacity.

"(b)(2) The contracting officer shall also encourage the participation of small disadvantaged concerns in the non-set-aside portion of an acquisition.

"(c)(1) The contracting officer shall award the non-set-aside

portion using normal contracting procedures.

(2) (i) After all awards have been made on the non-set-aside portion, the contracting officer shall negotiate with eligible concerns on the set-aside portion, as provided in the solicitation, and make an award. ~~Negotiations shall be conducted~~ with small disadvantaged business concerns in the order of priority as indicated in the solicitation (but see (ii) below). The set-aside portion shall be awarded as provided in the solicitation. An offeror entitled to receive the award for quantities of an item under the non-set-aside portion and who accepts the award of additional quantities under the set-aside portion shall not be requested to accept a lower price because of the increased quantities of the award, nor shall negotiation be conducted with a view to obtaining such a lower price based solely upon receipt of award of both portions of the acquisition. This does not prevent acceptance by the contracting officer of voluntary reductions in the price from the low eligible offeror before award, acceptance of voluntary refunds, or the change of prices after award by negotiation of a contract modification.

"(ii) If equal low offers are received on a non-set-aside portion from concerns eligible for the set-aside portion, the concern that is awarded the non-set-aside part of the acquisition shall have first priority with respect to negotiations for the set-aside."

This approach would be consistent with Undersecretary Godwin's statement that "partial set-asides will be included when changes are made as a result of public comment." (See Attachment)

Section 219.502-72 -- SDB set-aside.

Taken literally, this provision would require an SDB to offer the services of another SDB in order to have a procurement set-aside. This would effectively eliminate minority wholesalers and distributors from the program. In addition, procurement regulations should not carry an implicit presumption that SDB firms are less than qualified to perform on R&D or architect-engineering contracts. And finally, DoD should follow through on its intent to develop a proposed rule allowing an SDB set aside where a market survey and a "sources sought" CDB notice identify only one responsible SDB concern which could fulfill DoD's requirements. Therefore section 219.502-72 (a) should be amended to read as follows, succeeded by a new paragraph "(b)" as indicated. Further, the paragraph formerly labeled "(b)" should be changed to "(c)", "(c)" should be changed to "(d)", and "(d)" to "(e)."

"(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition shall be set-aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be

obtained from at least two responsible SDB concerns offering the supplies or services of different SDB concerns or of any domestic small business and (2) an award will be made at a price not exceeding the fair market price by more than ten percent.

~~(b) A direct award also may be made to an SDB firm without full and open competition, as permitted by section 1207, when a market survey and CBD notice identify only one responsible SDB concern which could fulfill DoD's requirements.~~

Section 219.502-72(b) -- We believe that multiple 8(a) firms expressing an interest in having an acquisition placed in their 8(a) program should not be a basis for examining whether the acquisition should be set aside in the 5% program. In fact, the 8(a) program and the 5% program should not compete for contracts at any level. Therefore, we recommend that the following language contained in Section 219.502-72(b)(2) should be deleted: "multiple responsible section 8(a) concerns express an interest in having the acquisition placed in the 8(a) program; or". In addition, the letter "(b)" should be changed to "(c)" as stated above, and the numeral "(3)" should be changed to the numeral "(2)".

Section 219.801 -- In light of the equally compelling mandate for Section 1207 of P.L. 99-661, this section should be written to avoid stating any preference between the 8(a) program and the 5% program. Therefore, we would amend this section to add the following:

"No preference shall exist, however, between the 8(a) program and the program established pursuant to section 1207 of P.L. 99-661."

Section 252.232-12 -- Advance payments.

The interim regulations failed to make any provision for advance payments. Section 1207 specifically calls for the mandatory usage of advance payments "to the extent practicable and when necessary to facilitate achievement of the 5 percent goal...."

Therefore, the regulations should be amended to allow advanced payments pursuant to Section 2307 of title 10, United States Code, to Section 1207 entities. It should be noted that Undersecretary Godwin had agreed to clarify the procedure for obtaining advanced payments under Section 1207. In addition, because the Undersecretary stressed the Department of Defense's preference for progress payments, the regulations should also clarify the procedures for obtaining progress payments and state criteria by which such payments will be made.

Beyond advance and progress payments, DoD should consider more aggressive schemes for providing financial assistance to SDBs. DoD and numerous interested minority contractors have pointed out that the benefits afforded through section 2307 are modest. Yet



it is clear that adequate financial assistance must be a central link in the success of P.L. 99-661. Since access to capital is a key problem of SDB enterprises, expanding contract opportunities will be of little avail if firms cannot gather the resources to take advantage of those opportunities.

Accordingly, DoD should explore, in conjunction with Congress, two financial assistance programs that could help realize the 5% goal. First, a debt financing program could be modeled after the DOT loan program for SDBs unable to obtain financing from conventional sources. DOT has entered into an agreement with a named bank to provide short and long term loans. Using funds appropriated by Congress, DOT advances 75% of the loan while the named bank advances the remaining 25%. Seventy-five percent of all repaid principle is then set aside in certificates of deposit that comprise a "DOT account", and serve as a continuing pool of funds for future loans. The Director of the OSDBU Office acts as the DOT representative in all matters related to the agreement.

DoD could pioneer a similar effort, but could keep its operation "off budget" by structuring it as a loan guaranty program instead of directly mirroring the program at DOT. Under such a scheme, DoD could provide a Federal guarantee covering 75% of the face value of SDB loans made by a named bank.

Although debt capital can be beneficial to some SDBs, many others are operating on margins too thin to absorb loan costs while still allowing for profits. In response, DoD should also explore an equity financing program.

Currently, Minority Enterprise Small Business Investment Corporations (MESBICs) provide a limited source of long term venture capital to minority businesses. A campaign is underway to privatize and expand the funding base for MESBICs by establishing the Corporation for Small Business Investment (COSBI). If successful, MESBICs, through COSBI, could become fruitful sources for financing the large numbers of SDBs contracting with DoD as well as with other government agencies.

However, because the expansion of MESBICs through COSBI is not assured, and even if achieved may not be adequate to meet the full range of SDB capital needs, DoD should explore the development of its own MESBIC-like, privately funded equity financing program.

One such program has already be outlined under the rubric of the National Security Investment Fund (NSIF). The NSIF would act essentially as an intermediary providing capital to SDBs contracting with DoD. Initial capitalization for the NSIF could be provided by successful minority and non-minority defense contractors who would be asked or required to purchase stock in the NSIF, perhaps in proportion to relative aggregate amounts of federal payments received within the past five years.

Proceeds from this capitalization would be used to leverage loans and create a larger pool of capital with which to purchase preferred stock in active and qualified SDBs contracting with DoD. Some of the proceeds of the NSIF would be reserved to purchase ~~other financial instruments that would round out the~~ Fund's portfolio, and to provide working capital. Under normal circumstances, Fund dividends would be reinvested.

Minority contractors would be required to repurchase the preferred stock held in their companies by the NSIF after a period of time, or to allow that stock to be converted to common stock with full voting rights.

After operation of the NSIF has been established, the Fund's stock could be marketed to a broader clientele to increase the pool of capital available for investment.

As investors in the NSIF, major prime contractors would have a material interest in the success of minority defense contractors.

This scheme is clearly ambitious, but it -- or something like it -- ultimately will be required to get to the most pressing financial assistance needs of a broad range of SDBs. Meeting those needs will be crucial to the success of the DoD 5% goal program.

#### Section 19.704 -- Subcontracting

The interim regulations make no provision for the subcontracting efforts of prime contractors pursuant to section 1207 of P.L. 99-661. Moreover, the DoD profit policy offers insufficient incentive to increase the efforts of major prime contractors to do business with minority firms. The policy neither identifies subcontracting with SDBs specifically nor attaches significant weight to such efforts. Therefore, Federal Acquisition Regulation Section 19.704 should be modified by adding a new section "(c)" to read as follows:

"(c) (1) Contract solicitations should contain a suggested goal representing the DoD expectation of the level of SDB participation in subcontracting. The expectation will vary with the discretion of the contracting officer, but shall be set at 5% or at such higher level as may be appropriate given the past performance of the apparent successor offeror or bidder and/or the contracting officer's analysis of market conditions.

(2) The solicitation should advise that the successful offeror may need initially to submit two alternative types of goals. The first goal would represent the offeror's maximum practicable opportunity for SDB's at the originally submitted price offered to the government. The second goal would be set at the DoD's expectation level (presuming that is higher than the first goal) and must be supported by evidence indicating how much in increased costs would be borne by the contractor if

required to meet the higher goal.

(3) In order to verify the differential, it would be necessary to obtain comparable subcontract bids or offers from ~~non-SDB firms and SDB firms~~ for the same subcontract item.

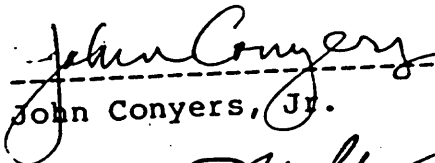
(4) DoD shall utilize the authority established in section 1207(e)(3) of P.L. 99-661 to pay any differential cost between the first and the second goal described in (2) above as long as that differential is not greater than 10%. The successful offeror would then be required to meet the second, presumably higher, SDB subcontracting goal.


(5) If the prime contractor breaches the agreement to meet the higher goal, the DoD shall deduct from the contract price twice the differential agreed upon to reach the higher goal.

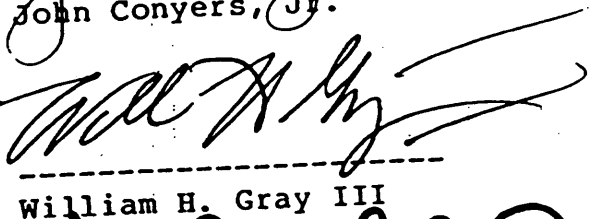
Size Standards -- Restrictive size standards pose a serious threat to achieving the 5% goal established by P.L. 99-661. A number of minority firms -- often those most capable of performing successfully in the expanded areas of DoD SDB contracting envisioned under Section 1207 -- may be barred from participating in the SDB set aside because they have grown past their size standard ceilings. Yet at the same time, these firms remain far short of being "dominant in their field of operation" as described in FAR 19.001.

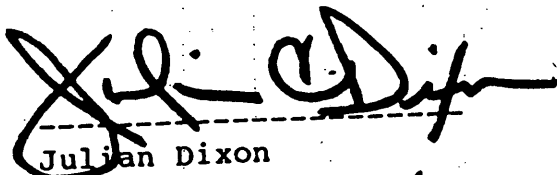
DoD, in conjunction with Members of Congress, should petition the SBA to set size standards at a level that facilitates reaching the 5% SDB contracting goal while still limiting participation in the SDB set aside program to firms that are not dominant in their field of operation.

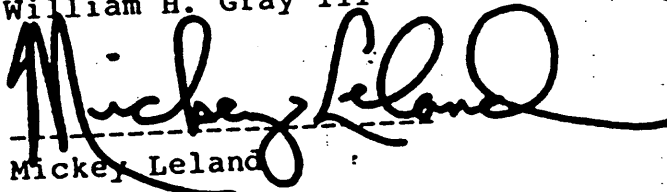
Sincerely,

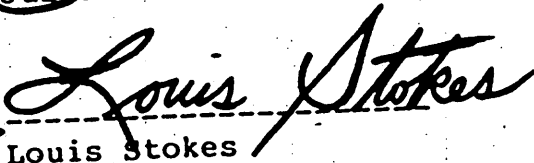
  
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John Conyers, Jr.

  
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Nicholas Mavroules

  
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William H. Gray III

  
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Julian Dixon

  
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Mickey Leland

  
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Louis Stokes

*C. B. Ranger*  
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Charles B. Ranger

*Edolphus Towns*  
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Edolphus Towns

*Major Owens*  
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Major Owens

*Augustus Hawkins*  
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Augustus Hawkins

*John Lewis*  
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John Lewis

*Kweisi Mfume*  
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Kweisi Mfume

*George W. Crockett, Jr.*  
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George W. Crockett, Jr.

**ROPES & GRAY**  
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August 3, 1987

HAND-DELIVERED

Defense Acquisition Regulatory Council  
ATTN. Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Re: DAR Case 87-33

Dear Mr. Lloyd:

We are a law firm that represents a large number of clients in connection with Government contracts matters. We are writing to submit comments on the interim rule amending the Defense Federal Acquisition Regulation Supplement ("DFARS") that was published in the May 4, 1987 edition of the Federal Register. See 52 Fed. Reg. 16,263 (1987) (a copy of which is enclosed). The stated purpose of the interim rule is "to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), [the "Act"], entitled 'Contract Goal for Minorities.'" However, it is our view that in one material respect -- the rule's definition of a small disadvantaged business -- the interim rule imposes a restriction that goes far beyond the provisions of Pub. L. 99-661.

Section 1207 of the Act (a copy of which is enclosed) sets a goal for the Department of Defense ("DOD") for the expenditure of funds for contracts with small disadvantaged business concerns, historically Black colleges and universities, and minority institutions. In effect, Section 1207 authorized a DOD program of total small disadvantaged business set aside procurements. This DOD program is similar to the "8(a) Program" of the Small Business

Administration ("SBA"). Under the 8(a) Program SBA enters into prime contracts with agencies of the Federal Government, and then awards a sole-source subcontract to a small disadvantaged business concern for the performance of the work under the prime contract. Thus the 8(a) Program and the DOD program provide an important incentive for small disadvantaged business concerns to participate in Government procurements, and confer benefits that can be the life blood of such concerns. The identification of firms who are entitled to receive these benefits, i.e., the definition of a small disadvantaged business concern, is, therefore, all important.

The interim rule would add to the DFARS a Section 19.001 (48 C.F.R. § 219.001) containing, inter alia, the following definition of a small disadvantaged business concern:

"Small disadvantaged business (SDB) concern, "... means a small business concern that ... is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 Percent of its stock owned by one or more socially and economically disadvantaged individuals....

Many publicly held companies have two or more classes of stock. One is voting stock, which gives its owner both ownership and the power of direct control over the company; the other is non-voting stock, which confers some of the advantages of ownership, but does not confer any control over the company. The interim rule quoted above makes no distinction between the voting stock and the non-voting stock of a company. To be eligible for the DOD program, the stock of a small company -- and not just the voting stock -- must be at least 51 percent owned by individuals who are socially and economically disadvantaged. The interim rule's failure to make this distinction is improper. For the following reasons the interim rule is more restrictive than was intended by Congress.

First, Section 1207 of the Act states that small disadvantaged business concerns are concerns "owned and controlled by socially and economically disadvantaged individuals (as defined by Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and regulations issued under such section )...." The SBA regulations that are issued under Section 8(d) of the Small Business Act are set forth at 13 C.F.R. Part 124 (a copy of which is enclosed). At the time that the Act was passed -- indeed both before and since the Act was passed by Congress -- the SBA regulations have

defined the ownership requirements for a small concern to be considered a small disadvantaged business as follows:

In the case of an applicant concern which is a corporation, 51 percent of all classes of voting stock must be owned by individual(s) determined to be socially and economically disadvantaged.

13 C.F.R. § 124.103(b) (emphasis supplied). Thus the regulations that are expressly referenced in the Act clearly apply the 51 percent stock ownership requirement only to voting stock.

Second, the interim rule itself reflects a Congressional intent to be consistent with the SBA regulations. For example, the interim rule's definition of a "small business concern" explicitly references the SBA size regulations that apply to the 8(a) Program, 13 C.F.R. Part 121. See DFARS 19.001, 48 C.F.R. Part 219.001, 52 Fed. Reg. 16,265 (1987). Further, the interim rule states that "[i]t is the policy of the [DOD] to strive to meet [the goal established by § 1207 of the Act] through the enhanced use of ... the section 8(a) program, and the special authority conveyed through section 1207 (e.g. through the creation of a total [small disadvantaged business] set aside)." DFARS 19.201(a), 48 C.F.R. § 219.201, 52 Fed. Reg. 16,265 (1987). Again, the interim rule expressly references the 8(a) Program. Indeed, it states that the DOD seeks to "enhance" the use of the 8(a) Program. The use of an overly restrictive definition of a small disadvantaged business concern is patently inconsistent with this goal.

Lastly, the purpose of both the 8(a) Program and the DOD program is to help small disadvantaged business concerns get a foothold in the marketplace so that they can compete and thrive in the future without Government aid. One way such companies are able to continue to compete and thrive is by "going public" and raising additional capital for investment and expansion. However, the effect of the restrictive definition in the interim rule is to provide a disincentive to "go public." The interim rule, therefore, undermines the goals of the program and statute it purports to implement.

The 8(a) Program and the DOD program have participants (who may well make up a minority of all participants in these programs) that are publicly held companies, 51 percent or more of whose voting stock is owned by socially and economically disadvantaged individuals, but who also have non-voting shareholders. For some of these companies, when the voting and non-voting stock is added together, the percentage of the total that is owned by socially and economically disadvantaged individuals falls below 51

percent. These companies meet the SBA regulations' definition of a small disadvantaged business concern, and participate fully in the 8(a) Program. However, under the interim rule these companies would not be eligible to participate in the DOD program. Yet the benefits of keeping these companies in the DOD program are as great as the benefits of keeping these companies in the 8(a) Program.

If the interim rule is not amended to make it consistent with the 8(a) regulations, a group of companies will be severely prejudiced: they will be able to enjoy the benefits of the SBA 8(a) Program, but they will not be permitted to enjoy the benefits of the DOD program. Since a company's participation in the 8(a) Program is for a fixed period of time, when a company graduates from the 8(a) Program it will be unable to participate in the DOD Program and will be at a severe competitive disadvantage. That situation would not only be unjust and unfair, it also would be contrary to the requirements of the law. We respectfully suggest that the interim rule's definition of a small disadvantaged business concern be amended to read as follows:

"Small disadvantaged business (SDB) concern," as used in this part, means a small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its voting stock owned by one or more socially and economically disadvantaged individuals.

In addition to the requirement concerning stock ownership, the interim rule's definition of a small disadvantaged business concern requires that the majority of the earnings of a small business concern accrue to the socially and economically disadvantaged owners. We believe that this requirement is unnecessary. The ownership requirements will ensure that socially and economically disadvantaged individuals control the company, including its earnings. It is the question of control with which the 8(a) Program requirements are concerned, and it is the question of control with which the DOD program requirements should be concerned. Accordingly, we respectfully request that the interim rule's definition of "small disadvantaged business concern" be amended to exclude the requirement that the majority of the earnings accrue to the socially and economically disadvantaged owners.

In light of the prejudicial impact of the interim rule on certain small disadvantaged business concerns, we request that, pending issuance of a final rule, the 8(a) Program



definition of small disadvantaged business concerns apply to the DOD program.

We appreciate your consideration of these comments.

Respectfully submitted,

ROPES & GRAY

By Patrick Simchak  
Matthew S. Simchak  
Patrick K. O'Keefe

Congress of the United  
Representatives

20515

Charles W. Lloyd,  
Defense Acquisition Regulatory Council  
OSASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-8062

Dear Mr. Lloyd:

Consider these comments on the interim rule implementing Section 1207 of P.L. 99-661 "Contract Goal for Minorities."

My comments reflect my views and the views of constituents who responded to my request for their comments. These constituents are minority-owned firms in the Denver Metro area.

1. 219.001 Definitions

The category "Asian-Pacific American" does not include the countries of Burma, Thailand, Malaysia, Brunei, and Indonesia. These countries should be included.

There has been enough immigration from countries further south in the Pacific Rim to warrant inclusion. Immigrants from these countries must overcome extraordinary obstacles in pursuing a livelihood here.

I suggest splitting the category two ways: Southeast Asian Americans (Burma, Cambodia, South Vietnam, Laos, Thailand, Malaysia, Singapore, Brunei, Indonesia, and Phillipines) and Asian-Americans (Japan, China, Korea, Samoa, Guam, U.S. Trust Territories of the Pacific Islands, Northern Mariana, Taiwan).

2. Commerce Business Daily

The cost of publishing notices in the Commerce Business Daily is prohibitive to many small businesses. Publishing notices in high public libraries is also restrictive.

Suggested alternatives include publishing notices in local newspapers, especially papers catering to minority populations in the geographic area of the proposed procurement.

Many commented that by the time notice appeared in the CBD, there would not enough time to prepare adequate response for the contracting officer.

better plan and let the contracting officer  
area firms. This would make the "rule of two" easier to meet.  
Language encouraging frequent community forums should be added.

3. 219.3 Determination of Status

Most respondents thought that definitions of SDBs was adequate. But some saw room for abuse since the contracting officer will assume a firm qualifies as a SDB. Only when a protest is filed will a review be done. How a contracting officer can quickly check a firm's eligibility may be needed.

One respondent said the five day limit for protest was too short.

4. 219.502 Rule of Two

The rule seemed reasonable when the SBA 8(a) approach was not used. Concern was raised about how a contracting officer will balance the two set-aside programs.

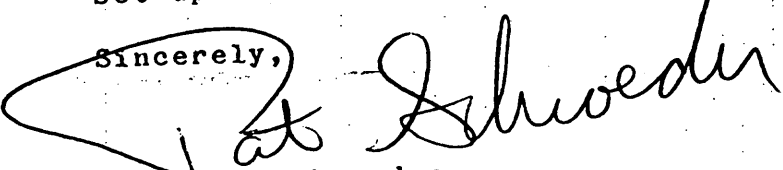
5. Oversight

My own opinion concerns compliance inspection. Congress will have no idea if the program is achieving its goal. One respondent pointed out, for example, that in some procurement areas, no SDBs exist. Other areas have an abundance. So to come to an average goal of 5%, higher goals will have to be set in some procurement areas.

I urge you to add some monitoring mechanism to the final rule.

I have addressed comments about the perceived lack of high level support for the program in general to the respective service secretaries. I sense that without that support, this is a program set up to fail.

Sincerely,

  
Patricia Schroeder  
Congresswoman

2100 Bankers Building  
WASHINGTON, DC 20515  
(202) 225-2661

CARLOTTA SCOTT  
ADMINISTRATIVE ASSISTANT

ROBERT BRAUER  
SPECIAL COUNSEL

July 30, 1987

Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS  
c/o OASD (P&L) (DARS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

RE: DAR Case ~~87-11~~

ATTN: Charles W. Lloyd  
Executive Secretary

Dear Mr. Lloyd:

I am enclosing my comments regarding the Department's Interim Regulation to implement Section 1207 of Public Law 99-661.

It is my hope that these comments will be considered in the drafting of a final rule regarding Section 1207. As well, I would direct your attention to the revisions of Section 1207 contained in the pending National Defense Authorization Act for Fiscal Years 1988/1989 (H.R. 1748). The relevant portions of H.R. 1748 may provide some guidance in areas where there is any doubt as to Congressional intent as stated in P.L. 99-661.

Thank you for your attention to this matter.

Sincerely,

  
Ronald V. Dellums  
Member of Congress

COMMENTS OF REP. RONALD V. DELLUMS (D-CA)  
REGARDING INTERIM RULE TO IMPLEMENT SECTION 1207  
OF PUBLIC LAW 99-661  
DAR CASE 87-33

My contact with military bases and DoD prime contractors has shown a significant misunderstanding as to the intent of Congress in implementing Section 1207 of P.L. 99-661. This misunderstanding is largely based upon the regulations as proposed and which stand as DoD's Interim Rule to implement 1207. These regulations do not come close to expressing the full intent of Congress.

The House of Representatives has expressed its dissatisfaction with the Interim Rule by passing H.R. 1748, now under consideration in the Senate. These comments express the same dissatisfaction, but within the framework of the request for comments in the May 4, 1987 Federal Register.

One concern is that SDBs not be restricted to set-asides. The primary objective should be to give SDBs increased opportunities to compete. Set-asides should be seen as one way to get a foot in the door, but by no means the exclusive way. As mentioned in Part 219.201, General policy of DoD's Interim Rule, efforts to increase contracting opportunities for minorities should include: "outreach efforts, technical assistance programs, [and] the section 8(a) program. . ."

The entire regulations speak to set-asides. There are no provisions for meeting the goal any other way. This is not a correct interpretation of congressional intent.

"Technical Assistance" needs to be specifically defined, particularly as it pertains to the duties of SBDU officers. Individuals may interpret goals and objectives in varying ways; accountability can be better upheld if there are clear-cut guidelines for personnel to follow. Suggestions include: written authority from the branch (e.g. Air Force) to the SBDU officer at his/her location; the development of mailing lists (known as "industrial reviews" in DoD talk); seminars held by the SBDU officer in addition to or in conjunction with those held by other parties (the rationale being that who better knows the contracting process than those directly involved with it); funding for seminar locations within the community - this funding must come from DoD as it will be unrealistic to expect the prime contractor (in the case of subcontracts) to finance this expenditure; specific times must be given to the SBDU officers as to when the seminars should be held, how many, what should be discussed, etc. The regulations should apply to each compliance officer at each facility.

Section 1207(c) defines the objectives of a technical assistance program very clearly. These objectives should be incorporated word-for-word in the regulations because field personnel implementing such a program should know what their responsibilities are.

*MW. Lloyd*

ROPES & GRAY  
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August 6, 1987

HAND-DELIVERED

Horace Crouch  
Deputy Director  
OSD/USD(A) SADB  
Small and Disadvantaged Business  
Utilization Program  
Office of the Secretary of Defense  
Room 2A340  
The Pentagon  
Washington, D.C. 20301

Re: DAR Case 87-33  
Interim Rule Implementing The  
DOD Small Disadvantaged Business Program

We have enclosed a copy of the comments we submitted to the Defense Acquisition Regulatory Council concerning the interim rule implementing Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661) (the "Act") (a copy of which is enclosed).

The interim rule was published in the May 4, 1987 edition of the Federal Register. See 52 Fed. Reg. 16,263 (1987) (a copy of which is enclosed). The section of the act which it tries to implement establishes a program under which the Department of Defense ("DOD") may set-aside procurements exclusively for participation by small disadvantaged businesses. The interim rule, which amends the Defense Federal Acquisition Regulation Supplement ("DFARS"), would impose the following definition of a small disadvantaged business for the DOD Program:

"Small disadvantaged business (SDB) concern, "... means a small business concern that ... is at least 51 percent

owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 Percent of its stock owned by one or more socially and economically disadvantaged individuals....

DFARS 19.001, 48 C.F.R. § 219.001, 52 Fed. Reg. 16,265 (1987).

This interim definition differs from the definition used by the Small Business Administration ("SBA") for its 8(a) program, which also confers benefits on small disadvantaged businesses. The SBA definition is as follows:

In the case of an applicant concern which is a corporation, 51 percent of all classes of voting stock must be owned by individual(s) determined to be socially and economically disadvantaged.

13 C.F.R. § 124.103(b) (emphasis supplied) (a copy of which is enclosed). Thus the SBA regulations apply the 51 percent ownership requirement only to a company's voting stock; the interim rule applies the 51 percent ownership requirement to all of a company's stock, for purposes of the DOD set-aside program.

On August 4, 1987 the undersigned Mr. O'Keefe was advised by Mr. Robert Wren of your office that the intention of the Department of Defense is that a company which is small and disadvantaged under the SBA's 8(a) program will also be considered small and disadvantaged under the DOD set-aside program. If this is not the case, please advise us in writing immediately. The interim rule published in the Federal Register is not consistent with the DOD intention, as expressed by Mr. Wren. Specifically, a small company that has both voting and non-voting stock will be eligible for the 8(a) Program if at least 51 percent of the company's voting stock is owned by socially and economically disadvantaged individuals. However, if, for the same company, less than 51 percent of all of the company's stock is owned by socially and economically disadvantaged individuals, the same company will not be eligible for the DOD set-aside program under the interim rule.


Since the clear intention of the DOD program is not reflected in the interim rule, we respectfully urge you to

contact Mr. Charles W. Lloyd of the DAR Council immediately so that this discrepancy can be removed.

Respectfully submitted,

ROPES & GRAY

By

  
Matthew S. Simchak  
Patrick K. O'Keefe

cc: Charles W. Lloyd  
Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062



COMMUNICATIONS INTERNATIONAL, INC.

A Telecommunications Corporation

Atlanta  
Washington  
Corpus Christi  
Los Angeles  
Chicago  
New York

August 3, 1987

Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd, Executive Secretary  
ODASD(P) DARS, c/o ODASD  
(P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Ref: DAR Case 87-33:  
DOD FAR Supplement;  
Implementation of Section 1207,  
PL99-661 Set-Asides for SDB concerns

Dear Mr. Lloyd:

These comments are submitted for your consideration on behalf of Communications International, Inc., an 8(a) contractor pursuant to the Small Business Act as amended, and the Region IV, Contractors Association, representing some three hundred and fifty 8(a) firms located throughout the Southeastern United States.

A: Background

While specific language provides for not penalizing small businesses as a class, it appears that no such concern is expressed in the interest of 8(a) firms that might be negatively impacted by the procedures set forth under 219-502-72, notwithstanding the language under 219.601. It is submitted that the long history of DOD's positive relationship with, and support of procurements let under section 8(a) should not be ignored, and indeed could be increased in furtherance of the 5 percent goal established by the act. In summary, the absence of SDB interest in procurements for specific industry sectors, should not release contracting officers from setting aside under 8(a) requirements that would otherwise not be let for want of "rule of two" entities under 219.502-72. This is particularly important where requirements are relatively large, and may lend themselves to partial set-asides under section 8(a), but not under 219.502-72.



# RESEARCH, ANALYSIS & MANAGEMENT CORPORATION

2555 RESEARCH BOULEVARD • ROCKVILLE, MARYLAND 20850 • PHONE (301) 840-5960

July 29, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, DC 20301-3062

Dear Mr. Lloyd:

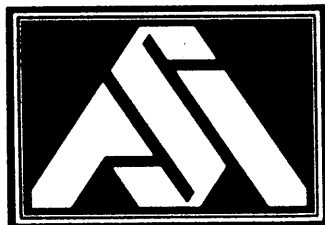
Your action is urgently needed now to prevent further erosion of the small business set-aside base and the possible demise of many small businesses.

What is happening is that DOD, particularly the Navy, is implementing Section 1207 of the 1987 DOD Authorization Act (Public Law 99-661), which assigned a goal to DOD to award 5% of its contract dollars to small disadvantaged businesses (SDB), by taking away long-term existing contracts from qualified small businesses and setting them aside for SDBs rather than using those contract dollars available to large business.

As noted in Appendix E, paragraph b(7) of the attached document, Congress is trying to correct this situation by requiring DOD to "establish policies and procedures which will ensure that there shall be no reduction in the number or dollar value of contracts awarded under the program established in Section 8(a) of the Small Business Act and under the small business set-aside program established under Section 15(a) of the Small Business Act in order to meet the goal of Section 1207 of the DOD Authorization Act of 1987."

An interim rule amending the DFAR supplement which implemented Section 1207 was issued by the Defense Acquisition Regulatory Council, effective 1 June 1987. At that time comments were requested from interested parties by 3 August 1987 so that a final rule could be promulgated.

If this rule is not changed as recommended in the enclosure, we and others in the small business community who serve the Department of Defense and depend almost 100% on the small business set-aside program, will surely be driven out of business within a very short period of time. Recent inquiries to the



August 1, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles Lloyd  
Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Re: Implementation of Section 1207 of Public Law 99-661; Set-Asides for Small Disadvantaged Business Concerns (52 Fed. Reg. 16263 (1987))

Gentlemen:

The American Subcontractors Association is a national trade association with more than 7,000 firms representing all major construction trades in 55 chapters. Many ASA members perform construction for the federal government. Sometimes they serve as prime contractors, contracting directly with the federal government. More often, they serve as subcontractors, dealing with the government only through a prime contractor. In both situations, these specialty trade contractors have a direct and real interest in the proper implementation of Section 1207 of Public Law 99-661.

Section 1207 requires the Department of Defense to attempt to award five percent of the total value obligated for (a) procurement; (b) research, development, test, and evaluation (RDT&E); (c) military construction; and (d) operation and maintenance in contracts and subcontracts to eligible participants. Eligible participants include, among others, small business concerns owned and controlled by socially and economically disadvantaged individuals, the majority of the earnings of which directly accrue to such individuals (SDBs).

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.  
1004 DUKE STREET, ALEXANDRIA, VA 22314-3512  
(703) 684-3450

Impact of Section 921 in Achieving the Goal of Section 1207

The interim rule implementing Section 1207 comes at a time of change in the procurement system, particularly with respect to encouraging participation in the system by small and disadvantaged businesses. The change that will, perhaps, have the greatest impact on the implementation of Section 1207 will be Section 921 of Public Law 99-661. Section 921 will reduce the small business size standard in most construction trades to ensure that a fair proportion of contracts per industry category (Standard Industrial Classifications), rather than overall contracts, are awarded to small businesses.

Implementation of Section 921 will substantially reduce the number of businesses defined as small and thus the number of SDBs available for DOD work. This, in turn, will reduce the amount of military construction performed by SDBs.

At the same time, Section 921 will enhance DOD's ability to measure the number of SDBs performing as subcontractors on military construction. This is true since many businesses, who will no longer be classified as small businesses, will have to comply with the subcontracting plan requirements of Public Law 95-507.

Comments on the Interim Rule on Section 1207

ASA believes four points should be kept in mind when this regulation is being finalized:

- (1) Section 1207 establishes a goal, not a mandatory set-aside program;
- (2) The program should be designed so that it does not have an inordinate impact on any one industry;
- (3) The program should be designed so that small businesses, other than SDBs, are not eliminated from the military construction market; and
- (4) Subcontracts performed by SDBs should be taken into consideration when determining whether the five percent goal is being met.

The construction industry consistently has exceeded the five percent goal for SDBs in DOD procurement. For example, in

August 1, 1987  
Page Three

fiscal year 1985, nine percent of military construction was performed by SDBs. Yet the total award to SDBs during fiscal year 1985 was only 2.1 percent. It appears then construction SDBs are more numerous, more willing, or more able to perform DOD work than SDBs in other industry segments. ASA believes that all three circumstances are true. ASA further believes that, without substantial effort on the part of DOD, construction will carry an inordinate and unnecessary burden in DOD's efforts to achieve its aggregate five percent goal of SDB participation in DOD procurement.

Therefore, ASA urges DOD to make every effort to assure that the five percent goal is reached in every procurement category and that no one category is inordinately impacted by DOD's efforts to meet the aggregate goal.

We believe this objective can be achieved by giving each contracting officer the flexibility and the authority to determine whether a particular construction contract should be set-aside for SDBs. For example, a contracting officer should take into account (1) the amount being set-aside in the total military construction program, (2) the amount being set-aside in the geographic area of the project being considered and its impact on non-SDB small businesses, and (3) the availability of subcontracting opportunities for SDBs on the project being considered. This flexibility can be achieved by amending 219.502-72(a) of the interim rule as follows:

(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition ~~shall~~ may be set-aside for exclusive SDB participation . . . .

This flexibility certainly is permitted under the statutory language, which makes clear that Congress intended to establish a goal for SDBs of five percent not a mandatory set-aside program or quota.

Such flexibility also is important if small businesses other than SDBs are not to be locked out of the military construction market. ASA recognizes that Congress excluded "small purchases" from the five percent goal in an effort to reduce the impact of Section 1207 on non-SDB small businesses. Nonetheless, if every project which a defined small business is capable of performing is set-aside for SDBs alone, many years of encouraging small participation in the government market will be negated. This certainly was not the intent of Congress nor, we believe, of DOD. It could, however, be the real effect if the interim rule were implemented fully without granting the contracting officer some flexibility.

August 1, 1987  
Page Four

ASA believes that the five percent goal can easily be met in military construction, even with the implementation of Section 921, if subcontracts performed by SDBs are counted toward the five percent goal. Historically, there have been many more SDBs in the construction specialty trades, which usually serve as subcontractors rather than prime contractors on military construction, than in the various prime contracting categories. As noted above, participation by SDBs as subcontractors on military construction will be much easier to measure by DOD since more prime contractors will be required to comply with the subcontracting plan requirements of Public Law 95-507, under the new definition of "small business" required by Section 921.

#### Summary and Conclusion

When implementing Section 1207 of Public 99-661, DOD should take into consideration that Section 921 of the same statute will have on its procurement system. At the same time, DOD should make every effort to ensure that implementation of its regulation does not inordinately or adversely impact any one industry or participation by non-SDB small businesses. ASA urges DOD to reevaluate and restructure the final rule to meet these objectives. We believe this can be achieved by granting the contracting officer greater flexibility in determining whether a particular project is appropriate for the set-aside program.

Sincerely,



E. Colette Nelson  
Director of Government Relations

# G and M Oil Company, Inc.

1549 N. WARWICK AVE.

301-728-0333

BALTIMORE, MARYLAND 21216



July 31st, 1987

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 30139  
The Pentagon  
Washington, D. C. 20301-3062

Re: DAR Case 87-33  
Comments

Handcarry To:  
1211 S. Fern Street  
Room C 102

Dear Mr. Lloyd:

The purpose of this letter is to comment on the interim and proposed rules regarding Department of Defense Federal Acquisition Regulation Supplement: Implementation of Section 1207 of Public Law 99-691: Set-Asides for Small Disadvantaged Business Concerns (SDB).

*( the goal of the awarding to SDB firms  
five percent (5%) of contract dollars )*

Firstly, as to price:

We agree with the concept formulated in the interim rules that an award to a SDB firm could be let at a contract amount not to exceed one hundred ten percent (110%) of the market price of the goods or services. Why market price? The cost of goods and services to a responsible SDB firm will be based on normal market conditions.

But we disagree with the concept formulated in the proposed rules that the ten percent (10%) price differential apply to the low offeror's bid. Why? This would place a SDB at a potential terrible risk of having its (the SDB firm) price based on an extraordinarily unrealistic low bid, possibly by a low bidder (1) who is dumping products to upset the normal marketplace, or (2) who is near bankruptcy and is selling goods at any price, or (3) who has placed a low bid due to error or other reasons.

July 31st, 1987

page 2

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary

Re: DAR Case 87-33  
Comments

Certainly, the market price method is the most fair and realistic way for SDB firms to participate, and for the Department of Defense to achieve the five percent (5%) goals.

Secondly, as to competition:

We agree with the concept formulated in the proposed rules that an award could be made to one SDB firm in those circumstances where, after the conclusion of a good faith market survey, only one SDB firm could be found. Why would one be fair? By always requiring at least two competing SDB firms, some SDB firms in certain geographical areas or in certain business classes may be left out of the program altogether only because that one SDB firm just so happens to be the only firm in that geographical area or in that particular class of business.

Conversely, we disagree with the concept formulated in the interim rules that require that bids need to be anticipated from at least two or more SDB firms. Why? This could preclude SDB firms from obtaining any awards under this program if those SDB firms were not located in areas populated with other SDB firms or if some SDB firms were involved in unique classes of trade [unique to SDB firms].

Thirdly, as to source of end items [term: disadvantaged ]:

We disagree with the source of end items provision which reads as follows:

"A manufacturer or regular dealer submitting an offer in its own name, agrees to furnish, in performing the contract, only end items manufactured or produced by small disadvantaged business concerns in the United States, its territories and ....."

Why is this provision unfair? This provision is unfair because it is self-defeating to the entire concept of minority participation. It is true that the intentions of this provision are excellent; nevertheless, as a matter of practicality, this provision is often and usually impossible to attain.



July 31st, 1987

page 3

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary

Re: **DAR Case 87-33**  
**Comments**

In the case of petroleum products, absolutely no disadvantaged manufacturers (refiners of petroleum products) exist anywhere in the United States. [ Probably no disadvantaged manufacturers of computers or cranes exist. ] But the provision states the term "disadvantaged." This makes an award to a SDB firm completely impossible. This therefore obliterates totally the five percent (5%) goal enacted by Congress.

Fourthly, as to source of end items [term: small ]:

We further disagree with the source of end items provision (exerpted on the previous page hereto) because of the inclusion of the word "small". Why?

(1) Small manufacturers, because of the economies of scale, must charge a price for their products that is greater than that of non-small manufacturers. The price charged by small manufacturers does not represent the normal market. The prices charged by SDB firms to the Federal Government are based on market prices. Therefore, even with the ten percent (10%) price differential, for SDB firms to purchase from small manufacturers, SDB firms would be paying a price above market, based on a small refiner, but receiving a price at market, based on a price mechanism controlled by major oil companies. This creates a loss position for the SDB firms, and precludes SDB firms from obtaining contracts with normal profit margins.

(2) Quite usually, it is difficult or just completely impossible to identify small manufacturers. In the case of petroleum products, only about thirty-five (35) small refiners of petroleum products exist in the United States, of which approximately twenty-five (25) are on the West Coast or in the Western States.

(3) Too often, small manufacturers are unable to service a SDB firm, either voluntarily or involuntarily, because of:

- (a) the lack of rigid government specifications, or
- (b) the lack of specific product types, or
- (c) the lack of required volumes, or
- (d) the lack of a manufacturing facility (refinery of petroleum products) which is located within the geographical operating sphere of the SDB firm.

July 31st, 1987

page 4

Defense Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary

Re: **DAR Case 87-33**  
**Comments**

In the latter case, transportation costs from the manufacturing facility to the location of the SDB firm are prohibitively unbearable, thereby causing a loss situation for the SDB firm. This certainly was not the intention of Congress, that SDB firms be priced out of business.

Fifthly, as to source of end items [ escape clause ]:

Notwithstanding the legitimate and practical concerns we voiced in the third and fourth major paragraphs of this letter, should our suggestions not be accepted, we would propose an escape clause, whereby a SDB firm, ( after having made a good faith and thorough search to identify a small and/or [depending on the outcome of the final rules] disadvantaged manufacturer with the required capabilities of specifications, product types, desire to service, reasonable transportation costs, and with products priced at or near market ), would be able to waive the small and/or disadvantaged manufacturer provision by representation.

As a matter of reference, our firm is a small and disadvantaged dealer in petroleum products and located in the Middle Atlantic States.

We thank you for the opportunity to comment on the five percent (5%) set-aside law enacted by Congress.

Should you need any clarification or have any questions, please call us at (301) 728-0333.

Sincerely yours,

*Rudolph C. Gustus C*

Rudolph C. Gustus  
President

RCG:JPB:NLK

**HAND CARRY**

C 693



COMPUTER  
SYSTEMS  
DEVELOPMENT  
CORP.

28 July 1987

Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD, (P&L) (M&RS), Room 3C841  
The Pentagon  
Washington, DC 20301-3062

Ref: DAR Case 87-33

Dear Mr. Lloyd:

This is to provide our comments regarding the interim rule for Implementation of Section 1207 of Pub. L. 99-661; Set Asides for Small Disadvantaged Business (SDB) Concerns, as published in the Federal Register, Vol. 52, No. 85 of 4 May 1987:

1. The proposed regulation is clear in its intent to provide additional opportunities for the minority small business community interested in pursuing defense procurements. The legislation set forth in Section 1207 clearly states that the objective is to realize five percent (5%) of the defense procurement dollars through Government procurement with qualified minority business enterprises, historically black colleges and universities and other minority institutions.

The Department of Defense implementation of the said legislation, while timely, has some deficiencies which if not corrected, will:

(a) adversely affect any chances of achieving the 5% goal;  
and

(b) increase the possibility of abuse by "front companies".

2. ADVERSE EFFECT ON THE 5% GOAL - The interim rule establishes a "rule of two" regarding set asides for SDB concerns wherein contracting officers make the final determination based on this rule, and a "reasonable expectation" that the award price under an SDB competition will not exceed fair market price by more than 10 percent.

28 July 1987

This has created one major problem - THE REPLACEMENT OF 8(a) CONTRACT OPPORTUNITIES BY SDB SET-ASIDES. Contrary to the instructions in the proposed regulation (219.801) and instructions from the Secretary of Defense regarding contracting under Section 8(a) of the Small Business Act - contracting Officers are already making arbitrary determinations regarding SDB set-asides. Specifically, (1) they are disregarding requirements committed to the 8(a) program and (2) are implementing the new SDB set-aside program by ruling against potential 8(a) set-asides. CSDC has experienced both of these situations:

- o In one case a self-marketed requirement was offered to and accepted by SBA not once, but twice, prior to publishing of the interim rule of 4 May 1987 (see exhibits A & B). Despite the fact that the requirement was committed to the 8(a) program, the cognizant contracting activity officer attempted to make it an SDB set-aside under the proposed regulation.
- o In another case, CSDC requested through SBA an opportunity to reserve for the 8(a) program a requirement compatible with our business plan and capacity. Prior to giving CSDC an opportunity to demonstrate its technical capacity, and review the benefits of performing the proposed requirements under the 8(a) program, the cognizant agency decided to make the requirement an SDB set-aside (Exhibit C).

Both of the above cases exemplify how the contracting agencies are "reacting" to the interim rule. Without a doubt, such actions are against the 5% DoD initiative. How can the 5% goal be achieved if the new program is used as a substitute for 8(a) set-asides? Furthermore, this is against the intent of the new legislation - to provide additional opportunities for qualified minority firms.

Possible solutions for eliminating arbitrary and uncontrolled determinations which are against the purpose of the 5% DoD initiative are:

- o Maintain the sole-source procurement method of the 8(a) program. The "8(a) negotiated procurement program" should be complemented, not replaced, by the competitive minority set-aside program. This complementary competitive minority set-aside program will facilitate the achievement of the DoD five percent contracting goal;

28 July 1987

- o Institute specific procedures to ensure that the DoD small disadvantaged business (SDB) set-aside program implementing the DoD five percent contracting goal does not interfere with or diminish the use of the 8(a) program in meeting the DoD five percent minority business goal.
- o Provide that Small and Disadvantaged Business Utilization (SADBU) Officers, rather than contracting officers, are responsible for the determination as to whether a particular procurement will be an 8(a) set-aside or an SDB set-aside;
- o Provide prime contractors with additional credits when they utilize minority subcontractors to facilitate the achievement of the DoD five percent minority contracting goal; and
- o Establish more objective procedures for determining fair market price. Create a Fair Market Price Determination Panel composed of SBA and DoD pricing specialists to resolve disputes over fair market price.

3. THE POSSIBILITY OF ABUSE BY FRONT COMPANIES. Recently published abuses by firms participating in the 8(a) program has created a rush of "reform legislation" that would substantially change the 8(a) program. As a new participant in the 8(a) program, we at CSDC strongly agree that some reform legislation is necessary to eliminate the possibility of abuse by "fronting". We are concerned, however, that after experiencing the hard reality that abuses are possible despite a formal certification process, DoD is proposing to implement a less restrictive certification and contracting process. Specifically, the DoD implementation does not adequately address:

- o at least a streamlined certification process that makes use of SBA or the agency's SADBU representative to ensure the "legitimacy" of the SDB offeror(s).
- o the degree of subcontracting which SDB firms will be permitted to pursue under an SDB set-aside procurement.

4. In summary, the proposed regulation lacks the necessary emphasis and procedures to reasonably expect that the 5% goal will be achieved. In fact, the implementation as described in the two real-life examples provided herein, clearly undermines the purpose of the legislation as set forth in Section 1207 of P.L. 99-661. Furthermore, while the DoD policy statement<sup>1</sup> clearly

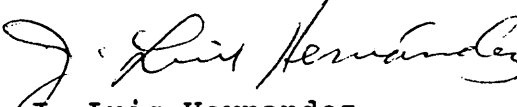
28 July 1987

established a commitment for continual support of the 8(a) program and establishes SDB responsibilities to various SADBUs representatives for implementation, the authority that should accompany this policy is nonexistent in the proposed DoD procedures.

I appreciate having the opportunity to offer these comments regarding the implementation of this legislation. I firmly believe that Section 1207 of P.L. 99-661, if properly implemented, can have a significantly positive impact on the minority business community.

Sincerely,

COMPUTER SYSTEMS DEVELOPMENT CORP.

  
J. Luis Hernandez  
President

JLH/mlm

Enclosures

NOTE: 1. OSD Memorandum for Secretaries of Military Departments Directors of the Defense Agencies, dated 18 March 1987.

H/8

Harbor Eight (8) Stevedores Inc.

P.O. Box 15655  
Houston, Texas 77220-5655  
713/673-6611

Houston  
Galveston  
Beaumont

July 28, 1987

Mr. Charles W. Lloyd  
Defense Acquisition Regulatory Council  
ODSAD (CP)DARS  
Room 3C841  
Washington, DC 20301-3062

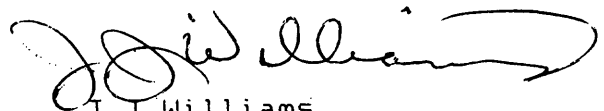
Dear Sir:

In response to DAR case 87-33, the proposal which would establish under authority of "exception five" of the Competition in Contracting Act (CICA) 10 USC 2304(c)(5) allowing for a direct award to be made to an small disadvantaged business firm. When only one firm can be identified to fulfill DOD requirements.

Harbor (8) would like for this proposal to be accepted. It has been our experience that a single source firm could be placed at a disadvantage if only the rule of 2 existed.

Harbor (8) would also like for consideration to be given to the application of preference differential when acquisitions are totally unrestricted.

Sincerely



J.J. Williams  
Vice President

JJW:ar

# HENRI ENTERPRISES

P.O. Box 41170  
Washington, D.C. 20018  
(202) 832-9098

July 30, 1987

Mr. Charles W. Lloyd, Executive Sec.  
ODASD (P)DARS c/o OASD(P&L)(M&RS)  
Defense Acquisition Regulatory Council  
Room 3c841  
The Pentagon  
Washington, D.C. 20301-3062

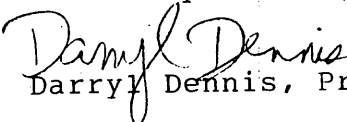
Dear Mr. Lloyd:

Recently your office released an interim rule for implementation of Section 1207 of Public Law 99-661. While I applaud your overall efforts for such a task, I am economically compelled to suggest modifications.

My company, HENRI ENTERPRISES, is engaged in the seafood & fish industry. We procure the majority of our products from processors in the states of Louisiana and/or Mississippi. Feasibility studies have concluded, that too few processors are located in either state and none are SDB concerns. Your requirement that a SDB purchase its goods from another SDB in my opinion has the effect of preventing a SDB from selling its products to the Federal Government. I strongly believe that in certain industries ( i.e. seafood & fish) an exception of this requirement should be made. It is further noted that I appreciate DOD's interest in procuring from the manufacturer, but in this instance an unreasonable hardship would result should your agency disregard the fact that few processors exist in the industry, none of which are SDB concerns. Ultimately, we intend to have a fully-intergrated enterprise whereby processing and distribution would be conducted under the same umbrella.

We also recommend the adoption of proposed rule which authorizes the contracting officer to award a contract sole source to an SDB concern in instances where only one SDB can be indentified. We further suggest the adoption of proposed rule that authorizes the contracting officer to make an award to an SDB if the concern comes within 10 percent of the fair market price on an unrestricted procurement or a small business set-aside. These methods are vital in industries where there is only one SDB concern.

Sincerely,

  
Darryl Dennis, President

DD/eh





# Bridge Enterprises Inc.

A Business Development Company

July 29, 1987

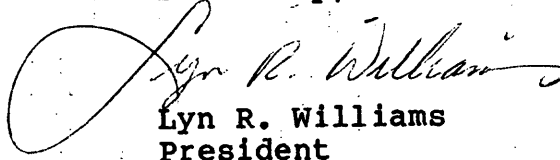
Mr. Charles W. Lloyd  
Secretary  
ODASD (D) DARS  
c/o QASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington D.C. 20301-3082

RE: BRIDGE GROUP POSITION

Dear Mr. Lloyd:

Bridge has the privilege of being retained by six influential minority firms in Virginia to work in regards to the revision and implementation of the Five Percent Defense Authorization Bill. From our information gathering process, we have ascertained several problematic areas and we request as well as urge that changes in the Interim Rule, implementing Public Law 99-661, be consistent with the proposal of the Bridge Group, which is attached.

Sincerely,



Lyn R. Williams  
President



# Bridge Enterprises Inc.

A Business Development Company

*Conrad Stephens*  
AUTOMATED SCIENCE GROUPS, INC.

*Wesley C. White*  
C & W AND ASSOCIATES, INC.

*Billie L. Taylor*  
GRACE INDUSTRIES, INC.

*Samuel A. Taylor*  
GRAPH-TECH, INC.

*Ronald C. Johnson*  
RONSON MANAGEMENT CORPORATION

*Harold J. Valenti*  
SYSTEMS MANAGEMENT AMERICAN CORP.

cc: Honorable Casper Weinberger  
Honorable James Abdnor  
Honorable Gus Savage  
Honorable Norma Leftwich

## POSITION PAPER

Date: July 29, 1987

From: Bridge Group Members

Bridge Group Members commend the timely response of the Department of Defense (DoD) in implementing Section 1207 of Public Law 99-661 (P.L. 99-661), the National Defense Authorization Act for the Fiscal Year of 1987. Upon review of the legislation, it is clear that Congress in passing this Act was attempting to enhance minority community participation in realizing the five percent goal of the defense procurement dollars through government procurement with qualified minority business enterprises, historically Black colleges and universities and other minority institutions.

Although the program has been implemented in a timely fashion, it does not possess the necessary aggressiveness to realize the five percent goal, especially in light of the reliance on 15 U.S.C. 637 of the Small Business Act. Therefore, the Bridge Group Members set forth the following proposal to rectify the problems that exist.

A. It has been established that contract officers will be providing the procurement opportunities/contracts for 8(a) firms and section 1207(a) firms. Allowing contract officers to maintain the procurement contracts for both programs has and will continue to have an adverse effect on the 8(a) firm. There is an incentive for the contract officer to set aside certain opportunities for a section 1207 firm

in light of the fact that the contract officer's performance is evaluated under the Five Percent Defense Authorization Program, thereby granting the contracting officer the authority to take from an 8(a) firm certain opportunities, if said firm does not adhere to certain specifications or negotiated prices, and placing the opportunity in the Five Percent Program if more than two section 1207(a) firms are capable of bidding on the project.

Bridge Group Members support Section 812(b)(7) of the Richardson Amendment which requires policies and procedures to ensure that no reduction in the number or dollar value of contracts awarded under 8(a) of the Small Business Act or under the small business set-aside program pursuant to 15(a) of the Small Business Act in order to meet the goal of Section 1207 of the Department of Defense Authorization Act, 1987.

B. The Bridge Group feels that DoD should not rely on the 8(d) definition under the Small Business Act to determine eligible participants for this program. Only 2.3 percent of the eligible participants (small and disadvantaged) are in actuality utilizing this program. The vast majority of 8(a) firms who are eligible for the Five Percent Program do not possess the necessary capability or technical experience to perform the contracts provided under this Act.

Secondly, the 8(a) and the section 1207 programs have an entirely different orientation. The program under 8(a) of the Small Business Act has the purpose of development for small and disadvantaged firms, whereas, section 1207 of P.L. 99-661 has

the intent and purpose of procurement. Therefore, it is obvious that because they are not sufficiently developed, a substantial number of 8(a) firms would be unable to implement the contracts of the magnitude provided under section 1207.

In order to effectuate the five percent goal, it is necessary to increase the size standards imposed by the 8(d) definition of the Small Business Act. As the program currently exists, the five percent goal will never be realized because the minority firms, who can perform the contracts, have graduated from the 8(a) program and although disadvantaged are ineligible under certain sic codes. These firms, if allowed to participate, have the technical capability, experience and track records to realize the mandated five percent goal. Secondly, during the act of participation, these graduated firms would be in a better position to give technical assistance and subcontracting opportunities to the 8(a) firms unable to compete due to a lack of the above.

Therefore, the Bridge Group advocates new legislation defining eligible participants under section 1207 of P.L. 99-661. Section 8(d) of the Small Business Act was enacted by Congress for a totally different reason than the program under section 1207. If Congressional intent and purpose for these programs are different, then the eligibility requirements need to reflect these differences. Under section 8(d) "small and disadvantaged" is the criteria. Bridge proposes that in the new legislation "small or disadvantaged" needs to be the basis for determining participants.

C. The DoD interim rule does not adequately address the degree of subcontracting which the small and disadvantaged business will be permitted to pursue under the small and disadvantaged business set-aside procurement program. Bridge Supports Section 812 (b) (2) (A) and (B) of the Richardson Amendment and any policy or procedure which requires the contracting officer to set goals which DoD prime contractors should meet in awarding subcontracts to section 1207(a) entities, with a minimum goal of five percent for each contractor who is required to submit a subcontracting plan under 15 U.S.C. section 637(d) (4) (B) and incentives for such prime contractors to increase subcontractor awards to Section 1207(a) entities.

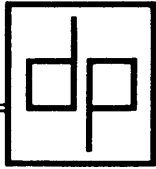
Secondly, the Bridge Group proposes that before a substantial contract is awarded to a prime, the contract should be reviewed by the Small Business Administration or the Small and Disadvantaged Business Utilization Program to determine the buying and cost activities of the contract. Once this is ascertained, break off from the contract these subsystems or subcontracting portions. Allocate this area to the capable 8(a) or 1207(a) entity. Once the prime acquires the contract, send the prime the subsystems and subcontractors, thereby avoiding the necessity of having the primes select the subcontractors thus creating a more equitable system. During this process the Small Business Administration and/or Small and Disadvantaged Business Utilization program should act as the monitoring and negotiating body between the prime and subcontractor.

D. We are aware that the Small and Disadvantaged Business Utilization

rogram at the Pentagon has the authority and flexibility to negotiate  
sole source contract under section 1207 when a 1207(a) entity has  
a unique service and the "Rule of Two" does not apply. We recommend  
that this office execute this authority in providing policy which  
allow sole source negotiation under section 1207 under these  
circumstances.

#### CONCLUSION

The Bridge Group wholeheartedly supports the Richardson  
amendment and urges DoD and relevant agencies to do so as well.  
Secondly, it is necessary to increase the size standards under  
section 1207 in order to effectuate the legislatively mandated  
reduction of five percent. Therefore, it is requested that new  
legislation be enacted to ensure that the intent and purpose  
of Congress is fully realized.



# DESIGNERS & PLANNERS, INC.

NAVAL ARCHITECTS

MARINE ENGINEERS

2011 Crystal Drive

Arlington, VA 22202

(703) 892-8200

**FERIDUN K. SERIM**  
President

July 29, 1987

Defense Acquisition Regulatory Council  
Mr. Charles W. Lloyd, Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
Pentagon, Washington, DC 20301-3082

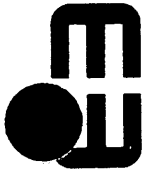
**Subject:** DAR Case 87-33, Interim Rule to Implement Section 1207 of National Defense Authorization Act; Submittal of Comments

Gentlemen:

As a small business performing technical and management support services for the U.S. Navy, we wish to submit the following comments on subject proposed interim rules:

1. We fully support the basic intent of Section 1207 and the desire of Congress to support Small Disadvantaged Businesses (SDB's).
2. However, the implementation of the rules by the U.S. Navy (NAVSEA), our primary customer, appears to be moving in the direction of meeting the 5% goal by redesignating contracts for SDB's only from those contracts previously set aside for small, technical service, businesses.
3. The continued implementation of such SDB set-aside policy could have a major deleterious effect on the existing small technical service business community which has been encouraged under present SBA policies. This policy has a set-aside target of about 20% of the U.S. Navy service business for all small businesses.
4. We believe in the spirit of fairness, that the 5% SDB goal should be shared by both large and small business. We would certainly support and urge you to adopt a system which diverts a maximum of 5% of the business normally set aside for small business to SDB's, i.e., 5% of our 20%; while at the same time requiring the large businesses to do likewise; i.e., 5% of their 80%. In this regard we note that NAVSEA has not yet achieved it's goal of 20% set aside for small business.





E. H. WHITE & CO.

July 28, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I would like to make a few comments and concerns regarding an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Sec. 1207 of the National Defense Authorization Act (P.L.99-661).

Although the 5% goal and the "Rule of Two" are spelled out, there seems to be no clear mandate for mandatory subcontracting, which would appear to be an Excellent way to help achieve the intended goals.

From my experience over the past seventeen years as a Small Minority owned business, I have on more than one occasion found contracts that should fall under the subcontracting provisions of P.L.95-507, but have been given every reason in the book, as to why it was not considered.

Subcontracting with a major contractor is good business for the Minority Community as a whole with its opportunities for training, skill development, and jobs, and it is also good for for the country. Many Black Vietnam area Veterans are available for jobs, have been trained and are now retiring who can't use their skills, this would open-up great opportunities both for them and recent college graduates among others.

Additionally, I would suggest that a SDB office be established within DOD (similar to the Minority Business Development Center in the Department of Transportation), which could provide assistance, search and location of SDB's capable of providing goods and services to DOD and notification of upcoming set asides for competition.

245 Clement Street  
San Francisco  
California 94118  
5/668-0076

1776 K Street, N.W.  
Suite 209  
Washington, D.C. 20006  
202/659-4911

I am provoked to request consideration of such a coordinated effort by the recent RFP for consultant services for 15 one day seminars to locate, provide T&TA and follow-up to potential SDB contractors, in 15 cities across the U.S. I thought the RFP was quite nearsighted to even think that a one day seminar could make anyone aware of the process of bidding on a Defense Contract who may not know about various MIL STD's, DFAR's, various qualification that are different from any other contracting process, and other details that are uniquely DOD.

As a Management Auditor who provided these services to 8(a) firms to help them bid on various State contracts, and Federal Railroad contracts, I can assure you that one day seminars would not be enough time for the extremely gifted, successful SDB.

In closing, I would urge the Defense Department to make subcontracting an integral part of this legislation and that consideration be given to creating DOD-SDB technical assistance offices in each region to keep SDB's aware of opportunities and provide guidance.

Sincerely,



Earl H. White  
President

EHW/pb

cc: Congressman R.Dellums  
Congressman J. Conyers, Jr.

# **PARK SUPPLY CO.**

**Distributors of Computer Supplies  
4417 18th AVE. SUITE 332  
BROOKLYN, N.Y. 11204  
718- 854-2530**

July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODAS (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectfully object to the exclusion of Hasidic Jews from the designated list of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.0 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. # 637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce

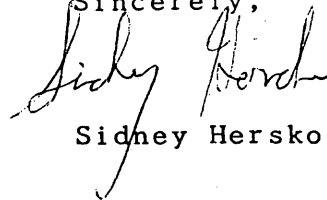
July 13, 1987

(most recently confirmed on October 24, 1984) that Hasidic Jews constitute a socially disadvantaged group individuals.

In the absence of express recognition of Hasidic eligibility in Part 219.001, I must respectfully object to the protest procedures set forth in proposed Part 219.302. These procedures are an open invitation to obstructionist opposition to contracting opportunities by disadvantaged individuals who are not members of a designated group. Under the proposed procedures, designated group members are entitled to a presumption of eligibility but other individuals are not. Under these circumstances, individuals who are not members of designated groups are likely to be the most frequent targets of the protest procedures under Part 219.302.

Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,



Sidney Hersko



INTERNATIONAL LOGISTICS • MANAGEMENT • SERVICES • PROCUREMENT  
5203 LEESBURG PIKE, SUITE 501, FALLS CHURCH, VA 22041 (703) 845-8441

July 31, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary  
QDASD (P) DARS  
c/o OASD (P&4) (Md RS) Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Reference: DAR Case 87-33

The above referenced case concerning the Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Pub. L. 99-661; Set-Asides for Small Disadvantaged Business Concerns, appear to me to be in direct contravention with the following statement:

"219.801 General. The Department of Defense to the greatest extent possible, will award contracts to the SBA under the Authority of section 8(a) of the Small Business Act and will actively identify requirements to support the business plan of 8(a) concerns."

The 8(a) Program has been administered primarily by the Small Business Administration through use of the Small and Disadvantage Business Utilization Specialist (SADBUS) at each Agency. The SADBUS office is by design separate from the Contracting/Procurement Office. This appears to work well since under the contract 8(a) program an independent advocate is suppose to be actually seeking contracting opportunities for small disadvantaged companies.

From information published, it appears that should DOD implement Section 1207 of Pub. L. 99-661, the resulting effect will be to ultimately destroy the 8(a) Programs instead of rectifying the ills associated with the Program. It appears that the Small Business Administration (SBA) and Small Businesses as well as Small and Disadvantaged Businesses will be much worse off under the planned program then they have ever been.

The Self-Certification rule relating to SDB's with the Small Business Administration getting involved only after a protest has been received or only to record that a contract was awarded leaves much latitude for corruption, i.e., "Front Organizations". The SDB contract program designed to help minorities will therefore result in being a detriment to minorities.

In the final analysis there is no doubt that SDB's will reap some benefit but it will be at the expense of the 8(a) programs.

Request the SDB program be reviewed and analyzed to determine the extent of damage the program as planned could cause to SBA and to the current program which is designed to aid small disadvantaged business. The SDB program should be designed to allow more small disadvantaged businesses to take advantage of DOD contacts without harming the current 8(a) Program.

Respectfully,



JOHN BROWN, JR  
President

Copy to:  
Honorable Stan Parris



**LAS ENERGY CORPORATION**

P.O. Box "V"  
82 Nassau Road  
Roosevelt, N.Y. 11575-0520

(516) 378-1633  
Telex No. 645577

July 31, 1987

Mr. Charles W. Lloyd  
Executive Secretary ODASD (P) DARS  
C/O OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Department of Defense Federal Acquisition  
Regulation Supplements  
Implementation of Section 1207 of Public Law 99-661  
Set-aside for Small Disadvantaged Business Concerns

Dear Sir:

I am the principle owner of a small minority oil concern located under the jurisdiction of the Small Business Administration (SBA) Region 2 (New York) office. We are also certified by the S.B.A. as an 8 (a) firm.

The comments that follow are, 1) in direct response to the Public Law as published in the Federal Register on Monday May 4, 1987 and 2) based on my understanding of adjustments being considered to P.L.99-661.

1) 252.219-7006 Paragraph (C) (P.16267)

Agreement. A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract only end items manufactured or produced by small disadvantaged business concerns in the United States...

Comments

As indicated above, LAS Energy is a marketing/distributor of oil (petroleum) products. The above requirement stipulates that the source of our products must come from a small disadvantaged business concern that has the capacity to manufacturer (refine).

To the best of my knowledge, there are only two such facilities active in the United States, one in Texas and the other in Oklahoma. Neither one is suitable as a source of supply to any area, other than their immediate vicinity, and are therefore of no help to anyone but themselves.

In addition, in a limited minority bidding process, that the P.L.99-661 endeavors to create, since the only available SDB sources of supply covers a market around each of the available points of manufacture (refinery), a market that these manufacturers (refiners) already serve, it will be most unlikely that they will want to offer supply economics at a level to allow an SDB competitor to take business from them, and probably more likely decline to offer other SDB's any supplies at all.

A possible consideration may be the use of small (not necessarily SDB) manufacturers as is currently defined and used by the Small Business Administration. Regretfully, the availability of this type of supply source is very, very similar to the SDB sources mentioned above. The SBA and D.F.S.C. are finding that the utilization of small manufacturers (refiners) have decidedly curtailed 8 (a) oil firms participating in the 8 (a) program as the existence of these viable manufacturers (refiners) have been scarce over the last 5 to 7 years.

I believe that the emphasis of P.L.99-661 should be to offer SDB oil firms the ability to compete in an equal and evenhanded manner with those companies that establishes the prices (Fair Market Prices or prices that the government will otherwise pay for product). To achieve this it is necessary to have SDB oil firms permitted to avail themselves of product and product economics from the general market that does not penalize the smaller SDB firm.

2) 206.203-70 Set-asides for small disadvantaged business concerns (P.16264).

To fulfill the objective of section 1207 off P.L.99-661, contracting officers may, for Fiscal Years 1987, 1988 and 1989...

#### Comments

As of this date, I believe that D.F.S.C. who has been the principle agency for petroleum products procurement for the United States Government does not have in place any procedures for handling any acquisition against P.L. 99-661, and as a consequence have not placed any contracts, this despite the passing of the first Fiscal Year of the program.



I would recommend that to provide SDB's an opportunity to gain benefit from this program, an extension of at least one year be considered.

3) My understanding that P.L.99-661 is enforceable to procurement made by the prime contractors to D.O.D.

Comment

The current position of the prime contractors that I have been in contact with is that this Public Law does not relate and/or is enforceable upon them. If it is the intent to have it binding on the primes, I believe that it is necessary that this be clearly stated in the Public Law to avoid anyone minimizing their responsibilities.

4) My understanding that size standards are to be used in categorizing eligible companies.

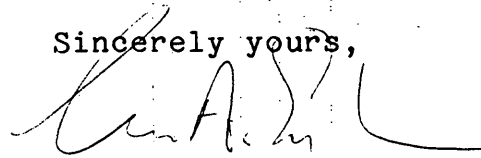
Comments

The petroleum business is a dollar intensive industry and while sales may be an impressive figure, the gross income is typically less impressive, usually representing no more than a 1 to 3 percent contribution to the (gross) bottom line. That is, if we sold \$10,000,000 worth of products, our gross income would be somewhere between \$100,000 and \$300,000. If you are selling product destined to the United States government, because your price is set for you under the 8 (a) program and to some degree P.L. 99-661 (when implemented) you can be reassured that most companies will fall into the lower gross income category.

The above therefore endeavors to point out that gauging oil companies eligibility to participate in the program based on total sales, should either be set at the appropriate level, not \$500,000 or \$1,000,000 sales levels, or not be used at all.

The above represents our comments as an oil concern, which are presented in an effect to contribute to a Public Law that equally reaches all entities that it is intended to reach.

Sincerely yours,



Leo A. Sullivan  
President

LAS/lis

GOVERNMENT CONTRACTING FOR ALL  
7150 South Reed Court  
Littleton, Colorado 80123  
303/973-6926

July 30, 1987

Mr. Charles W. Lloyd  
Executive Secretary  
Defense Acquisition Regulatory Council  
GDASD (D) DARS  
c/o OASD (P&L) (M&RS)  
Room 3 C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Government Contracting for All, an organization comprised of small and medium sized government construction contractors and suppliers, vigorously opposes the proposed interim regulations under Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661.

We strongly believe the proposed regulations spell disaster for all small and medium sized contractors and suppliers, including the small disadvantaged businesses they are intended to help. In Colorado we are already feeling the adverse effects of these regulations: the Department of the Air Force has already interpreted the proposed regulations to require that all Air Force construction projects until the end of 1990 be set asides for small disadvantaged businesses.

These proposed regulations are destructive to the construction industry in Colorado, and, contrary as well, to the concerns articulated by President Reagan when he signed Pub. L. 99-661 into law, that is, his concern that Section 1207 be implemented in a manner consistent with constitutional standards requiring findings of actual discrimination in the granting of defense contracts. If the Federal contracting and procurement process is to serve the needs of the people of this country that process must be open, fair to all, and stable. The proposed regulations fail on all counts.

I hope this commentary is helpful and I urge the Council not to make the proposed regulations permanent.

Very truly yours,

*Fred Erlandson*  
*by / Bruce Miller*

Fred Erlandson  
Executive Director

DUNN & SONS  
320 Park Avenue  
Plainfield, NJ 07060  
July 30, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, DC 20301-3062

Re: National Defense  
Authorization Act

Dear Mr. Lloyd:

It is with great concern and interest that I am stating my views on the interim regulations developed for P.L. 99-661, the National Defense Authorization Act.

The 5% setaside goal of this act is the most recent part of a very important and continuing commitment by the Federal government to assist minority businesses. It is because of the previous laws similar to this one that have enabled minority businesses to thrive and become an essential part of the American economy. To that end, the importance of fair and equitable regulations for the full inclusion of minority businesses in America's largest budgeted agency is long overdue.

In addition to the positive provisions of this law there are, unfortunately, several provisions that were omitted and need to be included. They are as follows:

1. Provisions for subcontracting;
2. Provisions for advance payments available to minority businesses;
3. Provisions for partial setasides; and
4. Provisions for participation of either historically Black colleges and universities or minority institutions.

As a successful minority businessman, who is also a contractor to the Department of Defense, I am very hopeful that

Mr. Charles W. Lloyd  
Page two

these additional and essential provisions can be incorporated into the final regulations.

Sincerely,

DUNN & SONS

*Malcolm R. Dunn*

Malcolm R. Dunn  
President

87-33

Sanford E. Harper  
President

Neva Dunn  
Vice President

Deila M. Billingslea  
Second Vice President



LeRoy Green  
Third Vice President

Burt Schildhouse  
Treasurer

Margaret Willis  
Secretary

## COLUMBUS METROPOLITAN AREA COMMUNITY ACTION ORGANIZATION

Curtis A. Brooks  
Executive Director

July 29, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
%: O A S-D, Room 3C 841  
The Pentagon  
Washington, D. C. 20301

Dear Mr. Lloyd:

As the Executive Director of an urban Community Action Agency and a advocate for increased minority economic development - I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

As you know, subcontracts give minority businesses a chance to participate in Defense Contracts that would otherwise be beyond their capacity and, it enables them to enter into agreements with prime contractors that currently ignore their potential. Thus, **subcontracting is a necessary vehicle in the development of minority businesses which ultimately fulfills America's defense needs.**

In this regard, I, along with my colleagues in Community Action Programs across the country, **urge the Defense Department to make subcontracting an integral part of the awards and procurement process.**

Sincerely,

Curtis A. Brooks  
Executive Director

January 8, 1987

7700-87-1398

Commander  
 Naval Air Systems Command Headquarters  
 Department of the Navy  
 Washington, D.C. 20361-2160  
 Attn: Mr. Mike Logan  
 ATF-21512K

Dear Commander:

This is in response to your letter dated December 15, 1986. Pursuant to Section 8(a) of the Small Business Act [15 USC 637(a)], and in accordance with FAR 19.8, the Small Business Administration desires to enter into a contract with the Department of the Navy for Support Equipment Acquisition Management Analysis and Training Services. The estimated value of this procurement is

This request is in support of the approved business plan submitted by Computer Systems Development Corporation, 3700 Bender Drive, Suite 106, Fairfax, VA 22030. You are requested to conduct negotiations with the above company and transmit a memorandum of these negotiations to NEI/COO (Contract Section) Ms. Carolyn N. Harper, 634-6174.

This memorandum should be signed, dated and state that the price is fair and reasonable to the Government. It should also include all relevant pricing data including a separate price analysis, when applicable. In addition, please submit the following:

1. A copy of your offering letter,
2. A copy of the SEA acquisition letter,
3. Technical evaluation rationale of eligible 8(a) concern,
4. Your agency's technical and cost proposal from the 8(a) concern,
5. Your agency's affirmative legal review, and
6. Six manually signed copies of the prime contract (Form 26, Contract Award) and six copies of the sub-contract.
7. Summary/Memorandum of Negotiations
8. Certs & Reqs
9. 8(a) general Provisions

Contract conditions should conform to (FAR 19.8).

February 27, 1987

7700-87-1717

Commander Naval Air  
Systems Command Headquarters  
Department of the Navy  
Washington, D.C. 20361-2160  
Attn: Ms. Linda Neilson, AIF-21627

Dear Commander:

This is in response to your letter dated February 18, 1987. Pursuant to Section 8(a) of the Small Business Act [15 USC 637(a)], and in accordance with FAR 19.8, the Small Business Administration desires to enter into a contract with the Department of the Navy for Support Equipment Acquisition Management Analysis and Training Course. The estimated value of this procurement is ~~\_\_\_\_\_~~.

This request is in support of the approved business plan submitted by Computer Systems Development Corporation, 3700 Pender Drive, Suite 106, Fairfax VA 22030. You are requested to conduct negotiations with the above company and transmit a memorandum of these negotiations to MSB/COD (Contract Section) Ms. Carolyn N. Harper, 634-6174.

This memorandum should be signed, dated and state that the price is fair and reasonable to the Government. It should also include all relevant pricing data including a separate price analysis, when applicable. In addition, please submit the following:

1. A copy of your offering letter, ✓
2. A copy of the SPA acquisition letter, ✓
3. Technical evaluation rationale of eligible 8(a) concern,
4. Your agency's technical and cost proposal from the 8(a) concern,
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Contract conditions should conform to (FAR 19.8).



DEPARTMENT OF THE NAVY  
 NAVAL AIR SYSTEMS COMMAND  
 NAVAL AIR SYSTEMS COMMAND HEADQUARTERS  
 WASHINGTON, DC 20361

IN REPLY REFER TO  
 4380  
 AIR-00E

JUL 16 1987

MEMORANDUM FOR THE DIRECTOR, SMALL AND DISADVANTAGED BUSINESS  
 UTILIZATION

Subj: SBA REQUEST FOR 3(A) RESERVATION FOR ATC (AIR-555)  
 ENGINEERING AND MANAGEMENT SUPPORT

Ref: (a) ASN memo dtd 13 June 1987

1. In response to reference (a) it has been decided by the cognizant technical personnel to issue a procurement request covering 13 man-years of the subject requirement. The procurement will be set-aside for SDB.

2. As you know, both Computer Systems Development Corporation and Operating Scientist Incorporated (OSI) have expressed an interest in the subject requirement. OSI has given a technical brief to APC 213. In an effort to further assess their technical capabilities they have been asked to respond to a sample tasks which was forwarded to them on 19 June 1987. Therefore, it appears that adequate competition from the SDB community can be expected.

*S. A. Clegg*

S. A. CLEGG  
 Director, Small Business Office

✓  
 7/20/87





**Eastern Poly Packaging Co., Inc.**

*Manufacturers and Designers of  
Unique Packaging Materials*

*Larry Weiss*  
PRESIDENT

701-64TH STREET  
BROOKLYN, NY 11220  
(718) 680-6700

July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 Fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectively object to the exclusion of Hasidic Jews from the designated lists of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.1 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. #637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce


July 13, 1987

(most recently confirmed on October 24, 1984) that Hasidic Jews constitute a socially disadvantaged group individuals.

In the absence of express recognition of Hasidic eligibility in Part 219.001, I must respectfully object to the protest procedures set forth in proposed Part 219.302. These procedures are an open invitation to obstructionist opposition to contracting opportunities by disadvantaged individuals who are not members of a designated group. Under the proposed procedures, designated group members are entitled to a presumption of eligibility but other individuals are not. Under these circumstances, individuals who are not members of designated groups are likely to be the most frequent targets of the protest procedures under Part 219.302.

Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,

  
Larry Weiss

# B. BERKO

2 PRINCE STREET  
BROOKLYN, N. Y. 11201

July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

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Sincerely,



Mrs. Rachel Berko

DC PLASTICS  
70 Hobart Avenue  
Bayonne, N.J. 07002

July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

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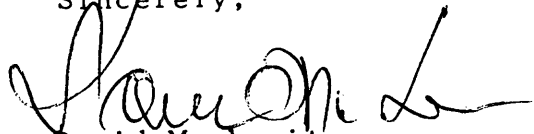
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Sincerely,



David Moskowitz



# Rex Bedding Sleep Products, Inc.

1355 WEST FRONT STREET, PLAINFIELD, N.J. 07063

(201) 668-0220

July 13, 1987

Defense Acquisition Regulatory Council  
Att; Mr. Charles W. Lloyd  
Executive Secretary  
ODASK (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

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Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,



Jack Kahan





July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 Fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectively object to the exclusion of Hasidic Jews from the designated lists of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.1 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. #637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce

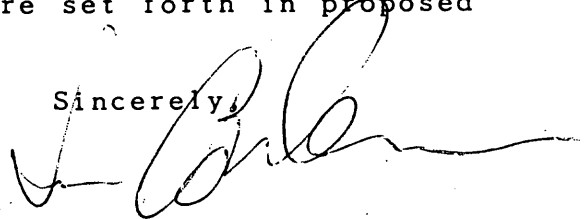
July 13, 1987

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Sincerely,



Solomon Birnbaum

Clarke

**RELIABLE RIBBONS, INC.**

350 Coney Island Avenue  
BROOKLYN, NEW YORK 11218

July 13, 1987

Defense Acquisition Regulatory Council  
Att; Mr. Charles W. Lloyd  
Executive Secretary  
ODASK (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

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July 13, 1987

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Sincerely,

  
Rubin Mayer

F.E. Williams Jr.  
P.O. Box 94494  
Oklahoma City, OK 73143

July 16, 1987

Subject: Economy/DOD Stability

TO: DAR COUNCIL  
ODASD (P) / DARS  
c/o OASD (A&L) (M & RS)  
Room 3C 841 The Pentagon  
Washington, D.C. 20301-3062

To Council,

The purpose of this Communique' is to present a letter that I forwarded to Senator Nickles of Oklahoma.

The Federal Acquisition Regulation specifically allows foreign petroleum procurement for Dept. of Defense use. The recurring theme and undergirding policy of the Federal Acquisition system is however, to stimulate economic growth through competition and other Government incentives whose long term effect is enhancement of the United States economic and Dept. of Defense posture.

As mentioned in attached letters the initial cost of crude under this proposed program may appear higher than those paid under current arrangements (Procurement procedures). A thorough analysis of the bottom line effects from especially a balance of trade perspective will prove this proposal less costly.

A significant percentage of the monies spent under present procurement procedures are drained from U.S. circulation. The analysis of this fact is capital loss- less capability to sustain future growth. The actual dollar percentage drain is the percentage of crude oil imported to total.

FACT: Each direct job generates and or stimulates at least two (2) associated and support jobs, this fact is especially true in an industry as major as the oil industry. The reverse is also true.

Dependence equals vulnerability. This fact has especially pronounced significance in the Dept. of Defense arena. The embargo of the early 1970's is a significant enough experience, alone to motivate initiations of provisioning wherein the whims, disjunct motivations, and stability of supplier countries are eliminated. The destabilizing effects of the 1970's embargo were extremely apparent, long gas lines, trucker violence, etc... all of which resulted in negative economic manifestations whose effects are still being felt.

The present escalation of dependence is itself a result of that destabilizing event, it is imperative that steps at this point be made to introduce as many stabilization factors possible.

The current oil problem is not as overt as that of the early 1970's yet the wake of economic devastation is more severe.

Above 50% of oil is imported, this fact translates into foreign supplier country control on the remainder of U.S. oil production.

U.S. oil prices have risen in direct parallel to OPEC. The whims of OPEC resulted in a recent steady decline in oil prices where U.S. oil producers operating frame work/progressive style prevented effective competition. Result: Huge lay-offs in the domestic oil industry and ripple effects in other industries too numerous to list, all of which continues to result in compound repercussion on the U.S. balance of trade and tax base.

The functional relationship of a monopoly and majority oil imports is easily corollated. A monopoly in the production of something as insignificant to National Defense/Economic stability as a thumb tack is tolerable, but when there is a probability of monopolistic cause and effect type relationships in an item critical to the heart of U.S. functioning as crude oil and telephone communications then independent and fail-safe provisioning must be implemented.

A monopolistic environment is specifically detested by the FAR and is abhorred in broader terms by the U.S. Constitution. If the U.S. Government determines that it is in her best interest to break-up a domestic monopoly whose profitability is tied directly to the U.S.'s profitability then it logically follows that any probable situation of external (foreign) control must be eliminated.

Irregardless of the high percentage of present oil imported or the time lapse since U.S. oil self-sufficiency, the goal should remain 100% self-sufficiency. Initiatives such as presented in this communique' in conjunction to overall higher proficiencies are positive steps in regaining control toward self-sufficiency.

*Fred E. Williams Jr.*  
Fred E. Williams Jr.  
(Contract Negotiator  
Tinker AFB, OK)

Fred E. Williams Jr.  
P.O. Box 94494  
Okla. City, Oklahoma 73143

Subject: Economy/DOD Stability

Honorable Don Nickles  
United States Senate  
Washington, D.C. 20510

Dear Senator Nickles

Attached is an observation and analysis that if further  
scrutinized and applied should provide a stimulus to Oklahoma's  
Economy and strengthen the National Defense posture.

Sincerely,

Fred E. Williams Jr.  
Contract Negotiator  
Tinker A.F.B., Ok.

At present a significant percentage of all crude oil based products sold in the U.S. have foreign origin, that also includes the crude oil based requirements that are subsequently sold to Dept. of Defense, that translates into U.S. D.O.D. operations dependance on the stability and motivations of a second country.

Therefore a provision should be developed where in all U.S. D.O.D. crude oil based requirements are purchased directly from select domestic suppliers. A separate contract would then be let to refine the crude into the desired grades/products.

This is a protection provision which will provide a secure source thereby eliminating all vulnerability in the oil-energy area. Crude oil based products are too important to National Security to allow any negative procurement factors.

The vulnerability experienced in the U.S. National Defense posture as a result of the oil embargo of the mid 1970's is more than enough rational to establish a secure source.

Just as there are protection provisions, such that U.S. directed buys for other unique items necessary to National Defense. Those same kind of protection provisions can be made for crude. The protection provisions applicable to labor surplus areas also have a degree of applicability.

The select U.S. sources preferably in the Texas-Oklahoma oil producing areas would also be required to purchase directly or invest in U.S. controlled off shore explorations for new sources. (The future realization of new sources will reduce procurement cost even further)

There is a legitimate probability that a long term commitment by the U.S. Government to said select producers is incentive to foster a sale price wherein the refined product price is competitive with the current market.

Even if the initial price paid for U.S. crude dollar per dollar is higher than that paid for foreign oil, the ultimate cost to the U.S. Government will be lower relative to balance of trade, direct employment by Americans and the stimulus of a broad spectrum of associated and support businesses.



The U.S. Air Transportation industry is a conglomerate that has also experienced serious operational impingements due to erratic fluctuations in oil prices and after being aware of this kind of program are likely to develop their own domestic sources to reach stability objectives similar to those proposed for Department of Defense operations.

Again, even though there is relative stability in obtaining crude from foreign supplies a progressive/wise concern will at the very minimum take steps to prevent that reoccurrence and all other foreseeable problems that can be linked to that major problem.

# NEW JERSEY ADHESIVES, INC.

*Manufacturers of*

ADHESIVES FOR ALL PURPOSES

181 CENTRAL AVENUE • PASSAIC, N.J. 07055

TELEPHONE (201) 777-8129

July 23, 1987

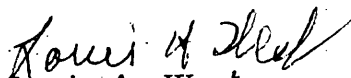
Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D. C. 20301

Dear Mr. Lloyd

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

With the high percentage of minorities who are serving in the military, it would seem that minority businesspersons, many whom like myself are veterans, should be given an opportunity to share more in defense contracts. When I am invited to speak to black youths, I find it hard to answer their questions about the fairness and intentions of our government concerning blacks. Many of these youths go on and enlist in the military.

Sincerely

  
Louis A. West  
President

LAW/lw

CHEMICAL  
AND  
RELATED  
LIFE  
TECHNOLOGIES

CORPORATE OFFICES:  
CARLTECH ASSOCIATES, INC.  
OVERLOOK CENTER • SUITE 301  
5457 TWIN KNOLLS ROAD  
COLUMBIA, MARYLAND 21045  
(301) 997-5155

July 24, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

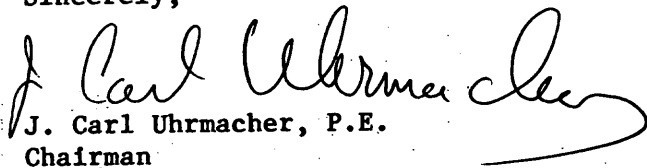
Dear Mr. Lloyd:

As a mobility-impaired businessperson, I am concerned about the Department of Defense interim regulations to implement PL 99-661, dated 4 May 1987. I believe that these regulations ignore potential benefits that small, disadvantaged businesses can receive from an increase in subcontract awards.

Subcontracts give small, disadvantaged businesses a chance to participate in major Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors who currently ignore our potential. Thus, subcontracting is a good way to develop small, disadvantaged businesses while fulfilling America's defense needs.

I urge the Defense Department to include subcontracting as an integral part of the awards and procurement process.

Sincerely,

  
J. Carl Uhrmacher, P.E.  
Chairman

The Greater Cleveland  
**REGIONAL TRANSIT AUTHORITY**  
615 Superior Avenue, N.W.  
Cleveland, Ohio 44113  
Phone (216) 566-5100



July 24, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D. C. 20301-3062

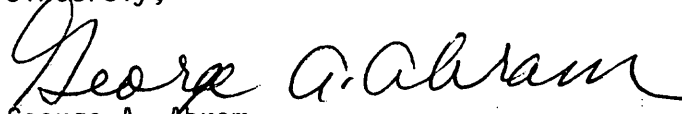
Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for sub-contracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation. If you are going to do it, you've got to do it right.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

  
George A. Abram  
Affirmative Action Administrator

GAA:wma



INTEGRATED  
FIELD OF  
ENGINEERING  
SERVICES  
AND  
TRAINING  
INC.

8027 LEESBURG PIKE, SUITE 414  
VIENNA, VIRGINIA 22180 (703) 821-9150

31 July 1987

Defense Regulatory Acquisition Council  
Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASC (P&L) (M&RS), Room 3C841  
The Pentagon  
Washington, DC 20301-3062

Reference: DAR Case 87-33

Dear Mr. Lloyd:

May I express my appreciation and support for the regulations developed by the Department of Defense to reach the 5% minority contracting goal. I do feel that a proposal rule should be developed, that in all contracts where price is a primary decision factor, a 10% preference differential be established for small disadvantaged businesses. As agreed, during a recent discussion with one of the staff involved in drawing up the regulations, in general it is a good start in the right direction and a good base from which to start the implementation of the program. There are a few important points that have been left out, I am sure by accident, but they must be considered and included. They are:

- Participation of Black Colleges, Universities and other minority institutions must be included
- Do not prohibit the partial set-asides that contribute to small disadvantaged participation at DOD
- There are no provisions for subcontracting
- How will advanced payment be made available to small disadvantaged contractors pursuing part of the 5%?
- The interim "rule of two" will discourage any small disadvantaged business thinker from offering innovative, new ideas to a potential sponsor. The contracting officer may withdraw it from the set-aside and put it in open competition.

**Automated  
Datatron  
Incorporated**

4318 Gallatin Street  
Hyattsville, Maryland 20781  
Telephone: 301-277-9575



July 29, 1987

Mr. Charles W. Lloyd, Exec. Secretary  
Defense Acquisition Regulation Council  
Department of Defense, ODASD (P) DARS  
c/o OASD (P&L) (M&RS), RM. 3C841  
The Pentagon, Washington, D.C. 20301-3062

Re: Public Law 99-661, Case 87-33

Dear Mr. Lloyd:

It will be a major task for the Department of Defense to achieve a goal of awarding five percent (5%) of contract dollars to Small Disadvantaged Businesses during fiscal years 1987 through 1989. Fiscal year 1987 is almost over.

Automated Datatron, Inc. (ADI) submits the following comments and recommendations to assist in formulating the final rule. Our position is that a minority set aside program is appropriate. If a contracting officer or requirements person determines that a particular SDB can fully satisfy the department's requirements, the contracting officer should have the authority to go directly with that small disadvantaged business.

The interim rule currently gives the contracting officer the authority to set aside acquisitions when the officer determines that two or more SDBs can be solicited. This interim rule, however, does not consider minority entrepreneurs who may, in fact, be one of a kind. In such instances, the contracting officer and the department's SDB specialist should have the authority to waive the rule of two.

The Standard Industrial Classification (SIC) Code, in its present structure, will inhibit DOD from achieving its ultimate five percent contracting objective. SIC Codes control all aspects of the contracting authority; thereby determining size, dollar amounts, and who can and can not solicit certain contracts. The SIC Codes should not be applicable in this program.

Sincerely,



Charles E. Marks  
President

31 July 1987

Mr. Charles Lloyd, Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, DC 20301-3062

Ref: DAR Care 87-33

Dear Sir:

As a small non-disadvantaged business owner, I am deeply disturbed over DoD's, particularly the Navy's interpretation of Section 1207 of the DoD Authorization Act (PL-99-661), wherein to implement the 5% Small Disadvantaged Business (SDB) goal, small business set asides (SBSA) are being changed to SDB set-asides, thereby shutting out incumbent small businesses from bidding as prime.

This is a dangerous precedent since it further erodes the country's small business base in terms of both technical and managerial talent as well as its financial capabilities. As it is, with the delays in the award process; the combining of solicitations; the delays in payments from the Government and primes; the extensive use (and abuse) of sole-source 8(a) contracts; and other related Government actions, the small technically-oriented businesses are hurting badly.

A more practical solution, and one Congress is apparently trying to direct DoD toward (see Para b(7), Section 846 of the proposed DoD Authorization Act for FY88, attached), is to obtain the funds for the SDB program from large business' slice of the pie, and leave the 20% SBSA amount intact. One way is by requiring all unrestricted RFP's to set-aside 5% for SDB support. Another is to take a large unrestricted RFP and break out one or more small SDB set-asides. I'm sure there are other ways which will protect current SBSA's.

SECTION 846 OF THE PROPOSED NATIONAL DEFENSE  
AUTHORIZATION ACT FOR FISCAL YEAR 1988



1 (b) EFFECTIVE DATE.—Section 2324(e)(1)(K) of title  
2 10, United States Code, as added by subsection (a), shall  
3 apply to any contract entered into on or after October 1,  
4 1987.

5 SEC. 846. REQUIREMENT FOR SUBSTANTIAL PROGRESS ON MI-  
6 NORITY AND SMALL BUSINESS CONTRACT  
7 AWARDS.

8 (a) REQUIREMENT FOR SUBSTANTIAL PROGRESS.—  
9 The Secretary of Defense shall ensure that substantial  
10 progress is made in increasing awards of Department of De-  
11 fense contracts to section 1207(a) entities.

12 (b) REGULATIONS.—The Secretary shall carry out the  
13 requirement of subsection (a) through the issuance of regula-  
14 tions which do the following:

15 (1) Provide guidance to contracting officers for  
16 making advance payments under section 2307 of title  
17 10, United States Code, to section 1207(a) entities.

18 (2) Establish procedures or guidance for contract-  
19 ing officers to—

20 (A) set goals which Department of Defense  
21 prime contractors should meet in awarding sub-  
22 contracts, including subcontracts to minority-  
23 owned media, to section 1207(a) entities, with a  
24 minimum goal of 5 percent for each contractor  
25 which is required to submit a subcontracting plan

1 under section 8(d)(4)(B) of the Small Business Act  
2 (15 U.S.C. 637(d)(4)(B)); and

3 (B) provide incentives for such prime con-  
4 tractors to increase subcontractor awards to sec-  
5 tion 1207(a) entities.

6 (3) Require contracting officers to emphasize  
7 awards to section 1207(a) entities in all industry cate-  
8 gories, including those categories in which section  
9 1207(a) entities have not traditionally dominated.

10 (4) Provide guidance to Department of Defense  
11 personnel on the relationship among the following  
12 programs:

13 (A) The program implementing section 1207  
14 of the Department of Defense Authorization Act,  
15 1987 (Public Law 99-661; 100 Stat. 3973).

16 (B) The program established under section  
17 8(a) of the Small Business Act (15 U.S.C.  
18 637(a)).

19 (C) The small business set-aside program es-  
20 tablished under section 15(a) of the Small Busi-  
21 ness Act (15 U.S.C. 644(a)).

22 (5) Require that a business which represents itself  
23 as a section 1207(a) entity in seeking a Department of  
24 Defense contract maintain such status at the time of  
25 contract award.

1 (6) With respect to a Department of Defense pro-  
2 curement for which there is a reasonable likelihood  
3 that the procurement will be set aside for section  
4 1207(a) entities, require to the maximum extent practi-  
5 cable that the procurement be designated as such a  
6 set-aside before the solicitation for the procurement is  
7 issued.

8 (7) Establish policies and procedures which will  
9 ensure that there shall be no reduction in the number  
10 or dollar value of contracts awarded under the program  
11 established under section 8(a) of the Small Business  
12 Act and under the small business set-aside program es-  
13 established under section 15(a) of the Small Business Act  
14 in order to meet the goal of section 1207 of the De-  
15 partment of Defense Authorization Act, 1987.

16 (8) Implement section 1207 of the Department of  
17 Defense Authorization Act, 1987, in a manner which  
18 shall not alter the procurement process under the pro-  
19 gram established under section 8(a) of the Small Busi-  
20 ness Act.

21 (9) Require that one factor used in evaluating the  
22 performance of contracting officers shall be the ability  
23 of the officer to increase contract awards to section  
24 1207(a) entities.

1 (10) Allow a contract with a section 1207(a)  
2 entity to be awarded at a price not exceeding fair  
3 market cost by more than 10 percent, regardless of the  
4 method of procurement used in awarding the contract.

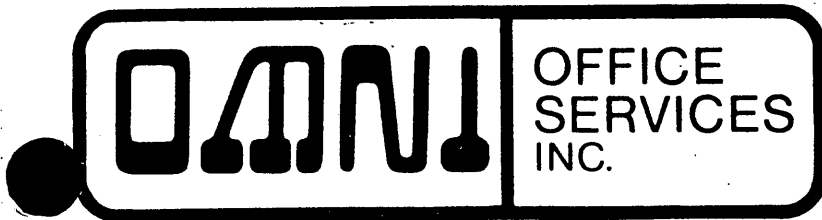
5 (11) Provide for partial set-asides for section  
6 1207(a) entities.

7 (12) Establish a procedure for awarding a contract  
8 to a section 1207(a) entity, without providing for full  
9 and open competitive procedures, in circumstances  
10 where a market survey and Commerce Business Daily  
11 sources sought notice resulted in the identification of  
12 only one responsible section 1207(a) entity.

13 (13) Provide for increased technical assistance to  
14 section 1207(a) entities.

15 (14) Require that a concern may not be awarded  
16 a contract under section 1207 of the Department of  
17 Defense Authorization Act, 1987, unless the concern  
18 agrees to comply with the requirements of section  
19 15(o)(1) of the Small Business Act.

20 (c) DEFINITION OF SECTION 1207(a) ENTITIES.—For  
21 purposes of this section, the term "section 1207(a) entities"  
22 means the small business concerns, historically Black col-  
23 leges and universities, and minority institutions described in  
24 section 1207(a) of the Department of Defense Authorization  
25 Act, 1987 (Public Law 99-661; 100 Stat. 3973).



COMPLETE LINE OF OFFICE SUPPLIES,  
OFFICE FURNITURE AND DESIGN SERVICES

July 24, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
C/O OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, DC 20301-3062

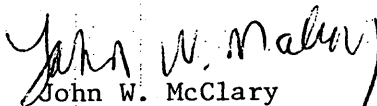
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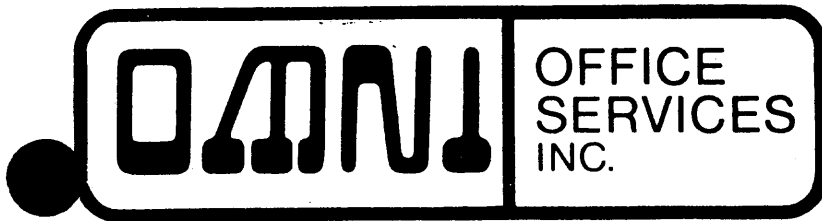
First, the regulation contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial setasides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

  
John W. McClary

JWM:dg



COMPLETE LINE OF OFFICE SUPPLIES,  
OFFICE FURNITURE AND DESIGN SERVICES

July 24, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
C/O OASD, Room 3C 841  
The Pentagon  
Washington, DC 20301

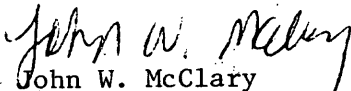
Dear Mr. Lloyd:

As a minority business person, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

Sincerely,

  
John W. McClary

JWM:dg

*Accounting  
Financial  
Ltd.*

P.O. BOX 1658  
SUITE 333  
501 CHURCH STREET, N.E.  
VIENNA, VA 22180-1658  
(703) 255-5508

28 July 1987

Defense Acquisition Regulatory Council  
Attention: Mr. Charles Lloyd  
Executive Secretary  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, DC 20301-3062

Dear Sir:

Re: Action Needed To Reverse DOD's Erroneous and Harmful Implementation  
Section 1207, 1987 DOD Authorization Act, PL 99-661

Contrary to the intent of the Congress, the DOD, particularly the Navy Department, has implemented the subject legislation in a manner which is damaging to many small business firms. Unremedied, the potential effect on those firms is disastrous.

Specifically, the DOD is addressing the goal of awarding 5% of its contract dollars to small disadvantaged businesses (SDB) by taking those dollars from other small businesses. By deduction, it was the clear intent of the Congress that any SDB contract dollars are to be set aside from contract dollars otherwise available to large businesses.

Paragraph (b)(7), Section 846 of the proposed National Defense Authorization Act for Fiscal Year 1988 reaffirms the Congress' intent that the SDB program implementation not work to the detriment of other small businesses.

We urge you and the Council to support the legislation in question and to aggressively pursue all available remedies to correct the damage done thus far to small businesses.

Very truly yours,



Richard C. Foote  
President

RCF:hvt



**McCLOUD AND ASSOCIATES, INC.**

44 STELTON ROAD, SUITE 105  
PISCATAWAY, N.J. 08854  
(201) 752-0010

Dr. Alma McCloud Evans  
President

July 28, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D. C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for sub-contracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payment and financial assistance will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

Alma McCloud Evans, Ph.D.  
President

AME/adw

cc: Senator Bill Bradley  
Senator Frank Lautenberg





NDA

July 28, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D. C. 20301

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provision for subcontracting. Second, the regulations do not provide for the participation of either historically black colleges and universities or minority insitutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

Many companies like ourselves count on DOD business and DOD contractors, but without unambiguous wording in the regulations not allowing for loopholes, minority businesses will not receive an opportunity for the much needed 5% set-aside.

RENOW, INC., is a small minority, woman owned and operated Pharmaceutical Wholesaler and we would be extremely interested in the 5% set-aside.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

Oswald W. Hoffler, Jr.  
Secretary/Treasurer

OWH/rc

HOME ADDRESS:  
HARRISON, ARKANSAS

WASHINGTON ADDRESS:  
2207 RAYBURN BUILDING  
WASHINGTON, DC 20515  
PHONE: 225-4301

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

PUBLIC WORKS AND  
TRANSPORTATION  
SUBCOMMITTEE:  
AVIATION—RANKING MEMBER  
WATER RESOURCES  
SURFACE TRANSPORTATION  
VETERANS' AFFAIRS—  
RANKING MEMBER  
SUBCOMMITTEE:  
HOSPITALS AND HEALTH CARE—  
RANKING MEMBER  
COMPENSATION, PENSION AND  
INSURANCE  
HOUSING AND MEMORIAL AFFAIRS  
SELECT COMMITTEE ON AGING  
SUBCOMMITTEE:  
HOUSING AND CONSUMER  
INTERESTS—RANKING MEMBER

July 28, 1987

Mr. Thurston S. Fox  
Office Manager  
Hardy Construction Company, Inc.  
P.O. Box 5856  
Pine Bluff, Arkansas 71611

Dear Mr. Fox:

Thank you very much for your recent letter expressing your opposition to the "Rule of Two" interim regulations implementing Section 1207 the National Defense Authorization Act for fiscal year 1987.

Mr. Fox, I share your basic opposition to this interim rule. Since the Department of Defense is currently accepting comments on this issue, you can be sure that I will make your view known to the proper Defense Department officials. All comments received by DOD by the August 3, 1987 closing date will be considered in formulating a final rule.

Again, thank you for contacting me about this matter of mutual concern.

With kind regards,

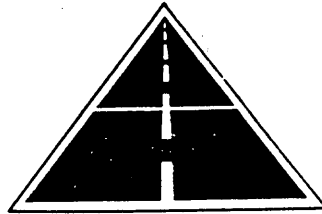
Sincerely,

~~(Signed)~~ John Paul Hammerschmidt

JOHN PAUL HAMMERSCHMIDT  
Member of Congress

JPH:sw  
bcc: Mr. Charles W. Lloyd (re: DAR Case 87-33) ✓  
enclosure

JUL 27 1987



## Hardy Construction Company, Inc.

GENERAL CONTRACTORS

July 22, 1987

The Honorable John Paul Hammerschmidt  
P. O. Box 1624  
Fort Smith, AR 72901

Dear Congressman,

As a concerned member of America's Construction Industry, I must express to you my opposition of the "Interim Rule" - "Rule of Two" which affects the small disadvantaged business.

First let me say that if you are going to give away 10 percent, go ahead, but do it above board, let the American People know and be prepared to answer to the American Public.

As I have previously stated (regarding the unionization of the Construction Industry), this action serves no useful function and will only result in:

- a. increased cost of construction and/or service
- b. downgrade the quality of construction
- c. a non-reduced budget.

As a member of the most competitive industry (all work we have is through direct bidding), I welcome any and all competition, but for God's Sake, don't penalize me by 10 percent going in. You are driving legitimate competition out and winding up with fly by night (for the most part) incompetent, and give me something contractors which are incapable of preparing a bid and performing the required work.

I implore you to be more concerned for the "good of America" and less concerned for special interest groups and giving away monies.

Items which concern me even more are:

- a. Rule of Two is not necessary, nor authorized by Congress.
- b. A smaller "Rule of Two" used in Small Business Set-Asides resulted in 80% of defense construction contract action being set aside in 1984.

July 22, 1987

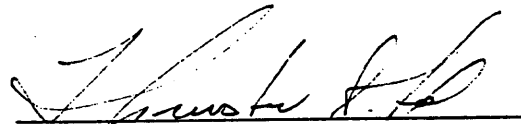
Representative Hammerschmidt  
Page two

In closing, I must say that I know some SDBs which are legitimate and while they will accept the special favors, are not relying on it. For these, it makes no difference.

I would appreciate your taking time from your busy schedule (as I have) to advise me of your stand on this matter.

Yours very truly,

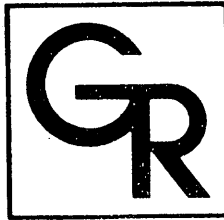
HARDY CONSTRUCTION COMPANY, INC.

A handwritten signature in cursive script, appearing to read "Thurston S. Fox", written over a horizontal line.

Thurston S. Fox,  
Office Manager

TSF:cww

cc-AGC



GENERAL RAILROAD EQUIPMENT AND SERVICES, INC. P.O. BOX 159, EAST ST. LOUIS, ILLINOIS 62202 (618)271-1866

July 28, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

RE: Interim Rule to implement Section 1207 of PL 99-661

Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from 1. the SBA 8(a) program, and 2. an increase in subcontract awards.

The SDB program, as it is currently configured, will adversely impact the SBA 8(a) program by enabling the CO's to withdraw requirements from the 8(a) program and designating them under the SDB program.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to 1. institute safeguards that will insure that the 8(a) program is not adversely impacted by the SDB set-aside program, and 2. make subcontracting an integral part of the awards and procurement process.

Sincerely,

  
Yvonne E. Thompson  
Vice President, Marketing

YET:bb



DYNAMIC PROGRAMS, INC.  
18 CHEVERLY ROAD  
LAWRENCEVILLE, N.J. 08648  
(609) 882-4222

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) OARS  
c/o OASD (P&L) (MARS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

July 28, 1987

Dear Mr. Lloyd:

I am writing to express my concerns about the interim regulations the Dept of Defense has developed to implement the 5% minority contracting goal. There are still a number of important issues to be considered.

First, the regulations do not contain provisions for subcontracting. Second, the regulations do not provide for the participation of historically Black colleges or minority institutions. Third, the advance payment issue needs to be clarified. Finally, partial set-asides have been prohibited despite their potential to increase more minority business participation.

It is urged the Department of Defense address these issues and include them in the final regulations. Sincerely, Susan D. Miller, President



3349-C HAMILTON BLVD., S. E. • ATLANTA, GEORGIA 30354 • (404) 766-4183

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

Sincerely,

*C. A. Robinson,*  
*President*

# Westco

Automated Systems & Sales, Inc.

400 Spring Street • Suite #400 • Silver Spring, Maryland 20910 • (301) 495-1500

July 27, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Subcontracts give minority businesses a chance to participate in Defense contracts which would otherwise be beyond our capacity and enable us to enter agreements with prime contractors who currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

Secondly, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Thirdly, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-aside have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Defense Department to make subcontracting and the other issues integral parts of the final regulations.

Sincerely,



Clinton A. West  
President

CAW/jdb

cc: Rep. John Conyers, Jr.



# COFPAES COMMITTEE ON FEDERAL PROCUREMENT OF ARCHITECTURAL/ENGINEERING SERVICES



American Congress on Surveying & Mapping  
American Consulting Engineers Council  
American Institute of Architects  
American Society of Civil Engineers  
ARTBA Planning & Design Division  
National Society of Professional Engineers

July 29, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD(P)/DARS  
c/o OUSD(A) Mail Room  
Room 3D139, The Pentagon  
Washington, D. C. 20301-3062

RE: DAR Case 87-33

Dear Mr. Lloyd:

On July 1, 1987 the Defense Acquisition Regulatory Council published a notice in the Federal Register inviting public comment by August 3, 1987 on an interim rule requiring that contracting officers set aside acquisitions for exclusive competition among small disadvantage business (SDB) concerns whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns and that the contract award price will not exceed fair market price by more than 10 percent. The goal of the interim rule is to award 5 percent of contract dollars to SDBs.

The Committee on Federal Procurement of Architectural/Engineering Services (COFPAES) represents the six professional architectural, engineering and surveying (A/E) societies listed above. The purpose of our Committee is to promote sound Federal A/E procurement practices. These societies represent the vast majority of America's practicing architects, engineers and surveyors.

We support the concept that small disadvantaged business (SDB) concerns should receive an equitable share of Federal contracts. We believe this does occur in the field of A/E procurement. Furthermore, we believe it occurs not through any special pricing advantages given to A/Es who are designated SDBs. To the credit of the small and disadvantaged A/E firms who are successful in the Federal arena, they compete for contracts on the same terms as any other A/E firm, on the basis of their skill and ability.

For the last four fiscal years SDB A/E firms received about 10% of the actions and about 9% of the contract dollars, twice the goal of the proposed rule. The latest Department of Defense figures are as follows:



NELLO L. TEER COMPANY

*A Subsidiary of Koppers Company, Inc.*

OFFICE TEL: (919) 682-6191 • TELEX: 57-9446

7/10/87

Department of Defense  
Mr. Charles W. Lloyd  
Executive Secretary, ODASD (DARS)  
c/o OASB (PNL) (M&RS), Room 3C841  
Pentagon  
Washington, DC 30201-3062

Dear Mr. Lloyd:

RE: DOD Federal Acquisition Regulation  
Volume 52, No. 84; Federal Register

I would like to reiterate the concern expressed by Mr. Gregg Ward of the National Construction Industry Council (NCIC) concerning the new DODefence Federal Acquisition Regulation.

I, too, understand the pressures that government offices come under relating to small, disadvantaged business (SDB) support; however, I cannot support the acceptance of this regulation as it stands.

The construction industry as a whole, and this company in particular have made many efforts to support, encourage, tutor and assist SDB's. The industry does have a good track record of compliance with guidelines and I encourage your office to insure that a careful assessment is made of the impact of this interim rule and any final regulations that may be written before allowing such a regulation to be passed "carte-blanche" without opportunity for opposition or rebuttal. Please convey my feelings on the matter to whomever else you feel may be able to have an impact on review and final decisions.

Attached is a copy of the NCIC letter to OMB outlining several concerns and questions. I encourage you to review these in making your assessment.

Respectfully yours,

Michael W. Powell  
Manager Engineering/Marketing



# NATIONAL CONSTRUCTION INDUSTRY COUNCIL

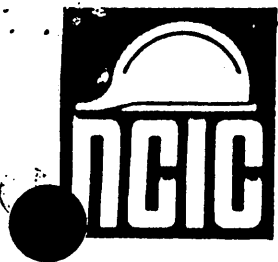
1919 Pennsylvania Avenue, N.W. • Suite 850 • Washington, D.C. 20006 • (202) 887-1494

## SPECIAL NOTICE

TO: All Delegates  
FROM: Gregg Ward *GW*  
RE: New DOD Defense Acquisition Regulation  
DATE: June 4, 1987

On June 1, 1987 the Department of Defense inaugurated new procedures relating to the solicitation of construction bids for the next three fiscal years. The new rule (being implemented on an interim basis) will in many cases have the effect of foreclosing bid submissions from firms which are not defined as being small, disadvantaged businesses. In general, if DOD is aware of two such firms in the area (known as the rule of two), DOD contracting officers are directed to set-aside the entire project for the small, disadvantaged business community (SDB's). Only bids from SDB firms will then be solicited.

Please review the attached NCIC letter recently sent to the Office of Management and Budget for more specific information. The regulation is on page 16263 of the May 4, 1987 Federal Register. We encourage you to read it and convey your feelings about it to the Department of Defense, OMB, the White House and your Congressional delegation as soon as possible.



## NATIONAL CONSTRUCTION INDUSTRY COUNCIL

1919 Pennsylvania Avenue, N.W. • Suite 850 • Washington, D.C. 20006 • (202) 887-1494

June 3, 1987

Mr. Wayne Arney  
Associate Director  
Office of Management and Budget  
Washington, D.C. 20503

Dear Wayne:

Re: DOD Federal Acquisition Regulation  
Volume 52, No. 84; Federal Register

Thank you for taking the time to meet with our delegation from the National Construction Industry Council (NCIC). As you can tell, we are very concerned over the practical impact of DOD's new interim acquisition regulation on the construction industry. If our interpretation of the proposal is correct, the 90 per cent of construction companies in the U.S. which are by definition considered small businesses, will be precluded from even bidding DOD-related projects for the next three fiscal years. Simply stated, that prospect is unacceptable.

We understand and appreciate the pressure the Department of Defense is responding to. Nonetheless, we believe the Department has misconstrued the legislative history related to 99-661 in this regard, and as a consequence, has produced a flawed proposal.

While the respective views of NCIC's members differ on the issue of small, disadvantaged set-aside percentages and less than free and open market competition, there is unanimity within the Council in opposition to the interim rule. We plan to make that position very clear in the ensuing weeks.

We do not discount that DOD had the best intentions in advancing the proposal. The contracting office was clearly responding to what it believes was both a congressional mandate and a directive from the Under Secretary's office. But the fact remains that the new procedures will literally put hundreds of small businessmen out of business in the near term.

The Council believes the following concerns/questions need to be addressed:

1. Is DOD aware that this "rule of two" will effectively foreclose all bidding opportunities from firms which are not disadvantaged?
2. Does not the "rule of two" in the construction industry become an exclusionary 100 per cent rule for disadvantaged firms over the next three fiscal years?
3. Has not the construction industry exceeded the 5 per cent threshold, cited in the regulation as the goal to be achieved, for years?
4. Why is the construction industry -- the very industry currently in compliance -- the only industry covered by the interim rule? Is aerospace affected? Research and development? High technology contractors? If not, why not?
5. Was an economic impact statement conducted? If not, why not? If one was compiled, what is the projected impact on small business organizations in the construction industry?
6. Why were no public comments received prior to the implementation of the interim rule? Why an interim rule in the first instance? Has the Administrative Procedures Act been violated?
7. Did the DOD acquisition regulation get OMB clearance? If not, why not? Has Director Miller been briefed on the subject at all? In short, has anyone in this Administration other than DOD personnel reviewed the proposal?

In short, NCIC believes this regulation has been very poorly conceived, that normal administrative procedures have been clearly circumvented, and that other defense industries are receiving preferential treatment at the expense of the construction industry. We intend to raise these concerns immediately with the appropriate Members and staff of the Armed Services, Small Business and Government Operations Committees, other high-ranking officials within the Administration, the trade and general press, and well as with DOD officials directly.

Director  
June 3, 1987

Page 3

We genuinely believe, Wayne, that this is a fundamentally flawed rule which will have (intended or otherwise) a devastating affect. We hope OMB is in a position to, at least, convey the nature of our concern to the proper persons and, where possible, lend substantive support.

Thanks once again for your time and consideration.

Sincerely,



Gregg Ward  
Executive Director

GW:bs

cc: Joe Hughes  
Jack Curtin  
Dave Johnston  
Jim Noble



Artisans of the Information Age

July 27, 1987  
RJO-87-423CEO

Defense Acquisition Regulatory Council  
Attention: Mr. Charles W. Lloyd  
Executive Secretary

ODASD(P)DARS  
c/o OASD(P&L)(M&RS)  
Room 3C841 The Pentagon  
Washington, D. C. 20301-3052

Dear Mr. Lloyd:

RJO Enterprises, Inc. (RJO) is a minority small business firm participating in the U. S. Small Business Administration's section 8(a) program. Through the 8(a) program, RJO has performed and is performing on numerous Department of Defense contracts. As the chief executive officer of RJO, I am very concerned with the Interim Rule implementing P.L. 99-661 and establishing the Small Disadvantaged Business (SDB) set-aside program.

While it is noted in the Supplementary Information section of the Federal Register notice (52 Federal Register No. 85, p. 16263) that the Interim Rule "addresses achievement of the [5 percent MBE] goal as it pertains to SDB concerns, RJO, as an 8(a) DoD contractor, is deeply concerned that the SDB set-aside program has the strong potential to have a severe negative impact on the 8(a) program by reducing the number of DoD awards through the 8(a) program. While it may appear that the Interim Rule creates an additional minority small business set-aside program, RJO is concerned, as are many other 8(a) firms, that the implementation of the Interim Rule will result in the transfer of potential DoD procurements from the 8(a) program to the SDB set-aside program, since the Interim Rule establishes a first priority for the SDB set-asides. In that approximately two-thirds of all 8(a) requirements are satisfied through the Department of Defense, it is our firm belief that 8(a) business within the DoD will disappear in the favor of procurements directed to the SDB set-aside program.

As the Interim Rule presently provides, 8(a) certified firms, many of whom will not have the financial capacity to reasonably compete against more established 8(a) firms, will be forced out of economic necessity to fully compete for DoD business, previously in the 8(a) program, and now under the SDB set-aside. While there are competitive features to the 8(a) program in the form of "technical shoot-outs", these competitions are between firms of approximately the same level of capability. The SDB set-aside program does not provide for this same qualification.

4550 Forbes Boulevard  
Lanham, MD 20706  
(301) 731-3600

Mr. Charles W. Lloyd  
July 27, 1987  
Page 2

Further, under the Interim Rule, the contracting officer is given sole discretion and responsibility for determining whether any particular DoD procurement should be part of the SDB set-aside program. This is the case even where multiple responsible 8(a) firms express an interest in having an acquisition placed in the 8(a) program. The activity Small and Disadvantaged Business Utilization (SADBU) representatives have no input into the contracting officer's decision on whether the particular procurement should be placed in the 8(a) or SDB set-aside program. Further, in the absence of language to the contrary, it would appear that acquisitions properly identified for the 8(a) program by the activity SADBU would be mandated by the Interim Rule to be shifted to the SDB set-aside program and require full technical and cost competition, rather than technical competition among competing 8(a) firms.

The Interim Rule also does not provide for partial SDB set-asides. At a time when "contract aggregation" (aggregating services contracting acquisitions by two-letter function) is on the increase, the fact the partial set-asides are not permitted under the SDB set-aside program will result in exclusions from the SDB program of certain requirements which many SDB and 8(a) firms are technically and financially capable of performing. The lack of partial set-asides in larger or omnibus contracts will discourage SDB participation in the set-aside program.

The Interim Rule permits very broad latitude in terms of who can protest or challenge a contract award under the SDB set-aside. At present, protests of all types of contract awards are frequently used as delaying tactics for a variety of reasons and serve in many cases only to delay the normal procurement process. In addition, under the Interim Rule, the fact that the SBA can create additional delay, by not promptly determining the SDB status of a firm, will add considerable time to the procurement process, a feature that is not prevalent under the 8(a) contracting method.

Further, the DoD Interim Rule contains no provision encouraging the award of SDB contracts under P.L. 99-661. While the contracting officer is "directed" to reserve a particular procurement for the SDB set-aside program when he determines that competition can be expected between two or more SDB concerns and at an award price not to exceed fair market price by more than 10 percent, the contracting officer has no "incentive" to make this determination.

Because of these concerns, RJO would make the following recommendations for changes to the SDB set-aside program under the Interim Rule:

1. Any final rule should explicitly provide that 8(a) contracts are counted toward the five percent goal.
2. No reductions should be made in the number of contracts or the dollar value of contracts awarded under the 8(a) program or the SDB set-aside program.

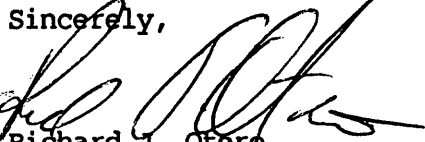


Mr. Charles W. Lloyd  
July 27, 1987  
Page 3

3. The determination of whether a particular procurement is directed to the 8(a) program or the SDB set-aside program should be made by both the contracting officer and the SADBU, who should be an integral party in the SDB set-aside process.
4. Partial set-asides directed to the SDB program on large or omnibus contracts should be expressly permitted to increase SDB participation in the SDB set-aside program.
5. SDB set-aside protests or challenges should be restricted to qualified SDB offerors and the contracting officer, with certain penalties assessed for frivolous protests.
6. The contracting officer's job performance appraisal should include an evaluation of satisfactory progress toward the five percent MBE goal.

These recommendations, if made a part of the SDB set-aside program and aggressively implemented, will increase the likelihood of success toward meeting the DoD minority goal and promote minority business participation in the DoD contracting arena.

Sincerely,



Richard J. Otero  
Chief Executive Officer

July 24, 1987

IRA SNELL, JR.  
4906 TEN MILLS ROAD  
COLUMBIA, MD 21044

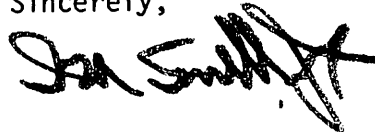
Mr. Charles W. Lloyd  
Secretary  
ODSAD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, DC 20301-3082

Dear Mr. Lloyd:

As an employee of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,

A handwritten signature in black ink, appearing to read "Ira Snell, Jr.", with a stylized flourish at the end.

CONCEPTUAL ENGINEERING ASSOCIATES, INC.

5600 HELMSDALE LANE  
ALEXANDRIA, VIRGINIA 22310

(703) 971-0987

July 26, 1987

Defense Acquisition Regulatory Commission  
ATTN: Mr. Charles W. Lloyd, Executive Secretary OASD (P) DARS  
c/o OASD (P&L)(M&RS) Room 3C841, The Pentagon  
Washington, DC 20301-3062

CITE: DARS 87-33

Gentlemen:

The May 3, 1987 Federal Register invited comments on the Department of Defense program to improve utilization of Small, Disadvantaged Business in DoD acquisition by August 3, 1987.

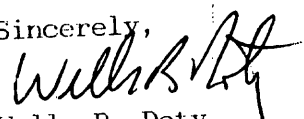
Conceptual Engineering Associates is a Hispanic-American employee-owned small business located in Virginia. We have applied for SBA 8(a) certification. We are actively pursuing business under the SDB program at this time, with our goal being to become a fully productive and profitable corporation in the near term.

We at Conceptual Engineering Associates applaud the program and its requirements. The strong and positive direction to all levels of the DoD should go far in enforcing the socio-economic objectives of the program. These objectives, long the goals of the Congress, have not been achieved in the past for a variety of reasons, not the least of which is the inability of SDB's to compete with the larger, more established corporations. Further, SDB's have been increasingly excluded from competition as acquisition have been combined for "economy of scale", "multi-year procurement", etc. If it is indeed the purpose of the U. S. Government to increase the overall industrial base and to improve the availability of third- and fourth-tier subcontractors, the current initiative will promote those goals.

Further, as an emergent SDB, Conceptual Engineering Associates would have an additional means of competing in the DoD contracting arena prior to approval of our 8(a) application. We are not scared to compete. We are competent, talented professionals in the demanding field of DoD Command, Control, and Communications engineering. We believe, however, that competitive opportunities for emergent companies are not as numerous as would be the case with full implementation of the procedures outlined in the Federal Register.

We are including with this letter some proposed changes for your consideration.

Sincerely,

  
Wells B. Doty  
President

See - Keep all  
these together -  
different letters, same  
comment.

July 24, 1987

HOYT R. DAVIS  
P.O. BOX 795  
MCLEAN, VA 22101

Mr. Charles W. Lloyd  
Secretary  
ODSAD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an employee of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to improve DoD Minority Contracting.

Sincerely,

*Hoyt R. Davis*

encl.



INTEGRATED SYSTEMS ANALYSTS, INC.

July 27, 1987

Serial: 87- M-0182

Honorable Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

As a senior line manager of a disadvantaged business, I am very concerned with the Interim Rule developed by the Department of Defense implementing Public Law 99-661.

The Coalition to Improved DOD Minority Contracting has prepared a number of changes to the Interim Rule which should assist the DOD in achieving the desired goal. I strongly support these changes.

Sincerely,

Alvin S. Glazier

- Operations Center Manager

Enclosure

ASG:stj

COPY TO: Honorable Caspar Weinberger  
Honorable Gus Savage  
Honorable James Abdnor  
Honorable Stan Parris

July 24, 1987

MARTHA HOWARD  
91 MOUNT HARMONY ROAD  
OWING, MD 20736

Mr. Charles W. Lloyd  
Secretary  
ODSAD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, DC 20301-3082

Dear Mr. Lloyd:

As an employee of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,

*Martha Howard*

July 24, 1987

SALOME B. OWU  
6445 FRANCONIA COURT  
SPRINGFIELD, VA 22150

Mr. Charles W. Lloyd  
Secretary  
ODSAD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, DC 20301-3082

Dear Mr. Lloyd:

As an employee of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,

A handwritten signature in cursive script, appearing to read "Salome B. Owu", with a long horizontal flourish extending to the right.

POSITION PAPER

COMMENTS ON INTERIM RULE IMPLEMENTING PUBLIC LAW 99-661

DATE: July 14, 1987

FROM: COALITION TO IMPROVE DOD MINORITY CONTRACTING

The timely response by the Department of Defense (DoD) in implementing Section 1207 of Public Law 99-661, (P.L. 99-661), the National Defense Authorization Act for Fiscal Year 1987, is commendable. The proposed regulations as set forth in the May 4, 1987 Federal Register can provide additional opportunity to the minority community in the pursuit of defense procurements.

In reading the legislation as set forth in Section 1207, it is clear that the intent of Congress in passing this legislation was that the minority community would realize five percent (5%) of the defense procurement dollars through government procurement with qualified minority business enterprises, historically Black colleges and universities and other minority institutions. The legislation recognizes that there is no economic parity between the minority and majority populations, and attempts to close this gap by providing an opportunity for the minority community to participate more equitably in the economic distribution through defense procurement.

The Department of Defense implementation of the legislation, while timely, does appear to lack the necessary aggressiveness and emphasis to reasonably expect that the 5% goal



will be achieved. In fact, the implementation relies heavily on the provisions of 15 U.S.C. 637 et seq, the Small Business Act, to the detriment of the realization of the goal.

Seven (7) specific areas which would significantly enhance the probability of attaining the goal, within the framework of the legislation, are set forth below. An Executive Summary which provides a brief overview of these proposed actions, is attached.

#### Substantive Programmatic Improvements (Transition Plan Related)

1. The proposed implementation of P.L. 99-661 could hinder the objectives of the Section 8(a) Program because Certified 8(a) business could be forced to compete for set-asides before they have gained the financial capability to be able to reasonably compete against more established firms. See 52 Fed. Reg. 16266 (to be modified at 48 CFR 219.502-72). In order to preserve the 8(a) opportunities, it is necessary that some hierarchal decision process be utilized since the regulations as presently written possess the potential to severely restrict the opportunities for newly established or smaller 8(a) firms.

The proposed regulations establish the first priority of the total SDB set-aside in the set-aside program order of precedence (Section 219.504). At the same time, Section 219.502-72(b)(2) requires the contracting officer to make an SDB set-aside determination when multiple responsible 8(a) firms express an interest in having an acquisition placed in the 8(a)

program. Under these proposed regulations, small 8(a) firms not yet firmly established would be forced to compete before they are ready. Additionally, acquisitions properly identified for the 8(a) program by the activity SADEU would then require a full technical and cost competition, rather than a technical competition among the competing 8(a) firms followed by SBA financial and management assistance to the successful 8(a) winner of the technical competition.

To remedy this situation, the regulations should state that 8(a) firms would receive first consideration for direct 8(a) contracts, or a technical competition would be conducted when two (2) or more responsible 8(a) firms express an interest in an acquisition, for all appropriate procurements below a certain threshold value. This would be similar to the threshold presently established for the small business set-aside program in DFARS 19.501. Specific and different thresholds (e.g. all appropriate acquisitions less than \$2M) could be established by industry groups, i.e., manufacturing, construction, professional services, nonprofessional services.

2. The DoD Interim Rule does not adequately address the degree of subcontracting which a Small Disadvantaged Business (SDB) will be permitted to pursue under SDB set-aside procurement. This creates the potential for a significant portion of the revenues earmarked for the minority community to end up in business of the majority community. This has been demonstrated under the existing small business set-aside program where large

business frequently plays a major role in determining the outcome of small business procurements, and takes a significant portion of the dollars intended for the small business community. Many small businesses in the defense industry realize that unless they have a large business subcontractor when bidding a small business set-aside, that their bid is for nought. This has been the central issue in many of the protests which are heard by the regional offices of the Small Business Administration (SBA) and the Office of Hearings and Appeals. This aspect of implementation of Section 1207 could be substantially strengthened by severely curtailing the degree of subcontracting (less than 25%) for a SDB set-aside, unless the subcontract is to a qualified Minority Business Enterprise (MBE), in which case the degree of subcontracting permitted would be considerably more liberal. This approach would both ensure that the bulk of the dollars would go to the segment of the marketplace for whom it was intended, yet would permit a SDB the opportunity to seek additional needed capability to ensure successful performance of a procurement effort. It would further promote the strengthening of minority businesses through cooperative efforts of the firms in the minority community.

3. The DoD implementation defines SDBs by referencing Section 8(d) of 15 U.S.C. This section invokes the size standards as established for each industry by the SBA. The dollar volume of revenue represented by the DoD 5% goal, if achieved, would quadruple the current level of performance of minority businesses in the defense marketplace. With SBA size standards as a limiting

factor, it may be difficult for the DoD to find sufficient numbers of qualified minority business enterprises to meet this dollar volume, especially since the size of many of the MBEs in the defense industry has been unrealistically inflated by revenues from subcontracts from the SBA via the section 8(a) Program. These MBEs have historically faced considerable difficulty after leaving the 8(a) business development program because of limited access to traditional financial institutions and bias within the marketplace. As a result, many of these firms have not survived as minority businesses after leaving the support of the 8(a) Program. To create a larger source of qualified SDBs and to offer a source of market access to MBEs who have left the 8(a) Program, it is recommended that revenues of the MBEs which were obtained via the 8(a) Program, not be considered in determining the size of these firms when competing under the SDB set-aside program. Such an action would not constitute a novel approach to addressing this issue. In fact, it has been proposed in a bill before the U.S. House of Representatives, H.R. 1807, addressing the 8(a) Program participation. Further, the SBA has the authority to take such action within the framework of 13 CFR 121.2 and 13 CFR 124.112(a)(2). Alternatively, as the intent of this legislation is neither to redistribute procurement dollars among small businesses nor to lower the amount of procurement dollars among small businesses, the size standards for "disadvantaged business" under this legislation could be redefined such that if there are two or more disadvantaged businesses capable of performing the work, it could be set-aside. This would establish the preference

that the procurements set-aside should come from the unrestricted, rather than the small business marketplace. (See the attached legal authority for the action proposed.)

#### Crucial Procedural Improvements

4. The DoD Interim Rule effectively eliminates, from the SDB set-aside determination process, the most knowledgeable and efficient resource that the DoD possesses for assisting in making these determinations. While the DoD policy statement assigns significant responsibilities to various Small and Disadvantaged Business Utilization (SADBU) representatives (i.e., DoD Director, Associate Directors, and Small Business Specialists) for implementation, technical assistance, and outreach programs associated with P.L. 99-661, the authority that should accompany these responsibilities is nonexistent in DoD's procedures. The procedures in DFAR 19.505, which deal with adjudicating rejections of set-aside recommendations between contracting officers and SADBU's, have been made inapplicable to the SDB set-aside program by DFAR 19.506. This undercutting of SADBU authority is further demonstrated in the DoD policy statement, where it is recommended that the contracting officer utilize acquisition history, solicitation mailing lists, the Commerce Business Daily, or DoD technical teams (a new and undefined term) to find two capable SDB sources. The exclusion of the SADBU representative from this process is highly suspect, especially since the SADBU representative would be the most likely person to have, in one

§§ 204, 205, 206, 219 and 252)]. Therefore, we recommend that some measure of the contracting officer's performance include an evaluation of satisfactory progress towards the 5% goal.

7. Small disadvantaged businesses should not be excluded from participation in the program simply because they cannot perform the entire scope of the requirements. Contracting officers should be encouraged to consider partial SDBs set-asides where there are SDBs capable of performing discrete portions of ominous or other large contracts. This would avoid the obvious result that no SDBs will be sufficiently large or qualified to perform some of the more complex Defense contracts. It is well within the spirit of DFAR 19.502-3, the purpose of which is to protect SDBs from usurpation of their contracts by large businesses. This position is consistent with the intent, since allowing SDBs to perform portions of contracts encourages, rather than discourages, greater SDB participation.

Taken as a package, these recommended changes are intended to substantially heighten the probability of realizing the DoD Minority Goal and to take a first step toward promoting a higher level of minority business participation in government contracting as a whole.

## EXECUTIVE SUMMARY

### POSITION PAPER of the COALITION TO IMPROVE MINORITY CONTRACTING

Seven (7) specific areas would significantly enhance the mandated DoD Minority Contracting Goal Program of Section 1207 of P.L. 99-661.

#### Substantive Programmatic Improvements (Transition Plan)

1) The Interim Rule does not give special consideration to firms qualified under the SBA Section 8(a) Program -- the effect of the implementation of P.L. 99-661 would be to dilute the impact of Section 8(a). To prevent such an occurrence, a decision-making process should be implemented to guide the contracting officer toward a fair distribution of appropriate contracts.

2) Subcontracting should be limited to 25% [unless the subcontract is to a qualified MBE utilizing a "Mentor" concept] to ensure that the bulk of the dollars reach the minority community, as intended.

3) MBEs which have "graduated" from the 8(a) Program should be encouraged to participate in the DoD Goal Program, by a regulatory change that no portion of the gross receipts or employment of a business concern awarded pursuant to Section 8(a) shall be included in determining the size of those firms under the SDB set-aside program (See H.R. 1807, Section 7) or some other appropriate increase in the size standards, solely for the DoD Program.

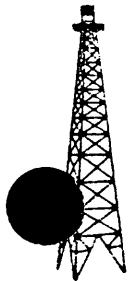
#### Crucial Procedural Improvements

4) The Small and Disadvantaged Business Utilization (SADBU) representatives should be an integral party in the SDB set-aside process and the appeal rights in DFAR 19.505 should apply to the SDB set-aside program.

5) SDB set-aside protests should be restricted to qualified SDB offerors, with penalties assessed for frivolous protests.

6) Some measure of the contracting officer's job performance should include an evaluation of satisfactory progress towards the 5% goal.

7) Implementation of P.L. 99-661 should include the award of portions of contracts to SDBs to increase SDB participation in Defense contracts.



**NATIONAL  
ASSOCIATION  
OF  
MINORITY  
PETROLEUM  
DEALERS**

**IN THE DEPARTMENT OF DEFENSE  
DEFENSE ACQUISITION REGULATORY COUNCIL**

**COMMENTS ON INTERIM RULE  
IN DAR CASE NO. 87-33**

Submitted by:

National Association of  
Minority Petroleum Dealers, Inc.  
1633 Sixteenth Street, N.W.  
Washington, D.C. 20009



By establishing a department-level entity capable of monitoring the progress of, and results achieved by, procurement units, the integrity of the Section 1207 program can be maintained, and DoD should be able to assure that no business sector having responsible SDB concerns would remain underutilized with respect to the dollar value of contract actions under Section 1207.

Unequivocally, utilization of the "rule of two," as defined in section 219.502-72 of the interim rule, will have an adverse impact on minority-owned oil companies desiring to participate in the Section 1207 program. Particularly among acquisitions centered on geographical commercial market areas (CMAs)- such as DFSC's ground fuels program- a number of responsible SDBs virtually will be denied access to the Section 1207 program, solely for reason that they are located in CMAs having no other SDBs to trigger the "rule of two."

Particularly egregious, we believe, is the variation of the so-called "non-manufacturer rule" embodied in section 252.219-7006 of the interim rule. While, for the most part, the requirement that SDB offerors furnish products manufactured or produced by small disadvantaged business concerns is a commendable objective, it is simply unworkable in the oil industry. Not only is there a dearth of minority-owned petroleum refiners, but also these refineries are not located within the CMAs of those minority oil companies which would represent the bulk of prospective participants in the Section 1207 program. Unless an exception is granted for SDB

petroleum suppliers, minority-owned oil companies will be locked out of the Section 1207 program.

NAMPD takes exception to using SDB set-asides only where the entire amount of an individual acquisition is to be set aside (section 219.502-3 of the interim rule). Petroleum contracting involves relatively large volumes which can easily be split, normally without detrimental impact on supply costs or margins. Clearly, splitting items would assuage non-SDB petroleum dealers who might otherwise view the program as detrimental or unfair.

In passing, NAMPD questions the extent to which decisions to make SDB set-asides should be solely within the discretion of contracting officers.

As possibly one of several options, NAMPD suggests that the interests of its membership would better be served through use of a 10 percent preference differential under sealed bid competitive acquisitions, as suggested in your alternative methods, 52 F.R. 16289, May 4, 1987. Conceivably, offerors would be notified of the possibility of a 50/50 split on items wherein an SDB offeror comes within the 10 percent limitation. Additionally, annualized ceilings might be placed on volumes awarded to individual SDB oil firms, thus assuring broader availability of the Section 1207 program's benefits.

Again, other options might arise in the course of the continuing dialogue on these rules. Simply stated, it is NAMPD's position that the interim rule, as written, will effectively deny access to the Section 1207 program to most SDB petroleum

firms, nationwide.

Finally, NAMPD is unalterably opposed to the suggested increased reliance on the section 8(a) program to meet the 5 percent SDB goal. As currently implemented, with its non-manufacturer rule and blatantly inadequate Interagency Agreement, the Small Business Administration's section 8(a) program for minority-owned petroleum firms is ludicrous.

NAMPD appreciates this opportunity to comment in this significant rulemaking proceeding.

Respectfully submitted,

*Robert O. Welch*

Robert O. Welch  
President

*Julius E. Mensah*

Julius E. Mensah  
General Counsel

Dated: August 3, 1987.

The National Association of Minority Petroleum Dealers, Inc. (NAMPD), is a trade association established to promote the business welfare of petroleum distribution firms owned by racial and ethnic minority group members across the country.

Among its constituency are a number of companies which provide, or have provided, petroleum products to agencies of the federal government under both competitive and section 8(a) contracting procedures, specifically through the coordinating function of the Defense Fuel Supply Center, Defense Logistics Agency.

NAMPD welcomes this opportunity to comment on the interim rule (52 F.R. 16263) implementing Section 1207 of P.L. 99-661, National Defense Authorization Act of 1987.

At the outset, it is NAMPD's considered opinion that, to the extent feasible, the 5 percent goal be achieved through equitable distribution of contracting opportunities throughout DoD. For example, minimal 5 percent goals should be assigned each of the four areas of procurement, research and development, military construction, and operation and maintenance. Likewise, parity should be encouraged among "specialized" procurement units, such as Defense Fuel Supply Center, Defense General Supply Center, and Defense Personnel Support Center. Assuming some basic procurement units actually exceed their individual 5 percent goals in a given fiscal year, the excess should not be figured in DoD's overall 5 percent goal, where goals of other procurement units remain largely unmet.

912 Montebello Circle  
Chesapeake, VA. 23320

24 July 1987

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an employee of a small disadvantaged business I urge your adoption of the attached changes in Interim Rule, implementing Public Law 99-661, proposed by the Coalition to Improve DoD Minority Contracting.

Sincerely,



Mr. Kevin B. McCleskey

cc: Honorable Caspar Weinberger  
Secretary  
Department of Defense  
The Pentagon 3E880  
Washington, D.C. 20301

Honorable Gus Savage  
U.S. House of Representatives  
Room 1121 Longworth Building  
Washington, D.C. 20515

Honorable James Abdnor  
Administrator  
Small Business Administration  
1441 L Street, N.W.  
Washington, D.C. 20515

Honorable Norman Sisisky  
426 Canon Bldg  
Washington, D.C. 20515

Coalition to Improve DoD Minority Contracting

(3)

POSITION PAPER

COMMENTS ON INTERIM RULE IMPLEMENTING PUBLIC LAW 99-661

DATE: July 14, 1987

FROM: COALITION TO IMPROVE DOD MINORITY CONTRACTING

The timely response by the Department of Defense (DoD) in implementing Section 1207 of Public Law 99-661, (P.L. 99-661), the National Defense Authorization Act for Fiscal Year 1987, is commendable. The proposed regulations as set forth in the May 4, 1987 Federal Register can provide additional opportunity to the minority community in the pursuit of defense procurements.

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The Department of Defense implementation of the legislation, while timely, does appear to lack the necessary aggressiveness and emphasis to reasonably expect that the 5% goal

will be achieved. In fact, the implementation relies heavily on the provisions of 15 U.S.C. 637 et seq, the Small Business Act, to the detriment of the realization of the goal.

Seven (7) specific areas which would significantly enhance the probability of attaining the goal, within the framework of the legislation, are set forth below. An Executive Summary which provides a brief overview of these proposed actions, is attached.

#### Substantive Programmatic Improvements (Transition Plan Related)

1. The proposed implementation of P.L. 99-661 could hinder the objectives of the Section 8(a) Program because Certified 8(a) business could be forced to compete for set-asides before they have gained the financial capability to be able to reasonably compete against more established firms. See 52 Fed. Reg. 16266 (to be modified at 48 CFR 219.502-72). In order to preserve the 8(a) opportunities, it is necessary that some hierarchal decision process be utilized since the regulations as presently written possess the potential to severely restrict the opportunities for newly established or smaller 8(a) firms.

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program. Under these proposed regulations, small 8(a) firms not yet firmly established would be forced to compete before they are ready. Additionally, acquisitions properly identified for the 8(a) program by the activity SADBUs would then require a full technical and cost competition, rather than a technical competition among the competing 8(a) firms followed by SBA financial and management assistance to the successful 8(a) winner of the technical competition.

To remedy this situation, the regulations should state that 8(a) firms would receive first consideration for direct 8(a) contracts, or a technical competition would be conducted when two (2) or more responsible 8(a) firms express an interest in an acquisition, for all appropriate procurements below a certain threshold value. This would be similar to the threshold presently established for the small business set-aside program in DFARS 19.501. Specific and different thresholds (e.g. all appropriate acquisitions less than \$2M) could be established by industry groups, i.e., manufacturing, construction, professional services, nonprofessional services.

2. The DoD Interim Rule does not adequately address the degree of subcontracting which a Small Disadvantaged Business (SDB) will be permitted to pursue under SDB set-aside procurement. This creates the potential for a significant portion of the revenues earmarked for the minority community to end up in business of the majority community. This has been demonstrated under the existing small business set-aside program where large



business frequently plays a major role in determining the outcome of small business procurements, and takes a significant portion of the dollars intended for the small business community. Many small businesses in the defense industry realize that unless they have a large business subcontractor when bidding a small business set-aside, that their bid is for nought. This has been the central issue in many of the protests which are heard by the regional offices of the Small Business Administration (SBA) and the Office of Hearings and Appeals. This aspect of implementation of Section 1207 could be substantially strengthened by severely curtailing the degree of subcontracting (less than 25%) for a SDB set-aside, unless the subcontract is to a qualified Minority Business Enterprise (MBE), in which case the degree of subcontracting permitted would be considerably more liberal. This approach would both ensure that the bulk of the dollars would go to the segment of the marketplace for whom it was intended, yet would permit a SDB the opportunity to seek additional needed capability to ensure successful performance of a procurement effort. It would further promote the strengthening of minority businesses through cooperative efforts of the firms in the minority community.

3. The DoD implementation defines SDBs by referencing Section 8(d) of 15 U.S.C. This section invokes the size standards as established for each industry by the SBA. The dollar volume of revenue represented by the DoD 5% goal, if achieved, would quadruple the current level of performance of minority businesses in the defense marketplace. With SBA size standards as a limiting

factor, it may be difficult for the DoD to find sufficient numbers of qualified minority business enterprises to meet this dollar volume, especially since the size of many of the MBEs in the defense industry has been unrealistically inflated by revenues from subcontracts from the SBA via the section 8(a) Program. These MBEs have historically faced considerable difficulty after leaving the 8(a) business development program because of limited access to traditional financial institutions and bias within the marketplace. As a result, many of these ~~firms~~ firms have not survived as minority businesses after leaving the support of the 8(a) Program. To create a larger source of qualified SDBs and to offer a source of market access to MBEs who have left the 8(a) Program, it is recommended that revenues of the MBEs which were obtained via the 8(a) Program, not be considered in determining the size of these firms when competing under the SDB set-aside program. Such an action would not constitute a novel approach to addressing this issue. In fact, it has been proposed in a bill before the U.S. House of Representatives, H.R. 1807, addressing the 8(a) Program participation. Further, the SBA has the authority to take such action within the framework of 13 CFR 121.2 and 13 CFR 124.112(a)(2). Alternatively, as the intent of this legislation is neither to redistribute procurement dollars among small businesses nor to lower the amount of procurement dollars among small businesses, the size standards for "disadvantaged business" under this legislation could be redefined such that if there are two or more disadvantaged businesses capable of performing the work, it could be set-aside. This would establish the preference

that the procurements set-aside should come from the unrestricted, rather than the small business marketplace. (See the attached legal authority for the action proposed.)

#### Crucial Procedural Improvements

4. The DoD Interim Rule effectively eliminates, from the SDB set-aside determination process, the most knowledgeable and efficient resource that the DoD possesses for assisting in making these determinations. While the DoD policy statement assigns significant responsibilities to various Small and Disadvantaged Business Utilization (SADBU) representatives (i.e., DoD Director, Associate Directors, and Small Business Specialists) for implementation, technical assistance, and outreach programs associated with P.L. 99-661, the authority that should accompany these responsibilities is nonexistent in DoD's procedures. The procedures in DFAR 19.505, which deal with adjudicating rejections of set-aside recommendations between contracting officers and SADBU's, have been made inapplicable to the SDB set-aside program by DFAR 19.506. This undercutting of SADBU authority is further demonstrated in the DoD policy statement, where it is recommended that the contracting officer utilize acquisition history, solicitation mailing lists, the Commerce Business Daily, or DoD technical teams (a new and undefined term) to find two capable SDB sources. The exclusion of the SADBU representative from this process is highly suspect, especially since the SADBU representative would be the most likely person to have, in one

location, more information on SDB companies and capabilities than any of the sources listed in the policy. It is specifically recommended that the SADBUs be identified as an integral party in the SDB set-aside process and that, as a minimum, the appeal rights in DFARS 19.505 be made applicable to the SDB set-aside program. The DoD should, in order to show vigorous support for this Congressionally mandated program, consider providing more stringent and higher visibility appeal rights that will assist in meeting program goals.

5. The DoD Interim Rule permits very broad latitude in terms of who can challenge (protest) a contract award under a SDB set-aside. Protests have frequently been used within the SDB set-aside program as delaying tactics in awarding contracts to allow for bridging contracts, contract extensions, etc. Many protests have not been well founded, and only serve to delay or perturb the normal procurement process. It is recommended that interested parties under the SDB set-aside be restricted to qualified SDB offerors, and that some consideration be given to imposing penalties for protests which are ultimately determined to have been frivolous in nature.

6. The DoD Interim Rule contains no provisions for encouraging the award of SDB contracts under P.L. 99-661. [See Interim Rule, 52, Fed. Reg. 16263 (to be codified at 48 CFR

§§ 204, 205, 206, 219 and 252)]. Therefore, we recommend that some measure of the contracting officer's performance include an evaluation of satisfactory progress towards the 5% goal.

7. Small disadvantaged businesses should not be excluded from participation in the program simply because they cannot perform the entire scope of the requirements. Contracting officers should be encouraged to consider partial SDBs set-asides where there are SDBs-capable of performing discrete portions of ominous or other large contracts. This would avoid the obvious result that no SDBs will be sufficiently large or qualified to perform some of the more complex Defense contracts. It is well within the spirit of DFAR 19.502-3, the purpose of which is to protect SDBs from usurpation of their contracts by large businesses. This position is consistent with the intent, since allowing SDBs to perform portions of contracts encourages, rather than discourages, greater SDB participation.

Taken as a package, these recommended changes are intended to substantially heighten the probability of realizing the DoD Minority Goal and to take a first step toward promoting a higher level of minority business participation in government contracting as a whole.

TRENT LOTT  
5TH DISTRICT, MISSISSIPPI

REPUBLICAN WHIP

RULES COMMITTEE

M. H. ANDERSON, JR.  
CHIEF OF STAFF

1987 JUL 23 AM 8:41

OFFICE OF  
THE SECRETARY OF DEFENSE

Congress of the United States  
House of Representatives  
Washington, DC 20515

2185 RAYBURN BUILDING  
WASHINGTON, DC 20515  
202-225-5772

DISTRICT OFFICES:  
GULFPORT, MS 39501  
601-864-7670  
HATTIESBURG, MS 39401  
601-582-3246  
PASCAGOULA, MS 39567  
601-762-6435

July 20, 1987

Honorable Caspar W. Weinberger  
Secretary  
Department of Defense  
The Pentagon  
Washington, D.C. 20301

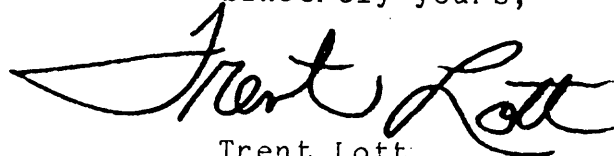
Dear Mr. Secretary:

I wanted to write to you in behalf of Mr. J. O. Collins, a prominent constituent of mine who is president of one of the principal construction companies in Biloxi, Mississippi.

Enclosed is correspondence that I have received which details the nature of the problem. I would sincerely appreciate your looking into this situation and doing everything that you possibly can to be of assistance in the matter. Additionally, I would welcome a report on your findings as soon as possible.

Again, I greatly appreciate your time and careful attention to this matter for me. I look forward to your reply, and with kind regards and very best wishes, I am

Sincerely yours,



Trent Lott

TL:sbh

Enclosure

13025

J. O. Collins Contractor, Inc.

*General Contractors*

CHARLES F. COLLINS  
SECRETARY

J. O. COLLINS  
PRESIDENT

DANIEL G. COLLINS  
VICE PRESIDENT

July 13, 1987

Honorable Trent Lott, M.C.  
2400 Rayburn House Office Building  
Washington, D.C. 20515

RE: DOD Federal Acquisition Regulation  
Volume 52, No. 84; Federal Register

Dear Congressman Lott:

On June 1, 1987, the Department of Defense inaugurated new procedures relating to the solicitation of construction bids for the next three years. The new rule (being implemented on an interim basis) will in many cases have the effect of foreclosing bid submissions from firms which are not defined as small, disadvantaged businesses.

As a member of the construction community in an area very dependent upon federally funded construction projects, I am very opposed to this procedure as I feel it is highly discriminatory. I urge your support in having this regulation rescinded as I am sure you will agree that it will have a negative impact upon the American free enterprise system.

Sincerely,

J. O. COLLINS CONTRACTOR, INC.



J. O. Collins  
President

h

THE CONGRESSIONAL AND EXECUTIVE BRANCH  
COMMITMENT TO THE SET ASIDE PROGRAM REMAINS  
UNWAVERING SINCE THE GREAT DEPRESSION

A. The Small Business Act Requires  
That DOD Keep Set Asides Intact

The Small Business Act declares that the small business community is vital to this Nation's security and well-being:

Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation.

The Act further declares, as amended by section 921 of the 1987 Authorization Act:

[S]mall-business concerns...shall receive any award or contract or any part thereof, and be awarded any contract for the sale Government property, as to which it is determined by the [Small Business] Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's

---

<sup>1</sup> 15 U.S.C. § 631(a).



1987 JUL 24 PM 2:57

OFFICE OF  
THE SECRETARY OF DEFENSE

United States Senate  
WASHINGTON, DC 20510

July 15, 1987

Caspar W. Weinberger  
Secretary  
Department of Defense  
The Pentagon  
Washington, D.C. 20301-1155

Dear Secretary Weinberger:

Enclosed is a representative sample of correspondence I have received from several constituents regarding the interim rule recently implemented by the Department of Defense on June 1, 1987 which would affect the ability of small businesses to compete for Defense contracts over the next three years. The letters raise some serious concerns about the rule and the process by which it was implemented.

I would appreciate your careful review of the concerns raised and any information you could provide me.

With best regards,

Sincerely,



Paul S. Sarbanes  
United States Senator

PSS/csg  
Enclosure

12932

**Rogers  
Refrigeration  
Company**



4871 Stamp Road  
Temple Hills, Maryland 20748  
Phone: (301) 423 2000

1308 Wayne Street  
Salisbury, Maryland 21801  
Phone: (301) 546-2700

July 8, 1987

Paul D. Sarbanes  
Dirksen Senate Office Bldg.  
Room 332  
Washington, DC 20510

Dear Congressman Sarbanes;

We call to your attention an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661). The statute permits DoD to enter into contracts using less than full and open competitive procedures, when practical and necessary to facilitate achievement of a goal of awarding 5% of contract dollars to small disadvantaged business concerns during FY 1987, 1988, and 1989, provided the contract price does not exceed fair market cost by more than 10%.

We understand and appreciate that the Department of Defense is endeavoring to respond to the needs of Small Disadvantaged Businesses; however, taking 100% of the proposed set aside from a military market that already exceeds the 5% objective does not appear to be fair or reasonable. Obviously, these procedures will put hundreds of small business people out of business in the short term.

We believe the following questions need to be asked, to fully disclose our concerns:

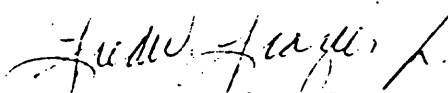
1. Is DOD aware that this "rule of two" will effectively foreclose all bidding opportunities from firms which are not disadvantaged?
2. Does not the "rule of two" in the construction industry become an exclusionary 100% rule for disadvantaged firms over the next three fiscal years?
3. Has not the construction industry exceeded the 5% threshold, cited in the regulation as the goal to be achieved, for years?
4. Why is the construction industry, the very industry currently in compliance, the only industry covered by the interim rule? Is aerospace affected? Research and development? High technology contractors? If not, why not?
5. Was an economic impact statement conducted? If not, why not? If one was compiled, what is the projected impact on small business organizations in the construction industry?

Rogers  
Refrigeration  
Company

6. Why were no public comments received prior to the implementation of the interim rule? Why an interim rule in the first instance? Has the Administrative Procedures Act been violated?
7. Did the DoD acquisition regulation get OMB clearance? If not, why not? Has Director Miller been briefed on the subject at all? Has anyone in Administration other than DoD personnel reviewed the proposal?

We believe this regulation has been very poorly conceived, that normal administrative procedures have been clearly circumvented, and that other defense industries are receiving preferential treatment at the expense of the construction industry. We cannot believe that was the intent of Pub. L. 99-661; therefore, we respectfully request that you respond to our urgent appeal to correct this obviously flawed regulation.

Sincerely,



Fred W. Frazier, Jr.  
Corporate Secretary  
Rogers Refrigeration Co., Inc.

FWF/tsb

1987 JUL 23 AM 8:43

OFFICE OF  
THE SECRETARY OF DEFENSE  
**United States Senate**

July 21, 1987

Respectfully referred to:

Margo Carlisle  
Assistant Secretary of Defense for  
Legislative Affairs  
Department of Defense  
Room 3E966, The Pentagon  
Washington, D.C. 20301

Because of the desire of this office to be responsive to all inquiries and communications, your consideration of the attached is requested. Your findings and views, in duplicate form, along with return of the enclosure, will be appreciated by

*Jesse Helms*  
.....  
U.S.S.

Form #2

Direct to the attention of:  
Wayne Boyles  
Office of Senator Jesse Helms  
402 Dirksen Office Building  
Washington, D.C. 20510  
(202) 224-6342

13023

LANE EVANS  
17TH DISTRICT, ILLINOIS

COMMITTEES:

HOUSE AGRICULTURE COMMITTEE

HOUSE COMMITTEE ON  
VETERANS' AFFAIRS

1987 JUL 23 AM 10:47

OFFICE OF  
THE SECRETARY OF DEFENSE

Congress of the United States  
House of Representatives  
Washington, DC 20515

July 13, 1987

WASHINGTON OFFICE:  
328 CANNON BUILDING  
WASHINGTON, DC 20515  
(202) 225-5905

DISTRICT OFFICES:  
3818 16TH STREET  
MOLINE, IL 61285  
(309) 793-5780  
TOLL FREE: 800-322-6210

125 EAST MAIN STREET  
GALESBURG, IL 61401  
(309) 342-4411

MONMOUTH CITY HALL  
SECOND FLOOR  
MONMOUTH, IL 61462

208 1/2 NORTH LAFAYETTE  
MACOMB, IL 61455

Ms. Margo Carlisle  
Legislative Affairs  
Department of Defense  
The Pentagon, Room 3E966  
Washington, D.C. 20301

Dear Ms. Carlisle:

I am writing on behalf of one of my constituents, Mr. Paul Deady, regarding his concerns. A copy of his letter is enclosed for your use.

Your consideration and comments on this subject would be greatly appreciated. Please forward your response to my district office at 3919 16th Street, Moline, IL 61265.

Sincerely,

*Lane Evans*

LANE EVANS  
Member of Congress

jl/cw

enclosure

13037



QUALITY

JUL 11 1987

SILVIS SERVICE

June 24, 1987

JUN 30 1987

The Honorable Lane Evans  
House of Representatives  
D-17, 328 Cannon House Office Bldg.  
Washington, D.C. 20515

Dear Representative Evans:

Chrome Locomotive, Inc. is in the process of bidding on a contract to remanufacture ten (10) sixty-ton locomotives for the U.S. Army. Award of that contract will mean more than 25,000 labor hours for residents of this district.

Chrome is also in the process of completing the remanufacture of seven (7) 65- and 80- ton locomotives for the U.S. Navy.

We have been advised that any future U.S. Navy contracts for locomotives of less than 100 tons will be SET ASIDE for Small Business. We do not qualify as a Small Business because we are a wholly-owned subsidiary of the Varlen Corporation. Our ability to stay in business is no less a function of our profitability than is true for any small business.

At one point recently, the Chrysler Corporation was qualified as a small business for the purpose of awarding federal contracts. Can you provide assistance or direction in our applying for Small Business set aside contracts, in view of our labor surplus area status, here in the Quad-Cities of Illinois?

Respectfully yours,

Paul F. Deady  
President

PFD/kh

**MICRO-TIME  
MANAGEMENT  
SYSTEMS INC.**

August 26, 1987

Mr. Charles W. Lloyd  
Executive Secretary, OASD (P) DARS  
c/o OASD (P&L) M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my support for the regulations which the Department of Defense has developed to reach its 5% minority contracting goal. In general, I view these rules as a satisfactory starting point towards rectifying the disproportionately low representation which minority firms have in the defense business. However, I do maintain certain specific reservations to which I feel I should call your attention during this commentary period.

My reservations stem from several omissions and ambiguities in the proposed regulations. First, although subcontracting is allowed, I found no clearly defined strategy in the regulations which ensure that prime contractors make a good faith effort to increase subcontracting opportunities for Small Disadvantaged Businesses. Second, the regulations make virtually no mention of historically black colleges or other such minority institutions, much less their role in the early stages in the research and development of United States military systems. Third, the regulations have failed to stipulate the precise basis upon which advance payments would be made available to small and disadvantaged contractors in pursuit of the five percent goal. Fourth, the regulations regarding the execution of sole-source contracts to minority firms are totally unsatisfactory and require strengthening. And fifth - neither an ambiguity nor an omission - the regulations specifically prohibit the granting of partial set-aside contracts in spite of the enormous potential which such contracts hold for small and disadvantaged businesses. All of these problems must be rectified if small and disadvantaged businesses are to succeed in realizing the Set-Aside Program's goals.

I urge the Defense Department to address the above issues quickly, and to move forward aggressively in pursuing the five percent goal as established by the Defense Authorization Act of 1987.

Sincerely,

  
Otis Kirkland, Jr.

17023 West 10 Mile Road  
Southfield, MI 48075  
(313) 557-6637

2133 Cadillac Tower  
Detroit, MI 48226  
(313) 963-6100

2767 14 Mile Road  
Sterling Heights, MI 48084  
(313) 557-6637

**YOUNG'S INC.**  
Mechanical - Electrical Contractors  
3121 E. 6th St.  
TOPEKA, KS 66607-2292

July 30, 1987

The Honorable Nancy Landon Kassebaum  
United States Senator  
302 Russell Senate O.B.  
Washington, D.C. 20510

Dear Senator Kassebaum:

It has been brought to my attention, that on June 1st an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661) became effective.

I own and operate a mechanical contracting company in Topeka. This legislation will have a drastic effect on the construction industry.

We understand and appreciate that the Department of Defense is endeavoring to respond to the needs of Small Disadvantaged Businesses; however, taking 100% of the proposed set aside from a military market that already exceeds the 5% objective does not appear to be fair or reasonable. Obviously, these procedures will put hundreds of small business people out of business in the short term.

The following concerns are expressed by the Construction Industry:

1. This "rule of two" will effectively foreclose all bidding opportunities from firms which are not disadvantaged.
2. The "rule of two" in the construction industry becomes an exclusionary 100% rule for disadvantaged firms over the next three fiscal years.
3. For years the construction industry has exceeded the 5% threshold cited in regulations as the goal to be achieved.
4. The construction industry, the very industry currently in compliance, is the only industry covered by the interim rule. Aerospace, reasearch and development, and high technology contractors have apparently been excluded.



**YOUNG'S INC.**  
**Mechanical - Electrical Contractors**  
3121 E. 6th St.  
TOPEKA, KS 66607-2292

Page 2

5. No economic impact statement was conducted. Such a statement would have revealed the drastic impact the interim rule would have on small business organizations in the Construction Industry.
6. No public comments were received prior to the implementation of the rule. This indicates a violation of the Administrative Procedures Act.
7. As far as can be determined the regulation did not get Office of Management & Budget clearance and further no one in the Administration other than DoD personnel reviewed the proposal.

We believe this regulation has been very poorly conceived, that normal administrative procedures have been clearly circumvented, and that other defense industries are receiving preferential treatment at the expense of the construction industry. We cannot believe that was the intent of Pub. L. 99-661; therefore, we respectfully request that correction be made to this obviously flawed regulation.

It would be greatly appreciated if you could help our industry in this matter.

Respectfully Yours,

Edward K. Young

**BYNES ELECTRONICS, S.E. CORPORATION**

87-33

1052 CLAUSSEN ROAD SUITE 325  
AUGUSTA, GEORGIA 30907  
404-737-3266

September 2, 1987

Disposal Unit  
Contract # 244-87-001  
244-87-001

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

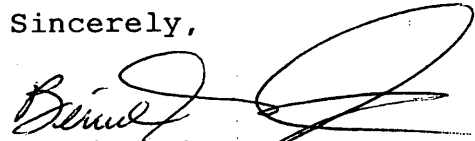
Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

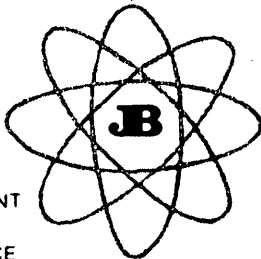
Sincerely,



Bennie Johnson  
President  
BYNES ELECTRONICS, S.E. CORP.

BJ/gr

**B**ECAUSE  
**Y**OU  
**N**EED  
**E**XCELLENT  
**S**ERVICE



207-A Broad Street

*O & S Fashions*  
Albany, Georgia 31705

Phone: 912/888-1701

August 20, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

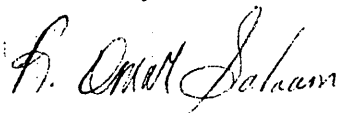
Dear Mr. Lloyd:

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First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,



R. Omar Salaam

**GEORGE A. HARRIS ENTERPRISES, INC.**

TOTAL FIRE PROTECTION - SALES AND SERVICE

August 20, 1987

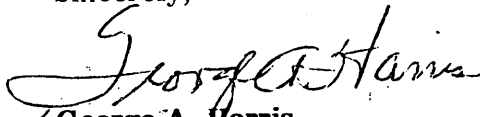
Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

Pursuant to the interim regulations that the Department of Defense has developed through the FY 87 National Defense Authorization Act (P.L. 99-661) to implement the 5% minority contracting goal. I recognize and applaud the Congress for it's foresight in addressing a need of minority contractors, historically black colleges and universities or minority institutions.

As a minority business person, I am highly concerned about what the interim regulations did not contain. **First**, there is a complete disregard as to the potential benefits that minority businesses could derive from an increase in sub-contract awards. Sub-contracts enable minority businesses to participate in Defense contracts with prime contractors that currently ignore their potential. **Second**, there is a definite need to provide some type of financial assistance either in the form of advance payments or loans to enable the minority firms to participate in worthwhile Defense awards. It is of no value to set-aside 8 billion dollars for minority firms when you know that they can not qualify for awards. In other words, if the **Department of Defense** is really interested and concerned about assisting small disadvantaged businesses then I urge them to address these issues quickly and thoroughly in the final regulations.

Sincerely,



George A. Harris  
President

GAH:bm

cc: Congressman Ron Dellum  
Senator Wyche Fowler, Jr.  
Congressman John Lewis  
Senator Sam Nunn



# Vertex Mechanical Industries

P. O. BOX 3833  
AUGUSTA, GEORGIA 30904  
(404) 733-8150

WELDING  
PLUMBING  
PIPE & STEEL FABRICATION  
PRE-ENGINEERED METAL BUILDINGS

JAMES WILLIAMS  
PRESIDENT  
JOHN D. DANDRIDGE  
VICE-PRESIDENT

August 19, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in sub-contract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

Sincerely,

*James Williams*  
James Williams  
President

JW/cj

87-33



**SELLERS OIL COMPANY**

P. O. Box 1335  
Bainbridge, Georgia 31717  
Phone 246-0646

August 19, 9187

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

*Brendia K. McDowell*

Brendia K. McDowell  
M.B.E. Coordinator

87-33

FINCH REMODELING CO., INC.

698 GARY AVE., N.W.  
ATLANTA, GA 30318

874-2754

August 20, 1987

Defense Acquisition Regulatory Council  
ATTN: MR. CHARLES W. LLOYD  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D. C. 20301

Dear Mr. Lloyd,

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregarded the potential benefits minority businesses could have and receive from an increase in sub-contract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements, subcontracting is a good way to develop minority businesses while fulfilling America's Defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

SINCERLY,

*Leroy M. Finch*  
Mr. Leroy M. Finch

President

87-33

# MEANS DEVELOPERS INC.

## General Contractors

Since 1923

August 14, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
C/O OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues thoroughly in the final regulations.

Yours truly,  
MEANS DEVELOPERS, INC.

Sylvia C. McDonald,  
President

SCM/ms



87-33

LINDA D. BERNARD, ESQ.

17355 Warrington Street  
Detroit, Michigan 48221-2766

(313) 345-9044

\*\*\*\*\*

August 11, 1987

Mr. Charles W. Lloyd  
Defense Acquisition Regulatory Council  
OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

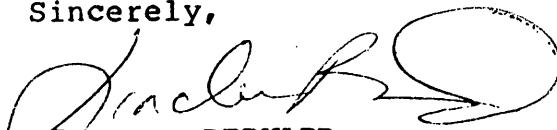
I am corresponding with you as a minority business person who is very concerned about the interim regulations published in May, 1987 by the Defense Department. It is important that Federal Regulations governing minority procurement facilitate the award of subcontracts to minority businesses. If minority businesses do not thrive, then minority communities do not, and unemployment rises and there are serious repercussions throughout the community at large. Since many minorities live in large urban areas in which there has been substantial investment by both the government, as well as the private sector, it is imperative that these communities not only survive but prosper.

Because most minority businesses are small, the only way that they can participate in any significant manner in government procurement opportunities, is through subcontracts, essentially denies them the opportunity to participate in a meaningful fashion in U.S. Government procurement.

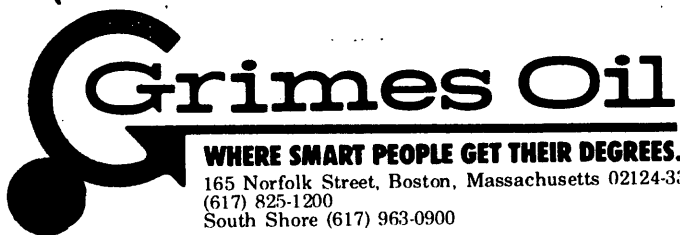
I am confident that this is not your intent. Therefore, I urge you to support the pursuit of five (5%) percent set aside for DOD contracts and to expressly provide for and facilitate the granting of subcontracts to minorities.

If you desire any further information, please do not hesitate to contact me personally.

Sincerely,



LINDA D. BERNARD  
Attorney at Law



**WHERE SMART PEOPLE GET THEIR DEGREES.™**

165 Norfolk Street, Boston, Massachusetts 02124-3396  
(617) 825-1200  
South Shore (617) 963-0900

Telex 928177

87-33

August 14, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, DC 20301

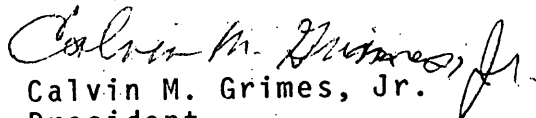
Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

Sincerely,

  
Calvin M. Grimes, Jr.  
President

CMG:av

87-33



Mc LAUGHLIN OLDSMOBILE, Inc.

8621 CENTRAL AVENUE / CAPITOL HEIGHTS, MARYLAND 20743 / Telephone: 350-1700

August 12, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (p) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

*Katye H. McLaughlin*  
Katye H. McLaughlin  
President

# SPEEGLE CONSTRUCTION, INC.

P.O. Box 2089 / Cocoa, Florida 32923-2089  
(305) 632-8164

August 10, 1987

General  
Contractor

DEFENSE ACQUISITION REGULATORY COUNCIL  
c/o OASD(P&L)(M&RS), Room 3C841  
The Pentagon  
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd, Executive Secretary  
ODASD(P)DARS

Reference: DAR Case 87-33

Dear Sir:

Twenty five years ago I started into business with very little money (mine not a Government loan/handout) and lost of ambition. After years of hard work and depriving myself of a Lincoln Continental (as driven by recipients of Government small business loans) I have achieved moderate success. My story can be multiplied by thousands of Americans like me that believe in the principals of honesty, hard work and the free enterprise system.

On the other hand I can show you at least a dozen persons (minorities and others) that received a small business loan, was given (not by competitive bid) special set aside government jobs, bought a big car, never paid withholding taxes and failed. These are just the ones that I am familiar with. The number can be multiplied by thousands nationwide.

Now not only do you want to loan money and never collect it, but penalize all the honest, hard working successful contractors by giving away bids that they are low bidder on.

If you initiate your intended program then real contractors will quit bidding Government work and you can then just give all of the contracts to minorities.

Why does our Government think it has to continue supporting non productive programs.

1. Take away farm subsidies and after 2 or 3 years of rock bottom prices the farmer will either change to another crop or fail. If he doesn't have enough sense to change then he should fail.
2. Take away "Davis-Bacon" and cost will decrease as production increases. All craftsmen should not be paid the same scale. It should be based on experience and production. By any stretch of the imagination the wages specified in Government contracting are not "the prevailing rates in the area". They are always Union rates.
3. Take away dairy subsidies and the industry will balance itself out. No more tons of cheese to be stored in warehouses.

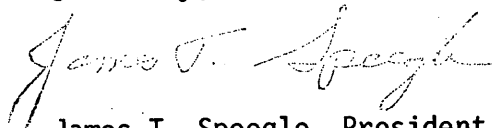
DEFENSE ACQUISITION REGULATORY COUNCIL

Attn: Mr. Charles W. Lloyd, Executive Secretary

August 10, 1987  
Page 2

In summary not only do I believe this program should be scrapped, but the entire Small Business Office should be revamped or eliminated.

Sincerely,



James T. Speegle, President  
SPEEGLE CONSTRUCTION, INC.

JTS/rln



## GENERAL BUSINESS SERVICES

3108 PARHAM ROAD  
BUILDING #400  
RICHMOND, VIRGINIA 23229  
Telephone (804) 346-4400

**GORDON M. HALCOMB**  
Business Counselor

**HENRY K. MYERS**  
Business Counselor

**J.C. BUMBRY**  
Staff Accountant

August 10, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M & RS)  
Room 3C 841  
The Pentagon  
Washington, D.C.

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

*Henry K. Myers*  
Henry K. Myers  
Business Owner  
General Business Services

HKM:dhe

# FIRST BAPTIST CHURCH

MRS. HELEN C. AMIS  
Church Clerk  
Phone 693-8815

Corner Granville and Front Streets  
Post Office Box 583  
Oxford, North Carolina 27565

MRS. GRACE C. ROBERSON  
Church Secretary

REVEREND LACY L. JOYNER, PASTOR  
August 9, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D. C. 20301-3062

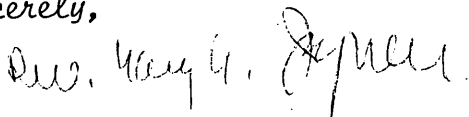
Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting, Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,



Rev. Lacy L. Joyner, Pastor  
First Baptist Church  
Oxford, N. C. 27565

LLJ/ger



OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION

WASHINGTON, DC 20301-3061

OFFICE OF SMALL AND  
DISADVANTAGED BUSINESS  
UTILIZATION

11 AUG 1987

Honorable Gillespie Montgomery  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman:

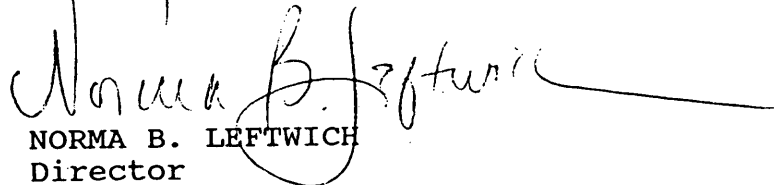
This is in reply to your letter of July 24, 1987 to the Deputy Assistant Secretary of Defense for Legislative Affairs on behalf of Mr. J. O. Collins, President of J. O. Collins Contractor, Inc.

By letter dated July 13, 1987, Mr. Collins provided you with comments on the interim rule revising the Defense Acquisition Regulation Supplement to implement section 1207 of Public Law 99-661.

Mr. Collin's comments have been provided to the Defense Acquisition Regulatory Council as instructed in the Federal Register. We can assure you that they will be considered along with other public comments, prior to publishing final regulations.

Thank you for your interest in this matter.

Sincerely,

  
NORMA B. LEFTWICH  
Director



1987 JUL 29 AM 9:23

G. V. "SONNY" MONTGOMERY  
3RD DISTRICT, MISSISSIPPI

OFFICE OF  
THE SECRETARY OF DEFENSE

DISTRICT OFFICES:  
FEDERAL BUILDING  
MERIDIAN, MISSISSIPPI 39301  
(601) 693-6681

GOLDEN TRIANGLE AIRPORT  
COLUMBUS, MISSISSIPPI 39701  
(601) 327-2766

FEDERAL BUILDING  
LAUREL, MISSISSIPPI 39440  
(601) 649-1231

**Congress of the United States**  
**House of Representatives**  
Washington, D.C. 20515

July 24, 1987

WASHINGTON OFFICE:  
2184 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C. 20515  
(202) 225-5031

COMMITTEES:  
VETERANS' AFFAIRS  
CHAIRMAN  
ARMED SERVICES  
ADMINISTRATIVE ASSISTANT:  
ANDRE CLEMANDOT

Mr. Anthony S. Makris  
Deputy Assistant Secretary  
Department Of Defense  
3D919, The Pentagon  
Washington, DC 20310

Dear Mr. Makris:

Please find attached a copy of correspondence from one of my constituents who is in need of assistance with regard to the new procedures implemented by the Department of Defense on solicitations for construction bids.

I have forwarded it to you in the hopes that your office can furnish information on which I will be able to base my reply to Mr. Collins.

I will appreciate any assistance you can give me in being of service to my constituent.

Sincerely,

  
GILLESPIE V. MONTGOMERY  
Member of Congress

GVM:ngs  
Enclosure

AQUO 1337887

JUL 17 1987

J. O. Collins Contractor, Inc.

*General Contractors*

CHARLES F. COLLINS  
SECRETARY

J. O. COLLINS  
PRESIDENT

DANIEL G. COLLINS  
VICE PRESIDENT

July 13, 1987

Honorable G. V. (Sonny) Montgomery, M.C.  
2184 Rayburn House Office Building  
Washington, D.C. 20515

RE: DOD Federal Acquisition Regulation  
Volume 52, No. 84; Federal Register

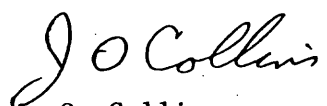
Dear Congressman Montgomery:

On June 1, 1987, the Department of Defense inaugurated new procedures relating to the solicitation of construction bids for the next three years. The new rule (being implemented on an interim basis) will in many cases have the effect of foreclosing bid submissions from firms which are not defined as small, disadvantaged businesses.

As a member of the construction community in an area very dependent upon federally funded construction projects, I am very opposed to this procedure as I feel it is highly discriminatory. I urge your support in having this regulation rescinded as I am sure you will agree that it will have a negative impact upon the American free enterprise system.

Sincerely,

J. O. COLLINS CONTRACTOR, INC.



J. O. Collins  
President

h

THOMAS A. FARRINGTON  
PRESIDENT

August 4, 1987

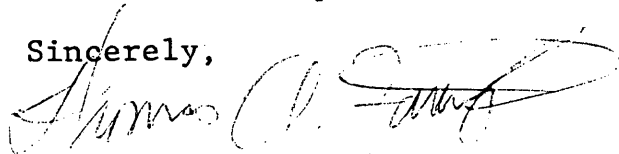
Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, DC 20301-3082

Dear Mr. Lloyd:

As an executive of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,



c. Honorable Caspar Weinberger  
Honorable James Abdnor  
Honorable Gus Savage  
Honorable Joseph Kennedy  
Coalition to Improve DoD Minority Contracting



INPUT OUTPUT COMPUTER SERVICES, INC.  
400 TOTTEN POND ROAD WALTHAM, MA 02254 (617) 890-2299



*Representative letter  
from many employees  
of this company*

27 July 1987

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an executive of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,

Marvin Beriss  
Vice President, Marketing  
Products Group

MB:jah

Enclosure

cc: Honorable Caspar Weinberger  
Secretary  
Department of Defense  
The Pentagon, 3E880  
Washington, D.C. 20301

Honorable James Abdnor  
Administrator  
Small Business Administration  
1441 L Street, N.W.  
Washington, D.C. 20416

Honorable Gus Savage  
U.S. House of Representatives  
Room 1121 Longworth Building  
Washington, D.C. 20515

Honorable Stan Paris  
U.S. House of Representatives  
1526 Longworth House Office Building  
Washington, D.C. 20515-4608

Coalition to Improve DoD Minority Contracting  
c/o Weldon H. Latham, Esquire  
Reed Smith Shaw & McClay  
8201 Greensboro Drive  
Suite 820  
McLean, Virginia 22102

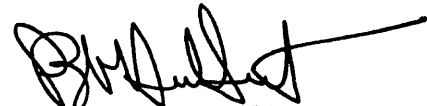
Bruce W. Hulbert  
1300 Crystal Dr.  
Arlington, Va. 22202  
29 July 1987

Mr. Charles W. Lloyd  
Secretary  
ADASD (p) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an employee of a small disadvantaged business, I urge your adoption of the attached changes in Interim Rule implementing Public Law 99-661 proposed by the Coalition to Improve DoD Minority Contracting.

Sincerely,



Bruce W. Hulbert

cc: Honorable Caspar Weinberger  
Secretary  
Department of Defense  
The Pentagon, Room 3E880  
Washington, D.C. 20301

Honorable James Abdnor  
Administrator  
Small Business Administration  
1441 L. Street N.W.  
Washington, D.C. 20416

Honorable Gus Savage  
U.S. House of Representatives  
Room 1121 Longworth Building  
Washington, D.C. 20515

Congressman Frank Wolf  
U.S. House of Representatives  
Washington D.C.

Coalition to Improve DoD  
Minority Contracting  
c/o Mr. Weldon H. Latham, Esq.  
Reed, Smith, Shaw and McClay  
8201 Greensboro Drive  
Suite 820  
McLean, Va., 22102



INTEGRATED SYSTEMS ANALYSTS, INC.

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As a resident of Montgomery County and an Executive of a small business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DOD Minority Contracting.

Sincerely,

INTEGRATED SYSTEMS ANALYSTS, INC.

Ralph D. Temple  
Operations Center Manager

RET:mdb

cc: Honorable Caspar Weinberger  
Secretary  
Department of Defense  
The Pentagon, 3E880  
Washington, D.C. 20301

Honorable James Abdnor  
Administrator  
Small Business Administration  
1441 L Street, N.W.  
Washington, D.C. 20416

Honorable Gus Savage  
U.S. House of Representatives  
Room 1121 Longworth Building  
Washington, D.C. 20515

Honorable Constance Morella  
1024 Longworth  
House Office Bldg  
Washington, D.C. 20515-20008

Representative  
letter from

Paul Young  
8615 Reicher Street  
Landover, MD 20785

Member Employees of  
The Coalition

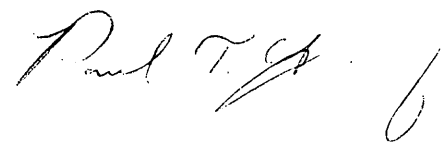
July 29, 1987

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an employee of a small disadvantaged business I urge your adoption of the attached changes in Interim Rule, implementing Public Law 99-661, proposed by the Coalition to Improve DoD Minority Contracting.

Sincerely,



cc: Honorable Caspar Weinberger  
Secretary  
Department of Defense  
The Pentagon, Room 3E880  
Washington, D.C. 20301

Honorable James Abdnor  
Administrator  
Small Business Administration  
1441 L Street, N.W.  
Washington, D.C. 20416

Honorable Gus Savage  
U.S. House of Representatives  
Room 1121 Longworth Building  
Washington, D.C. 20515



# IOCS

August 5, 1987

*This letter is  
representative of  
many letters  
received from  
This company*

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
C/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, DC 20301-3082

Dear Mr. Lloyd:

As an employee of a small disadvantaged business I urge your adoption of the attached changes in Interim Rule, implementing Public Law 99-661, proposed by the Coalition to Improve DoD Minority Contracting.

Sincerely,

*Adrian Backus*

Adrian Backus

s

- c. Honorable Caspar Weinberger
- Honorable James Abdnor
- Honorable Gus Savage
- Honorable Steny H. Hoyer
- Coalition to Improve DoD  
Minority Contracting

**INPUT OUTPUT COMPUTER SERVICES, INC.**

400 TOTTEN POND ROAD WALTHAM, MA 02254 (617) 890-2299

WASHINGTON, DC (202) 879-7000

207-A Broad Street

# O & S Fashions

Albany, Georgia 31705

Phone: 912/888-1701

August 20, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

Sincerely,



R. Omar Salaam

FRANK R. WOLF  
10TH DISTRICT, VIRGINIA

WASHINGTON OFFICE:  
130 CANNON BUILDING  
WASHINGTON, DC 20515  
(202) 225-5136

CONSERVATION SERVICES OFFICES:

WOOD MEADOW RD.  
SUITE 115  
MCLEAN, VA 22102  
(703) 734-1500

19 E. MARKET ST.  
ROOM 4B  
LEESBURG, VA 22075  
(703) 777-4422

Congress of the United States  
House of Representatives  
Washington, DC 20515

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:  
TRANSPORTATION

TREASURY—POSTAL SERVICE—GENERAL  
GOVERNMENT

DISTRICT OF COLUMBIA

SELECT COMMITTEE  
ON CHILDREN, YOUTH  
AND FAMILIES

August 17, 1987

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

I have received several inquiries which I have enclosed concerning the Interim Rule implementing Public Law 99-661.

I would appreciate it if you would review the matter and send me a report as to the possibilities of my constituents' suggestions. It would be helpful if you would address the response to me, attention: Judy McCary.

Thank you for your time and courtesy in being attentive to the concerns of my constituents.

With best regards,

Sincerely,



Frank R. Wolf  
Member of Congress

FRW:jm/mh



INTEGRATED SYSTEMS ANALYSTS, INC.

JACK SABOL  
Corporate Technical Director

00 WEST PLUME STREET  
PLUME CENTER WEST - SUITE 550  
NORFOLK, VA 23510

Bus: (804) 629-2080  
Res: (804) 420-5702

D SYSTEMS ANALYSTS, INC.  
EST PLUME STREET, SUITE 550  
PLUME CENTER WEST  
NORFOLK, VIRGINIA 23510

PHONE (804) 629-2080

23 July 1987

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an executive of a disadvantaged business with offices in both Norfolk and Chesapeake, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,

E. B. Sabol, Jr.  
ISA Corporate Technical  
Director

cc: Honorable Caspar Weinberger  
Secretary  
Department of Defense  
The Pentagon 3E880  
Washington, D.C. 20301

Honorable Norman Sisisky  
426 Cannon Blvd  
Washington, D.C. 20515

Honorable James Abdnor  
Administrator  
Small Business Administration  
1441 L Street, N.W.  
Washington, D.C. 20515

Honorable Owen B. Pickett  
1429 Longworth Bldg  
Washington, D.C. 20515

Coalition to Improve DoD Minority Contracting

JIM BATES  
44TH DISTRICT, CALIFORNIA

Congress of the United States  
House of Representatives  
Washington, D.C. 20515



August 10, 1987

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DATS  
c/o OASD (P&L) (M&RS)  
The Pentagon, Room 3 C841  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

I recently received the attached information from a group of constituents regarding the Interim Rule implementing Public Law 99-661.

I would appreciate your perusal of the material and providing me with a response so that I might properly reply to the inquiry. If you have any questions or require any additional information, please do not hesitate to contact Jay Hansen of my staff at (202)225-5452.

Again, thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Bates", written over the typed name and title.

JIM BATES  
Member of Congress

JB:jh

BENTSEN  
TEXAS

OFFICE OF  
THE SECRETARY OF DEFENSE

COMMITTEES:  
FINANCE  
COMMERCE, SCIENCE AND TRANSP  
JOINT ECONOMIC  
JOINT COMMITTEE ON TAXA1  
SELECT COMMITTEE ON INTELLI

# United States Senate

WASHINGTON, D.C. 20510

August 5, 1987

Honorable M.D.B. Carlisle  
Assistant Secretary of Defense  
(Legislative Affairs)  
Washington, D.C. 20301

Dear Ms. Carlisle:

I recently received the enclosed constituent inquiry, and I would very much appreciate your providing me with any pertinent information you might have regarding the matter.

Your kind assistance is greatly appreciated.

Sincerely,

  
Lloyd Bentsen

Enclosure

PLEASE REPLY TO:

961 Federal Building  
Austin, Texas 78701  
ATTN: Isaac Jackson

AGUC1437187

**"COLUMBUS MINORITY BUSINESS DEVELOPMENT CENTER"**  
(Contractor Assistance Program)

5 E. Mound St.  
Columbus, Ohio 43205

(614) 252-8005

SEPTEMBER 23, 1987

DEFENSE ACQUISITION REGULATORY COUNCIL  
SECRETARY, ODASO  
ROOM 841  
THE PENTAGON  
WASHINGTON, D.C. 20301-3082

ATTENTION: MR. CHARLES W. LLOYD, EXECUTIVE DIRECTOR

DEAR DEPARTMENT OF DEFENSE:

PLEASE SEND THE FOLLOWING INFORMATION:

48 CFR PARTS 204, 205, 206, 219 & 252, DEPARTMENT OF DEFENSE FEDERAL  
ACQUISITION REGULATION SUPPLEMENT IMPLEMENTATION OF SECTION 1207 OF PUB.  
99-661: SET-ASIDES FOR SMALL DISADVANTAGED BUSINESS CONCERNS.

IF YOU HAVE ANY QUESTIONS, PLEASE FEEL FREE TO CALL.

SINCERELY,

*Frank W. Watson*  
FRANK W. WATSON  
PRESIDENT

FWW/CDW

*done 10/1/87  
please call  
Average*

# Congress of the United States

House of Representatives

Washington, DC 20515

MATTHEW G. MARTINEZ

30TH DISTRICT, CALIFORNIA



COMMITTEE ON EDUCATION AND LABOR  
CHAIRMAN,  
SUBCOMMITTEE ON EMPLOYMENT  
OPPORTUNITIES  
SUBCOMMITTEE ON ELEMENTARY,  
SECONDARY AND VOCATIONAL EDUCATION  
SUBCOMMITTEE ON SELECT EDUCATION  
GOVERNMENT OPERATIONS  
SUBCOMMITTEE ON GOVERNMENT ACTIVITIES  
AND TRANSPORTATION  
SUBCOMMITTEE ON EMPLOYMENT AND  
HOUSING  
SELECT COMMITTEE ON CHILDREN, YOUTH  
AND FAMILIES

REPLY TO:  
WASHINGTON OFFICE:  
U.S. HOUSE OF REPRESENTATIVES  
WASHINGTON, DC 20515  
(202) 225-5464  
DISTRICT OFFICE:  
1712 WEST BEVERLY BOULEVARD  
MONTEBELLO, CA 90640  
(213) 722-7731

September 3, 1987

Mr. Charles W. Lloyd  
Defense Acquisition Regulatory Council  
OASD (P) DARS / OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington D.C. 20301-3052

Re: DAR Case 87-33, Section 219.502-72

Dear Mr. Lloyd:

This is a brief note to contribute my view on a provision within the proposed and interim rules concerning Department of Defense set-asides for small, disadvantaged businesses (SDBs).

Section 1207 of PL 99-561 was promulgated with unequivocal intentions. As my colleagues and I had discussed repeatedly, the basic principle behind this law was to encourage---and, in fact, institute---incorporation of minority-owned businesses of all kinds into the regular DoD scheme of contract awards. Repeatedly, both in the 99th Congress and more recently in connection with the Richardson Amendment, we reiterated our unequivocal concern for widening the swath of Section 1207 to include all types of businesses, without limits, including types of businesses which had historically not participated in DoD affairs. It was repeatedly stressed, including at the June meeting between Secretary Weinberger and the Congressional Black Caucus, that distributorships, among other lines of business, were to be within the Section 1207 mechanism.

However, it seems clear that the proposed rules for Section 1207 have surcharged the 1207 mechanism with an additional requirement for distributors which must be met for them to be eligible under the 1207 program. It is often inappropriate to require that the product being distributed be manufactured by an SDB producer. Many products do not have such a broad group of sources that would enable a distributor to choose between an SDB manufacturer and traditional sources. In instances where no bid has been submitted by an SDB to distribute the product of an SDB manufacturer, it is imperative that an SDB distributor of non-SDB product be included within the 1207 framework. Hence, I suggest simply adding language at the end of proposed rule 219.502-72(a)(1) so that the rule reads,

...offers will be obtained from at least two responsible SDB concerns offering the supplies or services of different SDB concerns unless no bids have been submitted by such concerns, in which case SDB distributors of a non-SDB service or supply are eligible under this mechanism.

Requiring SDB-owned production would effectively exclude many SDB-owned distributorships from participating in the 1207 program. The fact that no viable minority-owned competitor for a particular product has established itself is no reason to cripple the efforts of that product's minority-owned distributor as well.



Page 2  
September 3, 1987

Finally, I would like to add a corollary to the above discussion. Perhaps the most important means for effectuating the Congressional intent of Section 1207 is to implement a broad-reaching publicity scheme to alert minority-owned businesses to this program. In many cases, there may seem to be no SDB manufacturer of a particular supply, thus creating the type of problem elucidated above; however, in many of these potential cases, there is likely to be an alternative, SDB-owned producer which simply has not been made aware of this program. Hence, greater efforts are needed for tuning in SDB distributors to SDB producers, and making all potential SDBs aware of this program.

Your consideration and appropriate action on this matter is appreciated.

Sincerely,

  
MATTHEW G. MARTINEZ  
Member of Congress

**TECHPLAN CORPORATION**

Suite 600, Crystal Mall 1  
1911 Jefferson Davis Highway, Arlington, Virginia 22202  
(703) 685-1111

September 14, 1987

Defense Acquisition Regulatory Council  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS), Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Attn: Mr. Charles W. Lloyd  
Executive Secretary

Re: DAR Case 87-33, Set-Asides for Small  
Disadvantaged Business Concerns

Dear Mr. Lloyd:

On May 4, 1987, the Department of Defense issued an interim rule implementing Section 1207 of the 1987 Defense Authorization Act, P.L. 99-661, by establishing a set-aside program for Small Disadvantaged Business Concerns. The official comment period for the interim rule was to and including August 3, 1987. However, on September 1, 1987, you acknowledged to our counsel that additional comments would still be accepted and reviewed by the Council. Accordingly, TECHPLAN Corporation ("TECHPLAN") takes this opportunity to submit its comments on the impact of the interim rule, as presently drafted.

TECHPLAN is a technology services company which provides research, analysis, and engineering support to both government and industry. Until the interim rule was issued, TECHPLAN had seen a successful small business. Unfortunately, TECHPLAN's continued viability is in jeopardy since the application of the interim rule by the Department of Defense will result in reclassification for small disadvantaged business set-aside many small business set-aside procurements in our service industry category.

September 14, 1987  
Page 2

In fact, three contracts which TECHPLAN is currently performing, and which together comprise approximately 90% of TECHPLAN's business, are scheduled to be recompeted in the next several months. According to our customer, the Department of Navy, one, and possibly two, of these procurements will be changed from small business set-asides to set-asides for small disadvantaged business. As a result, TECHPLAN is foreclosed from any opportunity to compete in its own area of expertise. Moreover, TECHPLAN faces the likelihood of being precluded from competing on two contracts which currently represent 60% of its revenue.

TECHPLAN believes that under the interim rule, as drafted, Contracting Officers can reclassify procurements which have been set-aside for small service businesses without any consideration of the existing regulatory requirements of Section 19.5 of the Federal Acquisition Regulations and the Department of Defense supplement. Literally speaking, under the interim rule, all small business set-aside procurements in this industry category could be reclassified, to the wholesale detriment of that segment of the small business community.

The reasons for these very damaging circumstances is that the interim rule fails to provide any guidance on the relationship between the SDB set-aside program and the small business set-aside program. Surely, the SDB program must contain some restrictions to prevent such wholesale action. For example, the Small Business Administration ("SBA") will not accept a proposed procurement for 8(a) award under specific circumstances, such as where the 8(a) award would have an adverse impact on other small business programs or individual small business. 13 CFR Sec. 124.301(b) (8).

Further, from our research, there appears to be no need for the harshness which the rule will sanction without guidelines between the two programs. There is nothing in the 1987 Defense Appropriation Act to indicate that Congress intended for DOD to satisfy the 5% SDB "goal" to the detriment of the small business community. Also, the statistics on DOD procurement money which went to SDB's in FY '86, according to the Deputy Director of Small and Disadvantaged Business in the Office of the Secretary of Defense, equalled 4.2% of the DOD budget. Therefore, it is difficult for TECHPLAN to understand why DOD implemented regulations which potentially are so severely damaging to the small business set-aside program.

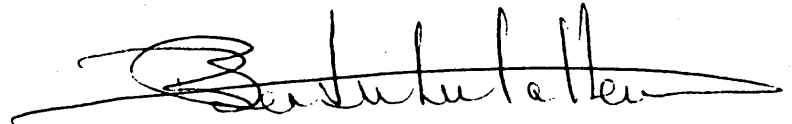
September 14, 1987  
Page 3

Finally, with regard to other concerns raised by both the interim rule and the procedures used in its implementation, TECHPLAN endorses fully the comments made by the Professional Services Council on August 3, 1987, especially the absolute need for the Initial Regulatory Flexibility Analysis required by the Regulatory Flexibility Act of 1980.

TECHPLAN trusts that the DAR Council will seriously consider the comments made by TECHPLAN and others concerning the negative impact of the interim rule upon small business and make the changes necessary to minimize that impact in the final rule.

Sincerely yours,

TECHPLAN Corporation

A handwritten signature in black ink, appearing to read "Robert M. Matteucci", written over a horizontal line.

Robert M. Matteucci  
Chairman of the Board and  
Chief Executive Officer

ED JONES  
8TH DISTRICT, TENNESSEE  
108 CANNON HOUSE OFFICE BUILDING  
(202) 225-4714

COMMITTEE ON  
AGRICULTURE

CHAIRMAN:  
SUBCOMMITTEE ON  
CONSERVATION, CREDIT AND  
RURAL DEVELOPMENT

COMMITTEE ON  
HOUSE ADMINISTRATION

CHAIRMAN:  
SUBCOMMITTEE ON  
HOUSE SERVICES

Congress of the United States  
House of Representatives  
Washington, D.C. 20515

September 2, 1987

DISTRICT OFFICES:  
ROOM B-7, POST OFFICE BUILDING  
JACKSON, TENNESSEE 38301  
(901) 423-4848

3179 NORTH WATKINS  
MEMPHIS, TENNESSEE 38127  
(901) 358-4094

P.O. Box 128  
YORKVILLE, TENNESSEE 38389  
(901) 643-6123

KELLY M. SHARBEL, JR.  
ADMINISTRATIVE ASSISTANT

Mr. Charles Lloyd  
Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD(P)/DARS  
c/o OUSD(A) Mail Room, Room 3D139  
The Pentagon  
Washington, D. C. 20301-3062

Re: DAR Case 87-33

Dear Mr. Lloyd:

Enclosed is a copy of a letter I received from a constituent who would like his views to be considered regarding the aforementioned case number. I respectfully request that you review his letter and give to it your utmost consideration. It is my understanding that the comment period ended August 3, 1987. Any information you can provide to me regarding your Final Rule would be greatly appreciated.

With kindest regards and best wishes, I am

Sincerely yours,

  
ED JONES, M. C.

EJ/dt

Enclosure

*received by Doug this date,*

**AUG 24 1987**

July 30, 1987

AUG 06 1987



**Morgan & Thornburg**  
INCORPORATED

MECHANICAL  
CONTRACTORS

DESIGN/BUILD

H.V.A.C.

PLUMBING

PROCESS PIPING

SHEETMETAL

TEST & BALANCING

SERVICE CONTRACTS

The Honorable Ed Jones  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Jones:

I wish to call to your attention an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661). The statute permits DOD to enter into contracts using less than full and open competitive bid procedures, to achieve a goal of awarding 5% of contract dollars to small disadvantaged business concerns during FY 1987, 1988, and 1989, provided the contract price does not exceed fair market cost by more than 10%.

I understand and appreciate that the DOD is endeavoring to respond to the needs of SDBs; however, taking 100% of the proposed set aside from a military market that already exceeds the 5% objective does not appear to be fair or reasonable. Obviously, these procedures will put hundreds of small business people out of business in the short term.

I believe the following questions need to be asked:

1. Is DOD aware that this "rule of two" will effectively foreclose all bidding opportunities from firms which are not disadvantaged?
2. Does not the "rule of two" in the construction industry become an exclusionary 100% rule for disadvantaged firms over the next three fiscal years?
3. Has not the construction industry exceeded the 5% threshold, cited in the regulation as the goal to be achieved, for years?
4. Why is the construction industry, the very industry currently in compliance, the only industry covered by the interim rule? Is aerospace affected? Research and development? High technology contractors? If not, why not?
5. Was an economic impact statement conducted? If not, why not? If one was compiled, what is the projected impact on small business organizations in the construction industry?
6. Why were no public comments received prior to the implementation of the interim rule? Why an interim rule in the first instance? Has the Administrative Procedures Act been violated?
7. Did the DOD acquisition regulation get OMB clearance? If not, why not? Has OMB Director Miller been briefed on the subject at all? Has anyone in administration other than DOD personnel reviewed the proposal?

Continued

4076 HATCHER CIRCLE

TELEPHONE 365-4936

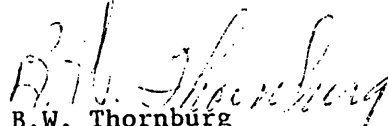
MEMPHIS, TENNESSEE 38118

July 30, 1987

Page 2

We believe this regulation has been very poorly conceived, that normal administration procedures have been clearly circumvented, and that other defense industries are receiving preferential treatment at the expense of the construction industry. We cannot believe that was the intent of Pub. L. 99-661; therefore, we respectfully request that you respond to our urgent appeal to correct this obviously flawed regulation.

Sincerely,  
MORGAN & THORNBURG, INC.

  
B.W. Thornburg  
President

BWT:km

# BYNES ELECTRONICS, S.E. CORPORATION

1052 CLAUSSEN ROAD SUITE 325  
AUGUSTA, GEORGIA 30907  
404-737-3266

September 2, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, DC 20301

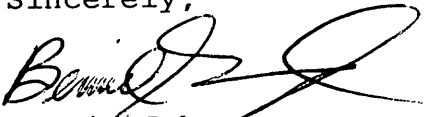
Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

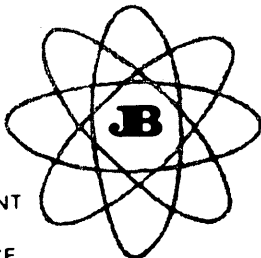
Sincerely,



Bennie Johnson  
President  
BYNES ELECTRONICS, S.E. CORP.

BJ/gr

**B**ECAUSE  
**Y**OU  
**N**EED  
**E**XCELLENT  
**S**ERVICE





FLEMING CORP V JACKSON  
100 PEACHTREE ST SUITE 537  
ATLANTA GA 30303 02AM

Western  
Union Mailgram



-004945S214 08/02/87 ICS IPMTZZ CSP WWSB  
4049924874 MGMB TDMT ROSEWELL GA 124 08-02 0124P EST

THE DEFENSE ACQUISITION REGULATORY  
COUNCIL, ATTN CHARLES W LLOYD EXECUTIVE SEC,  
ODASD (P) DARS, CARE OASD (P & L)  
(M & RS), ROOM 3C841, THE PENTAGON  
WASHINGTON DC 20301-3062

REFERENCE: SECTION 1207 OF PL99-661

THE WORDING OF THE PROPOSED LEGISLATION EXCLUDES DISADVANTAGED FIRMS WHICH ARE NOT "SMALL BUSINESS" BY CURRENT SBA DEFINITIONS. PROVISIONS SHOULD BE MADE IN THE PROPOSED LEGISLATION TO INCLUDE SMALL AND DISADVANTAGED BUSINESSES. DOD COULD THEN AVAIL ITSELF OF A LARGE POOL OF FIRMS WITH WHICH TO WORK. ADDITIONALLY MORE EFFORTS SHOULD BE MADE TO SOLICIT THESE FIRMS FOR ARCHITECT/ENGINEER DESIGN PROJECTS. THE IMPLEMENTATION OF THESE MODIFICATIONS WOULD ENHANCE THE ATTAINMENT OF THE 5 PERCENT MINORITY GOALS.

SINCERELY,  
VIRDEL F JACKSON FLEMING CORP  
100 PEACHTREE ST SUITE 537  
ATLANTA GA 30303

13122 EST

MGMCOMP

EXHIBIT A

Establish policies and procedures which will ensure that there shall be no reduction in the number or dollar value of contracts awarded under the program established under section 8(a) of the Small Business Act and under the small business set-aside program established under section 15(a) of the Small Business Act in order to meet the goal of section 1207 of the Department of Defense Authorization Act, 1987.



10 years of Service to Industry

ETS, INC.

Providing Air Pollution Control Services

July 30, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, DC 20301-3062

SUBJECT: Public Law 99-661

Dear Mr. Lloyd:

Please be advised that ETS is an advocate of the correction of the subject law so that the final rule contains the attached wording (see Exhibit A) and so that there will be no reduction in number or dollar value of contracts awarded to qualified small businesses.

Your consideration of our concern is greatly appreciated.

Sincerely,

ETS, INC.

John C. Mycock  
Vice President

JCM:chg

Enclosure: Exhibit A



Division Office  
2905 Westcorp Blvd., Suite 219  
Huntsville, Alabama 35805  
(205) 536-4400

July 30, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd, Executive Secretary  
PDASD(P)DARS  
% OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Reference is made to DAR Case 87-33.

Essentially this interim rule is a contravention and dilution of the Small and Disadvantaged Business (SDB) process of selecting a minority contractor set forth in FAR 19.802. It sets up a quasi competition and permits award to a SDB contractor that does not exceed 10% of the fair market cost. Instead of the SBA Procurement Center rep identifying recipients for awards and consequently, insuring that all SDB contractors are provided the business necessary for growth, the new interim rule will tend to "fatten" the most efficient contractors who obviously are most in need of the business to increase their volume and efficiency.

It sets up additional "Red Tape", i.e. the ascertainment by the contracting officer that there are two eligible SDB's on the one hand and whether the proposed price is within 10% of the fair market cost on the other. Contracting officers are beset with such like programs that this one is doomed from the beginning.

The other two proposals mentioned in the Federal Register, Vol 52, No. 85, page 16290 are equally unworkable. It would appear that the DAR council has lost sight of the objective. The goal should be the increase of SDB awards by five (5) percent, not the creation of "Red Tape". The procedure for award to SDB's is already in place and working. The only thing that needs doing now, is to provide SBA PCRs with the additional requirements so that they can match them with SDB Contractors.

Sincerely,

A handwritten signature in black ink that reads "Steven C. Walker". The signature is written in a cursive, flowing style.

Steven C. Walker  
Vice President

SCW:pfm

A-Z COMPUTER & OFFICE SUPPLY CO.  
100 E. ADAMS ST.  
JACKSONVILLE, FLORIDA 32202  
904-355-1623

AUGUST 3, 1987

DEFENSE ACQUISITION REGULATORY COUNCIL  
ATTN: MR CHARLES W. LLOYD  
EXECUTIVE SECRETARY, ODASD (P) DARS  
C/O OASD (P&L) (M&RS)  
ROOM 3C 841  
THE PENTAGON  
WASHINGTON, D. C. 20301 -3062

DEAR MR. LLOYD:

I AM WRITING TO EXPRESS MY CONCERN ABOUT THE INTERIM REGULATIONS THAT THE DEPARTMENT OF DEFENSE HAS DEVELOPED TO IMPLEMENT THE 5% MINORITY CONTRACTING GOAL. ALTHOUGH THE REGULATIONS ARE A STEP IN THE RIGHT DIRECTION, IT APPEARS THAT A NUMBER OF IMPORTANT ISSUES HAVE BEEN OVERLOOKED.

FIRST, THE REGULATIONS CONTAIN NO EXPRESS PROVISIONS FOR SUBCONTRACTING. SECOND, THE REGULATIONS DO NOT PROVIDE FOR THE PARTICIPATION OF EITHER HISTORICALLY BLACK COLLEGES AND UNIVERSITIES OR MINORITY INSTITUTIONS. THIRD IT IS UNCLEAR ON BUSINESS IN PURSUIT OF THE 5% GOAL. FINALLY, PARTIAL SET-ASIDES HAVE BEEN SPECIFICALLY PROHIBITED DESPITE THEIR POTENTIAL ABILITY TO FACILITATE MINORITY BUSINESS PARTICIPATION.

I ALSO FEEL THAT IT IS A PUNISHMENT TO THE MINORITY BUSINESS WHO MAY BE THE ONLY ONE THAT HAS APPLIED FOR THE RIGHT TO DO BUSINESS WITH DOD. YOU SHOULD LET THE RULE APPLY TO ONE OR MORE MINORITY BUSINESSES.

I URGE THE DEPARTMENT OF DEFENSE TO ADDRESS THESE ISSUES QUICKLY AND THOROUGHLY IN THE FINAL REGULATIONS.

SINCERELY,

*Larry Lay*  
LARRY LAY



August 3, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

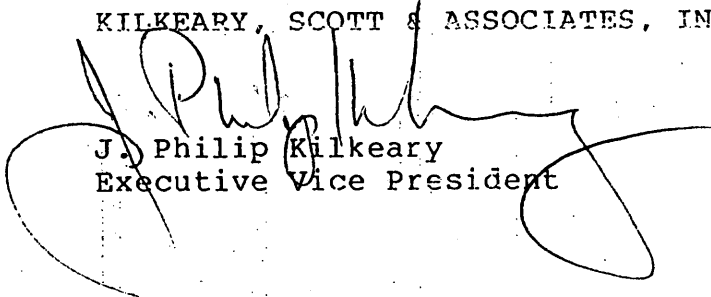
This letter is to advise you of Kilkeary, Scott & Associates, Inc.'s opposition to the implementation of Section 1207 of the DOD Authorization Act of 1987.

We are not opposed to providing reasonable assistance to the small and disadvantage business concern, but, using funds designated for other small business set aside contracts does not seem logical or in the spirit of Section 15(a) of the Small Business Act.

We believe that if Section 1207 is to be implemented, the larger pool of contract dollars available to large businesses should be used.

Very truly yours,

KILKEARY, SCOTT & ASSOCIATES, INC.

  
J. Philip Kilkeary  
Executive Vice President

JPK/nnmi



**LANDMASTERS**  
INC.

July 31, 1987

Mr. Charles W. Lloyd  
Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS c/o OASD (P&L) (M&RS)  
Room 3C841 THE PENTAGON  
Washington, D.C. 20301-3062

Dear Mr. Charles W. Lloyd:

For several years I have been trying to get the 10% set aside quota removed from the DOT's Highway Contracting Program.

Now with Rule of Two by D.O.D., the so called disadvantaged want, not just a piece of the pie, they want the whole pie.

Several contractors around the country have been convicted of bid rigging. The practice of 100% set-a-side sounds to me to be about the same thing. Whether its 10% or 100% set-a-side it still promotes discrimination and polarizes. Also, it increases the cost, permits substandard work and creates a bureaucracy that add a burden to all Americans.

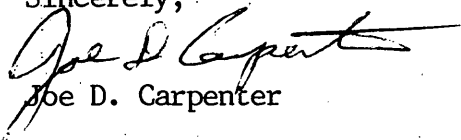
There is a better way. That is to help all to be a part of the Free Enterprise System by removing all special favoritism so that those who want to be a viable part of the construction industry can do so with honor.

It has been my observation that favoritism creates a false sense of economy for the participant. It would be much better to show them how to compete rather than give handicaps.

When will those leaders in power recognize and admit that what's good for one is good for the other?

Please stop lying to those who want for themselves and their family a better way.

Sincerely,

  
Joe D. Carpenter

cc: Rep. Cass Ballinger  
Senator Jessie Helms  
Senator Terry Sanford

JDC/gc

# WESTERN TECHNICAL ASSOCIATES

261 East 157th Street, Gardena, California 90248  
P.O. Box 91735, Los Angeles, California 90009  
Telephone: (213) 516-6021

30 July 1987

Defense Acquisition Regulatory Council  
Attention: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

If the above areas are not clearly delineated in the regulations, persons within the agency will attempt to interpret the regulations normally to the detriment of the minority business.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

WESTERN TECHNICAL ASSOCIATES



John Redmond, Jr.  
President

JRJ:jd



Master  
Mix



ROBESON FARM SERVICES, INC.  
P. O. Box 214  
Pembroke, North Carolina 28372 919/521-2318

August 3, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
C/O OASD (P&L) (M&RS)  
Room 3c 841  
The Pentagon  
Washington, DC 20301-3062

Dear Mr. Lloyd:

Robeson Farm Services Inc. is a Small Minority Owned Business, (Native American), which is actively doing business with the Department of Defense and other Federal Agencies. After reviewing the interim regulations that have been established by DOD for implementation of the 5% minority set-aside goal there are several areas of concern.

The regulations make no specific reference to purchases being made by GSA for DOD. While the volume purchased by GSA may restrict some SDB's from being competitive, portions of these acquisitions could be handled without reducing the quality of goods, adjusting delivery requirements and effecting price competitiveness.

A procedure for handling advance payments would enhance the ability of SDB's in meeting performance requirements. I understand that there would be potential abuse if not monitored; however firms with existing track records would be able to provide products and services more competitively and to a larger degree. This would go a long way in successfully meeting the 5% set-aside goal.

The areas available for procurement under the existing guidelines are some what limited. Potential contracting opportunities would greatly be enhanced by having SDB set-aside goals for Prime Contractors doing business with DOD. It is vital that construction and manufacturing prime contractors not be excluded from DOD's attempt to meet the 5% set-aside goal.

I hope that these observations give some insight into the needs of SDB's to meet the procurement set-aside goals for DOD. Mr. Lloyd I look forward to the day this important objective is met. It will give me the same sense of pride that I received when awarded my Bronze Star. If I can be of any additional service please contact me.

Sincerely,

*James L. Oxendine*  
James L. Oxendine  
President

**SCALES & ASSOCIATES, INC.**  
Consulting Engineers

Suite 1025 David Whitney Bldg.  
1553 Woodward  
Detroit, Michigan 48226  
313 • 962 • 8830

July 31, 1987

Mr. Charles W. Lloyd  
Executive Secretary, OASD (P) DARS  
c/o OASD (P & L) M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C.  
20301-3062

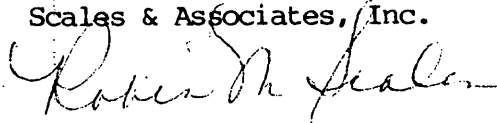
Dear Mr. Lloyd:

I am writing to express my support for the regulations which the Department of Defense has developed to reach its 5% minority contracting goal. In general, I view these rules as a satisfactory starting point towards rectifying the disproportionately low representation which minority firms have in the defense business. However, I do maintain certain specific reservations to which I feel I should call your attention during this commentary period.

My reservations stem from several omissions and ambiguities in the proposed regulations. First, although subcontracting is allowed, I found no clearly defined strategy in the regulations which ensure that prime contractors make a good faith effort to increase subcontracting opportunities for Small Disadvantaged Businesses. Second, the regulations make virtually no mention of historically black colleges or other such minority institutions, much less their role in the early stages in the research and development of United States military systems. Third, the regulations have failed to stipulate the precise basis upon which advance payments would be made available to small and disadvantaged contractors in pursuit of the five percent goal. Fourth, the regulations regarding the execution of sole-source contracts to minority firms are totally unsatisfactory and require strengthening. And fifth--neither an ambiguity nor an omission--the regulations specifically prohibit the granting of partial set-aside contracts in spite of the enormous potential which such contracts hold for small and disadvantaged businesses. All of these problems must be rectified if small and disadvantaged businesses are to succeed in realizing the Set-Aside Program's goals.

I urge the Defense Department to address the above issues quickly, and to move forward aggressively in pursuing the five percent goal as established by the Defense Authorization Act of 1987.

Sincerely,  
Scales & Associates, Inc.



Robin M. Scales  
DIRECTOR OF MARKETING

RMS/lis

*Centrex*  
ELECTRICAL SUPPLY CORP.  
3900 WASHINGTON AVE.  
ST. LOUIS, MISSOURI 63108  
WHOLESALE SUPPLIERS - (314) 535-3900

July 28, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for sub-contracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority business in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation. There should be a form for all minority business with set rules and regulations on how to go about obtaining these contracts. There are too many middlemen in this type of operation where as the minority business man ends up with less a percentage than expected and not enough capital to continue in business. We need names and telephone numbers of the people who are disbursing the money and/ contracts for direct input and communication between parties.

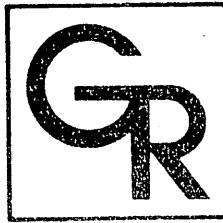
I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely

*William H. Smith*

William H. Smith  
Office Manager

hyj



GENERAL RAILROAD EQUIPMENT AND SERVICES, INC. P.O. BOX 159, EAST ST. LOUIS, ILLINOIS 62202 (618)271-1866

July 28, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

RE: Interim Rule to implement Section 1207 of PL 99-661

Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from 1. the SBA 8(a) program, and 2. an increase in subcontract awards.

The SDB program, as it is currently configured, will adversely impact the SBA 8(a) program by enabling the CO's to withdraw requirements from the 8(a) program and designating them under the SDB program.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to 1. institute safeguards that will insure that the 8(a) program is not adversely impacted by the SDB set-aside program, and 2. make subcontracting an integral part of the awards and procurement process.

Sincerely,

Cynthia B. Thompson  
Vice President, Personnel

CBT:bb

# TWIN TOWER TRADING, INC.

MANUFACTURERS OF LADIES APPAREL

1372 BROADWAY 9TH FLOOR NEW YORK, NEW YORK 10018  
(212) 921-1077 / 921-1078

July 13, 1987

Defense Acquisition Regulatory Council  
Att; Mr. Charles W. Lloyd  
Executive Secretary  
ODASK (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 Fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectfully object to the exclusion of Hasidic Jews from the designated list of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

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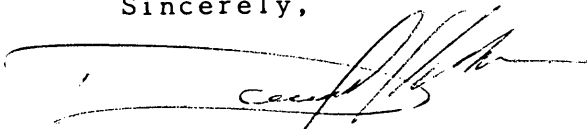
July 13, 1987

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Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,



David Kolman



# Manhattan Poly Bag Co.

1150 Metropolitan Ave. • Brooklyn, N.Y. 11237 • TEL (718) 326-4770

July 13, 1987

Defense Acquisition Regulatory Council  
Att; Mr. Charles W. Lloyd  
Executive Secretary  
ODASK (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

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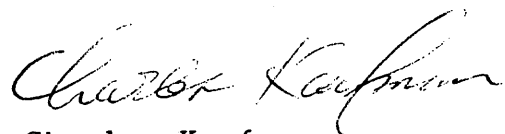
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Sincerely,

  
Charles Kaufman



**MECHANICAL  
CONTRACTORS ASSOCIATION  
OF NORTHERN CALIFORNIA**

862 Southampton Rd., #213  
Benicia,  
California  
94510

800-645-5151  
707-746-6484



July 27, 1987

Charles W. Lloyd, Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS  
C/O OASD (P&L) (M + RS)  
Room 3 c 841  
Pentagon Washington, D.C. 20301-3062

RE: DAR Case 87-333

Dear Mr. Lloyd,

The Mechanical Contractors Association of Northern California opposes the new Department of Defense's policy of only allowing small disadvantaged businesses to compete for Defense contracts through 1989.

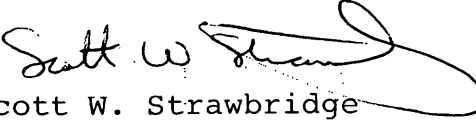
This policy not only is contradictory to the American free Enterprise System, but is unworkable as a practical matter.

How can the Department of Defense justify such a stance without having public input.

We believe this new regulation has been poorly conceived and the normal administrative process has been circumvented. This is clearly not the normal intent of the Department of Defense.

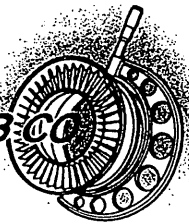
We strongly urge you to repeal this new policy.

Sincerely,

  
Scott W. Strawbridge  
Executive Vice President

SWS:js

**J.T. SLOCOMB**



68 MATSON HILL ROAD · SOUTH GLASTONBURY, CONN. 06073 U.S.A. · 203/633-9485 · TWX: 710-424-8713

July 23, 1987

Department of Defense  
The Pentagon, Room 2A330  
Washington, DC 20301

Re: Reservation of SBA 8(a) 11th Stage Stator Assembly  
NSN: 2840-00-912-0730  
Aviation Supply Office

Attn: Norma B. Lefwich, Director - SADBU

Dear Ms. Lefwich:

The purpose of this correspondence is to express my strong concerns as they relate to the response of the Department of the Navy's, K. J. Annunziata, Acting Director, Procurement Division # 2, to J. T. Slocomb's above-referenced reservation request.

To paraphrase, Mr. Annunziata suggests that the referenced contract should not be reserved due to time constraints and the criticality of the procurement.

J. T. Slocomb is the first to be concerned about the issue of flight safety, in all instances, and has an exemplary record, witnessed by the fact the the firm has produced hundreds of similar stators for prime contractors and the military direct - all were critical components and produced to stringent specifications.

While it was pointed out that Pratt & Whitney was the sole-source to supply the part in the past and produces the part in-house, it should be noted that under the Competition Enhancement Act of 1985, that similarity is an effective and prudent methodology to qualify a vendor of record as a qualified source - as was the vehicle in this case. One key factor that has greatly assisted J. T. Slocomb in being source approved, based upon similarity, is on site visits to Slocomb by ASO procurement and technical personnel. During these sessions it has been unequivocally demonstrated that J. T. Slocomb possesses the in-house capability to produce stators. Slocomb has full in-house capacity for welding, brazing, heat-treating, pressing & spinning, etc. - all of the requisite capability to meet contract requirements.

J. T. Slocomb does not dispute the fact that awarding the referenced contract under the 8(a) program would require submission of certified cost and pricing data and the preparation of a DCAS Field Pricing Assistance Report supported by a DCAA Audit and DCASR Technical Data, nor does it categorically dispute the length of time such a procedure requires under normal circumstances. What J. T. Slocomb takes exception to is the apparent lack of effort on the part of the procurement Division #2 et al, to take a positive posture that translates into action that directly enhances and supports the dictates, spirit and intent of Public Law 95-507 and Section 1207 of Public Law 99-661...making good faith efforts to provide procurement support for the protected classes.

The Department of Defense "Policy Statement" which serves as the basic framework for final implementation into the Defense Federal Acquisition Regulation Supplement, including compliance with the requirements for publication in the Federal Register pursuant to Public Law 98-577, Publicizing Proposed Procurement Regulations and P. L. 96-354, Regulatory Flexibility Act - specifically states under Section 3. Procedures; B.

Contracting under Section 8(a) of the Small Business Act.

(1) Requirements committed to the 8(a) program will remain in the 8(a) program to become an integral part of efforts to increase competition and expand the industrial base. The requirements offered for manufacturing will represent an economic production quantity. Unless compelling reasons dictate otherwise, the quantities committed to the 8(a) program, to the extent permitted by its capacity, will be at least equal to the quantity being purchased simultaneously under competitive procedures.

If, as Mr. K. J. Annunziata suggests, the supply of stators has dwindled to a (10) month stock and could cause work stoppages at the engine repair facility and render the A-6 Aircraft incapable of flying, there are at least two viable options to award the 11th stage stator as an 8(a) contract to J. T. Slocomb.

First, the 8(a) procurement award process could be expedited to ensure the review and negotiation procedures are not elongated or unnecessarily delayed, as is the normal course of events during 8(a) contract awards.

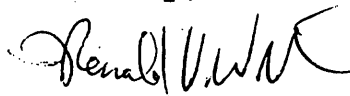
Secondly, and probably at this juncture most prudent when considering the bureaucracy associated with 8(a) contract awards, it is quite plausible to split the award of the 562 statos - especially since it was acknowledged that the last buy in April of 1986 was 45 statos. A sufficient portion of the contract - 45 or more - could be procured competitively to ensure under the worst circumstances that the Navy's A-6 Aircraft will remain airborne. The remaining statos - 517 or less - could then be procured under the SBA's 8(a) program. The scheduling of the latter procurement should coincide with the delivery schedule that is in concert with the award date.

Either of these options are viable and are reasonable methodologies to assist the ASO in meeting its public mandates - particularly Section 1207 of Public Law 99-661, which was effective as of June 1, 1987. Progressive options, as those here-outlined, will enable the Department of Defense to meet its 5% goal. The ASO's commitment to the spirit and intent of the aforementioned Public Law can and should be measured by how affirmatively it pursues options, such as those outlined, in meeting contract goal objectives. If an opportunity, such as the one we are currently presented with, is allowed to pass with mere platitudes as to - why awards can not be made, instead of how can we make the Public Law work - the 5% goal can not be expected to be realistically achieved.

In this spirit, J. T. Slocomb strongly feels the Contracting Officer should be urged to reconsider soliciting and placing the subject requirement on a competitive basis.

We anxiously await the response of ASO and expect that it will feel so compelled to review its posture and take a more affirmative posture.

Sincerely,



Ronald V. Williams  
Government Relations Spec.

cc: Secretary Taft  
Charles W. Lloyd, Exec. Sec. ODASD (P) DARS  
Defense Acquisition Regulatory Council  
MBELEDEF  
Congressman John LaFalce, Chairman - HSBC  
Congressman Charles Hayes, Chairman - Braintrust  
Donald Hathoway, Director SADB



DEPARTMENT OF THE NAVY

AVIATION SUPPLY OFFICE  
700 ROBBINS AVENUE  
PHILADELPHIA, PA. 19111-5098

IN REPLY REFER TO

RECEIVED

4200  
PBB3-C:JB  
8 JUL 1987

JUL 13 1987

SEA BOSTON  
REGIONAL MSB/COD

Ms. Gizzi  
U.S. Small Business Administration Region I  
60 Battery March  
Boston, MA 02110

Dear Ms. Gizzi

The Aviation Supply Office is in receipt of your 5 June letter which requests this activity reserve a requirement for 562 ea. 11th Stage Stator Assemblies (NSN: 2840-00-912-0730) for award to SBA under the Section 8(A) Contracting Program. The Contracting Officer has considered your request in light of the procurement method currently assigned this item, its prior procurement history, and its current stock position.

The 11th Stage Stator Assembly is a critical internal component of the Pratt and Whitney (P&W) J-52 engine. The item's criticality to both safety of flight and performance determined its being sourced to the prime manufacturer. The most recent sole-source procurement of the item was accomplished in April 1986, when a quantity of 45 each was procured from P&W at [REDACTED] each. This and previous procurements were supported by certified cost and pricing information and field pricing reviews, audits and technical reports which make ASO knowledgeable concerning the prime's manufacturing techniques and experienced costs. Contract history demonstrates that P&W is the only source which has ever supplied the item, and investigation of cost data shows that P&W manufactures the item in-house.

J.T. Slocomb Co. was identified by ASO's Competition Advocate as a potential source of supply for this item on the basis of its having manufactured a similar item for the same engine, because it possesses a P&W data package which allows it to manufacture this variety of stator, and because it has been approved by P&W as a potential source for this type of material. J.T. Slocomb Co. was advised of its approval by ASO as a source of supply for this item on 25 March 1987.

The requirement for 562 ea. stators is the first time "breakout" of this item from sole-source directed procurement to competitive solicitation of two approved sources. The large buy quantity is generated by ASO's delaying procurement of this quantity - sensitive item until it could be procured competitively. Procurement of minimal quantities from the sole source during the previous three years has caused on-hand quantities of the item to dwindle. Seventy-three pieces are currently on-hand with 61 remaining for contract delivery. The Navy projects it will be out of stock for this stator within 10 months. Lack of material will cause work stoppages at the engine repair facility and will result in Navy A-6 Aircraft becoming incapable of flying.



4200  
PBB3-C:JB  
8 JUL 1987

ASO has begun processing a competitive solicitation covering this item. Resumption of the solicitation process without undue delay should result in the issuance of a competitively placed award within sixty days. Were the item solicited on a sole-source basis, as would be the case under Section 8(A) contracting methods, a procurement of this value would require submission of certified cost and pricing data and preparation of a Defense Contract Administrative Service Field Pricing Assistance Report supported by Defense Contract Audit Agency Audit and Defense Contract Administration Service Region Technical Data. Experience in placing sole-source procurements of this value suggests a non-competitive method of contracting will require a minimum of six months leadtime before contract issuance.

In light of the information discussed above, the Contracting Officer has determined to solicit and place the subject requirement on a competitive basis because it is the most expeditious method of contract placement available, and because doing so will produce a fair-market price for the item established by the competitive market place. J.T. Slocomb Co. will be solicited on a competitive basis as one of the approved sources of supply.

Sincerely yours,

*K. J. Annunziata*  
K. J. ANNUNZIATA  
Acting Director  
Procurement Division #2

Copy to:  
SBA-PCR  
SB-A

GAP FILLER INDUSTRIES CORPORATION  
2158 Red Rock Drive, Beavercreek, Ohio 45431

Tel. (513) 429-4021

Thomas H. Savage  
President

July 29, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd

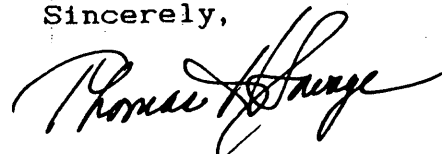
I am writing to express my support for the regulations that the Department of Defense has developed to reach its 5% minority contracting goal. In general, I think they represent a step forward and at least a good starting point for going ahead with implementation. I especially support the intent to develop a proposed rule that would establish a 10% preference differential for small disadvantage business in all contracts where price is a primary decision factor.

However, I am concerned that several important questions have been overlooked in the published interim regulations. First, there are no provisions for subcontracting. Second, there is no mention of participation by Historically Black Colleges and Universities, and other minority institutions. Third, it is not clear on what basis advance payments will be available to small disadvantaged contractors in pursuit of the 5% goal. And finally, partial set-asides have been specifically prohibited despite their potential contribution to small disadvantage participation at DOD.

Gap Filler Industries Corporation is highly interested in this regulation, as it pertains to the minority institutions mentioned above and their ability to participate in the growth of this country. We fully support Congressman Grays' efforts in this endeavor.

I urge the Defense Department to address the above issues quickly, and to move forward aggressively in pursuing the 5% goal set by law.

Sincerely,



*Selective Knitwear, Inc.*

B'KLYN NAVY YARD. BLDG. #5  
BROOKLYN. NEW YORK 11205

July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C: 20301-3062

Dear Mr. Lloyd:

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July 13, 1987

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Sincerely,

*Abe Schlesinger*  
Abe Schlesinger

**F**  
rye

(201) 643-3236

**W**illiams & Co., PA  
Certified Public Accountants

43 Halsey Street • Newark, New Jersey 07102

July 27, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, DC 20301-3062

RE: 1987 National Defense  
Authorization  
Public Law 99-661 (Section 1207)

Dear Mr. Lloyd:

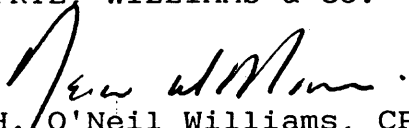
I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

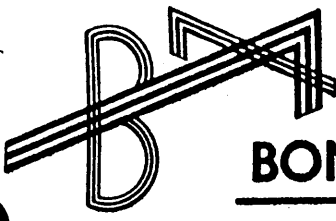
I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

FRYE WILLIAMS & CO.

  
H. O'Neil Williams, CPA  
Partner

cc: Honorable Bill Bradley  
Honorable Frank Lautenberg  
Honorable Peter W. Rodino, Jr.



# **BONDED MAINTENANCE CO., INC.**

P.O. Box 1355 • National City, CA 92050

(619) 292-8057 • (619) 292-8061

July 29, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

As a minority businesswoman, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

Sincerely,

Mickie C. Cochran  
President

**HONIG****INDUSTRIAL DIAMOND WHEEL, INC.**

50 21st St., Brooklyn, N.Y. 11232

July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

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866 East 29th Street,  
Brooklyn, N.Y. 11210  
(212) 258-5200

Out Of N.Y. State  
800-221-0850  
800-221-0851

July 13, 1987

Defense Acquisition Regulatory Council  
Att; Mr. Charles W. Lloyd  
Executive Secretary  
ODASK (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

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Sincerely,



Betty Lenovits

87-5240  
JEG:gew  
28 July 1987

**AmSEC** "Quality People Providing Quality Service"  
**AMERICAN SYSTEMS ENGINEERING CORPORATION**

760 LYNNHAVEN PARKWAY • SUITE 200 • P. O. BOX 8988 • VIRGINIA BEACH, VIRGINIA 23452 • (804) 463-6666

Defense Acquisition Regulatory Council  
Attn: Mr. Charles Lloyd, Executive Secretary  
ODASD(P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

The Federal Register, Vol. 52, No. 85, of 4 May 1987 invites comments on an interim rule amending the Defense Federal Acquisition Regulations Supplement (DFARS).

The National Defense Authorization Act for Fiscal year 1987 (Public Law 99-661) established a program to allow five percent of DoD contracts to be awarded to Small Disadvantaged Business (SDB) concerns. The Navy has recently started to implement this program by diverting contracts which were previously held by other small business concerns. I do not believe this was the intent of Congress.

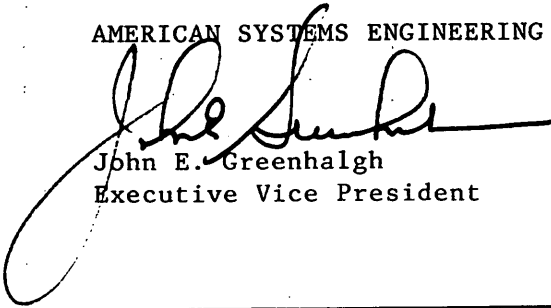
In the FY 1988 Defense Authorization Act, there is language in Section 846(b)(7) that directs the DoD to not reduce the existing 8(a) and other small business set aside programs in order to meet the five percent goal for SDB awards.

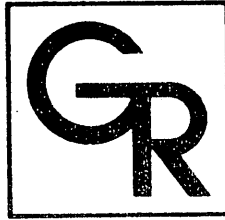
The current DoD approach is causing immediate problems for small business firms by diverting small business contracts to SDB firms in spite of the likelihood that Congress will direct them to stop this practice. They will probably continue until the Authorization Act is law. In a recent instance, we have been a subcontractor on a small business set aside contract and were prepared to bid the follow-on contract as the prime contractor. After being announced in the Commerce Business Daily as a small business set aside, the Navy suddenly announced that it would be set aside for SDB firms. This prevents our firm from bidding as the prime contractor.

We strongly recommend that action be taken to incorporate the intent of Section 846(b)(7) of the FY 1988 Defense Authorization Act into the final language used in the proposal DFARS revision.

Sincerely,

AMERICAN SYSTEMS ENGINEERING CORPORATION

  
John E. Greenhalgh  
Executive Vice President



GENERAL RAILROAD EQUIPMENT AND SERVICES, INC. P.O. BOX 159, EAST ST. LOUIS, ILLINOIS 62202 (618) 271-1866

July 28, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C.841  
The Pentagon  
Washington, D.C. 20301

RE: Interim Rule to implement Section 1207 of PL 99-661

Dear Mr. Lloyd:

As a minority businessperson, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from 1. the SBA 8(a) program, and 2. an increase in subcontract awards.

The SDB program, as it is currently configured, will adversely impact the SBA 8(a) program by enabling the CO's to withdraw requirements from the 8(a) program and designating them under the SDB program.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

I urge the Defense Department to 1. institute safeguards that will insure that the 8(a) program is not adversely impacted by the SDB set-aside program, and 2. make subcontracting an integral part of the awards and procurement process.

Sincerely,

Ronald L. Thompson  
President

RLT:bb





**AUTOMATED DATA  
MANAGEMENT, INC.**

201 North Union, Suite 110, Alexandria, Virginia 22314, (703) 684-3200

87-33

EXEC. SEC.  
58 copies of  
THIS RECEIVED

8/16/87

August 3, 1987

Mr. Charles Lloyd  
Sec, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an executive of an 8(a) Small Disadvantaged Business I am writing to add my support for the Interim Rule implementing Public Law 99-661. I, along with many others, appreciate the impact that the 8a program is having on minority-owned businesses enabling them access to contracts that might not have been available to them through normal contracting procedures. Public Law 99-661 will provide additional opportunities to those deserving corporations; however, the Interim Rule implementing the law does have some major discrepancies that could reduce its effectiveness.

The Interim Rule would not provide any special considerations for those companies already participating in and qualified under the SBA Section 8(a) program, thereby diluting the effectiveness of both programs. Contracting Officers should, as part of the Interim Rules, be provided decision-making criteria that would provide a fair distribution of contracts between those companies participating in the 8(a) program and those in the DOD program.

Minority MBE 8(a) program "graduates" should be encouraged by DOD to participate in the DOD goals program. That could be accomplished by changes to the regulation to allow no portion of gross receipts or employment levels awarded pursuant to 8(a) to be included in contracts to be awarded under SDB set-aside program (See H.R. 1807-Sec 7), or to allow some other appropriate increase in size-levels.

I also feel strongly that Small and Disadvantaged Business Utilization (SADBU) representatives should be part of the SDB set-aside process and appeal rights under DFAR 19-505 should apply to all SDB set-aside program contracts. SDB set-aside protests should be restricted to qualified SDB offerors, with penalties assessed for frivolous protests.

The inclusion of some measure for a contracting officers job performance directly tied to satisfactory progress towards meeting the 5% SDB goal would encourage the maximum utilization of the program.

The Interim Rule for implementation of Public Law 99-661 should also include the authority to award portions of contracts to SDBs. The authority would allow contracting officers to increase SDB participation and ease the burden on reaching the 5% goal for defense contracts.

The Interim Rule should also include a provision for application to contracts let OCONUS. While some contracts fall under local treaty provisions requiring participation by foreign corporations, a significant number of contracts are let overseas for U.S. companies only. The inclusion of a provision requiring overseas contractors to honor the Public Law 99-661 would greatly increase the participation by minority corporations in international business and provide a further opportunity for defense to meet its 5% goal.

I must reiterate that the Interim Rule for implementation of Public Law 99-661 is basically a fine program. However, with minor changes the program could increase participation, provide more opportunities for minority-owned corporations, and allow the Defense Department to realize its 5% goal.

Sincerely,



David Dale  
Executive Vice President

03 August 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd, Executive Secretary  
ODASD(P) / DARS  
c/o OUSD(A) Mail Room  
Room 3D139  
The Pentagon  
Washington, D.C. 20301-3062

Subject: DAR Case 87-33

Dear Mr. Lloyd:

ENSCO, Inc. is a small R&D company of 270 employees headquartered in Springfield, Virginia. We strongly support the government's small business program, because we believe the benefits to the government and our society are many fold. First, one of the major problems facing America today is a need for more technological innovation. Historically, small businesses have been a frequent source of innovative advances. The government's small business program, including the Small Business Innovative Research (SBIR) Program, has been a useful catalyst to spawn these technological developments. Second, small business are usually more cost competitive than large companies. The major reason for the lower cost is they do not have the extensive corporate support staffs many larger companies have. Third, small businesses have shorter communication chains which result in more flexibility and a greater ability to react faster to problems.

Small disadvantaged businesses offer the same benefits as non-disadvantaged small businesses. Overall, from a socioeconomical and political stand-point, the small disadvantaged business program has been a success. However, the program does have several serious problems and they should be solved before any thought is given to expanding the program.

- o First, there must be more competition between small disadvantaged companies for the business. Too frequently the competition is so limited there is no incentive for the disadvantaged company to be cost competitive.

**Recommendation -**

Require all small disadvantaged set-asides to have a minimum of three bidders. If there are less than three, open the competition to all small businesses and give the disadvantaged companies a cost advantage up to 5%. That is, if the disadvantaged company qualifies technically and managerially and falls within the competitive range, the company could be up to 5% more expensive than the non-disadvantaged companies and still win the contract.

- o Second, we believe many of the small disadvantaged companies focus on low technology areas such as guard services or janitorial services. If the Department of Defense (DoD) increased the set-aside goal from 2.5% to 5.0%, which would probably expand contract awards into higher technical work areas, we question whether there will be sufficient qualified companies to meet the requirements.

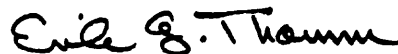
Recommendation -

Keep the 2.5% goal, but make it a more meaningful one. Require a certain portion of high technical work to be small disadvantaged set-aside and concentrate on developing companies to become qualified.

- o Third, a problem in the past has been graduating small disadvantaged companies from the program. Too frequently small companies have grown to a large company status yet have stayed in the program. The Small Business Administration (SBA) has solved most of this problem through closer monitoring of the companies' growth. Because of the large contract dollars involved there is always the possibility of abuses and the SBA must continue to maintain their close monitoring.

In summary, we are against the expansion of the small disadvantaged business program to 5.0%. We strongly believe a better objective of the program should be to raise the quality of technical effort being set-aside rather than the quantity.

Very truly yours,  
ENSCO, Inc.



Erik G. Thamm, Director  
Finance and Contracts

/bd



ODA Economic  
Development  
Corporation

# Opportunity Development Association

12 Heyward Street, Brooklyn, New York 11211 • (718) 522-5620

July 30, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 Fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, we respectively object to the exclusion of Hasidic Jews from the designated lists of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.1 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. #637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce

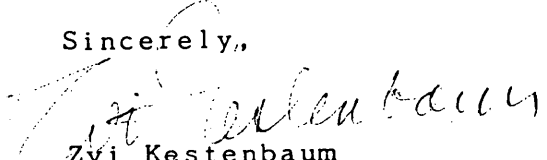
July 13, 1987

(most recently confirmed on October 24, 1984) that Hasidic Jews constitute a socially disadvantaged group of individuals.

In the absence of express recognition of Hasidic eligibility in Part 219.001, we must respectfully object to the protest procedures set forth in proposed Part 219.302. These procedures are an open invitation to obstructionist opposition to contracting opportunities by disadvantaged individuals who are not members of a designated group. Under the proposed procedures, designated group members are entitled to a presumption of eligibility but other individuals are not. Under these circumstances, individuals who are not members of designated groups are likely to be the most frequent targets of the protest procedures under Part 291.302.

Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility criteria of 15 U.S.C. #637, it also requires that eligibility determinations be made by the Defense Department and not the SBA. Accordingly, we oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,

  
Zvi Kestenbaum  
Executive Director

ZK:rt



# GM ENERGY COMPANY INC.

45 Rockefeller Plaza  
New York, New York 10020  
212/713-0022

Michael Z. Matthew  
President

August 3, 1987

Mr. Charles W. Lloyd  
Executive Secretary  
Defense Acquisition Regulatory Council  
ODASD (P) DARS,  
c/o OASK (P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Re: DAR Case 87-33

Dear Sir:


GM Energy Company Inc. (herein referred to as "GME") hereby submits comments on the interim rule regarding DAR Case 87-33. These rules are of continuing paramount importance to GME, a wholly-owned minority corporation.

These comments specifically address Vol. 52 No. 85 of the Federal Register dated May 4, 1987 Page 16267 of Section 252.219-7006(c) regarding the program set aside for SDBC's and sourcing therefrom petroleum products. Your attention is drawn to the following.

The promulgation of Vol. 52, No. 85 Fed. Reg., May 4, 1987, Section 252.219-7006(c) at 16267 would appear to contradict the implementing statute, P.L. 99-661 Section 1207(b). This conflicting construction apparently is the result of the Division of Small Business Affairs of the Department of Defense's interpretation of this section of the Federal Register to limit minority participation to only those entities which produce "end-items". There has been a misconstruction of the language at 10 U.S.C.A. Section 2301 note makes clear that it is limited by P.L. 93-365 Title VII, Section 707 - the Buy America Act provides, at subsection (b) that:

"(b) For purposes of this section, the term 'goods which are other than American goods' means (1) an end product which has not been mined, produced, or manufactured in the United States, or (2) an end product manufactured in the United States but the cost of the components thereof which are not mined, produced, or manufactured in the United States."

Accordingly, the subsection of the Federal Register at issue seems

 My-K Laboratories, Inc.
6451 WEST MAIN STREET
MORTON GROVE, IL 60053
PHONE (312) 967 - 5600
Formerly Bay Laboratories, Inc.

July 30, 1987

Defense Acquisition  
Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P)DARS  
c/o OASD(P&L) (M&RS), Room 3C841  
The Pentagon  
Washington, DC 20301-3062

RE: DAR Case 87-33

Dear Mr. Lloyd:

We are providing you with our comments on the interim rule on the above mentioned case.

My-K Laboratories Inc., an 8(a) certified company since 1979, is a manufacturer of pharmaceutical products. As a manufacturer, we provide pharmaceutical products to various federal agencies, including the Veterans Administration and the Department of Defense.

We are very much concerned with certain aspects of the proposed legislation, in particular, how this rule will affect our firm as well as other 8(a) firms and SDBs.

We are therefore, formally submitting the following comments.

A) Section 219.301: We are not in favor of self certification. We propose the SBA be involved in SDB certification. The SBA has done a magnificent job in preventing the proliferation of "front" type firms.

B) Section 219.302: If the SBA does not respond within 10 days, with regard to SDB status, the offeror is considered SDB. We propose the rule state, if the SBA does not respond within the 10 day period, an extension be requested until such time the SBA has investigated bona fide disadvantaged status.

QUALITY IS OUR NO. 1 PRIORITY



Mr. Lloyd  
page 2

C) Section 219.501: We are in opposition of the decision to set-aside SDB be a unilateral one by the contracting officer. We propose the decision be made in conjunction with the SBA.

D) Section 219.502-3: We are opposed to entire contract set-asides. We propose partial set-asides with SBA involvement.

E) Section 219.502-72: There is potential danger for 8(a) firms to be excluded from effectively performing self marketing. We propose legislation to protect 8(a) firms from losing self marketed contracts under this section.

F) Section 219.504: Finally, we propose 8(a) firms be offered the same type of priority given this legislation.

We are very concerned regarding the above mentioned comments. We are therefore requesting correspondence from you, so that we may stay abreast of new developments.

Very truly yours,

  
Kun Chae Bae  
President



# Galactic Technologies INC.

6322 Sovereign Suite 248 • San Antonio, Texas 78229 • (512) 366-3422

Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
C/O OASD ( P & L ) ( MARS), Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062  
July 30, 1987.

Subject: National Defense Authorization Act ( P.L. 99-661 )

1. I appreciate the opportunity to express my concern on this matter. The following is submitted for your consideration:

a. The regulations do not address, specifically, how the 8(a) set asides will be awarded to the new firms in the initial period. Some firms cannot compete with existing 8(a) firms that have established a good performance record because they have been in the program longer. Starting firms see firms about to graduate from the 8(a) program , for all practical purposes, as big business. THE PROGRAM MUST REMAIN AS A DEVELOPMENT EFFORT WHICH RULES OUT COMPETITION AMOUNG 8(A) FIRMS. THIS REQUIRES SBA INTERVENTION SINCE THE PCO OR THE AGENCY'S SMALL BUSINESS OFFICER CANNOT EFFECTIVELY DETERMINE WHICH FIRMS ARE IN THE MOST NEED. ADDITIONALLY, THE MISSION OF DOD PERSONNEL IS IN AWARDDING THE CONTRACT AND NOT IN DEVELOPING NEW BUSINESSES.

b. The SDB set-aside procedure is prone to be misunderstood or misused. THE PROCEDURE REQUIRES THAT THE PCO(S) EXERCISE A JUGEMENT CALL CONCERNING NUMBER OF SDB(S) AVAILABLE, AT LEAST TWO, THAT THE PROPOSALS FOR THE PROCUREMENT NOT EXCEED 10% OF THE MARKET VALUE, AND FINALLY THE POWER TO WITHDRAW THE REQUIREMENT IF THESE CONDITIONS ARE NOT MET. THESE ARE QUESTIONS THAT CAN BE EASILY JUSTIFIED IN BOTH SIDES, PCO OR THE SDB. UNFORTUNATELY, THE PCO HAS THE UPPER HAND AND CAN TAKE ACTIONS THAT AFFECT THE SDB FIRMS ADVERSELY. A MECHANISM FOR ASSURING THAT ALL 8(A) CONTRACTORS DEVELOP TO A POSITION OF MATURITY UPON GRADUATION FROM THE PROGRAM IS LACKING, IN THE PRESENT SYSTEM AND IN THIS PROPOSED PROCEDURE. THE 8(A) PROGRAM MUST MAINTAIN AS ITS PRIMARY MISSION THE DEVELOPMENT OF NEW FIRMS. THIS CANNOT HAPPEN AND CERTAINLY WILL NOT HAPPEN IN THE PERIOD OF 5YRS IF COMPETITION AMONG 8(A) FIRMS IS A PREREQUISITE. ALSO, THE PCO IS PRIMARILY INTERESTED IN AWARDDING CONTRACTS NOT DEVELOPING NEW BUSINESSES.



# Galactic Technologies INC.

6322 Sovereign Suite 248 • San Antonio, Texas 78229 • (512) 366-3422

2. We hope that the 8(a) program remains as a development tool for SDB(S). This requires expertise in the area of small business development and real time data on the 8(a) firms being serviced. The SBA is the proper agency for this function.

Sincerely,

*Emilio Mendoza*  
Emilio Mendoza, Phd. President

**GAONA SHEET METAL**

4024 S. 16th St.  
PHOENIX, ARIZONA 85040  
(602) 268-9409

Aug 3rd 1987

Defense Acquisition Regulatory Council  
ATTN: MR. CHARLES W. LLOYD  
c/o OASD, Room 3E 841  
The Pentagon  
Washington, D. C. 20301

Dear Mr. Lloyd:

As a minority business man, I am deeply concerned about the interim regulations published in May by the Defense Department. I believe that these regulations disregard the potential benefits minority business man could receive from an increase in subcontract awards.

Subcontracts give minority businessmen a chance to participate in Defense contracts and be a part of our great country that would otherwise be beyond their capacity and enable them to enter agreements with prime contractors that currently ignore our potential.

**GAONA SHEET METAL**

4024 S. 16th St.  
PHOENIX, ARIZONA 85040  
(602) 268-9409

Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

Mr. Lloyd I wish to thank you for your consideration. Let us be a part of our future.

I urge the Defense Department to make subcontracting an integral part of the award and procurements process.

Sincerely

Manny Gaona



30 July 1987

Defense Acquisition Regulatory Council
Attn Mr. Charles Lloyd, Executive Secretary
ODASP(P) DARS
c/o OASD(P&L) (M&RS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

By the Federal Register, Volume 52, Number 85, May 4, 1987, the Defense Acquisition Regulatory (DAR) Council invites public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, entitled "Contract Goals for Minorities". Comments are required by August 3, 1987.

ANADAC, Inc. is a small publicly-owned engineering management and technical services company. We employ approximately 150 people. Under an ESOP (Employee Stock Ownership Plan), the employees own in excess of 20 percent of the publicly held stock. Our major customer is the Department of the Navy and, more particularly, the Naval Sea Systems Command (NAVSEA). We are one of perhaps 50 companies in the Washington area that compete for NAVSEA service contracts, particularly contractor support services (now defined as CAAS: Contractor Advisory and Assistance Services). There are at least 10 small disadvantaged 8A-certified companies who also participate in NAVSEA CAAS procurements.

ANADAC, Inc. and most of the other small businesses performing NAVSEA technical services/CAAS contracts depend to a large extent on competitive small business set-aside awards to sustain our business base. As part of the Federal Government Small Business Program, we as a group support the 8A and small disadvantaged business (SDB) programs. We cannot, however, condone OSD implementation of SEC 1207 as it now stands. It is inequitable and unfair and will severely damage many companies in our business community.

As a basic premise, ANADAC, Inc. questions the legality of the interim rule as it is written and being implemented. We believe it to be in conflict with the Small Business Act as it pertains to protecting the interests of small business concerns and with the Armed Services Procurement Act as it pertains to fairness in allocating federal contracts to small business. In addition, the Section 1207 language does not appear to be permissive. Therefore, unless either Section 1207 or CICA is amended, it would seem that SDB set-asides made without justifications and approvals would be subject to challenge. We request that a legal opinion in all three instances be

Congress of the United States  
House of Representatives

Washington, D.C. 20515

August 3, 1987

DARS  
Complete

Copy  
from Bill Pollock  
1310 hrs 8/5/87  
Q

The Honorable Casper Weinberger  
Secretary  
Department of Defense  
The Pentagon  
Washington, D.C. 20301-3062

Dear Secretary Weinberger:

As members of Congress concerned about the success and proper implementation of the Department of Defense's minority set-aside program, we are writing this letter to propose specific regulatory language for the final regulations implementing Section 1207 of P.L. 99-661.

Section 205.207 -- Preparation of bids.

The regulations should not prohibit non-small disadvantaged businesses from submitting unsolicited proposals, provided they know in advance that the procurement may be set-aside. Although the regulations should be clear in seeking proposals from SDBs only, they should not specifically prohibit unsolicited proposals from non-SDBs. Therefore, we would amend the language of Section 205.207(d)(S-73) by substituting the following language in place of the last sentence:

"Therefore, replies to this notice are requested at this time from small disadvantaged business concerns only. Replies received from other than small disadvantaged business concerns will not be considered, unless adequate interest is not received from SDB concerns, and the solicitation is issued as a \_\_\_\_\_ (enter basis for continuing the acquisition, e.g. 100% small business set-aside with evaluation preference for SDB concerns, etc.)."

Section 206.203-70 -- Set-asides for small disadvantaged business concerns.

Even assuming that the Competition in Contracting Act does not require a contracting officer to prepare a written justification for a set-aside award under the 5% program, we would amend Section 206.203-70 by deleting the last sentence and substituting the following language:

"All justifications, determinations, findings, and approvals in connection with the set-aside of a procurement under this program shall conform with the requirements of P.L. 99-661 and DoD procurement practices."

We would also recommend that Federal Acquisition Regulation 52.219-9 (d)(11)(iii) be amended to read as follows:

"Records on each subcontract solicitation resulting in an award of more than \$10,000, indicating (A) whether small business concerns were solicited and if not, why not, (B) whether small disadvantaged business concerns were solicited and if not, why not, and (C) if applicable, the reason the award was not made to a small business concern."

Section 219.001 -- Definitions.

The definition of "fair market price" should be amended to read:

"For purposes of this part, fair market price is a price based on reasonable costs under normal competitive conditions and not on lowest possible costs. For new procurement requirements, or requirements that lack satisfactory procurement history, the estimate shall be based upon recent award prices adjusted to insure compatibility. Such adjustments shall take into account differences in quantities, performance times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any additional cost which may be deemed appropriate."

Section 219.201 -- Technical assistance.

The regulations fail to make specific proposals regarding the technical assistance requirements under Section 1207. Therefore, we suggest that the following language be incorporated in the final regulations:

In the amendment to 219.201(a), the phrase ", pursuant to section 1207(c)," should be inserted after the phrase "It is the policy of the Department of Defense" and before "to strive to meet these objectives".

A new 219.202-6 should be added to read as follows:

"19.202-6 Technical assistance.

"(a) Contracting officers shall provide projections of DoD requirements up to 18 months in advance of publication. Such projections shall include a description of what will be purchased, who should be contacted and the anticipated capabilities necessary to fulfill the requirement.

"(b) Each military facility with procurement activities shall conduct annual technical assistance seminars, funded by DoD, using contracting officers and other related personnel. This subsection applies to military procurement personnel at the facilities of prime contractors as well. These seminars shall include discussions regarding information about the minority contracting program in general and at particular military bases or prime contractor facilities, advice about DoD procurement procedures, instruction on preparation of proposals, and other



Accordingly, 219.302(5) should be deleted.

Finally, 219.302(6) should be amended to read:

"(5) If the DoD determination is not issued within 10 days after the contracting officer's receipt of the protest, it shall be presumed that the questioned offeror is a SDB concern. This presumption will not be used as a basis for an award without first ascertaining when a determination can be expected, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government."

Section 219.502-3 -- Partial set-asides.

Provision should be made for partial set-asides under the 5% program. Therefore, we would amend section 219.502-3 to track the language of the Federal Acquisition Regulations to read as follows:

"(a) The contracting officer shall set aside a portion of an acquisition for exclusive small disadvantaged business participation when--

"(1) A total set-aside is not appropriate;

"(2) The requirement is severable into two or more economic production runs or reasonable lots;

"(3) One or more small disadvantaged business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a reasonable price;

"(4) The acquisition is not subject to small purchase procedures; and

"(5) A class of acquisitions may be partially set aside. Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures.

"(b)(1) When the contracting officer determines that a portion of an acquisition is to be set aside, the requirement shall be divided into a set-aside portion and a non-set-aside portion, each of which shall (i) be an economic production run or reasonable lot and (ii) have terms and a delivery schedule comparable to the other. When practicable, the set-aside portion should make maximum use of small disadvantaged business capacity.

"(b)(2) The contracting officer shall also encourage the participation of small disadvantaged concerns in the non-set-aside portion of an acquisition.

"(c)(1) The contracting officer shall award the non-set-aside

portion using normal contracting procedures.

(2) (i) After all awards have been made on the non-set-aside portion, the contracting officer shall negotiate with eligible concerns on the set-aside portion, as provided in the solicitation, and make an award. Negotiations shall be conducted with small disadvantaged business concerns in the order of priority as indicated in the solicitation (but see (ii) below). The set-aside portion shall be awarded as provided in the solicitation. An offeror entitled to receive the award for quantities of an item under the non-set-aside portion and who accepts the award of additional quantities under the set-aside portion shall not be requested to accept a lower price because of the increased quantities of the award, nor shall negotiation be conducted with a view to obtaining such a lower price based solely upon receipt of award of both portions of the acquisition. This does not prevent acceptance by the contracting officer of voluntary reductions in the price from the low eligible offeror before award, acceptance of voluntary refunds, or the change of prices after award by negotiation of a contract modification.

"(ii) If equal low offers are received on a non-set-aside portion from concerns eligible for the set-aside portion, the concern that is awarded the non-set-aside part of the acquisition shall have first priority with respect to negotiations for the set-aside."

This approach would be consistent with Undersecretary Godwin's statement that "partial set-asides will be included when changes are made as a result of public comment." (See Attachment)

Section 219.502-72 -- SDB set-aside.

Taken literally, this provision would require an SDB to offer the services of another SDB in order to have a procurement set-aside. This would effectively eliminate minority, wholesalers and distributors from the program. In addition, procurement regulations should not carry an implicit presumption that SDB firms are less than qualified to perform on R&D or architect-engineering contracts. And finally, DoD should follow through on its intent to develop a proposed rule allowing an SDB set aside where a market survey and a "sources sought" CDB notice identify only one responsible SDB concern which could fulfill DoD's requirements. Therefore section 219.502-72 (a) should be amended to read as follows, succeeded by a new paragraph "(b)" as indicated. Further, the paragraph formerly labeled "(b)" should be changed to "(c)", "(c)" should be changed to "(d)", and "(d)" to "(e)."

"(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition shall be set-aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be

obtained from at least two responsible SDB concerns offering the supplies or services of different SDB concerns or of any domestic small business and (2) an award will be made at a price not exceeding the fair market price by more than ten percent.

(b) A direct award also may be made to an SDB firm without full and open competition, as permitted by section 1207, when a market survey and CBD notice identify only one responsible SDB concern which could fulfill DoD's requirements.

Section 219.502-72(b) -- We believe that multiple 8(a) firms expressing an interest in having an acquisition placed in their 8(a) program should not be a basis for examining whether the acquisition should be set aside in the 5% program. In fact, the 8(a) program and the 5% program should not compete for contracts at any level. Therefore, we recommend that the following language contained in Section 219.502-72(b)(2) should be deleted: "multiple responsible section 8(a) concerns express an interest in having the acquisition placed in the 8(a) program; or". In addition, the letter "(b)" should be changed to "(c)" as stated above, and the numeral "(3)" should be changed to the numeral "(2)".

Section 219.801 -- In light of the equally compelling mandate for Section 1207 of P.L. 99-661, this section should be written to avoid stating any preference between the 8(a) program and the 5% program. Therefore, we would amend this section to add the following:

"No preference shall exist, however, between the 8(a) program and the program established pursuant to section 1207 of P.L. 99-661."

Section 252.232-12 -- Advance payments.

The interim regulations failed to make any provision for advance payments. Section 1207 specifically calls for the mandatory usage of advance payments "to the extent practicable and when necessary to facilitate achievement of the 5 percent goal...."

Therefore, the regulations should be amended to allow advanced payments pursuant to Section 2307 of title 10, United States Code, to Section 1207 entities. It should be noted that Undersecretary Godwin had agreed to clarify the procedure for obtaining advanced payments under Section 1207. In addition, because the Undersecretary stressed the Department of Defense's preference for progress payments, the regulations should also clarify the procedures for obtaining progress payments and state criteria by which such payments will be made.

Beyond advance and progress payments, DoD should consider more aggressive schemes for providing financial assistance to SDBs. DoD and numerous interested minority contractors have pointed out that the benefits afforded through section 2307 are modest. Yet

it is clear that adequate financial assistance must be a central link in the success of P.L. 99-661. Since access to capital is a key problem of SDB enterprises, expanding contract opportunities will be of little avail if firms cannot gather the resources to take advantage of those opportunities.

Accordingly, DoD should explore, in conjunction with Congress, two financial assistance programs that could help realize the 5% goal. First, a debt financing program could be modeled after the DOT loan program for SDBs unable to obtain financing from conventional sources. DOT has entered into an agreement with a named bank to provide short and long term loans. Using funds appropriated by Congress, DOT advances 75% of the loan while the named bank advances the remaining 25%. Seventy-five percent of all repaid principle is then set aside in certificates of deposit that comprise a "DOT account" and serve as a continuing pool of funds for future loans. The Director of the OSDBU Office acts as the DOT representative in all matters related to the agreement.

DoD could pioneer a similar effort, but could keep its operation "off budget" by structuring it as a loan guaranty program instead of directly mirroring the program at DOT. Under such a scheme, DoD could provide a Federal guarantee covering 75% of the face value of SDB loans made by a named bank.

Although debt capital can be beneficial to some SDBs, many others are operating on margins too thin to absorb loan costs while still allowing for profits. In response, DoD should also explore an equity financing program.

Currently, Minority Enterprise Small Business Investment Corporations (MESBICs) provide a limited source of long term venture capital to minority businesses. A campaign is underway to privatize and expand the funding base for MESBICs by establishing the Corporation for Small Business Investment (COSBI). If successful, MESBICs, through COSBI, could become fruitful sources for financing the large numbers of SDBs contracting with DoD as well as with other government agencies.

However, because the expansion of MESBICs through COSBI is not assured, and even if achieved may not be adequate to meet the full range of SDB capital needs, DoD should explore the development of its own MESBIC-like, privately funded equity financing program.

One such program has already be outlined under the rubric of the National Security Investment Fund (NSIF). The NSIF would act essentially as an intermediary providing capital to SDBs contracting with DoD. Initial capitalization for the NSIF could be provided by successful minority and non-minority defense contractors who would be asked or required to purchase stock in the NSIF, perhaps in proportion to relative aggregate amounts of federal payments received within the past five years.

*CB Ranger*  
-----  
Charles B. Ranger

*Edolphus Towns*  
-----  
Edolphus Towns

*Major Owens*  
-----  
Major Owens

*Augustus Hawkins*  
-----  
Augustus Hawkins

*John Lewis*  
-----  
John Lewis

*Kweisi Mfume*  
-----  
Kweisi Mfume

*George W. Crockett, Jr.*  
-----  
George W. Crockett, Jr.

Proceeds from this capitalization would be used to leverage loans and create a larger pool of capital with which to purchase preferred stock in active and qualified SDBs contracting with DoD. Some of the proceeds of the NSIF would be reserved to purchase other financial instruments that would round out the Fund's portfolio, and to provide working capital. Under normal circumstances, Fund dividends would be reinvested.

Minority contractors would be required to repurchase the preferred stock held in their companies by the NSIF after a period of time, or to allow that stock to be converted to common stock with full voting rights.

After operation of the NSIF has been established, the Fund's stock could be marketed to a broader clientele to increase the pool of capital available for investment.

As investors in the NSIF, major prime contractors would have a material interest in the success of minority defense contractors.

This scheme is clearly ambitious, but it -- or something like it -- ultimately will be required to get to the most pressing financial assistance needs of a broad range of SDBs. Meeting those needs will be crucial to the success of the DoD 5% goal program.

#### Section 19.704 -- Subcontracting

The interim regulations make no provision for the subcontracting efforts of prime contractors pursuant to section 1207 of P.L. 99-661. Moreover, the DoD profit policy offers insufficient incentive to increase the efforts of major prime contractors to do business with minority firms. The policy neither identifies subcontracting with SDBs specifically nor attaches significant weight to such efforts. Therefore, Federal Acquisition Regulation Section 19.704 should be modified by adding a new section "(c)" to read as follows:

"(c) (1) Contract solicitations should contain a suggested goal representing the DoD expectation of the level of SDB participation in subcontracting. The expectation will vary with the discretion of the contracting officer, but shall be set at 5% or at such higher level as may be appropriate given the past performance of the apparent successor offeror or bidder and/or the contracting officer's analysis of market conditions.

(2) The solicitation should advise that the successful offeror may need initially to submit two alternative types of goals. The first goal would represent the offeror's maximum practicable opportunity for SDB's at the originally submitted price offered to the government. The second goal would be set at the DoD's expectation level (presuming that is higher than the first goal) and must be supported by evidence indicating how much in increased costs would be borne by the contractor if

required to meet the higher goal.

(3) In order to varyify the differential, it would be necessary to obtain comparable subcontract bids or offers from non-SDB firms and SDB firms for the same subcontract item.


(4) DoD shall utilize the authority established in section 1207(e)(3) of P.L. 99-661 to pay any differential cost between the first and the second goal described in (2) above as long as that differential is not greater than 10%. The successful offeror would then be required to meet the second, presumably higher, SDB subcontracting goal.

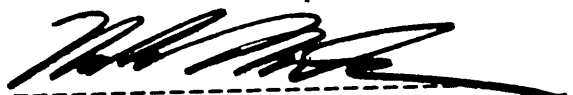
(5) If the prime contractor breaches the agreement to meet the higher goal, the DoD shall deduct from the contract price twice the differential agreed upon to reach the higher goal.

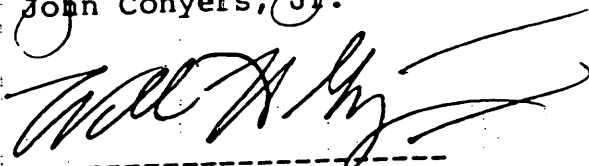
Size Standards -- Restrictive size standards pose a serious threat to achieving the 5% goal established by P.L. 99-661. A number of minority firms -- often those most capable of performing successfully in the expanded areas of DoD SDB contracting envisioned under Section 1207 -- may be barred from participating in the SDB set aside because they have grown past their size standard ceilings. Yet at the same time, these firms remain far short of being "dominant in their field of operation" as described in FAR 19.001.

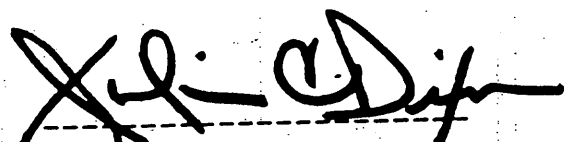
DoD, in conjunction with Members of Congress, should petition the SBA to set size standards at a level that facilitates reaching the 5% SDB contracting goal while still limiting participation in the SDB set aside program to firms that are not dominant in their field of operation.

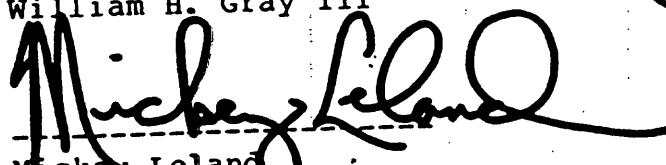
Sincerely,

  
-----  
John Conyers, Jr.

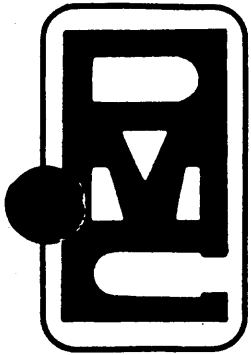
  
-----  
Nicholas Mavroules

  
-----  
William H. Gray III

  
-----  
Julian Dixon

  
-----  
Mickey Leland

  
-----  
Louis Stokes



(404) 790-0301  
(404) 798-1622  
(404) 798-9611

**DAN McCAIN CONSTRUCTION COMPANY, INC.**  
P.O. BOX 10051      2420 PEACH ORCHARD ROAD      AUGUSTA, GEORGIA 30903-2651

August 26, 1987

Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS) Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

We request to be placed on the solicitation list for minority businesses. We are a general contractor working out of Augusta, Georgia.

If this is not the appropriate office to make this request, we would appreciate you instructing us where we would inquire about our company name being added to the solicitations mailing list.

Sincerely,

*Dan McCain*

Dan McCain  
President

DMC/maj

9/1/87

*Mr. McCain - out  
Mr. McIntyre will call -  
Did not call on 9/1*

9/2/87

*called  
if possible to what  
Mr. McIntyre to know  
he wanted to know  
11:35*





# Environmental Systems Industries, Ltd.

1471 60th ST., BROOKLYN, NY 11219 (718) 851-2801, (201) 824-6444

July 13, 1987

Defense Acquisition Regulatory Council  
Att: Mr. Charles W. Lloyd  
Executive Secretary  
ODASD (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 Fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectively object to the exclusion of Hasidic Jews from the designated lists of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.1 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. #637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce

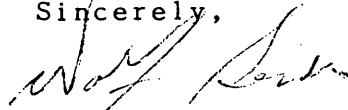
July 13, 1987

(most recently confirmed on October 24, 1984) that Hasidic Jews constitute a socially disadvantaged group individuals.

In the absence of express recognition of Hasidic eligibility in Part 219.001, I must respectfully object to the protest procedures set forth in proposed Part 219.302. These procedures are an open invitation to obstructionist opposition to contracting opportunities by disadvantaged individuals who are not members of a designated group. Under the proposed procedures, designated group members are entitled to a presumption of eligibility but other individuals are not. Under these circumstances, individuals who are not members of designated groups are likely to be the most frequent targets of the protest procedures under Part 219.302.

Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,



Wolf Sender

# Hartford & Sterling Financial Services

July 30, 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington ,D.C. 20301

Dear Mr. Llyod:

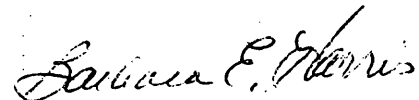
As a minority businessperson, I am deeply concerned about the interim regulations published in may by the Defense Department. I believe that these regulations disregard the potential benefits minority businesses could receive from an increase in subcontract awards.

Subcontracts give minority businesses a chance to participate in Defense contracts that would otherwise be beyond their capacity, and enable them to enter agreements with prime contractors that currently ignore our potential. Thus, subcontracting is a good way to develop minority businesses while fulfilling America's defense needs.

We are still in the first generation of the minority business phenomenon, lead it not into extinction

I urge the Defense Department to make subcontracting an intergal part of the awards and procurement process.

Sincerely,



Barbara Harris

TELEPHONE (703) 644-5660

6 August 1987

Defense Acquisition Regulatory Council  
ATTN: Mr. Charles Lloyd, Executive Secretary  
ODASD (P) DARS  
c/o OASD (P & L) (M & RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

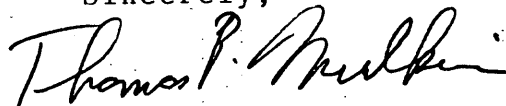
It has come to my attention that DoD is implementing Section 1207 of the 1987 DoD Authorization Act (Public Law 99-661) which takes away long-term existing contracts from qualified small businesses and sets them aside for small disadvantaged businesses (SDBs) rather than using those contract dollars available to large businesses. This is absurd!

In today's society, the entrepreneur pursues the great American dream of having their own business and the Government helps in any way it can. However, in order to help the SDBs, the government does not need to undermine the small businesses that are surviving. Consequently, SDBs should be assisted with contract dollars but not at the expense of other small businesses.

Therefore, I heartily agree with Congress' effort to correct this situation. Congress is trying to require DoD to "establish policies and procedures which will ensure that there shall be no reduction in the number or dollar value of contracts awarded under the program established in section 8(a) of the Small Business Act and under the small business set-aside program established under 15(a) of the Small Business Act in order to meet the goal of Section 1207 of the DoD Authorization Act of 1987".

Mr. Lloyd, small businesses are a rare breed. Let us not be obliterated by our own kind.

Sincerely,



Thomas P. Mulkerin

# Garrett Communications

ADVERTISING GRAPHICS & PUBLIC RELATIONS • POST OFFICE BOX 21411 • ATLANTA, GEORGIA 30321

August 6, 1987

Mr. Charles W. Lloyd  
Defense Acquisition Regulatory Council  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

As a businessperson, a female and minority owned business, I am concerned about the interim regulations published in May by the Defense Department.

First, it did not make subcontracting an intergral part of the procurement process for small and minority businesses. I would like this clearly defined.

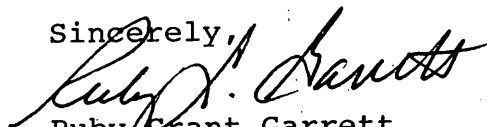
Second, it expressed no provisions to assure that small or minority businesses could or would benefit from 'advance payments'. This leverage should be used to encourage prime contractors to use small and minority businesses as defined in the regulations.

Third, because of the contributions made by minorities and small businesses in the development and daily defense of this great nation of ours. I seriously question why an impact analysis is necessary of small concerns that are not owned and controlled by socially and economically disadvantage individuals.

This makes me wonder who has and is getting the other 95% of the Defense Department budget. Could you please explain to a small minority business why this statement was included in the regulations ?

I am proud to see the Defense Department make this effort to use assets of small and minority businesses but please be open and honest in this effort. Small and minority businesses make a major contribution to our economy and daily defence.

Sincerely,

  
Ruby Grant Garrett  
President

RGG/jf

27 July 1987

Mr. Charles W. Lloyd  
Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an employee of a small disadvantaged business, I urge your adoption of the attached changes in Interim Rule, implementing Public Law 99-661, proposed by the Coalition to Improve DoD Minority Contracting.

Sincerely,



William Anderson  
11311 Calenda Road  
San Diego, CA. 92127

cc: Honorable Caspar Weinberger  
Secretary  
Department of Defense  
The Pentagon, 3E880  
Washington, D.C. 20301

Honorable James Abdnor  
Administrator  
Small Business Administration  
1441 L Street, N.W.  
Washington, D.C. 20416

Honorable Gus Savage  
U.S. House of Representatives  
Room 1121 Longworth Building  
Washington, D.C. 20515

Mr. Charles W. Lloyd  
Page 2  
27 July 1987

cc: Alan Cranston  
880 Front Street 5S31  
San Diego, CA 92188

Pete Wilson  
401 B Street, Suite 2209  
San Diego, CA 92101

Jim Bates  
3450 College Avenue, #231  
San Diego, CA 92115

Duncan Hunter  
366 So. Pierce Street  
El Cajon, CA 92020

87-33  
Attachment is of interest  
8/11/87  
EXOR. SOC.

# JOHN FONTENO, JR. AND ASSOCIATES

REAL ESTATE CONSULTANTS

2215 CLEBURNE AVENUE • P. O. BOX 8471 • (713) 529-4968 • HOUSTON, TEXAS 77004-5104

August 3, 1987

Defense Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

We have two businesses one is a travel agency and the other is a real estate consulting firm. Please favor us with particulars for our utilization of the National Defense Authorization Act(P.P.99-661).

Thank you for your immediate assistance in this matter.

Very truly yours,

*John Fonteno III*  
John Fonteno, III

Encl

CC: John Conyers, Jr.  
Member of Congress



APPRAISALS

BONDED RECEIVER

FINANCING

SALES

INSPECTIONS

ACQUISITIONS

REALTOR



MEDICAL PLACE  
1287 Carter Hill Road  
P. O. Box 6121  
Montgomery, AL 36106-1419  
(205) 262-4283

July 29, 1987

Mr. Charles W. Lloyd, Executive  
Secretary, DAR Council  
Room 3C841/The Pentagon  
Washington, DC 20301-3062

Dear Mr. Lloyd:

We are a small, minority-owned business specializing in medical equipment and supplies. We need your help and support in changing Public Law 99-661 dealing with the 5% goal for distributors.

In medical equipment and supplies there are very few small manufacturers and if we have to buy from a small manufacturer in order to participate, the law will be there but small and minority distributors will have few opportunities.

I spoke to Mrs. Rita Strausburg, SBA, Defense Personnel Support Center, she stated that out of 461 million plus dollars that was spent by the Department of Defense, minority-owned medical supply dealers including 8(a) firms received 1.5%. If minorities don't have opportunities the figure will remain the same.

I would like to see the following implemented:

1. The 8(a) program remain funded at the same level or higher.
2. Keep Public Law 99-661 separate from the 8(a) program.
3. Extend the 8(a) program participation to 14 years.
4. Monitor the small business specialist and heads of Government facilities to make sure they have a direct outline in reaching their goals with small, minority-owned businesses. SBA need to play a real part in making sure goals are met by Government agencies.
5. Penalize agencies that donot reach thier goals and make it public knowledge to the Congressman.

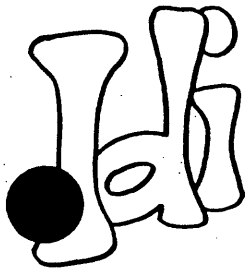
I look forward to hearing from you as soon as possible because fiscal year 87 ends in October.

Sincerely,

  
Alfred Seawright  
President

t1m/Enclosures

*Called 8/11*



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INDUSTRIAL PIPE • VALVES • FITTINGS  
WATER and SEWER EQUIPMENT

P.O. Box 3181 • Madison, WI 53704 • 608-244-1234

DARC

Mr. Charles W. Lloyd,  
executive secretary,  
ODASD (P) DARS, c/o  
OASD (P&L) (M&RS)

Dear Mr. Lloyd,

I am addressing this correspondence to you on behalf of my company with the hope that it will enhance our quest in securing some portion of the DOD contracts that have been designated for small disadvantaged businesses thru fiscal year 1989.

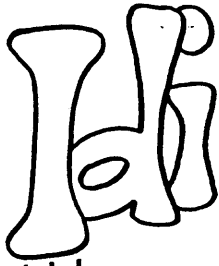
We are a wholesale distributor of plumbing supplies and fixtures and heating supplies. We meet all Qualifications and requirements relative to the guidelines set forth in the "interim rule", which amends the Defense Federal Acquisition Regulation Supplement of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), termed "Contract Goal for Minorities."

We have contacted our U.S. representative, congressman Robert W. Kastenmeier, who has pledged to investigate this matter. Subsequently, we would sincerely appreciate any additional information or directives that you could extend that may facilitate our involvement in this program. Thank You

Sincerely,  
*Robert L. Hansbro Jr.*  
Robert L. Hansbro Jr., President

**INDEPENDENT DISTRIBUTORS INCORPORATED of WISCONSIN**

*Called  
5/13/87  
out of town  
did not know  
who he would  
be  
+ SB info*



**PLUMBING  
HEATING  
INDUSTRIAL PIPE • VALVES • FITTINGS  
WATER AND SEWER EQUIPMENT**

**INDEPENDENT DISTRIBUTORS INCORPORATED of WISCONSIN  
P.O. Box 3181  
Madison, WI 53704  
608-244-1234**

**PLUMBING & HEATING PRODUCT LINES**

**INDEPENDENT DISTRIBUTORS INCORPORATED  
of WISCONSIN**



**Resource Data Consultants**

(801) 298-2401  
563 West 500 South, Suite 450  
P.O. Box 387  
Bountiful, Utah 84010

August 6, 1987

Defense Acquisition Regulatory Council  
Mr. Charles W. Lloyd - Executive Secretary  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841  
The Pentagon, Washington D.C. 20301-3062

RE: DAR Case 87-33

Dear Mr. Lloyd:

This letter is in response to an opportunity to comment on Public Law 99-661 as it applies to Small Disadvantaged Businesses which REDCON - Resource Data Consultants has been certified by the Small Business administration as such.

My principal concern is your use of the term "fair market cost" as the basis for establishing whether the SDB's are within the 10 percent cost range. I can foresee where there could be considerable conflict on its meaning to the detriment of the SDB's in negotiating any set-aside solicitations. If the term is to be applied in negotiating, then prior to the best and final offer made by the SDB's the fair market cost should be disclosed in fairness to both parties.

The other inquiry which I have pertains to the future of the Public Law after fiscal year 1989 and assuming the success of the law as to its future continuation. If you could provide any comment, I would appreciate the response.

Sincerely,

REDCON



Tom N. Hori  
President

TNH:bd

# SHULL & ASSOCIATES

2712 N. Saginaw  
Flint, MI 48505  
313/232-3580

557 E. Jefferson  
Detroit, MI 48226  
313/961-0544

August 4, 1987

Mr. Charles W. Lloyd  
Executive Secretary, OASD (P) DARS  
c/o OASD (P&L) M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C.  
20301-3062

Dear Mr. Lloyd:

I am writing to express my support for the regulations which the Department of Defense has developed to reach its 5% minority contracting goal. In general, I view these rules as a satisfactory starting point towards rectifying the disproportionately low representation which minority firms have in the defense business. However, I do maintain certain specific reservations to which I feel I should call your attention during this commentary period.

My reservations stem from several omissions and ambiguities in the proposed regulations. First, although subcontracting is allowed, I found no clearly defined strategy in the regulations which ensure that prime contractors make a good faith effort to increase subcontracting opportunities for Small Disadvantaged Businesses. Second, the regulations make virtually no mention of historically black colleges or other such minority institutions, much less their role in the early stages in the research and development of United States military systems. Third, the regulations have failed to stipulate the precise basis upon which advance payments would be made available to small and disadvantaged contractors in pursuit of the five percent goal. Fourth, the regulations regarding the execution of sole-source contracts to minority firms are totally unsatisfactory and require strengthening. And fifth--neither an ambiguity nor an omission--the regulations specifically prohibit the granting of partial set-aside contracts in spite of the enormous potential which such contracts hold for small and disadvantaged businesses. All of these problems must be rectified if small and disadvantaged businesses are to succeed in realizing the Set-Aside Program's goals.

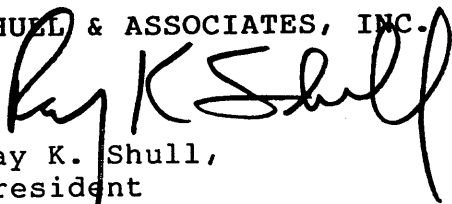
Minorities and low income persons have historically given their services and often times their lives in defense of our Country in great proportions. Surely, these same persons deserve and are entitled to a greater share of the business opportunities with this same government.

Mr. Charles W. Lloyd  
Executive Secretary, OASD (P) DARS  
August 4, 1987  
Page -2-

I urge the Defense Department to address the above issues quickly, and to move forward aggressively in pursuing the minimal five percent goal as established by the Defense Authorization Act of 1987.

Sincerely,

SHULL & ASSOCIATES, INC.



Ray K. Shull,  
President

RKS/wr

# V. P. INSTALLERS, INC.

WINDOW REPLACEMENT EXPERTS

211 LAWRENCE PLACE • PATERSON, N.J. 07501

201-279-7586

August 7, 1987

Defense Acquisition Regulatory Council  
Attn. Mr. Charles W. Lloyd  
Executive Secretary, ODASAD (P) Dars  
C/O OASD (P & L) (M & RS)  
Room 3 C 841  
The Pentagon  
Washington, D. C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for sub-contracting. Second, the regulations do not provide for the participation of either historically Black colleges and Universities or Minority Institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

*Irene B. Price*

Irene B. Price  
V. President

A. G. Comserve Incorporated  
33 Kassul Place  
P. O. Bob 5538  
Somerset New Jersey 08873  
(201)-545-7109

July 30, 1987

Defense Acquisition Regulatory Council  
Attention: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The Pentagon  
Washington, D. C. 20301-3062

Dear Mr. Lloyd;

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the five (5%) percent minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues have been overlooked.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and Universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the five (5%) percent goal. Finally, partial setasides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I am sure that we can reach and obtain the goals set by the Department of Defense if you address these issues promptly and affirmatively. I urge you to do so in the final regulations.

Sincerely,



Arthur L. Satterwhite Jr.  
President,  
A. G. Comserve Incorporated

cc: U. S. Senate Representatives, New Jersey  
U. S. House Representatives, New Jersey



Page 2  
Mr. Charles W. Lloyd  
Defense Acquisition Regulatory Council  
August 5, 1987

Secondly, although these regulations are a step in the right direction, they provide no clear basis on what advance payments will be available to minority businesses in pursuit of the 5% goal. Third, steps should be taken to effect payment abuses by prime contractors in the future, for many minority businesses have suffered financial ruin due to lack of payments on a timely basis.

I sorely urge the Defense Department to make subcontracting an integral part of the awards and procurement process in the final regulations.

Sincerely,



Fred Gillette  
Vice President

FG/cnh



P.O. Box 92004, Los Angeles, California 90009

(213)643-2228

August 5, 1987

The Honorable Meldon E. Levine  
U.S. House of Representatives  
502 Cannon Building  
Washington, D.C. 20515

DJC:064

Dear Mr. Levine:

During the last four years my father and I have put every penny of our collective assets into the development of a small business service contracting company. We have built on the age old concepts of quality service at a competitive price and have developed a reputation as such.

But today we face a serious crisis in our ability to not only grow our business but to it's very survival.

That nemesis is Section 1207 to Public Law 99-661. This Section entitled "Contract Goal for Minorities" mandates that governmental contracting agencies solicit bids from only qualified small disadvantaged business firms. And, as such, we are precluded from bidding this work.

While I recognize the need to develop small disadvantaged business concerns, I question the integrity of a system that takes from one small business to help another. And, we question the urgency to implement this type of sweeping mandate without prior public comment as is the case in this matter.

More urgent, however, is the immediate impact of this law on our firm. We currently operate a small Food Service (Mess Attendants) contract at Norton Air Force Base in San Bernardino, CA. Our contract performance has been consistently rated above average during it's entire term.

But two weeks ago the Air Force announced that they would solicit for the follow-on contract during August from exclusively small disadvantaged business sources. The Contracting Officer's justification for this decision is this new law.

While we've made numerous phone calls to the Air Force in an attempt to change their mind, this has met with no success. They seem intent on meeting their 5% objectives using this contract as their starting point.

To that end we most urgently require your assistance. Your intervention to dissuade the Air Force from acting so capriciously to our detriment is essential. We only seek a comprehensive examination of the urgency to implement this law and an evaluation of the other options open to the Air Force at Norton.

Hopefully, your office can help bring reason and logic to the implementation of this law and allow our firm the opportunity to continue to bid on this contract. To that end, any assistance you can provide will be appreciated.

Please feel free to contact me if you have any further questions at (213) 375-1046.

Sincerely,



John E. Delane  
President

# PARKWAY SERVICES, INC.

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July 31, 1987

Defense Acquisition Regulatory Council  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C 841  
The PENTAGON  
Washington, DC 20301-3062

Dear Mr. Lloyd:

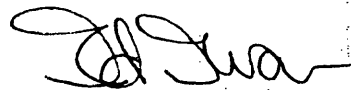
I write to express concern regarding the interim regulations that the Department of Defense has developed to implement the minority contracting goal. There are quite a few important issues that need to be addressed.

First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for the participation of either historically Black colleges and universities or minority institutions. Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal. Fourth, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

More specifically, I am concerned that the 5% set-aside program will directly interfere with the successful continuation of the 8(a) program. The 8(A) program fosters the development of small and disadvantaged firms and should therefore remain intact for fund allocation. The 5% set-aside program should complement 8(a), rather than compete.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,



Edward T. Evans  
President

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August 5, 1987

Mr. Charles W. Lloyd  
Defense Acquisition Regulatory Council  
c/o OASD, Room 3C 841  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd,

As a black minority business firm, we are deeply concerned about the interim regulations published in May by the Defense Department. These regulations completely disregard the possibly benefits, our firm and other minority enterprises could receive from an increase in subcontract awards.

Subcontracts give minority business the opportunity to participate in defense contracts that would otherwise be beyond their capacity. Subcontracts would enable firms such as ours to enter agreements with prime contractors that currently ignore our potentiality. Subcontracts are excellent vehicles to broaden and develop minority businesses while fulfilling the Defense Department needs and providing employment possibilities for labor surplus areas.

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July 13, 1987

Defense Acquisition Regulatory Council  
Att; Mr. Charles W. Lloyd  
Executive Secretary  
ODASK (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectfully object to the exclusion of Hasidic Jews from the designated list of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.0 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. # 637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce

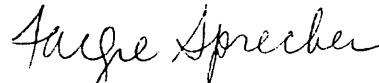
July 13, 1987

(most recently confirmed on October 24, 1984) that Hasidic Jews constitute a socially disadvantaged group individuals.

In the absence of express recognition of Hasidic eligibility in Part 219.001, I must respectfully object to the protest procedures set forth in proposed Part 219.302. These procedures are an open invitation to obstructionist opposition to contracting opportunities by disadvantaged individuals who are not members of a designated group. Under the proposed procedures, designated group members are entitled to a presumption of eligibility but other individuals are not. Under these circumstances, individuals who are not members of designated groups are likely to be the most frequent targets of the protest procedures under Part 219.302.

Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,



Faigie Sprecher



Rochester Area  
Chamber of Commerce, Inc.  
55 St. Paul Street  
Rochester, NY 14604  
(716) 454-2220

July 31, 1987

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Defense Acquisition Regulatory Council  
Attention: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P & L) (M & RS)  
Room 3 C 841  
The Pentagon  
Washington, D. C. 20301-3062

Dear Mr. Lloyd:

The Black Business Association of the Greater Rochester Area Chamber of Commerce has some concerns about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that some important issues have been overlooked:

First, the regulations contain no express provisions for sub-contracting

Second, partial set-asides have been specifically prohibited.

We also believe that the original goals of the Department of Defense have been side tracked by the length of time required to qualify minority businesses as 8(a) certified. The black business owners of the Black Business Association urge the Department of Defense to address these issues and to remove any bars from the final regulations that may limit our access to this market, thus deminishing the Department of Defense's ability to successfully reach the 5% goal.

Sincerely,

A handwritten signature in black ink that reads 'John L. Blake'. The signature is written in a cursive style and is followed by a horizontal line.

John L. Blake  
President

JLB:tc



ROBERT L. LIVINGSTON  
1ST DISTRICT, LOUISIANA

APPROPRIATIONS COMMITTEE

SUBCOMMITTEE:  
DEFENSE

PERMANENT SELECT COMMITTEE  
ON INTELLIGENCE



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DISTRICT OFFICE:  
111 VETERANS BLVD.  
SUITE 700  
METAIRIE, LA 70005  
(504) 889-2753

**Congress of the United States**  
**House of Representatives**

Washington, DC 20515

August 5, 1987

Mr. Charles W. Lloyd  
Executive Secretary-DAR Council  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS) Rm 3E144  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

The Department's interim rule implementing Section 1207 of P.L. 99-661 (DAR Case 87-33) should be amended to allow more flexibility for small disadvantaged businesses (SDBs) to actually benefit from set-asides by the Defense Department.

I support Congressional and DOD efforts to provide greater procurement opportunities for small disadvantaged businesses. However, allowing SDBs to participate only if they purchase or furnish end items manufactured or produced by other SDBs (section 252.219-7006(c)), will severely restrict and in some cases eliminate any opportunity for SDBs to participate in this critical program.

There will be many procurement instances where SDB manufactured or produced end items will not exist. Just one example, that has been brought to my attention and that of the Department's, is the almost non-existent small and disadvantaged steel and pipe manufacturing or production capability in the United States. In addition, there will be other instances where SDB requirements will not be met because existing SDB end item products cannot be furnished in adequate amounts.

The intent of Congress in passing laws to help SDBs is to increase business opportunities for existing firms. More importantly, I also believe it is Congress' intent to foster an environment where more minority or disadvantaged citizens can actually get into or compete in a product market where SDBs did not previously exist.

Therefore, I request that the interim rule be amended to allow exemptions to section 252.219-7006(c) for SDBs in instances where no SDB end product manufacturers or producers exist or where there is very limited SDB end product availability or manufacturer capability.

Mr. Charles W. Lloyd

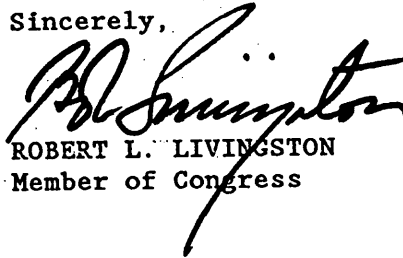
Page 2

August 5, 1987

I understand similar exemptions from small business requirements have been administratively implemented in other government procurement efforts. I sincerely believe DOD should do likewise, or, at the very least, provide much more flexibility for more SDBs to participate than is currently envisioned in the interim rule.

Thanking you in advance for your consideration of this important request, I remain

Sincerely,



ROBERT L. LIVINGSTON  
Member of Congress

RLL/pc

§ 124.1

13 CFR Ch. I (1-1-87 Edition)

(2) Proceeds of loans under this subpart shall not be used for the payment of dividends or other disbursements to owners, partners, officers or stockholders unless they constitute reasonable remuneration and are directly related to their performance of services; nor for refunding of existing indebtedness incurred prior to or not as a result of the event which gave rise to the issuance of the declaration or designation or to reduce loans provided, guaranteed or insured by another Federal agency or a small business investment company licensed under the Small Business Investment Act. No part of the proceeds of any loan under this subpart shall be used, directly or indirectly, to pay any obligations resulting from a Federal, state or local tax penalty as a result of negligence or fraud, or non-tax criminal fine or any civil fine or penalty for non-compliance with a law, regulation or order of a Federal, state, regional, or local agency or similar matter.

(3) Each borrower shall use the loan proceeds for the purposes set forth in the loan authorization. Any loan recipient who wrongfully applies loan proceeds shall be civilly liable to SBA in an amount equal to one and one-half times the original amount of the loan (Pub. L. 92-385, approved August 16, 1972; 86 Stat. 554).

(4) Applicants must use personal and business assets to the greatest extent possible, without incurring undue personal hardship, before disbursement of funds under this subpart.

(h) *Other requirements.* For application requirements see § 123.18; for terms of loans, see § 123.9(a); for types of loans, see § 123.4; for services fees, see § 123.6 of this part.

(49 FR 32311, Aug. 13, 1984, as amended at 50 FR 4615, Jan. 31, 1985; 51 FR 45300, Dec. 18, 1986)

**PART 124—MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT**

Sec.

- 124.1 The Section 8(a) and 7(j) programs.
- 124.2 Program management.
- 124.3 Violations.
- 124.100 Definitions and applicability of these regulations.

Sec.

- 124.101 The section 8(a) program: General eligibility.
- 124.102 Small business concern.
- 124.103 Ownership.
- 124.104 Control and management.
- 124.105 Social disadvantage.
- 124.106 Economic disadvantage.
- 124.107 Potential for success.
- 124.108 Additional eligibility requirements.
- 124.109 Ineligible businesses.
- 124.110 Fixed program participation term.
- 124.111 Mechanics for extension of a fixed program participation term.
- 124.112 Program termination.
- 124.113 Suspension of program assistance.
- 124.201 Processing applications.
- 124.202 Place of filing.
- 124.203 Applicant representatives.
- 124.204 Requirement support determination.
- 124.205 Forms and documents required.
- 124.206 Approval and declination of applications for eligibility.
- 124.207 Business activity.
- 124.301 The provision of requirements support for 8(a) firms.
- 124.302 8(a) Contracts and subcontracts.
- 124.401 Advance payments.
- 124.402 Business development expense.
- 124.403 Letter of credit.
- 124.501 Development assistance program.
- 124.502 Small Business and Capital Ownership Development program.
- 124.503 Compliance with the Paperwork Reduction Act of 1980.

AUTHORITY: 15 U.S.C. 637(a).

SOURCE: 51 FR 36141, Oct. 8, 1986, unless otherwise noted.

§ 124.1 The Section 8(a) and 7(j) programs.

(a) *General.* (1) These regulations implement sections 8(a) and 7(j) of the Small Business Act (15 U.S.C. 637(a) and 636 (j)) which establish the Minority Small Business and Capital Ownership Development Program (program). These regulations apply to all section 8(a) concerns participating in the program as of the effective date of these regulations and all concerns applying for admission to the program subsequent to that date.

(2) Section 8(a) authorizes SBA to enter into all types of contracts (including, but not limited to, supply, services, construction, research and development) with other Government departments and agencies, and to negotiate subcontracts for the performance thereof with small business con-

- 1 The section 8(a) program: General eligibility.
- 2 Small business concern.
- 3 Ownership.
- 4 Control and management.
- 5 Social disadvantage.
- 6 Economic disadvantage.
- 7 Potential for success.
- 8 Additional eligibility requirements.
- 9 Ineligible businesses.
- 10 Fixed program participation term.
- 11 Mechanics for extension of a fixed program participation term.
- 12 Program termination.
- 13 Suspension of program assistance.
- 14 Processing applications.
- 15 Place of filing.
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- 23 Advance payments.
- 24 Business development expense.
- 25 Letter of credit.
- 26 Development assistance program.
- 27 Small Business and Capital Ownership Development program.
- 28 Compliance with the Paperwork Reduction Act of 1980.
- 29 15 U.S.C. 637(a).
- 30 51 FR 36141, Oct. 8, 1986, unless noted.

**The Section 8(a) and 7(j) provisions.**

**General.** (1) These regulations under sections 8(a) and 7(j) of the Small Business Act (15 U.S.C. 637(a)(7)) which establish the Minority Small Business and Capital Ownership Development Program. These regulations apply to section 8(a) concerns participating in the program as of the effective date of these regulations and all concerns for admission to the program to that date.

(2) Section 8(a) authorizes SBA to participate in all types of contracts (including but not limited to, supply, construction, research and development) with other Government departments and agencies, and to negotiate subcontracts for the performance of such contracts with small business con-

**Small Business Administration**

**§ 124.100**

cerns owned and controlled by socially and economically disadvantaged individual(s).

(3) Section 7(j) authorizes SBA to provide financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or small business concerns eligible for assistance under sections 7(a)(11), 7(j)(10), and 8(a) of the Small Business Act.

(b) **Purposes.** (1) It is the purpose of the Section 8(a) program to:

(i) Foster business ownership by individuals who are both socially and economically disadvantaged;

(ii) Promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary; and

(iii) Clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

(2) It is the purpose of the Section 7(j) program to:

(i) Foster business ownership by individuals in groups that own and control little productive capital; and

(ii) Promote the competitive viability of such firms by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.

**§ 124.2 Program management.**

The Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB-COD) is responsible for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of the Small Business Act under the supervision of, and responsible to the Administrator of SBA.

**§ 124.3 Violations.**

Willful violation by an applicant for admission to the section 8(a) program or an applicant for participation in the section 7(j) program of any of SBA's regulations governing its other programs may result in the applicant's

denial of admission to the program. Any such violation will be considered by the AA/MSB-COD in making a determination on the admission of an applicant to the program, and such consideration will include the nature and severity of any such violation.

**§ 124.100 Definitions and applicability of these regulations.**

(a) "Business plan" means the business plan documents as submitted by the applicant section 8(a) concern and approved by SBA which include the objectives, goals, and business projections of a section 8(a) concern, and all written amendments or modifications which have also been approved by SBA.

(b) "Certification of SBA's competency" means a certification by SBA that it is competent to perform the requirement as stated in the contract, and is based upon an assessment of a section 8(a) concern's competency to perform. The assessment does not require a special investigation or the issuance of a Certificate of Competency (COC) as provided for elsewhere in these regulations under the authority of section 8(b)(7) (A), (B), and (C) of the Small Business Act.

(c) "Commitment" means the commitment made by a procuring activity to SBA that the procuring activity will negotiate to place a contract with SBA or subcontract with a section 8(a) concern, provided there is no material change in requirements, availability of funds, or other pertinent factors. A commitment does not mean that an award of a particular contract to SBA and a section 8(a) concern will or must be made.

(d) "Local buy item" means a supply or service purchased to meet the specific needs of one user. Examples include the purchase of nonprofessional services, such as custodial or trash hauling, and construction work.

(e) "Manufacturer" means a concern which owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment described by the business plan. In order to qualify as a manufacturer, a concern must be able to show (1) that it is

an established manufacturer of particular goods or goods of general character which may be sought by the Government, or (2) if it is newly entering into such manufacturing activity, that it has made all necessary prior arrangements for space, equipment, and personnel to perform manufacturing operations. A new firm which has made such definite commitments in order to enter a manufacturing business which will later qualify it, shall not be barred from 8(a) approval because it has not yet done any manufacturing; however, this interpretation is not intended to qualify a firm whose arrangements to use space, equipment, or personnel are contingent upon 8(a) approval. This definition is based upon the Walsh-Healy Public Contracts Act, 41 U.S.C. 35-45.

(f) "National buy item" means an item or service purchased to meet the needs of a system where supply control, inventory management, and procurement responsibility have been assigned to a central procuring activity to support the needs of two or more users of the item. Examples include military clothing purchased by the Defense Personnel Support Center of the Department of Defense, paint or hand tools purchased by the Federal Supply Service of the General Services Administration, medical supplies purchased by the Veterans Administration, or studies, evaluations, consulting services or similar services purchased by the headquarters office of a department or agency.

(g) "Negative control," as used in this part is defined in § 121.3(a)(i), formerly § 121.3-2(a)(1), of these regulations which is entitled "Nature of Control."

(h) "Open requirement" means a requirement submitted to SBA by a procuring activity for possible 8(a) award without a particular 8(a) concern identified as a candidate for the award. Open requirements can be for local buy items or national buy items.

(i) "Primary industry classification" means the four digit Standard Industrial Classification (SIC) Code designation which, for an on-going applicant concern, best describes the industry representing the largest proportion of its business revenues for the previous

year or, in the case of a start-up applicant concern, that SIC Code designation which best describes the industry in which it intends to do the most business.

(j) "Regular dealer" means a person who owns, operates, or maintains a store, warehouse, or other establishment in which materials, supplies, articles, or equipment of the general character described in the business plan are bought for the account of such person, kept in stock and sold to the public in the usual course of business. In order to qualify as a regular dealer, the concern must be able to show:

(1) That he has an establishment or leased or assigned space in which he regularly maintains a stock of goods in which he claims to be a dealer; if the space is in a public warehouse, it must be maintained on a continuing, and not on a demand basis;

(2) That the stock maintained is a true inventory from which sales are made; the requirement is not satisfied by a stock of sample or display goods, or by a stock consisting of surplus goods remaining from prior orders, or by a stock unrelated to the supplies which are the subject of the business plan, or by a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made;

(3) That the goods stocked are of the same general character as the goods in which he claimed to be a dealer; to be of the same general character the items to be supplied must be either identical with those in stock or be goods for which dealers in the same line of business would be an obvious source;

(4) That sales are made regularly from stock on a recurring basis; they cannot be only occasional and constitute an exception to the usual operations of the business; the proportion of sales from stock that will satisfy the requirements will depend upon the character of the business;

(5) That sales are made regularly in the usual course of business to the public, i.e., to purchasers other than Federal, State, or local government agencies; this requirement is not satisfied if the applicant concern merely

or, in the case of a start-up applicant, that SIC Code designation which best describes the industry which it intends to do the most business.

"Regular dealer" means a person who owns, operates, or maintains a warehouse, or other establishment in which materials, supplies, or equipment of the general character described in the business are bought for the account of a person, kept in stock and sold to the public in the usual course of business. In order to qualify as a regular dealer, the concern must be able to

That he has an establishment or assigned space in which he regularly maintains a stock of goods in which he claims to be a dealer; if the stock is in a public warehouse, it must be maintained on a continuing, and not on a demand basis;

That the stock maintained is a general inventory from which sales are made; the requirement is not satisfied if the stock consists of surplus goods remaining from prior orders, or stock unrelated to the supplies which are the subject of the business; or by a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made;

That the goods stocked are of the same general character as the goods in which he claims to be a dealer; to be supplied must be either with those in stock or be those which dealers in the same business would be an obvious

That sales are made regularly on a recurring basis; they are not only occasional and constitute an exception to the usual operation of the business; the proportion of sales from stock that will satisfy requirements will depend upon the nature of the business;

That sales are made regularly in the usual course of business to the extent, to purchasers other than the State, or local government, that this requirement is not satisfied if the applicant concern merely

seeks to sell to the public but has not yet made such sales; if government agencies are the sole purchasers, the applicant concern will not qualify as a regular dealer; the number and amount of sales which must be made to the public will necessarily vary with the amount of total sales and the nature of the business; and

(6) That his business is an established and going concern; it is not sufficient to show that arrangements have been made to set up such a business.

This definition is based upon the Walsh-Healy Public Contracts Act.

(k) "Requirement support" means contract opportunities from Federal procuring agencies to acquire articles, equipment, supplies, services, materials or construction work which a section 8(a) business concern could perform.

(l) "Self-marketing" of an item occurs when a section 8(a) marketing firm identifies a requirement that has not been committed to the section 8(a) program and through its marketing efforts causes the procuring activity to offer that specific requirement to the section 8(a) program on its behalf.

(m) *Applicability to participating section 8(a) concerns.* Business plans for all participating section 8(a) concerns shall reflect Standard Industrial Classification Code designations consistent with the requirements of § 124.207 of these regulations. Within 120 calendar days of publication of this final rule, the appropriate SBA field office will review the business plan and related documents of each participating section 8(a) concern and within the same 120-day period will notify each concern by certified mail to its address of record of the SIC Code designations for which it has been approved to receive section 8(a) program contract awards. Within 30 calendar days from the date on which the notice is mailed, a participating concern may request in writing that SBA make a correction in the approved SIC Code designations in its presently approved business plan in order to conform to the approved business plan to these regulations. Written approval or disapproval of any such request will be provided by SBA

within 60 calendar days of the receipt of the request. Any correction of one or more SIC Code designations will be effective only when SBA gives written approval of such request. After the process is completed as to all concerns participating in the section 8(a) program on the effective date of these regulations, any subsequent changes in SIC Code designations appearing in their business plans must be accomplished pursuant to § 124.207(b).

§ 124.101 The section 8(a) program: General eligibility.

(a) In order to be eligible to participate in the section 8(a) program, an individual or an applicant concern must meet all of the eligibility criteria set forth in § 124.102 through § 124.110 hereunder. All determinations made pursuant to §§ 124.102, 124.103, 124.104, 124.105, 124.106, and 124.107 shall be in writing, setting forth the grounds and relevant facts upon which the determination is based, by the AA/MSB-COD, whose decision shall be final.

(b) It is the intent of the Small Business Administration to limit participation in the section 8(a) program to eligible individuals and concerns, and to process applications for participation in a fair and consistent manner. Toward that end, the Small Business Administration invites the participation of the public in preventing fraud and assuring the integrity of the section 8(a) program. The AA/MSB-COD shall review any determination that an individual or applicant concern is eligible to participate in the section 8(a) program whenever a member of the public submits credible evidence that such determination was based on fraudulent information, or that SBA did not follow the requirements of these regulations in rendering the determination. The AA/MSB-COD shall determine whether the facts developed during any such review warrant further action; provided that any review of potential misconduct by SBA shall be concluded with a detailed report of the findings to the member of the public whose information gave rise to the review.

## § 124.102

13 CFR Ch. I (1-1-87 Edition)

### § 124.102 Small business concern.

(a) In order to be eligible to participate in the section 8(a) program, an applicant concern must qualify as a small business concern as defined in § 124.4 of the SBA Rules and Regulations (13 CFR 121.4). The particular size standard to be applied will be based on the primary industry classification of the applicant concern.

(b) In order to continue to participate in the section 8(a) program once a concern is admitted to the program, the concern must certify to SBA that it is a small business pursuant to the provisions of § 121.4 for the purpose of performing each individual contract which it is awarded. SBA, in turn, will verify such certifications.

(c) Once admitted to the section 8(a) program, a concern will only be permitted to perform 8(a) contracts which are classified according to the standard industrial classification code numbers which appear in its business plan as established pursuant to § 124.207 of these regulations. A participating section 8(a) business concern is free to pursue any non-section 8(a) contract regardless of its Standard Industrial Classification Code number which it is capable and competent to perform.

### § 124.103 Ownership.

In order to be eligible to participate in the section 8(a) program, an applicant concern must be one which is at least 51 percent owned by an individual(s) who is a citizen of the United States (specifically excluding resident alien(s)) and who is determined to be socially and economically disadvantaged by SBA.

(a) In the case of an applicant concern which is a partnership, 51 percent of the partnership interest must be owned by an individual(s) determined to be socially and economically disadvantaged.

(b) In the case of an applicant concern which is a corporation, 51 percent of all classes of voting stock must be owned by an individual(s) determined to be socially and economically disadvantaged.

(c) Part ownership in an applicant concern by nondisadvantaged individual(s) is permitted and may be

necessary to insure adequate capital and management for the concern's development. However, any property, equipment, supplies, services and/or financial assistance other than personal services which are sold, rented or donated to the 8(a) concern by such nondisadvantaged individual(s) must be reported to SBA on an annual basis. Such nondisadvantaged individual(s), their spouses or immediate family members may not:

(1) Be former employers of the disadvantaged owner(s) of the applicant concern without prior approval of SBA;

(2) Be affiliated with another business in the same or similar type of business as the applicant concern;

(3) Hold ownership interest in any other 8(a) concern in an amount deemed excessive by SBA;

(4) Exercise negative control over the applicant concern as defined in 13 CFR 121.3(a)(i) (formerly 13 CFR 121.3-2(a)(i)); or

(5) Receive compensation for personal services from the applicant concern as directors or employees which is deemed to be excessive by SBA

(d) Non-section 8(a) concerns in the same or similar line of business are prohibited from having an ownership interest in an applicant concern which is deemed by SBA to cause negative control over the applicant concern, as defined in 13 CFR 121.3(a)(i) (formerly 13 CFR 121.3-2(a)(i)).

(e) A section 8(a) business concern may continue participation in the program subsequent to a change in its ownership. However, any change of ownership of an 8(a) business concern requires the prior written approval of SBA. Continued participation of the 8(a) concern under new ownership requires compliance with all individual and business eligibility requirements of these regulations by the concern and the new owners. Failure of either an individual owner or the concern to maintain compliance constitutes a ground for program termination.

(f) Applicant concerns owned and controlled by an Indian Tribe are eligible for participation in the section 8(a) program if the individuals who manage and control the concern are found to be socially and economically

to insure adequate capital management for the concern's debt. However, any property, equipment, supplies, services and/or assistance other than personal services which are sold, rented or leased to the 8(a) concern by such disadvantaged individual(s) must be reported to SBA on an annual basis.

Such nondisadvantaged individual(s), their spouses or immediately preceding members may not:

1. be former employers of the disadvantaged owner(s) of the applicant concern without prior approval of

2. be affiliated with another business in the same or similar type of business as the applicant concern;

3. have an ownership interest in any other 8(a) concern in an amount that is excessive by SBA;

4. exercise negative control over any other 8(a) concern as defined in 13 CFR 121.3(a)(1) (formerly 13 CFR 121.3(a)(1)); or

5. receive compensation for personal services from the applicant concern or its owners or employees which is excessive by SBA.

Section 8(a) concerns in the same or similar line of business are prohibited from having an ownership interest in an applicant concern which is controlled by SBA to cause negative impact on the applicant concern, as defined in 13 CFR 121.3(a)(1) (formerly 13 CFR 121.3-2(a)(1)).

Continued participation in the 8(a) business concern subsequent to a change in its ownership. However, any change of ownership of an 8(a) business concern requires the prior written approval of the SBA for continued participation of the concern under new ownership to ensure compliance with all individual eligibility requirements and regulations by the concern's new owners. Failure of either the individual owner or the concern to comply constitutes a ground for program termination.

Applicant concerns owned and controlled by an Indian Tribe are eligible for participation in the section 8(a) program if the individuals who manage and control the concern are not socially and economically

disadvantaged by SBA, and the Tribe is found to be economically disadvantaged by SBA.

(g) Applicant concerns owned and controlled by a Regional Corporation or a Village Corporation as defined in 43 U.S.C. 1602 (Alaska Native Claims Settlement Act, Pub. L. 92-203, December 18, 1971) are eligible for participation in the section 8(a) program if the individuals who manage and control the concern are found to be socially and economically disadvantaged by SBA, and the Regional or Village Corporation is found to be economically disadvantaged by SBA.

#### § 124.104 Control and management.

Except in the case of applicant concerns owned and controlled by an Indian tribe or a Regional Corporation or Village Corporation (see § 124.103(g)), an applicant concern's management and daily business operations must be controlled by an owner(s) of the applicant concern who has been (have been) determined to be socially and economically disadvantaged, and such owner(s) must own a greater percentage of the business entity than any nondisadvantaged owner, or in the case of a corporation, more voting stock than any nondisadvantaged stockholder.

(a) Individuals who are not socially and economically disadvantaged may be involved in the management of an applicant concern, and may be stockholders, officers, directors, or employees of such concern. However, such individuals shall not exercise actual control or have the power to control the operations of the applicant or section 8(a) business concern. The existence of control or the power to control shall be determined by the facts of each case.

(b) An applicant concern must be managed on a full-time basis by one or more persons who have been found by SBA to be socially and economically disadvantaged, and such person(s) must possess requisite management capabilities as determined by SBA. This precludes outside employment or other business interests by the individual which conflict with the management of the firm or prevent it from achieving the objectives of its business

development plan. Any disadvantaged person upon whom section 8(a) eligibility is based, who is engaged in the management and daily business operations of the section 8(a) concern and who wishes to engage in regular outside employment must notify SBA of the nature and anticipated duration of the outside employment prior to engaging in such employment. SBA will review such notification for compliance with the requirement of day-to-day management and control of the 8(a) concern.

#### § 124.105 Social disadvantage.

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because their identity as a member of a group without regard to their individual qualities. The social disadvantage of individuals must stem from circumstances beyond their control.

(b) *Members of designated groups.* In the absence of evidence to the contrary, the following individuals are considered socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, or Taiwan); Subcontinent Asian Americans; and members of other groups designated from time to time by SBA according to procedures set forth at § 124.105(d) of this part.

(c) *Individuals not members of designated groups.* (1) Individuals who are not members of the above-named groups must establish their social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(i) The individual's social disadvantage must stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause not common to small business



persons who are not socially disadvantaged.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant.

(v) The individual's social disadvantage must have negatively impacted on his or her entry into, and/or advancement in, the business world. SBA will entertain any relevant evidence in assessing this element of an applicant's case. SBA will particularly consider and place emphasis on the following experiences of the individual, where relevant: education, employment, and business history.

(A) *Education.* SBA shall consider, as evidence of an individual's social disadvantage, denial of equal access to business or professional schools; denial of equal access to curricula; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(B) *Employment.* SBA shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into non-professional or non-business fields; and other similar factors.

(C) *Business history.* SBA shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt

(award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.

(d) *Minority group inclusion—(1) General.* Upon an adequate showing to SBA by representatives of a minority group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a minority group not specifically named in section 201 of Pub. L. 95-507 to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the section 8(a) program. The notice shall adequately identify the minority group making the request; and if a hearing is requested on the matter, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AAMSB-COD.

(2) *Standards to be applied.* In determining whether a minority group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:

(i) If the group has suffered the effects of discriminatory practices or similar invidious circumstances over which its members have no control.

(ii) If the group has generally suffered from prejudice or bias.

(iii) If such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95-507, and

(iv) If such conditions have produced impediments in the business world for members of the group over which they have no control which are not common to all small business people.

If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish a notice under this regulation.

(3) *Procedure.* Once a notice is published under this regulation, SBA shall

ward and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded individual's business development.

**d) Minority group inclusion—(1) General.** Upon an adequate showing to A by representatives of a minority group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of representatives of the group that A do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a minority group not specifically named in section 201 of Pub. L. 95-507 to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the section 8(a) program. The notice shall adequately identify the minority group making request, and if a hearing is requested on the matter, the time, date and location at which such hearing is held. All information submitted in support of a request should be addressed to the AAMSB-COD.

**Standards to be applied.** In determining whether a minority group has an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine

If the group has suffered the effect of discriminatory practices or other invidious circumstances over which its members have no control,

If the group has generally suffered from prejudice or bias,

If such conditions have resulted in economic deprivation for the group of a type which Congress has found to be for the groups named in Pub. L. 95-507, and

If such conditions have produced significant impediments in the business world for members of the group over which they have no control which are not common to all small business people.

When demonstrated to SBA by a particular group that it satisfies the criteria, SBA will publish a notice under this regulation.

**Procedure.** Once a notice is published under this regulation, SBA shall

adduce further information on the record of the proceeding which tends to support or refute the group's request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in written form, or orally at such hearings as SBA may hold on the matter.

**(4) Decision.** Once SBA has published a notice under this regulation, it shall afford a reasonable comment period of not more than thirty (30) days for public comment upon a request. It shall complete the reception of comments, including the holding of hearings within such comment period. Thereafter, SBA shall consider the comments received as expeditiously as possible, and shall render its final decision within 30 days of the close of receipt of information on the matter. Such decision shall take the form of a notice in the FEDERAL REGISTER, and SBA shall also inform the subject group representatives who have appeared in the proceeding of such decision in writing at the time it is made.

#### § 124.106 Economic disadvantage.

**(a) General.** For purposes of the section 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged.

**(b) Factors to be considered.** In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the applicant concern with which he or she is affiliated. Factors to be analyzed depend upon the particular industry in which the applicant concern is involved. Such factors may include, but are not limited to, the following:

**(1) Personal financial condition of the disadvantaged individual.** This criterion is designed to assess the relative degree of economic disadvantage of the individual in comparison to

other individuals, as well as the potential to capitalize or otherwise provide financial support to the business. The specific factors considered are: personal income for at least the past two years; total fair market value of all assets (except that the equity value of the individual's primary residence will be considered); and the net worth of all holdings of the individual.

**(2) Business financial condition.** This criterion is designed to evaluate liquidity, leverage, operating efficiency and profitability of the applicant concern using commonly accepted financial ratios and percentages. This evaluation will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same business area who are not socially disadvantaged. These factors are considered as indicators of a firm's economic disadvantage relative to businesses owned by non-socially disadvantaged individuals. Factors to be considered are business assets, net worth, income and profit. Also, factors to be compared include, but are not limited to: Current ratios, quick ratios, inventory turnover; accounts receivable turnover; sales to working capital; returns on assets; debt to net worth ratio; percentage return on investment; percentage gross profit margin; and percentage return on sales.

**(3) Access to credit and capital.** This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. The factors to be considered are: Access to long-term financing; access to working capital financing; equipment trade credit; access to raw materials and/or supplier trade credit; bonding capability.

**(4) Additional considerations.** A comparison will be made of the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business and competitive market area. It is not the intent of the section 8(a) program to allow program participation to concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, have unlimited growth potential and have

§ 124.107

not experienced or have overcome impediments to obtaining access to financing, markets and resources.

§ 124.107 Potential for success.

To be eligible to participate in the section 8(a) program, an otherwise eligible applicant concern must be determined to be one that with contract, financial, technical and management support will be able to successfully perform subcontracts awarded under the section 8(a) program, and further, with such support, will have a reasonable prospect for success in competition in the private sector within the maximum amount of time that a concern may be in the section 8(a) program (up to seven years). In addition, the AA/MSB-COD must make a determination that the procurement, financial, technical and management support necessary to enable the applicant concern to successfully complete the section 8(a) program is available from SBA or other identified and acceptable sources before the applicant concern may be admitted to the section 8(a) program.

§ 124.108 Additional eligibility requirements.

(a) *Individual character review.* If, during the processing of an application, adverse information is obtained from the section 8(a) program application or a credible source regarding criminal conduct by an individual applicant, no further action will be taken on the application until the adverse information has been forwarded through appropriate channels to the SBA's Inspector General for evaluation and that evaluation has been completed. The Inspector General will advise the AA/MSB-COD of his or her findings and the AA/MSB-COD will consider those findings as part of the process of evaluation of a particular application.

(b) *Standard of conduct.* The SBA Standards of Conduct regulations, 13 CFR 105, *et seq.*, apply to eligibility questions involving SBA employees and their relatives.

(c) *Individual eligibility limitations.* An individual's or business concern's eligibility may be used only once in

13 CFR Ch. I (1-1-87 Edition)

qualifying for section 8(a) program participation.

(1) The AA/MSB-COD may reinstate a former section 8(a) program participant if:

(i) The section 8(a) concern has totally ceased its business operations; and

(ii) The section 8(a) concern voluntarily withdrew from the section 8(a) program due to—

(A) The health of a disadvantaged owner;

(B) Acts of God which destroyed or severely disrupted the operation of such concern; or

(C) Such other circumstances beyond the control of the section 8(a) concern which inequitably interrupted the continued participation of the concern in the section 8(a) program.

(2) Where a section 8(a) concern is reinstated pursuant to paragraph (c)(1) of this section, it will continue in the section 8(a) program for that amount of time which remained in its Fixed Program Participation Term at the time it withdrew from the program. A new Fixed Program Participation Term shall not be established for such concern.

(d) *Manufacturers and regular dealers.* Each applicant concern which intends to manufacture or furnish materials, supplies, articles and equipment in the performance of section 8(a) subcontracts must be determined to be a manufacturer or regular dealer as defined in the Walsh-Healey Public Contracts Act Regulations found at 48 CFR Subpart 22.6.

§ 124.109 Ineligible businesses.

(a) *Brokers and Packagers.* Brokers and packagers are ineligible to participate in the section 8(a) program. These types of businesses do not satisfy the definition of a manufacturer or regular dealer, as stated in § 124.100 of this part.

(b) *Debarred or Suspended Person or Concern.* Individuals or concerns who are debarred, suspended, or are found to be an ineligible bidder by any contracting agency of the Federal Government pursuant to 48 CFR Chapter I, Subpart 9.4 are ineligible for admission into the section 8(a) program

qualifying for section 8(a) program participation.

(1) The AA/MSB-COD may reinstate a former section 8(a) program participant if:

(i) The section 8(a) concern has totally ceased its business operations;

(ii) The section 8(a) concern voluntarily withdrew from the section 8(a) program due to—

(A) The health of a disadvantaged enterprise;

(B) Acts of God which destroyed or severely disrupted the operation of the concern; or

(C) Such other circumstances and the control of the section 8(a) concern which inequitably interrupted continued participation of the concern in the section 8(a) program.

Where a section 8(a) concern is reinstated pursuant to paragraph (1) of this section, it will continue in the section 8(a) program for that amount of time which remained in its Fixed Program Participation Term at the time it withdrew from the program. A new Fixed Program Participation Term shall not be established for the concern.

*Manufacturers and regular dealers.* Each applicant concern which intends to manufacture or furnish materials, supplies, articles and equipment for performance of section 8(a) subcontract must be determined to be a manufacturer or regular dealer as defined in the Walsh-Healey Public Contract Act Regulations found at 48 CFR Subpart 22.6.

**9 Ineligible businesses.**

*Brokers and Packagers.* Brokers and packagers are ineligible to participate in the section 8(a) program. Types of businesses do not satisfy the definition of a manufacturer or dealer, as stated in § 124.100 of this part.

*Debarred or Suspended Person or Concern.* Individuals or concerns who are debarred, suspended, or are found to be ineligible bidder by any contract awarding agency of the Federal Government pursuant to 48 CFR Chapter 101, subpart 9.4 are ineligible for admission to the section 8(a) program

**Small Business Administration**

during the period of debarment, suspension, or status as an ineligible bidder. Prior to approval of any applicant concern, the applicant concern will certify that the applicant concern and the disadvantaged individual(s) upon whom eligibility is based is not at that time debarred, suspended or otherwise an ineligible bidder.

**§ 124.110 Fixed program participation term.**

(a) Every section 8(a) program participant is subject to a Fixed Program Participation Term. A Fixed Program Participation Term and any extension thereof establishes the ultimate time period during which a concern may remain in the section 8(a) program and the conditions of participation, regardless of whether competitiveness is reached by the concern.

(b) The Fixed Program Participation Term must be negotiated between SBA and each small concern which has applied for participation in the program and must be established by mutual agreement prior to the concern's admission to the program.

(c) The provisions of the Fixed Program Participation Term, including the time limitation thereof, will be set forth in the SBA approved business plan of the section 8(a) concern which must be established prior to the applicant concern's admission to the program.

(d) For concerns applying for entry into the program, the Fixed Program Participation Term will begin on the date of award of the concern's first section 8(a) subcontract.

(e) The maximum Fixed Program Participation Term for any concern is five years.

(f) Not less than one year prior to the expiration of the Fixed Program Participation Term, a concern may request SBA to review and extend its Fixed Program Participation Term for a period not to exceed the difference between the Fixed Program Participation Term established in the business plan and the maximum Fixed Program Participation Term of five years, plus two years. For business concerns which have a Fixed Program Participation Term of one year, a request for extension shall be deemed to be timely

if postmarked no later than 10 days subsequent to the receipt by the concern of notification of award of the concern's first section 8(a) subcontract. There may be no further extensions.

(g) The criteria which SBA will use in negotiating a Fixed Program Participation Term or in considering a request for an extension thereof are as follows:

(1) The factors referenced in § 124.106 of these regulations for determining economic disadvantage.

(2)(i) The number and dollar amount, and the progressively decreasing importance, of section 8(a) contract support that it is anticipated will be necessary to achieve competitiveness. In order to maximize limited program resources, SBA will emphasize business plans anticipating lesser amounts of section 8(a) contract support to reach competitiveness.

(ii) In considering whether to grant an extension of a Fixed Program Participation Term, the section 8(a) contract support previously received by the concern will be a factor. An SBA determination that such previous contract support has failed to appreciably contribute toward a timely achievement of competitiveness will be a significant factor in consideration of the request for extension.

(3)(i) The number and dollar amount and the progressively increasing importance of contract support, other than section 8(a) contract support, that it is anticipated will be necessary to achieve competitiveness. SBA will emphasize business plans having greater reliance on this non-section 8(a) contract support to reach competitiveness.

(ii) In considering a Fixed Program Participation Term extension request, the non-section 8(a) contract support previously received by the firm will be a factor. An SBA determination that the concern has failed to progressively increase the importance of such non-section 8(a) contract support during its previous participation in the program will be a significant factor in SBA's consideration of the request for extension.

(4)(i) The length of time that it is anticipated will be necessary to

§ 124.110

13 CFR Ch. I (1-1-87 Edition)

achieve competitiveness. In order to maximize limited program resources, SBA will emphasize program participation for those concerns closer to achieving competitiveness.

(i) In considering requests for Fixed Program Participation Term extensions, the length of time during which the concern has previously participated in the program will be a factor.

(5)(i) The degree to which it is anticipated that Advance Payments and Business Development Expense will be necessary to enable a concern to successfully complete section 8(a) contracts and the extent to which reliance upon such proceeds will progressively decrease in importance. In order to maximize limited SBA resources and to increase exposure to regular competitive procedures, SBA will emphasize maximum use of conventional governmental and private resources in performing such contracts.

(ii) In considering requests for a Fixed Program Participation Term extension, the previous Advance Payments and Business Development Expense already received by the concern will be a factor. An SBA determination that such Advance Payments and Business Development Expense support has failed to progressively decrease in importance during the concern's previous participation in the program will be a factor toward limiting or denying extension of the Fixed Program Participation Term and the conditions thereof.

(6)(i) The rate at which it is anticipated that a concern will decrease its reliance upon all forms of program support, especially section 8(a) contracts support, in reaching competitiveness at the end of the Fixed Program Participation Term.

(ii) In considering Fixed Program Participation Term extensions, a factor will be the previous rate at which the concern has decreased its reliance upon program support and correspondingly increased its reliance upon conventional governmental and private contract business. An SBA determination that the concern has failed to appreciably improve its rate of business reliance in this manner will be a factor toward limiting or denying the Fixed Program Participa-

tion Term extension and the conditions thereof.

(h) No section 8(a) contracts may be awarded to any section 8(a) concern unless it has received and is operating under an SBA approved Fixed Program Participation Term.

(i) Nothing in this section shall be construed to limit SBA from initiating termination, completion or suspension actions, pursuant to §§ 124.111, 124.110(k), or 124.113, respectively, during any Fixed Program Participation Term granted hereunder.

(j) Upon the conclusion of its Fixed Program Participation Term, including any extension thereof, a concern will cease to be a program participant. This cessation of program participation will occur without the necessity of any additional action by SBA. It will not give rise to any rights, claim or prerogatives on behalf of the concern. Cessation of program participation at the conclusion of the Fixed Program Participation Term is not subject to the requirements of section 8(a)(9) of the Small Business Act (1 U.S.C. 637(a)(9)), or any of SBA's implementing rules and regulations.

(k) *Program completion.* (1) When section 8(a) business concern has substantially achieved the goals and objectives set forth in its business plan prior to the expiration of its Fixed Program Participation Term, and has demonstrated the ability to compete in the marketplace without assistance under the section 8(a) program, its participation within the program shall be determined by SBA to be completed.

(2) In determining whether a concern has substantially achieved the goals and objectives of its business plan and has attained the ability to compete in the marketplace without section 8(a) program assistance, the following factors, among others, shall be considered by SBA.

(i) Positive overall financial trends, including but not limited to:

- (A) Profitability;
- (B) Sales, including improved ratio of non-section 8(a) sales;
- (C) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
- (D) Ability to obtain bonding;

Term extension and the conditions thereof.

(1) No section 8(a) contracts may be awarded to any section 8(a) concern unless it has received and is operating under an SBA approved Fixed Program Participation Term.

Nothing in this section shall be construed to limit SBA from initiating termination, completion or suspension actions, pursuant to §§ 124.112, 124.110(k), or 124.113, respectively, regarding any Fixed Program Participation Term granted hereunder.

Upon the conclusion of its Fixed Program Participation Term, including any extension thereof, a concern shall cease to be a program participant. Cessation of program participation will occur without the necessity of any additional action by SBA. It shall not give rise to any rights, claims or prerogatives on behalf of the concern. Cessation of program participation at the conclusion of the Fixed Program Participation Term is not subject to the requirements of section 8(a) of the Small Business Act (15 U.S.C. 637(a)(9)), or any of SBA's implementing rules and regulations.

**Program completion.** (1) When a section 8(a) business concern has substantially achieved the goals and objectives set forth in its business plan at the expiration of its Fixed Program Participation Term, and has demonstrated the ability to compete in the marketplace without assistance from the section 8(a) program, its participation within the program shall be determined by SBA to be completed.

determining whether a concern has substantially achieved the goals and objectives of its business plan and has attained the ability to compete in the marketplace without assistance from the section 8(a) program, the following factors, among others, shall be considered by SBA:

- (a) Positive overall financial trends, but not limited to:
  - (1) Profitability;
  - (2) Sales, including improved ratios;
  - (3) Section 8(a) sales;
  - (4) Net worth, financial ratios, work-in-progress, financial ratios, work-in-progress, financial ratios, work-in-progress;
  - (5) Access to capital;
  - (6) Ability to obtain bonding;

Small Business Administration

(E) A positive comparison of the section 8(a) business concern's business and financial profile with profiles of non-section 8(a) businesses in the same area or similar business category; and

(F) Good management capacity and capability.

(3) Upon determination by SBA that a section 8(a) business concern's participation in the section 8(a) program has been completed pursuant to paragraph (k)(1) of this section, SBA shall so advise the firm and shall issue it an order to show cause why its participation in the section 8(a) program should not be deemed to be completed. The section 8(a) business concern shall be afforded an opportunity for a hearing on the record in accordance with chapter 5 of Title 5 of the United States Code, at which hearing it may contest such determination. Such a hearing will be held pursuant to the procedures of SBA's Office of Hearings and Appeals set forth at Part 134 of these regulations.

(4) Subsequent to the completion of such hearing, based upon the record established therein, and after consideration of the initial decision of the Administrative Law Judge who has conducted the hearing, the AA/MSB-COD shall render a final decision regarding the completion of the section 8(a) business concern's participation in the program. Prior to a final decision, the subject section 8(a) business concern may have full rights of participation in the section 8(a) program.

§ 124.111 Mechanics for extension of a fixed program participation term.

As stated in § 124.110(f), a section 8(a) concern's Fixed Program Participation Term (FPPT) may be extended only once, and only if the application for such an extension is made not less than one year prior to the expiration of the firm's original Fixed Program Participation Term.

(a) *The request.* The section 8(a) concern must make a request for extension in writing by certified mail, return receipt requested, or by registered mail, to the SBA field office servicing its account, not less than one year prior to the expiration of the

FPPT, specifically requesting an extension of its FPPT.

(b) *SBA response.* Upon receipt of a timely request, the appropriate SBA field office will forward to the section 8(a) concern all forms needed to process the request. All required forms must be completed and returned to SBA within 45 days of receipt along with a persuasive narrative rationale to establish the basis for justifying the requested extension.

(c) *Narrative rationale.* The narrative rationale submitted by the section 8(a) concern must detail the following:

(1) The firm's progress since admission into the 8(a) program;

(2) Areas where the firm has failed to make progress anticipated when the original FPPT was set;

(3) Reasons for lack of progress;

(4) Benefits to be derived from an extension, other than increase in contract support;

(5) Any extenuating circumstances unique to the firm which cause an extension to be necessary and appropriate;

(6) Any other facts which the firm believes support its request.

(d) *Non waiver of time limits.* Neither the requirement of § 124.110(f) to make a request for an extension of a concern's FPPT not less than one year prior to the expiration of a concern's original FPPT, nor the requirement of § 124.111(b) to return all forms and documentation completed along with the supporting narrative within 45 days may be waived. Failure to meet either time limit will result in denial of an extension of an FPPT.

(e) *Approval authority.* Unless otherwise delegated by the Administrator, the AA/MSB-COD has final authority to approve the concern's request for an extension, and may in his discretion approve an extension less than that requested, set terms and conditions for any extension granted, or deny any extension. The concern will be advised in writing of the Agency's final decision.

§ 124.112 Program termination.

(a) Participation of a section 8(a) business concern in the section 8(a) program may be terminated by SBA

prior to the expiration of the concern's fixed program participation term or extension thereof, if any, for good cause. The term good cause as used in the regulation means conduct violative of applicable State and Federal law or regulations or the pursuit of business practices detrimental to business development of an 8(a) concern. Examples of good cause include, but are not limited to, the following:

- (1) Failure to continue to meet any one of the standards of program eligibility set forth in these regulations.
- (2) Failure by the concern to maintain status as a small business under the Small Business Act, as amended, and the regulations promulgated thereunder for each of the Standard Industrial Code designations contained in the participating concern's business plan.
- (3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership and control by the persons(s) who has (have) been determined to be socially and economically disadvantaged pursuant to these regulations.
- (4) Failure by the concern to obtain written approval from SBA prior to any changes in ownership and management control.
- (5) Failure by the concern to disclose to SBA the extent to which nondisadvantaged persons or firms participate in the management of the section 8(a) business concern.
- (6) Failure by the concern to provide SBA with required quarterly or annual financial statements within ninety days of the close of the reporting period, or required audited financial statements within 180 days of the close of the reporting period. Failure to provide SBA with requested tax returns, reports, or other available data within 30 days of the date of request.
- (7) Failure by the concern to submit an updated business plan within 30 days of receipt of request, without an extension of time which has been approved by SBA.
- (8) Failure by the concern to provide documents or otherwise respond to requests for information relating to the section 8(a) program from SBA or other authorized government officials.

(9) Cessation of business operations by the concern.

(10) Failure by the concern to achieve the goals cited in its original or modified business plan as a result of repeated refusals to accept or utilize SBA assistance.

(11) Failure by the concern to pursue competitive and commercial business in accordance with the business plan, or failure to make reasonable efforts to achieve competitive status.

(12) Inadequate performance of awarded section 8(a) procurement subcontracts by the concern.

(13) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(14) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters.

(15) Diversion of funds from the section 8(a) business concern to any other individual, subsidiary, firm, or enterprise which is detrimental to the achievement of the section 8(a) business concern's business plan.

(16) Unauthorized use of business development expense funds and/or advance payment funds. Violation of an advance payment or business development expense agreement.

(17) Failure by the concern to obtain prior SBA approval of any management agreement or joint venture agreement relative to the performance of a section 8(a) subcontract. Violation of any requirements of a management or joint venture agreement approved by SBA by either the section 8(a) concern or one of the joint venturers.

(18) Failure by the concern to obtain approval from SBA before subcontracting under a section 8(a) subcontract, or failure by the concern to abide by any conditions imposed by SBA upon such approval.

(19) Violation by the concern of a section 8(a) subcontract provision which prohibits contingent fees and gratuities; or failure to disclose to SBA fees paid or to be paid, or costs incurred or committed to third parties, directly or indirectly, in the process of obtaining section 8(a) contracts or subcontracts.

(20) Knowing submission of false information to SBA on behalf of a sec-





§ 124.201

13 CFR Ch. I (1-1-87 Edition)

notice of suspension will provide the following information:

(1) The reason for the suspension which will be the grounds upon which the order to show cause has been issued;

(2) That the suspension will continue pending the completion of further investigation or the termination proceeding or some other specified period of time;

(3) That awards of section 8(a) subcontracts, including those which have been "self-marketed" by an 8(a) concern, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or his or her authorized representative to be in the best interest of the Government to do so, and the SBA Administrator or the AA/MSB-COD adopts that determination;

(4) That the concern is obligated to complete previously awarded section 8(a) subcontracts;

(5) That the suspension is effective nationally throughout the SBA;

(6) That a request for a hearing on the suspension will be considered by the Administrative Law Judge hearing the termination proceeding and granted or denied as a matter of his or her discretion. It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the participant requests one. However, no such hearing may be granted if the suspension is based upon advice from either the Department of Justice or the Department of Labor that such a hearing would prejudice substantial interests of the Government. A hearing on the suspension will commence as soon as possible following the decision of the Administrative Law Judge to grant a request; but in no case more than 20 calendar days after the Administrative Law Judge's ruling if the request is granted. At the close of such suspension hearing, the Administrative Law Judge will make a recommended decision on the matter to the AA/MSB-COD who will then issue a final decision upholding or lifting the suspension.

(c) Any suspension which occurs in accord with these regulations will continue in effect until such time as the

SBA lifts it or the section 8(a) business concern's participation in the program is fully terminated. If all program assistance to a section 8(a) business concern has been suspended under these regulations, and that concern's participation in the program is not terminated, an amount of time equal to the duration of the suspension will be added to the concern's fixed program participation term.

§ 124.201 Processing applications.

It is SBA's policy that an individual or business has the right to apply for section 8(a) assistance, whether or not there is an appearance of eligibility.

§ 124.202 Place of filing.

An application for admission is to be filed, and approved cases are to be serviced in the SBA field office serving the territory in which the principal place of business of the applicant concern is located. Principal place of business means the location at which the business records of the applicant concern are maintained.

§ 124.203 Applicant representatives.

An applicant concern may employ at its option outside representatives in connection with an application for section 8(a) program participation. If the applicant chooses to employ outside representation such as an attorney, accountant, or others, the requirements of 13 CFR 103 dealing with the appearance and compensation of persons appearing before SBA are applicable to the conduct of the representative.

§ 124.204 Requirement support determination.

SBA shall first make a determination that there is a reasonable likelihood of section 8(a) requirements available to support the applicant concern. If the necessary requirement support is not available, the applicant concern shall be informed in writing that no further action can be taken on its application for participation in the section 8(a) program. If the necessary requirements support is determined to be available, the applicant concern may continue to submit the required application forms.

its it or the section 8(a) business concern's participation in the program is terminated. If all program assistance to a section 8(a) business concern has been suspended under these provisions, and that concern's participation in the program is not terminated, the amount of time equal to the duration of the suspension will be added to the concern's fixed program participation term.

**1 Processing applications.**

SBA's policy that an individual business has the right to apply for section 8(a) assistance, whether or not an appearance of eligibility.

**Place of filing.**

An application for admission is to be filed in approved cases are to be filed in the SBA field office serving the territory in which the principal business of the applicant concern is located. Principal place of business is the location at which the records of the applicant concern are maintained.

**Applicant representatives.**

An applicant concern may employ at least one outside representative in connection with an application for section 8(a) program participation. If the applicant chooses to employ outside representatives such as an attorney, accountant, or others, the requirements of FAR 103 dealing with the appearance and compensation of persons before SBA are applicable to the conduct of the representative.

**Requirement support determination.**

All applicants must first make a determination as to whether there is a reasonable likelihood that the section 8(a) requirements to support the applicant concern can be met. If the necessary requirement is not available, the applicant shall be informed in writing whether further action can be taken on the application for participation in the section 8(a) program. If the necessary requirements support is determined to be insufficient, the applicant concern shall be notified to submit the required information.

**Small Business Administration**

**§ 124.301**

**§ 124.205 Forms and documents required.**

Each section 8(a) applicant concern must submit the forms and attachments thereto required by SBA when making application for admission to the section 8(a) program including but not limited to financial statements and Federal personal and business tax returns.

**§ 124.206 Approval and declination of applications for eligibility.**

The AA/MSB-COD has final authority over approval or declination of applications for admission to the section 8(a) program. If the AA/MSB-COD declines an application, he or she will notify the applicant in writing giving detailed reasons for the decline and informing the applicant of the right to request a reconsideration within 30 days of receipt of the decline letter. The AA/MSB-COD will also inform the applicant to submit in writing to the field office any subsequent information and documentation pertinent to rebutting the reason(s) for declination. If the application is declined by the AA/MSB-COD on reconsideration, no new application will be accepted within one year of the reconsideration decision.

**§ 124.207 Business activity.**

(a) Eligible concerns will be approved for section 8(a) program participation according to their primary industry classification, as defined in § 124.100 of this part. The primary industry classification relevant to a given concern and related Standard Industrial Classification Code designations will be stated in a participating concern's business plan upon the concern's entry into the section 8(a) program and will be subject to change thereafter only if a condition of subsection (b) is met. A participating section 8(a) business concern will be eligible to receive only Government contracts pursuant to the section 8(a) program which are classified under the Standard Industrial Classification Codes stated in its business plan. (See definition of "business plan," § 124.100(a).) A participating section 8(a) business concern may, however, receive Government contracts classified in other Standard Industrial Clas-

sification Codes through other Government procurement procedures. As section 8(a) concerns develop, it is essential that they pursue commercial and competitive Government contracts to supplement section 8(a) sales and to achieve logical business progression or diversification.

(b) Requests for changes in Standard Industrial Classification Code designations stated in a business plan will be considered by the relevant SBA Regional Administrator only under the circumstances indicated below.

(1) Such Regional Administrator may approve an amendment to the Standard Industrial Classification Code designations in a section 8(a) concern's business plan if:

(i) The new Standard Industrial Classification Code designation relates to a unique procedure or product that the section 8(a) concern has developed; or

(ii) SBA determines that an additional Standard Industrial Classification Code designation is needed to correct significant limitations in section 8(a) contract support which result from administrative or regulatory actions by a contracting agency, which are beyond the control of the section 8(a) concern, and which were not contemplated by the original business plan.

(2) The Administrator or his designee may approve an amendment to the Standard Industrial Classification Code designations in a section 8(a) concern's business plan if the Administrator or his designee determines that absent a Standard Industrial Classification Code designation change, the section 8(a) concern would be unable to achieve reasonable section 8(a) development.

**§ 124.301 The provision of requirements support for 8(a) firms.**

(a) These regulations govern the mechanics of the provision of requirements (contract) support to section 8(a) business concerns. They are to be read in conjunction with § 124.302 below.

(b) Basic Principles of Requirements Support.

§ 124.301

13 CFR Ch. I (1-1-87 Edition)

(1) An 8(a) subcontract will be provided to a section 8(a) concern only when consistent with that concern's business development needs.

(2) An 8(a) concern will be provided a section 8(a) contract only when the procurement is consistent with the concern's capabilities as identified in its business plan by means of Standard Industrial Classification (SIC) codes.

(3) The aggregate dollar amount of 8(a) contracts to an 8(a) concern for any Federal fiscal year may not exceed by more than 25 percent the applicable annual 8(a) contract support level approved by SBA as reflected in the concern's business plan. This shall not preclude an 8(a) concern from requesting an increase in its approved 8(a) contract support level on other than an annual basis. Such request must be supported by a revised business plan and evidence that the firm has the capability to perform at the increased level.

(4) SBA does not guarantee any particular level of contract support to a section 8(a) business concern by the approval of its business plan.

(5) SBA is not required to make an award of any particular contract, and should it make an award, SBA is not required to award a contract to a particular 8(a) concern. Nonetheless, SBA will usually reserve a procurement for possible 8(a) award in favor of an 8(a) concern which initially self-marketed the procurement, provided the firm needs the requirement to satisfy its business plan projections without exceeding them.

(6) In cases in which SBA must select an 8(a) concern for possible award from among more than one concern which appear to be qualified to perform the contract, the selection will be based upon consideration of relevant factors, including the following:

(i) Technical capability, including the ability to perform the contract, the concern's organizational structure, the experience and technical knowledge of its key employees, and technical equipment and facilities.

(ii) Financial capacity, including the availability of adequate

(iii) Ability to comply with the required delivery or performance schedules.

(iv) Ability to obtain any necessary bonding.

(v) Any applicable geographic limitations.

(vi) The concern's need for the specific contract to further the development objectives of the concern's business plan, in light of any other potential contracts under consideration.

(vii) The overall likelihood of successful performance of the proposed requirement.

(viii) Past amount of 8(a) contract support received by the concern and the performance record on past 8(a) contracts.

(ix) Current contracts in process, and progress toward timely delivery of those contracts.

(x) Length of time in the 8(a) program and the proximity of the FPPT date. (xi) Amount of BDE and advance payment support received since entering the 8(a) program and required to perform the present requirement. (xii) Which 8(a) concern initially identified the procurement, if any.

(7) In cases in which SBA must select an 8(a) concern for possible award of a professional service contract (except CPA audit services) SBA may, in its discretion, arrange for the evaluation of technical capabilities of several concerns, which appear to be most qualified, by the procuring agency itself. In such cases, SBA will request a written report of the evaluation including the criteria used, the results found, and an overall evaluation of each concern as technically or not technically acceptable for their particular procurement. SBA will make the final selection.

(8) SBA will not accept for 8(a) award proposed procurements not previously in the section 8(a) program if any of the following circumstances exist:

(i) Public solicitation has already been issued for the procurement as a small business set-aside in the form of an Invitation for Bid (IFB), Request for Proposal (RFP) or a Request for

13 CFR Ch. I (1-1-87 Edition)

Ability to comply with the re-delivery or performance schedule.

Ability to obtain any necessary supplies within any applicable geographic limitations.

The concern's need for the subcontract to further the development objectives of the concern's business, in light of any other potential contracts under consideration. The overall likelihood of successful performance of the proposed contract.

Past amount of 8(a) contract received by the concern and performance record on past 8(a) contracts.

Current contracts in process, progress toward timely delivery of contracts.

Proximity of the FPPT to the proximity of the FPPT. (i) Amount of BDE and advance payment support received since entered into the 8(a) program and required to meet the present requirement. (xii) Whether the 8(a) concern initially identified as a possible procurement, if any.

In cases in which SBA must determine if a possible 8(a) concern for possible procurement of a professional service (except CPA audit services) SBA, in its discretion, arrange for the procurement of technical capabilities of concerns, which appear to be qualified, by the procuring agency itself. In such cases, SBA will require a written report of the evaluation including the criteria used, the reasons for the selection, and an overall evaluation of the concern as technically or not technically acceptable for their participation in the procurement. SBA will make its selection.

SBA will not accept for 8(a) proposed procurements not previously awarded in the section 8(a) program if the following circumstances exist:

Public solicitation has already been issued for the procurement as a business set-aside in the form of Invitation for Bid (IFB), Request for Proposal (RFP) or a Request for Quote (RFQ). Provision of a general set-aside, such as Procurement Information Notices (PIN's),

Small Business Administration

§ 124.301

annual procurement forecasts or past procurements by set aside, is insufficient reasons to preclude the procurement from 8(a) consideration.

(ii) The procuring agency will award the contract by noncompetitive means to a small disadvantaged concern whether or not it is presently in the 8(a) program.

(iii) There is a reasonable probability that a small disadvantaged concern, whether or not a section 8(a) concern, can successfully compete for the contract under conventional competitive procedures.

(iv) SAB has made a written determination that acceptance of the procurement for an 8(a) award would have an adverse impact on other small business programs or individual small business, whether or not the affected small business, is in the section 8(a) program.

(A) In determining whether or not an adverse impact exists, SBA will consider relevant factors, including but not limited to:

(1) Whether or not SBA's acceptance of a proposed *National* buy requirement is likely to result in SBA's taking an inordinate portion of total procurements in subject industry to the detriment of the small business set-aside program, or

(2) Whether or not SBA's acceptance of a proposed *local* buy requirement is likely to result in SBA taking an inordinate portion of total procurements, in subject industry within a given SBA region to the detriment of the small business set-aside program.

(B) SBA presumes adverse impact to exist when a small business concern has been the recipient of two or more consecutive awards of the item or service within the last 24 months, and the estimated dollar value of the award would be 25 percent or more of its most recent annual gross sales (including those of its affiliates).

(c) Procedures for Obtaining Requirements Support. (1) SBA procurement center representatives (PCR's) will screen proposed procurements for possible 8(a) contracts, in accordance with 13 CFR Part 125.6.

(2) A requirement for possible award may be identified by SBA, a particular 8(a) concern, or the procuring activity

itself. Once identified by whatever means, SBA shall verify the appropriateness of the SIC Code designation assigned to the requirement and shall select and nominate to the procuring agency an 8(a) concern for possible award. The selection will be made pursuant to these regulations and will be based on the business plan and such supplemental materials as SBA may request. If the 8(a) concern fails to provide SBA with the supplemental materials requested within any particular time specified by SBA, SBA will make its selection based solely on information contained in the concern's business plan.

(3) SBA's nomination of a section 8(a) concern to perform an identified procurement shall be communicated to the procuring activity in writing with notice to the 8(a) concern.

(4) If the procuring activity responds to SBA's nomination, or request for commitment, by making a commitment to SBA, SBA will then match the specific needs of the procurement with the specific capabilities of the selected 8(a) concern, relying upon the business plan and such supplemental or updated material as SBA in its discretion shall require. To facilitate matching, and to the extent reasonably available, SBA will obtain from the procuring activity the complete procurement package, which contains plants, specifications, delivery schedules, labor rates and so forth, along with the following:

(i) The title or name or work to be performed or items to be delivered.

(ii) The estimated period of performance.

(iii) The SIC code of the item or service.

(iv) The PSC number used by the Federal Procurement Data Center.

(v) The procuring agency dollar estimate of the requirement (current government estimate).

(vi) Any special requirement restrictions or geographical limitations.

(vii) Any special capabilities or disciplines needed for contract performance.

(viii) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials.

§ 124.302

13 CFR Ch. I (1-1-87 Edition)

(ix) A list of contractors who have performed on this specific procurement during the previous 36 months.

(x) A statement that public solicitation for the specific procurement has not been issued for small business set aside.

(xi) A statement that the procurement cannot reasonably be expected to be won by a disadvantaged concern under normal competition.

(xii) The nomination of any particular 8(a) concern designated for consideration, including a brief justification, such as one of the following:

(A) The requirement is a result of an unsolicited proposal and the buying activity is unable to justify a sole-source award.

(B) The 8(a) concern through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) program.

(C) The procuring agency has determined that the recommended concern has unusual technical qualifications to perform.

(5) Within ten working days of a commitment from a procuring activity identifying a particular 8(a) concern, SBA will determine whether a proper match exists, and will contract the procuring activity to arrange for initiation of contact negotiations. A letter accepting the commitment should normally be sent to the procuring activity at this time. Should contract negotiations be successful and result in a proposed award to the 8(a) concern, SBA will provide a Certification of SBA's Competency as a contract provision pursuant to § 124.302(c) of these regulations. Should SBA determine that a proper match does not exist, it will so advise the affected 8(a) concern, and may then select and nominate an alternative 8(a) concern to the procuring activity which, in the opinion of SBA, does match with the procurement, if any such concern exists.

(6) Should a procuring activity offer a contract to SBA as an open requirement, SBA will select and nominate in accordance with these regulations an 8(a) concern which appears to be qualified, subject to the following additional procedures:

(i) If the contract is a local buy item, the portfolio of 8(a) concerns main-

tained by the SBA district office where all or most of the work is to be performed or the items delivered will be examined initially for selection of a qualified 8(a) concern. If none are found to be qualified, the requirement may be considered for other 8(a) concerns located within the appropriate SBA region, or the requirement may be considered for 8(a) concerns located in immediately adjacent regions.

(ii) If the procurement is a national buy item, it shall be referred to SBA's Central Office. Central Office will allocate national buy requirements to the regional offices on an equitable basis, and regional offices will allocate national buy requirements to the districts on an equitable basis.

§ 124.302 8(a) Contracts and subcontracts.

(a) *General.* It is the policy of SBA to enter into contracts with other government agencies and subcontract the performance of such contract to concerns admitted to the section 8(a) program pursuant to section 8(a)(1)(C) of the Small Business Act, at prices which will enable a company to perform the contract and earn a reasonable profit.

(b) *Performance of work by the 8(a) subcontractor.* To assure the accomplishment of the purposes of the program, each 8(a) subcontractor shall be required to perform work equivalent to the following percentages of the total dollar amount of each subcontract, exclusive of material costs, with its own labor force:

(1) Manufacturing—50 percent.

(2) Construction:

(i) General Construction—15 percent.

(ii) Special Trades, Such as Electrical, Plumbing, Mechanical, etc.—25 percent.

(3) Professional Services—55 percent.

(4) Nonprofessional Services—75 percent.

The 8(a) concern is required to include in its proposal to perform a given contract a statement that it agrees to perform the required percentage of the work with its own labor force. Refusal of the concern to provide such a state-

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by the SBA district office all or most of the work is to be done or the items delivered will be provided initially for selection of a section 8(a) concern. If none are so qualified, the requirement may be considered for other 8(a) concerns located within the appropriate region, or the requirement may be considered for 8(a) concerns located in immediately adjacent regions.

If the procurement is a national concern, it shall be referred to SBA's Central Office. Central Office will allocate national buy requirements to regional offices on an equitable basis and regional offices will allocate local buy requirements to the district offices on an equitable basis.

**8(a) Contracts and subcontracts.** It is the policy of SBA to award contracts with other government agencies and subcontract the performance of such contract to concerns committed to the section 8(a) program pursuant to section 8(a)(1)(C) of the Small Business Act, at prices which will enable a company to perform the contract and earn a reasonable profit.

**Performance of work by the 8(a) contractor.** To assure the accomplishment of the purposes of the program, each 8(a) subcontractor shall be required to perform work equivalent to the following percentages of the total amount of each subcontract, exclusive of material costs, with its own labor force:

- Manufacturing—50 percent.
- Construction:
  - General Construction—15 percent.
  - Special Trades, Such as Electrical, Plumbing, Mechanical, etc.—25 percent.
  - Professional Services—55 percent.
  - Other Professional Services—75 percent.

When a concern is required to include its own labor force to perform a given contract, it is required to agree to perform the contract with the required percentage of its own labor force. Refusal to provide such a state-

ment will result in the contract not being awarded.

**(c) Certification of SBA's competency.** (1) SBA will not certify as to its competency, as provided by section 8(a)(1)(A) of the Small Business Act, without first determining that the section 8(a) concern it intends to subcontract to is responsible to perform the contract in question. If SBA determines that the concern lacks the capability, competency, capacity, credit, integrity, perseverance, and tenacity to perform on a specific 8(a) subcontract, the contract will not be awarded. In addition, SBA will also certify that an 8(a) concern is eligible under the Walsh-Healey Public Contracts Act, 41 U.S.C. 35(a) for each individual 8(a) subcontract. An 8(a) concern which has not submitted required financial statements to SBA will be deemed not responsible to receive 8(a) subcontracts.

(2) SBA's determination not to award an 8(a) subcontractor a specific 8(a) subcontract because the concern lacks an element of responsibility, or is ineligible under the Walsh-Healey Public Contracts Act, does not constitute a denial of total section 8(a) program participation for the purposes of section 8(a)(9) of the Small Business Act.

**(d) Contract administration.** SBA may delegate its authority to administer section 8(a) subcontracts to the procuring agency or any Federal agency designated by it. This is done through the use of special clauses in the contract between SBA and the procuring agency, or by letter, as appropriate.

**(e) Contract termination.** (1) A decision to terminate a specific section 8(a) subcontract for default is made by the procuring activity contracting officer in cooperation with SBA. The contracting officer will advise SBA in advance of his/her intent to terminate for default the 8(a) subcontract. SBA may provide whatever program benefits as are reasonably available to the 8(a) concern in order to prevent termination for default of the contract. The contracting officer will be made aware of this effort. If, despite the efforts of SBA, in the opinion of the procuring activity contracting officer grounds

for termination continue to exist, he/she may terminate the 8(a) subcontract for default.

(2) In cooperation with SBA, the procuring activity contracting officer may terminate a section 8(a) subcontract for convenience at any time it is determined in the best interest of the government to do so.

**(f) Disputes and appeals.** (1) SBA is not subject to the Disputes Clause of a specific contract, and SBA is not a party to and does not appear at or participate in appeals brought under such a clause in its own behalf or on behalf of an 8(a) concern.

(2) If a dispute between an 8(a) subcontractor and the procuring activity contracting officer arises under the subcontract, it will be decided unilaterally by the procuring activity contracting officer. The 8(a) subcontractor has the right to appeal the decision of the procuring activity contracting officer under the Contract Disputes Act of 1978.

§ 124.401 Advance payments.

**(a) General.** (1) Advance payments are disbursements of money made by SBA to a section 8(a) business concern prior to the completion of performance of a specific section 8(a) subcontract. Advance payments are made for the purposes of assisting the section 8(a) business concern in meeting financial requirements pertinent to the performance of the subcontract. The gross amount of advance payments must be determined by SBA prior to commencement of performance of the contract. Any subsequent change in the gross amount of advance payments must be justified in writing by SBA as to amount and purpose. Advance payments are to be awarded only after all other forms of financing have been considered by SBA and rejected as unacceptable to support performance of the subcontract. Advance payments must be liquidated from proceeds derived from the performance of the specific section 8(a) subcontract to which they pertain. However, this does not preclude repayment of such advance payments from other revenues of the business, except from other advance payments and business development

expenses (as defined hereinafter in these regulations); provided such repayment must occur according to the liquidation schedule established by the subcontract under which the advance payments were made. The proceeds derived from the performance of the specific section 8(a) subcontract must be deposited by the procuring agency in a special bank account established exclusively for the purpose of administering the advance payments. These proceeds will be used to liquidate the advance payments. No withdrawals of such subcontract proceeds from the special bank account may be made by the section 8(a) business concern which are inconsistent with the disbursement schedule established by the subcontract under which the advance payments were made.

(2) Advance payments shall not be made to a section 8(a) business concern in any case in which the section 8(a) business concern has assigned its rights to receive any payment under the specific section 8(a) subcontract to any person or entity, unless such assignment shall be made to SBA or to a Federal agency in regard to the receipt by the section 8(a) business concern of a progress payment for any specific section 8(a) subcontract.

(3) In no event shall the total amount of advance payments for a section 8(a) business concern exceed 90 percent of the outstanding unpaid proceeds of the section 8(a) subcontract to which the advance payments relate.

(4) SBA shall not charge interest on advance payments disbursed pursuant to these regulations.

(b) *Requirements.* (1) Advance payments may be approved for a section 8(a) business concern when all of the following conditions are found by SBA to exist:

(i) A section 8(a) business concern does not have adequate working capital to perform a specific section 8(a) contract.

(ii) Adequate and timely financing is not available on reasonable terms to provide necessary capital.

(iii) The section 8(a) business concern has established or agrees to establish and maintain financial records and controls which will provide for complete accountability and required

reporting of advance payment funds. These records must be made available upon request for review and copying by SBA and other appropriate Federal officials.

(iv) A company may receive an advance payment on a section 8(a) subcontract only in instances in which that company has no unliquidated advance payments outstanding on another section 8(a) subcontract which is completed, terminated or in default, unless such unliquidated advance payment is due *only* to the contracting agency's delay in making final payment to the section 8(a) concern which has successfully completed the subcontract.

(c) *Procedure.* To be eligible to receive advance payments, a section 8(a) business concern must meet the conditions set forth above and must comply with the following procedure.

(1) A section 8(a) business concern desiring to receive an advance payment in connection with any section 8(a) subcontract shall:

(i) Submit a written request for advance payment to the appropriate SBA Regional Administrator or his designee. Such request must include detailed documentation requested by SBA as evidence to support the need for such funds and proof that working capital financing cannot be found upon terms acceptable pursuant to § 124.401(b)(ii) above, from financing institutions.

(ii) The section 8(a) business concern must select a commercial bank which is a member of the Federal Reserve System in which it must establish a special non-interest bearing bank account for the deposit of payments made to it by the procuring agency pursuant to the performance of the subcontract(s). This special account must be a demand deposit account. The appropriate SBA Regional Administrator shall designate at least two SBA employees to serve as countersignatories on the special bank account.

(A) Disbursements from the account will be made only upon the authorized signatures of the section 8(a) concern and one of the designated SBA employees.

or services rendered pursuant to the subject section 8(a) subcontract shall be paid into the special bank account by the procuring agency, and shall be applied by SBA first against the balance of advance payments according to the liquidation schedule. Any amounts remaining in the special bank account may be disbursed to the section 8(a) concern, *provided, however*, that the unpaid balance on the section 8(a) subcontract is sufficient to allow the 8(a) concern to comply with its advance payment liquidation schedule.

(e) *Cancellation.* (1) SBA may determine that advance payments should be cancelled under the following circumstances:

(i) The terms and conditions of the advance payment agreement have not been adhered to by a section 8(a) small business concern.

(ii) The section 8(a) business concern's participation in the section 8(a) program has ended by expiration of the Fixed Program Participation Term and any extension, or has been suspended pursuant to § 124.113 of these regulations or has been terminated by administrative action under section 8(a)(9) of the Small Business Act, 15 U.S.C. 637(a)(9).

(2) In the event of cancellation of advance payments to a section 8(a) business concern, all previous advance payments made to that section 8(a) business concern shall become due and payable to SBA prior to the receipt of final contract payment.

§ 124.402 Business development expense.

(a) *Purpose.* Business Development Expense (BDE) funds are made available by SBA at the time of the execution of a specific section 8(a) subcontract for the purpose of assisting a section 8(a) business concern with the performance of that subcontract. The authority to approve the uses and amount of BDE rests with the Administrator who has the power to delegate the authority. An award of BDE is justified only if, prior to the execution of the related section 8(a) subcontract, SBA conducts a complete analysis of the written request and determines that the proposed BDE will promote the long term development objectives

of the section 8(a) concern as described in the business plan.

(b) At the discretion of SBA, BDE funds may be added to the section 8(a) subcontract price and may be used for the following purposes and in the following order of priority.

(1) *Capital equipment.* For the purchase of capital equipment which has been determined by SBA to be essential to the section 8(a) business concern's performance of a specific section 8(a) subcontract at a fair market price and for which acquisition cannot reasonably be made by other financing means.

(2) *Other capital improvements.* To assist in the acquisition of other necessary production/technical assets or to subsidize the cost of other capital improvements directly related to reduction of production costs, or to increase productivity and/or production capacity in connection with a specific section 8(a) subcontract. This category includes, but is not limited to, such items as quality control systems, inventory control systems, and other business systems.

(3) *Price differential.* To make up the difference between Government's established fair market price and the price required by the section 8(a) contractor to provide the product or service in connection with a specific section 8(a) subcontract. This type of BDE should be granted to a firm only one time for any specific type of requirement and only if the analysis demonstrates that the firm will be able to produce the item/service competitively in the future.

(c) BDE shall not be provided to satisfy:

(1) Price differentials for professional and nonprofessional service firms;

(2) Any contingency arising subsequent to execution of the section 8(a) subcontract for which the BDE is proposed;

(3) Cost overruns;

(4) Entertainment expenses;

(5) The cost of capital equipment and other capital improvements when one of the following conditions exists:

(i) Funds are available from outside sources to the concern, including SBA financing and the personal resources of the principal(s); or



section 8(a) concern as defined in the business plan.

At the discretion of SBA, BDE may be added to the section 8(a) contract price and may be used for following purposes and in the following order of priority:

(i) *Capital equipment.* For the purchase of capital equipment which has been determined by SBA to be essential to the section 8(a) business concern's performance of a specific section 8(a) subcontract at a fair market price and for which acquisition cannot be made by other financing

(ii) *Other capital improvements.* To defray the acquisition of other necessary production/technical assets or to reduce the cost of other capital improvements directly related to reducing production costs, or to increase productivity and/or production capacity in connection with a specific section 8(a) subcontract. This category is not limited to, such as quality control systems, inventory control systems, and other systems.

(iii) *Price differential.* To make up the difference between Government's established fair market price and the price required by the section 8(a) contract to provide the product or service in connection with a specific section 8(a) subcontract. This type of price differential would be granted to a firm only for any specific type of request and only if the analysis indicates that the firm will be able to produce the item/service contract in the future.

(iv) BDE shall not be provided to satisfy

(v) price differentials for professional or nonprofessional service firms; (vi) contingency arising subsequent to execution of the section 8(a) contract for which the BDE is provided

(vii) overruns; (viii) entertainment expenses; (ix) the cost of capital equipment for capital improvements when the following conditions exist: (1) funds are available from outside the concern, including SBA and the personal resources of principal(s); or

(ii) Adequate and timely financing from outside sources is available at a reasonable rate.

(6) Costs of interest expenses to be borne by the section 8(a) concern.

(d) *Participatory BDE.* Where appropriate and feasible, section 8(a) concerns will participate to the fullest extent possible in funding the acquisition of assets acquired with BDE funds.

(e) *Requirements.* To be eligible for business development expense funds, a section 8(a) business concern must submit a written request to the appropriate SBA Regional Administrator or his designee. The request must include detailed documentation to support the need for funds, proof that adequate financing is not available at current market rates, and such additional information as required by SBA to adequately consider the request.

(f) When BDE, including participating BDE, will be used to purchase capital equipment, the section 8(a) concern shall comply with the following requirements. The section 8(a) concern shall:

(1) Execute and record a lien on the equipment in favor of SBA. SBA will remove the lien on the assets acquired with BDE funds upon successful completion of the section 8(a) subcontract, except in the case of the firm which has outstanding obligations owed to SBA. Upon full repayment of such outstanding obligations, SBA shall release the lien.

(2) Execute a BDE agreement with SBA which among other things contains the following covenants that:

(i) The concern will use the funds exclusively for the purposes stated in the BDE approval;

(ii) The concern shall maintain records to substantiate the uses for which BDE funds have been expended; and

(iii) In the event of default on the contract to which the BDE relates, the section 8(a) concern shall be liable for repayment of the full amount of the BDE.

§ 124.403 Letter of credit.

(a) *General policy.* The letter of credit method of payment will be utilized under certain circumstances to

disburse advance payments to section 8(a) business concerns performing subcontracts under the section 8(a) program when SBA has made a decision approving the use of advance payments pursuant to the requirements and conditions provided for in these regulations.

(b) *Eligibility requirements.* SBA may disburse advance payments through the letter of credit method of payment through the Federal Reserve Bank System to a section 8(a) business concern when all of the following conditions are found by SBA to exist:

(1) SBA determines that the section 8(a) business concern may be awarded more than one section 8(a) subcontract during a period of at least one year.

(2) The aggregate amount of letter of credit advance payment funds made to one section 8(a) business concern will exceed \$120,000 annually.

(3) The section 8(a) business concern has submitted a schedule of its projected monthly advance requirements for section 8(a) subcontract disbursements, SBA has reviewed it, and SBA has found it to be reasonable.

(4) The section 8(a) business concern has established or agrees to establish and maintain financial records and controls which will provide for complete accountability and required reporting of program funds. These records must be made available upon request for review and audit by SBA and the General Accounting Office.

(c) *Procedures.* The procedures for the utilization of the letter of credit method of payment shall be in accord with 48 CFR § 32.406.

§ 124.501 Development assistance program.

(a) *General.* Section 7(j)(1) of the Small Business Act provides for financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or enterprises eligible for assistance under sections 7(a)(11), 7(j)(10), and 8(a) of the Small Business Act. The AA/MSB-COD is responsible for coordinating and formulating policies relating to the dissemination of such assistance.

nation of this assistance to small business concerns eligible for assistance under sections 7(a)(11), 7(j)(10) and 8(a) of the Small Business Act.

(b) *Services.* (1) Section 7(j)(1-2) of the Small Business Act empowers the SBA to provide through public and private organizations the management and technical assistance enumerated below to those individuals or concerns who meet the eligibility criteria contained in section 7(a)(1) and 8(a) of the Small Business Act.

(2) The SBA shall give preference to projects which promote the ownership, participation in ownership, or management of small businesses owned by low-income individuals and small businesses eligible to participate in the section 8(a) program.

(3) This assistance may include any or all of the following:

(i) Planning and research, including feasibility studies and market research;

(ii) The identification and development of new business opportunities;

(iii) The furnishing of centralized services with regard to public services and Federal Government programs including programs authorized under sections 7(a)(11), 7(j)(10) and 8(a) of the Small Business Act;

(iv) The establishment and strengthening of business service agencies, including trade associations and cooperatives;

(v) The furnishing of business counseling, management training, and legal and other related services, with special emphasis on the development of management training programs using the resources of the business community, including the development of management training opportunities in existing business, and with emphasis in all cases upon providing management training of sufficient scope and duration to develop entrepreneurial and managerial self-sufficiency on the part of the individuals served.

(4) Sections 7(j)(3) and 7(j)(9) of the Small Business Act authorize SBA to:

(i) Encourage the placement of subcontracts by businesses with small business concerns located in areas of high concentration of unemployed or low-income individuals, with small businesses owned by low-income indi-

viduals, and with small businesses eligible to receive contracts pursuant to section 8(a) of this Act. SBA may provide incentives and assistance to such businesses that will aid in the training and upgrading of potential subcontractors or other small business concerns eligible for assistance under sections 7(a)(11), 7(j), and 8(a) of the Small Business Act, and

(ii) Coordinate and cooperate with the heads of other Federal departments and agencies, to insure that contracts, subcontracts, and deposits made by the Federal Government or with programs aided with Federal funds are placed in such a way as to further the purposes of sections 7(a)(11), 7(j), and 8(a) of the Small Business Act.

(c) *Eligibility.* (1) Eligibility for the assistance enumerated under § 124.501(b) above shall include, but not be limited to:

(i) Businesses which qualify as small within the meaning of size standards prescribed in 13 CFR Part 121, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(ii) Businesses eligible to receive contracts pursuant to section 8(a) of the Small Business Act.

(d) *Delivery of services.* (1) The financial assistance authorized for projects under paragraph (b) of this section includes assistance advanced by grant, cooperative agreement, or contract.

(2) To the extent feasible, services available under paragraph (b) of this section shall be provided in a location which is easily accessible to the individuals and small business concerns served.

(e) *Coordination and cooperation with other government agencies.* (1) The AA/MSB-COD may utilize the resources of other agencies and departments whenever practicable which can directly or indirectly support or augment the purposes of sections 7(a)(11), 7(j) and 8(a) of the Small Business Act.

(2) The AA/MSB-COD shall enter into agreements with Federal agencies and departments to further effective

is, and with small businesses eligible to receive contracts pursuant to section 8(a) of this Act. SBA may provide incentives and assistance to such businesses that will aid in the training and upgrading of potential subcontractors or other small business concerns eligible for assistance under sections 7(j), 7(j), and 8(a) of the Small Business Act, and

Coordinate and cooperate with the heads of other Federal departments and agencies, to insure that contracts, subcontracts, and deposits by the Federal Government or programs aided with Federal funds are placed in such a way as to further the purposes of sections 7(j), 7(j), and 8(a) of the Small Business Act.

**Eligibility.** (1) Eligibility for the assistance enumerated under section 8(a) above shall include, but not be limited to:

(i) Businesses which qualify as small businesses within the meaning of size standards prescribed in 13 CFR Part 121, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(ii) Businesses eligible to receive contracts pursuant to section 8(a) of the Small Business Act.

**Delivery of services.** (1) The full assistance authorized for contracts under paragraph (b) of this section includes assistance advanced pursuant to cooperative agreement, or contract.

To the extent feasible, services authorized under paragraph (b) of this section shall be provided in a location which is easily accessible to the individuals and small business concerns eligible for assistance.

**Coordination and cooperation with other government agencies.** (1) The AA/MSB-COD may utilize the resources of other agencies and departments whenever practicable which can provide directly or indirectly support or assistance for the purposes of sections 7(a)(11), 7(j), and 8(a) of the Small Business Act.

The AA/MSB-COD shall enter into agreements with Federal agencies and departments to further effective

## Small Business Administration

sections 7(a)(11), 7(j) and 8(a) of the Small Business Act.

(3) The AA/MSB-COD shall encourage the placement of deposits made by the Federal Government, or by programs aided with Federal funds, in such a way as to further the purposes of section 7(a)(11), 7(j) and 8(a) of the Small Business Act.

### § 124.502 Small Business and Capital Ownership Development program.

(a) **General.** Section 7(j)(10) of the Small Business Act establishes a Small Business and Capital Ownership Development program which shall provide additional assistance exclusively for small business concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act. The management of the Capital Ownership Development program is vested in the AA/MSB-COD who is responsible for the oversight of the program and activities set forth in this part of these regulations. The development assistance described below shall be provided exclusively to those small business concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act. Such small business concerns shall be participants in the Small Business Capital Ownership Development program. This program shall:

(1) Assist small business concerns participating in the program to develop comprehensive business plans with specific business targets, objects, and goals;

(2) Provide for such other nonfinancial services as deemed necessary for the establishment, preservation, and growth of small business concerns participating in the program, including but not limited to:

(i) Loan packaging.

(ii) Financial counseling.

(iii) Accounting and bookkeeping assistance.

(iv) Marketing assistance, and

(v) Management assistance;

(3) Assist small business concerns participating in the program to obtain equity and debt financing;

(4) Establish regular performance monitoring and reporting systems for small business concerns participating

in the program to assure compliance with their business plans;

(5) Analyze and report the causes of success and failure of small business concerns participating in the program; and

(6) Provide assistance necessary to help small business concerns participating in the program to procure surety bonds. Such assistance shall include, but not be limited to:

(i) The preparation of surety bond participation forms;

(ii) Special management and technical assistance designed to meet the specific needs of small business concerns participating in the program and which have received or are applying to receive a surety bond, and

(iii) Preparation of all forms necessary to receive a surety bond guarantee form from the SBA pursuant to Title IV, Part B of the Small Business Investment Act of 1958.

### § 124.503 Compliance with the Paperwork Reduction Act of 1980.

(a) In compliance with the Paperwork Reduction Act of 1980 (Title 44, U.S.C., Chapter 35) and its implementing regulations, the recordkeeping or reporting requirements and forms appearing in the following sections of this part have been approved by the Office of Management and Budget (OMB) under number 3245-0015: §§ 124.105(b), 124.106(b), 124.106(b)(1), 124.106(b)(2), 124.106(b)(3), 124.202, 124.204, 124.205, 124.403(b)(4), 124.502(a)(1) and 124.502(a)(6).

(b) The recordkeeping or reporting requirements and forms appearing in the following sections of this final rule have also been approved by OMB:

§ 124.103(c) [OMB Approval No. 3245-0145];  
§ 124.103(e) [OMB Approval No. 3245-0145];  
§ 124.111(c) [OMB Approval No. 3245-0147];  
§ 124.112(a)(7) [OMB Approval No. 3245-0146]; § 124.205 [OMB Approval No. 3245-0015]; § 124.206 [OMB Approval No. 3245-0143]; § 124.401(c)(1)(i), 124.401(c)(1)(iii) and 124.403(b)(3) [OMB Approval No. 3245-0148]; § 124.402(e) [OMB Approval No. 3245-0149]; and §§ 124.112(a)(6), 124.205 (financial statements) and 124.502(a)(4) [OMB Approval No. 3245-0151]

**§ 95.207 (R/C Rule 7) On what channels may I operate?**

(a) Your R/C station may transmit only on the following channels (frequencies):

(1) The following channels may be used to operate any kind of device (any object or apparatus, except an R/C transmitter), including a model aircraft device (any small imitation of an aircraft) or a model surface craft device (any small imitation of a boat, car or vehicle for carrying people or objects, except aircraft): 26.995, 27.045, 27.095, 27.145, 27.195 and 27.255 MHz.

(2) The following channels may only be used to operate a model aircraft device: 72.01, 72.03, 72.05, 72.07, 72.09, 72.11, 72.13, 72.15, 72.17, 72.19, 72.21, 72.23, 72.25, 72.27, 72.29, 72.31, 72.33, 72.35, 72.37, 72.39, 72.41, 72.43, 72.45, 72.47, 72.49, 72.51, 72.53, 72.55, 72.57, 72.59, 72.61, 72.63, 72.65, 72.67, 72.69, 72.71, 72.73, 72.75, 72.77, 72.79, 72.81, 72.83, 72.85, 72.87, 72.89, 72.91, 72.93, 72.95, 72.97 and 72.99 MHz.

(3) The following channels may only be used to operate a model surface craft devices: 75.41, 75.43, 75.45, 75.47, 75.49, 75.51, 75.53, 75.55, 75.57, 75.59, 75.61, 75.63, 75.65, 75.67, 75.69, 75.71, 75.73, 75.75, 75.77, 75.79, 75.81, 75.83, 75.85, 75.87, 75.89, 75.91, 75.93, 75.95, 75.97 and 75.99 MHz.

(4) Channels 72.16, 72.32 and 72.98 MHz may also be used to operate a model aircraft device or a model surface craft device until December 20, 1987.

(5) Channels 72.08, 72.24, 72.40 and 75.64 MHz may also be used to operate a model aircraft device until December 20, 1987.

(e) (Reserved.)

[FR Doc. 87-9784 Filed 5-1-87; 8:45 am]  
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**DEPARTMENT OF DEFENSE**

48 CFR Parts 204, 205, 206, 219 and 252

**Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Pub. L. 99-661; Set-Asides for Small Disadvantaged Business Concerns**

**AGENCY:** Department of Defense (DoD).  
**ACTION:** Interim rule and request for comment.

**SUMMARY:** The Defense Acquisition Regulatory (DAR) Council invites public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement

(DFARS) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), entitled "Contract Goal for Minorities." The statute permits DoD to enter into contracts using less than full and open competitive procedures, when practical and necessary to facilitate achievement of a goal of awarding 5 percent of contract dollars to small disadvantaged business (SDB) concerns during FY 1987, 1988 and 1989, provided the contract price does not exceed fair market cost by more than 10 percent. The interim rule implements the statute by requiring that contracting officers set aside acquisitions, other than small purchases conducted under procedures of Federal Acquisition Regulation (FAR) Part 13, for exclusive competition among SDB concerns, whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns and that the contract award price will not exceed fair market price by more than 10 percent.

**DATES:** *Effective Date:* June 1, 1987 (effective for all solicitations issued on or after June 1, 1987).

*Comment Date:* Comments concerning the interim rule must be received on or before August 3, 1987, to be considered in formulating a final rule. Please cite DAR Case 87-33 in all correspondence related to these subjects.

**ADDRESS:** Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, ODASD (P) DARS, c/o OASD (P&L) (M&RS), Room 3C841, The Pentagon, Washington, DC 20301-3062.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7268.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

As summarized above, section 1207(a), Pub. L. 99-661 established an objective that 5 percent of total combined DoD obligations (i.e., procurement; research, development, test and evaluation; construction; and, operation and maintenance) for contracts and subcontracts awarded during FY 1987 through FY 1989, be entered into with (1) small disadvantaged business (SDB) concerns, (2) historically Black colleges and universities, and (3) minority institutions. To facilitate attainment of that goal, Congress permitted DoD, in Section 1207(e) to use less than full and open competitive procedures in awarding contracts, provided contract prices do not exceed fair market price by more than 10 percent. The scope of

the present rule addresses achievement of the goal as it pertains to SDB concerns; other aspects of Section 1207 will be addressed in subsequent issuances.

The interim rule establishes a "rule of two" regarding set-asides for SDB concerns, which is similar in approach to long-standing criteria used to determine whether acquisitions should be set aside for small businesses as a class. Specifically, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns, and that there is a reasonable expectation that the award price will not exceed fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among such SDB firms. The rule provides guidance concerning *Commerce Business Daily* notices to bidders concerning the SDB set-aside reservation, as well as a "sources sought" announcement to ensure that competition is enhanced while also ensuring that non-SDB concerns are not misled in incurring bid or proposal costs. However, should effective competition not materialize or pricing exceed the 10 percent factor, guidance is provided to the contracting officer concerning withdrawal of the set-aside.

In order to ensure that small businesses as a class are not penalized by the new SDB set-aside procedure, it was decided not to apply SDB set-asides to small purchases conducted under FAR Part 13 procedures, upon which heavy reliance is placed in ensuring that small businesses as a class receive a fair proportion of DoD contract dollars. This approach should tend to reduce impact upon non-SDB small businesses resulting from the new procedure, while facilitating attainment of the goal established by Congress.

**B. Regulatory Flexibility Act**

The interim rule may have significant economic impact upon a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and an Initial Regulatory Flexibility Analysis is deemed necessary. However, as another proposed rule will be issued shortly, affecting the same topic, the DoD has determined that it is necessary to delay preparation of that analysis, under authority of 5 U.S.C. 608, in order that the cumulative impact of both rules might be considered. The initial analysis will be provided to the Chief Counsel for Advocacy, U.S. Small Business Administration, at the time of

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(e) (Reserved.)

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## DEPARTMENT OF DEFENSE

48 CFR Parts 204, 205, 206, 219 and 252

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**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7266.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

As summarized above, section 1207(a), Pub. L. 99-661 established an objective that 5 percent of total combined DoD obligations (i.e., procurement; research, development, test and evaluation; construction; and, operation and maintenance) for contracts and subcontracts awarded during FY 1987 through FY 1989, be entered into with (1) small disadvantaged business (SDB) concerns, (2) historically Black colleges and universities, and (3) minority institutions. To facilitate attainment of that goal, Congress permitted DoD, in Section 1207(e) to use less than full and open competitive procedures in awarding contracts, provided contract prices do not exceed fair market price by more than 10 percent. The scope of

the present rule addresses achievement of the goal as it pertains to SDB concerns; other aspects of Section 1207 will be addressed in subsequent issuances.

The interim rule establishes a "rule of two" regarding set-asides for SDB concerns, which is similar in approach to long-standing criteria used to determine whether acquisitions should be set aside for small businesses as a class. Specifically, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns, and that there is a reasonable expectation that the award price will not exceed fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among such SDB firms. The rule provides guidance concerning *Commerce Business Daily* notices to bidders concerning the SDB set-aside reservation, as well as a "sources sought" announcement to ensure that competition is enhanced while also ensuring that non-SDB concerns are not misled in incurring bid or proposal costs. However, should effective competition not materialize or pricing exceed the 10 percent factor, guidance is provided to the contracting officer concerning withdrawal of the set-aside.

In order to ensure that small businesses as a class are not penalized by the new SDB set-aside procedure, it was decided not to apply SDB set-asides to small purchases conducted under FAR Part 13 procedures, upon which heavy reliance is placed in ensuring that small businesses as a class receive a fair proportion of DoD contract dollars. This approach should tend to reduce impact upon non-SDB small businesses resulting from the new procedure, while facilitating attainment of the goal established by Congress.

##### B. Regulatory Flexibility Act

The interim rule may have significant economic impact upon a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and an Initial Regulatory Flexibility Analysis is deemed necessary. However, as another proposed rule will be issued shortly, affecting the same topic, the DoD has determined that it is necessary to delay preparation of that analysis, under authority of 5 U.S.C. 608, in order that the cumulative impact of both rules might be considered. The initial analysis will be provided to the Chief Counsel for Advocacy, U.S. Small Business Administration, at the time of

publication of the referenced proposed rule. Comments are invited.

Comments from small entities concerning DFARS Subpart 219.8 will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DAR Case 87-610D in correspondence.

C. Paperwork Reduction Act

The interim rule does not impose information collection requirements within the meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., and OMB approval of the interim rule is not required pursuant to 5 CFR Part 1320 et seq.

D. Determination to Issue an Interim Regulation

In order to achieve the 5 percent goal established by Congress during FY 1987, DoD has determined pursuant to Pub. L. 99-577 that compelling reasons exist to publish interim DFARS changes without prior public comment, inasmuch as present procurement procedures have been determined inadequate to attain the prescribed goal. Comments received in response to this Notice will be evaluated and incorporated in future revisions to this rule.

List of Subjects in 48 CFR Parts 204, 205, 206, 219 and 252

Government procurement: Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, 48 CFR Parts 204, 205, 206, 219 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 204, 205, 206, 219 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

PART 204—ADMINISTRATIVE MATTERS

2. Section 204.671-5 is amended by adding at the end of the introductory text and before "Code A" in paragraph (d)(9) the sentence "Small Disadvantaged Business set-asides will use Code K-Set-aside."; by changing the period at the end of paragraph (e)(3)(iii) to a comma and adding the words "unless the action is reportable under code 4 or 5 below."; by adding paragraphs (iv) and (v) to paragraph (e)(3); and by revising paragraph (f), to read as follows:

204.671.5 Instructions for completion of DD Form 350.

- (e) \* \* \*
(3) \* \* \*

(iv) Enter Code 4 if the award was totally set-aside for small disadvantaged businesses pursuant to 219.502-72.

(v) Enter Code 5, if the award was made to a small disadvantaged business pursuant to 19.7001 an award was made based on the application of a price differential. If award was made to a small disadvantaged business concern without the application of a price differential (i.e., the small disadvantaged business was the low offeror without the differential), enter Code 3.

(f) Part E, DD Form 350. Data elements E2-E4 shown below are to be reported in accordance with the appropriate departmental or OSD instructions.

(1) Item E1, Ethnic Group. If the award was made to a small disadvantaged business firm and the contractor submitted the certification required by 252.219-7005, enter the code below which corresponds to the ethnic group of the contractor.

(i) Enter Code A if the contractor categorizes the firm as being owned by Asian-Indian-Americans.

(ii) Enter Code B if the contractor categorizes the firm as being owned by Asian-Pacific Americans.

(iii) Enter Code C if the contractor categorizes the firm as being owned by Black Americans.

(iv) Enter Code D if the contractor categorizes the firm as being owned by Hispanic Americans.

(v) Enter Code E if the contractor categorizes the firm as being owned by Native Americans.

(vi) Enter Code F if the contractor categorizes the firm as being owned by other minority group Americans.

- (2) Reserved for OSD.
(3) Reserved for OSD.
(4) Reserved for OSD.

PART 205—PUBLICIZING CONTRACT ACTIONS

3. Section 205.202 is amended by adding paragraph (a)(4)(S-70) to read as follows:

205.202 Exceptions.

(a)(4)(S-70) The exception at FAR 5.202(a)(4) may not be used for contract actions under 206.203-70. (See 205.207(d)(S-72) and (S-73).)

4. Section 205.207 is amended by adding paragraphs (d) (S-72) and (d) (S-73) to read as follows:

205.207 Preparation and transmittal of synopses.

(d) (S-72) When the proposed acquisition provides for a total small disadvantaged business (SDB) set-aside under 206.203 (S-72), state: "The proposed contract listed here is a 100 percent small disadvantaged business set-aside. Offers from concerns other than small disadvantaged business concerns are not solicited."

(d) (S-73) When the proposed acquisition is being considered for possible total small disadvantaged-business set-aside under 206.203 (S-70), state: "The proposed contract listed here is being considered for 100 percent set-aside for small disadvantaged business (SDB) concerns. Interested SDB concerns should, as early as possible but not later than 15 days of this notice, indicate interest in the acquisition by providing to the contracting office above evidence of capability to perform and a positive statement of eligibility as a small socially and economically disadvantaged business concern. If adequate interest is not received from SDB concerns, the solicitation will be issued as \_\_\_\_\_ (enter basis for continuing the acquisition, e.g. 100% small business set-aside, unrestricted, 100% small business set-aside with evaluation preference for SDB concerns, etc.) without further notice. Therefore, replies to this notice are requested from \_\_\_\_\_ (enter all types business to be solicited in the event a SDB set-aside is not made; e.g., all small business concerns, all business concerns, etc.) as well as from SDB concerns."

PART 206—COMPETITION REQUIREMENTS

5. A new Subpart 206.2, consisting of sections 206.203 and 206.203-70, is added to read as follows:

Subpart 206.2—Full and Open Competition After Exclusion of Sources

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

206.203-70 Set-asides for small disadvantaged business concerns.

(a) To fulfill the objective of section 1207 of Pub. L. 99-661, contracting officers may, for Fiscal Years 1987, 1988, and 1989, set-aside solicitations to allow only small disadvantaged business concerns as defined at 219.001 to compete under the procedures in Subpart 219.5. No separate justification or determination and findings is required under this Part to set-aside a contract action for small disadvantaged business.

specific detailed evidence supporting the protestant's claim.

(2) In order to apply to the acquisition in question, such protest must be filed with and received by the contracting officer prior to the close of business on the fifth business day after the bid opening date for sealed bids. In negotiated acquisitions, the contracting officer shall notify the apparently unsuccessful offerors of the apparently successful SDB offeror(s) in accordance with FAR 15.1001 and establish a deadline date by which any protest on the instant acquisition must be received.

(3) To be considered timely, a protest must be delivered to the contracting officer by hand or telegram within the period allotted or by letter post marked within the period. A protest shall also be considered timely if made orally to the contracting officer within the period allotted, and if the contracting officer thereafter receives a confirming letter postmarked no later than one day after the date of such telephone protest.

(4) Upon receipt of a protest of disadvantaged business status, the contracting officer shall forward the protest to the Small Business Administration (SBA) District Office for the geographical area where the principal office of the SDB concern in question is located. In the event of a protest which is not timely, the contracting officer shall notify the protestor that its protest cannot be considered on the instant acquisition but has been referred to SBA for consideration in any future acquisition; however, the contracting officer may question the SDB status of an apparently successful offeror at any time. A contracting officer's protest is always timely whether filed before or after award.

(5) The SBA will determine the disadvantaged business status of the questioned offeror and notify the contracting officer and the offeror of its determination. Award will be made on the basis of that determination. This determination is final.

(6) If the SBA determination is not received by the contracting officer within 10 working days after SBA's receipt of the protest, it shall be presumed that the questioned offeror is a SDB concern. This presumption will not be used as a basis for award without first ascertaining when a determination can be expected from SBA, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government.

#### 219.304 Solicitation provisions.

(b) Department of Defense activities shall use the provision at 252.7005, Small Disadvantaged Business Concern Representation, in lieu of the provision at FAR 52.219-2, Small Disadvantaged Business Concern Representation.

10. Section 219.501 is amended by adding paragraph (b); by adding at the end of paragraph (c) the words "The contracting officer is responsible for reviewing acquisitions to determine whether they can be set-aside for SDBs."; by adding at the end of paragraph (d) the words "Actions that have been set-aside for SDBs are not referred to the SBA representative for review."; by adding at the end of paragraph (g) the words "except that the prior successful acquisition of a product or service on the basis of a small business set-aside does not preclude consideration of a SDB set-aside for future requirements for that product or service."; to read as follows:

#### 219.501 General.

(b) The determination to make a SDB set-aside is a unilateral determination by the contracting officer.

11. Section 219.501-70 is added to read as follows:

#### 219.501-70 Small disadvantaged business set-asides.

As authorized by the provisions of section 1207 of Pub. L. 99-661, a special category of set-asides, identified as SDB set-aside, has been established for Department of Defense acquisitions awarded during Fiscal Years 1987, 1988, and 1989, except those subject to small purchase procedures. The authorization to effect small disadvantaged business set-asides shall remain in effect during these fiscal years, unless specifically revoked by the Secretary of Defense. A "set-aside for SDB" is the reserving of an acquisition exclusively for participation by SDB concerns.

12. Sections 219.502-3 and 219.502-4 are added to read as follows:

#### 219.502-3 Partial set-asides

These procedures do not apply to SDB set-asides. SDB set-asides are authorized for use only when the entire amount of an individual acquisition is to be set-aside.

#### 219.502-4 Methods of conducting set-asides.

(a) SDB set-asides may be conducted by using sealed bids or competitive proposals.

(b) Offers received on a SDB set-aside from concerns that do not qualify as

SDB concerns shall be considered nonresponsive and shall be rejected.

#### 219.502-70 [Amended]

13. Section 219.502-70 is amended by inserting in the second sentence of paragraph (b) between the word "others" and the word "when" the words "except SDB set-asides."

14. Section 219.502-72 is added to read as follows:

#### 219.502-72 SDB set-aside.

(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition shall be set-aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns offering the supplies or services of different SDB concerns and (2) award will be made at a price not exceeding the fair market price by more than ten percent. In making SDB set-asides for R&D or architect-engineer acquisitions, there must also be a reasonable expectation of obtaining from SDB scientific and technological or architectural talent consistent with the demands of the acquisition.

(b) The contracting officer must make a determination under (a) above when any of the following circumstances are present: (1) the acquisition history shows that within the past 12 month period, a responsive bid or offer of at least one responsible SDB concern was within 10 percent of an award price on a previous procurement and either (i) at least one other responsible SDB source appears on the activity's solicitation mailing list or (ii) a responsible SDB responds to the notice in the Commerce Business Daily; or (2) multiple responsible section 8(a) concerns express an interest in having the acquisition placed in the 8(a) program; or (3) the contracting officer has sufficient factual information, such as the results of capability surveys by DoD technical teams, to be able to identify at least two responsible SDB sources.

(c) If it is necessary to obtain information in accordance with (b)(1) above, the contracting officer will include a notice in the synopsis indicating that the acquisition may be set-aside for exclusive SDB participation if sufficient SDB sources are identified prior to issuance of the solicitation (see 205.207(d) (S-73)). The notice should encourage such firms to make their interest and capabilities known as expeditiously as possible. If prior to synopsis, the determination has been

July 28, 1987

Mr. Charles W. Lloyd, Executive  
Secretary, DAR Council  
Room 3C841/The Pentagon  
Washington, DC 20301-3062

Dear Mr. Lloyd:

We are a small, minority-owned business specializing in medical equipment and supplies. We need your help and support in changing Public Law 99-661 dealing with the 5% goal for distributors.

In medical equipment and supplies there are very few small manufacturer-ers and if we have to buy from a small manufacturer in order to participate, the law will be there but small and minority distributors will have few opportunities.

I spoke to Mrs. Rita Strausburg, SBA, Defense Personnel Support Center, she stated that out of 461 million plus dollars that was spent by the Department of Defense, minority-owned medical supply dealers including 8(a) firms received 1.5%. If minorities don't have opportunities the figure will remain the same.

I would like to see the following implemented:

1. The 8(a) program remain funded at the same level or higher.
2. Keep Public Law 99-661 separate from the 8(a) program.
3. Extend the 8(a) program participation to 14 years.
4. Monitor the small business specialist and heads of Government facilities to make sure they have a direct outline in reaching their goals with small, minority-owned businesses. SBA need to play a real part in making sure goals are met by Government agencies.
5. Penalize agencies that donot reach thier goals and make it public knowledge to the Congressman.

I look forward to hearing from you as soon as possible because fiscal year 87 ends in October.

Sincerely,

*Theresa McCurdy*  
Theresa McCurdy

tlm/

8/13  
no phone # or  
return address  
- can't respond  
of



*This letter is  
representative of  
many identical  
letters.*

July 24, 1987

RONALD L COOPER  
1802 METZEROTT RD #305  
ADELPHI, MD 20783

Mr. Charles W. Lloyd  
Secretary  
ODSAD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, DC 20301-3082

Dear Mr. Lloyd:

As an employee of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,

*Ronald L. Cooper*

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July 13, 1987

Defense Acquisition Regulatory Council  
Att; Mr. Charles W. Lloyd  
Executive Secretary  
ODASK (P) DARS, c/o OASD (P&L) (M&RS)  
Room 3C841, The Pentagon  
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 Fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectfully object to the exclusion of Hasidic Jews from the designated list of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.0 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. # 637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce

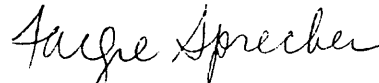
July 13, 1987

(most recently confirmed on October 24, 1984) that Hasidic Jews constitute a socially disadvantaged group individuals.

In the absence of express recognition of Hasidic eligibility in Part 219.001, I must respectfully object to the protest procedures set forth in proposed Part 219.302. These procedures are an open invitation to obstructionist opposition to contracting opportunities by disadvantaged individuals who are not members of a designated group. Under the proposed procedures, designated group members are entitled to a presumption of eligibility but other individuals are not. Under these circumstances, individuals who are not members of designated groups are likely to be the most frequent targets of the protest procedures under Part 219.302.

Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,



Faigie Sprecher



Rochester Area  
Chamber of Commerce, Inc.  
55 St. Paul Street  
Rochester, NY 14604  
(716) 454-2220

July 31, 1987

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Datrose Industries  
Professional Counseling Service  
Killingsworth Communications  
International Bible Quiz League  
Business Data Services  
Darrell Greene Associates  
Visual Marketing Concepts.

Defense Acquisition Regulatory Council  
Attention: Mr. Charles W. Lloyd  
Executive Secretary, ODASD (P) DARS  
c/o OASD (P & L) (M & RS)  
Room 3 C 841  
The Pentagon  
Washington, D. C. 20301-3062

Dear Mr. Lloyd:

The Black Business Association of the Greater Rochester Area Chamber of Commerce has some concerns about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that some important issues have been overlooked:

First, the regulations contain no express provisions for sub-contracting

Second, partial set-asides have been specifically prohibited.

We also believe that the original goals of the Department of Defense have been side tracked by the length of time required to qualify minority businesses as 8(a) certified. The black business owners of the Black Business Association urge the Department of Defense to address these issues and to remove any bars from the final regulations that may limit our access to this market, thus deminishing the Department of Defense's ability to successfully reach the 5% goal.

Sincerely,

A handwritten signature in black ink that reads 'John L. Blake'. The signature is written in a cursive style and is followed by a horizontal line.

John L. Blake  
President

JLB:tc

ROBERT L. LIVINGSTON  
1ST DISTRICT, LOUISIANA

APPROPRIATIONS COMMITTEE

SUBCOMMITTEE:  
DEFENSE

PERMANENT SELECT COMMITTEE  
ON INTELLIGENCE



WASHINGTON OFFICE:  
ROOM 2412  
RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515  
(202) 225-3015

DISTRICT OFFICE:  
111 VETERANS BLVD.  
SUITE 700  
METAIRIE, LA 70005  
(504) 889-2753

**Congress of the United States**  
**House of Representatives**

Washington, DC 20515

August 5, 1987

Mr. Charles W. Lloyd  
Executive Secretary-DAR Council  
ODASD (P) DARS  
c/o OASD (P&L) (M&RS) Rm 3E144  
The Pentagon  
Washington, D.C. 20301

Dear Mr. Lloyd:

The Department's interim rule implementing Section 1207 of P.L. 99-661 (DAR Case 87-33) should be amended to allow more flexibility for small disadvantaged businesses (SDBs) to actually benefit from set-asides by the Defense Department.

I support Congressional and DOD efforts to provide greater procurement opportunities for small disadvantaged businesses. However, allowing SDBs to participate only if they purchase or furnish end items manufactured or produced by other SDBs (section 252.219-7006(c)), will severely restrict and in some cases eliminate any opportunity for SDBs to participate in this critical program.

There will be many procurement instances where SDB manufactured or produced end items will not exist. Just one example, that has been brought to my attention and that of the Department's, is the almost non-existent small and disadvantaged steel and pipe manufacturing or production capability in the United States. In addition, there will be other instances where SDB requirements will not be met because existing SDB end item products cannot be furnished in adequate amounts.

The intent of Congress in passing laws to help SDBs is to increase business opportunities for existing firms. More importantly, I also believe it is Congress' intent to foster an environment where more minority or disadvantaged citizens can actually get into or compete in a product market where SDBs did not previously exist.

Therefore, I request that the interim rule be amended to allow exemptions to section 252.219-7006(c) for SDBs in instances where no SDB end product manufacturers or producers exist or where there is very limited SDB end product availability or manufacturer capability.

Mr. Charles W. Lloyd

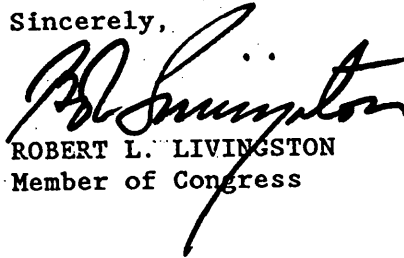
Page 2

August 5, 1987

I understand similar exemptions from small business requirements have been administratively implemented in other government procurement efforts. I sincerely believe DOD should do likewise, or, at the very least, provide much more flexibility for more SDBs to participate than is currently envisioned in the interim rule.

Thanking you in advance for your consideration of this important request, I remain

Sincerely,



ROBERT L. LIVINGSTON  
Member of Congress

RLL/pc

§ 124.1

13 CFR Ch. I (1-1-87 Edition)

(2) Proceeds of loans under this subpart shall not be used for the payment of dividends or other disbursements to owners, partners, officers or stockholders unless they constitute reasonable remuneration and are directly related to their performance of services; nor for refunding of existing indebtedness incurred prior to or not as a result of the event which gave rise to the issuance of the declaration or designation or to reduce loans provided, guaranteed or insured by another Federal agency or a small business investment company licensed under the Small Business Investment Act. No part of the proceeds of any loan under this subpart shall be used, directly or indirectly, to pay any obligations resulting from a Federal, state or local tax penalty as a result of negligence or fraud, or non-tax criminal fine or any civil fine or penalty for non-compliance with a law, regulation or order of a Federal, state, regional, or local agency or similar matter.

(3) Each borrower shall use the loan proceeds for the purposes set forth in the loan authorization. Any loan recipient who wrongfully applies loan proceeds shall be civilly liable to SBA in an amount equal to one and one-half times the original amount of the loan (Pub. L. 92-385, approved August 16, 1972; 86 Stat. 554).

(4) Applicants must use personal and business assets to the greatest extent possible, without incurring undue personal hardship, before disbursement of funds under this subpart.

(h) *Other requirements.* For application requirements see § 123.18; for terms of loans, see § 123.9(a); for types of loans, see § 123.4; for services fees, see § 123.6 of this part.

(49 FR 32311, Aug. 13, 1984, as amended at 50 FR 4615, Jan. 31, 1985; 51 FR 45300, Dec. 18, 1986)

**PART 124—MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT**

- Sec.  
124.1 The Section 8(a) and 7(j) programs.  
124.2 Program management.  
124.3 Violations.  
124.100 Definitions and applicability of these regulations.

- Sec.  
124.101 The section 8(a) program: General eligibility.  
124.102 Small business concern.  
124.103 Ownership.  
124.104 Control and management.  
124.105 Social disadvantage.  
124.106 Economic disadvantage.  
124.107 Potential for success.  
124.108 Additional eligibility requirements.  
124.109 Ineligible businesses.  
124.110 Fixed program participation term.  
124.111 Mechanics for extension of a fixed program participation term.  
124.112 Program termination.  
124.113 Suspension of program assistance.  
124.201 Processing applications.  
124.202 Place of filing.  
124.203 Applicant representatives.  
124.204 Requirement support determination.  
124.205 Forms and documents required.  
124.206 Approval and declination of applications for eligibility.  
124.207 Business activity.  
124.301 The provision of requirements support for 8(a) firms.  
124.302 8(a) Contracts and subcontracts.  
124.401 Advance payments.  
124.402 Business development expense.  
124.403 Letter of credit.  
124.501 Development assistance program.  
124.502 Small Business and Capital Ownership Development program.  
124.503 Compliance with the Paperwork Reduction Act of 1980.

AUTHORITY: 15 U.S.C. 637(a).

SOURCE: 51 FR 36141, Oct. 8, 1986, unless otherwise noted.

§ 124.1 The Section 8(a) and 7(j) programs.

(a) *General.* (1) These regulations implement sections 8(a) and 7(j) of the Small Business Act (15 U.S.C. 637(a) and 636 (j)) which establish the Minority Small Business and Capital Ownership Development Program (program). These regulations apply to all section 8(a) concerns participating in the program as of the effective date of these regulations and all concerns applying for admission to the program subsequent to that date.

(2) Section 8(a) authorizes SBA to enter into all types of contracts (including, but not limited to, supply, services, construction, research and development) with other Government departments and agencies, and to negotiate subcontracts for the performance thereof with small business con-

- 1 The section 8(a) program: General eligibility.
- 2 Small business concern.
- 3 Ownership.
- 4 Control and management.
- 5 Social disadvantage.
- 6 Economic disadvantage.
- 7 Potential for success.
- 8 Additional eligibility requirements.
- 9 Ineligible businesses.
- 10 Fixed program participation term.
- 11 Mechanics for extension of a fixed program participation term.
- 12 Program termination.
- 13 Suspension of program assistance.
- 14 Processing applications.
- 15 Place of filing.
- 16 Applicant representatives.
- 17 Requirement support determina-
- 18 Forms and documents required.
- 19 Approval and declination of applications for eligibility.
- 20 Business activity.
- 21 The provision of requirements for 8(a) firms.
- 22 8(a) Contracts and subcontracts.
- 23 Advance payments.
- 24 Business development expense.
- 25 Letter of credit.
- 26 Development assistance program.
- 27 Small Business and Capital Ownership Development program.
- 28 Compliance with the Paperwork Reduction Act of 1980.
- 29 15 U.S.C. 637(a).
- 30 51 FR 36141, Oct. 8, 1986, unless noted.

**The Section 8(a) and 7(j) provisions.**

**General.** (1) These regulations under sections 8(a) and 7(j) of the Small Business Act (15 U.S.C. 637(a)(7)) which establish the Minority Small Business and Capital Ownership Development Program. These regulations apply to section 8(a) concerns participating in the program as of the effective date of these regulations and all concerns for admission to the program on that date.

(2) Section 8(a) authorizes SBA to participate in all types of contracts (including but not limited to, supply, construction, research and development) with other Government departments and agencies, and to negotiate subcontracts for the performance of such contracts with small business con-

**Small Business Administration**

**§ 124.100**

cerns owned and controlled by socially and economically disadvantaged individual(s).

(3) Section 7(j) authorizes SBA to provide financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or small business concerns eligible for assistance under sections 7(a)(11), 7(j)(10), and 8(a) of the Small Business Act.

(b) **Purposes.** (1) It is the purpose of the Section 8(a) program to:

- (i) Foster business ownership by individuals who are both socially and economically disadvantaged;
- (ii) Promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary; and

(iii) Clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

(2) It is the purpose of the Section 7(j) program to:

- (i) Foster business ownership by individuals in groups that own and control little productive capital; and
- (ii) Promote the competitive viability of such firms by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.

**§ 124.2 Program management.**

The Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB-COD) is responsible for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of the Small Business Act under the supervision of, and responsible to the Administrator of SBA.

**§ 124.3 Violations.**

Willful violation by an applicant for admission to the section 8(a) program or an applicant for participation in the section 7(j) program of any of SBA's regulations governing its other programs may result in the applicant's

denial of admission to the program. Any such violation will be considered by the AA/MSB-COD in making a determination on the admission of an applicant to the program, and such consideration will include the nature and severity of any such violation.

**§ 124.100 Definitions and applicability of these regulations.**

(a) "Business plan" means the business plan documents as submitted by the applicant section 8(a) concern and approved by SBA which include the objectives, goals, and business projections of a section 8(a) concern, and all written amendments or modifications which have also been approved by SBA.

(b) "Certification of SBA's competency" means a certification by SBA that it is competent to perform the requirement as stated in the contract, and is based upon an assessment of a section 8(a) concern's competency to perform. The assessment does not require a special investigation or the issuance of a Certificate of Competency (COC) as provided for elsewhere in these regulations under the authority of section 8(b)(7) (A), (B), and (C) of the Small Business Act.

(c) "Commitment" means the commitment made by a procuring activity to SBA that the procuring activity will negotiate to place a contract with SBA or subcontract with a section 8(a) concern, provided there is no material change in requirements, availability of funds, or other pertinent factors. A commitment does not mean that an award of a particular contract to SBA and a section 8(a) concern will or must be made.

(d) "Local buy item" means a supply or service purchased to meet the specific needs of one user. Examples include the purchase of nonprofessional services, such as custodial or trash hauling, and construction work.

(e) "Manufacturer" means a concern which owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment described by the business plan. In order to qualify as a manufacturer, a concern must be able to show (1) that it is



an established manufacturer of particular goods or goods of general character which may be sought by the Government, or (2) if it is newly entering into such manufacturing activity, that it has made all necessary prior arrangements for space, equipment, and personnel to perform manufacturing operations. A new firm which has made such definite commitments in order to enter a manufacturing business which will later qualify it, shall not be barred from 8(a) approval because it has not yet done any manufacturing; however, this interpretation is not intended to qualify a firm whose arrangements to use space, equipment, or personnel are contingent upon 8(a) approval. This definition is based upon the Walsh-Healy Public Contracts Act, 41 U.S.C. 35-45.

(f) "National buy item" means an item or service purchased to meet the needs of a system where supply control, inventory management, and procurement responsibility have been assigned to a central procuring activity to support the needs of two or more users of the item. Examples include military clothing purchased by the Defense Personnel Support Center of the Department of Defense, paint or hand tools purchased by the Federal Supply Service of the General Services Administration, medical supplies purchased by the Veterans Administration, or studies, evaluations, consulting services or similar services purchased by the headquarters office of a department or agency.

(g) "Negative control," as used in this part is defined in § 121.3(a)(i), formerly § 121.3-2(a)(1), of these regulations which is entitled "Nature of Control."

(h) "Open requirement" means a requirement submitted to SBA by a procuring activity for possible 8(a) award without a particular 8(a) concern identified as a candidate for the award. Open requirements can be for local buy items or national buy items.

(i) "Primary industry classification" means the four digit Standard Industrial Classification (SIC) Code designation which, for an on-going applicant concern, best describes the industry representing the largest proportion of its business revenues for the previous

year or, in the case of a start-up applicant concern, that SIC Code designation which best describes the industry in which it intends to do the most business.

(j) "Regular dealer" means a person who owns, operates, or maintains a store, warehouse, or other establishment in which materials, supplies, articles, or equipment of the general character described in the business plan are bought for the account of such person, kept in stock and sold to the public in the usual course of business. In order to qualify as a regular dealer, the concern must be able to show:

(1) That he has an establishment or leased or assigned space in which he regularly maintains a stock of goods in which he claims to be a dealer; if the space is in a public warehouse, it must be maintained on a continuing, and not on a demand basis;

(2) That the stock maintained is a true inventory from which sales are made; the requirement is not satisfied by a stock of sample or display goods, or by a stock consisting of surplus goods remaining from prior orders, or by a stock unrelated to the supplies which are the subject of the business plan, or by a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made;

(3) That the goods stocked are of the same general character as the goods in which he claimed to be a dealer; to be of the same general character the items to be supplied must be either identical with those in stock or be goods for which dealers in the same line of business would be an obvious source;

(4) That sales are made regularly from stock on a recurring basis; they cannot be only occasional and constitute an exception to the usual operations of the business; the proportion of sales from stock that will satisfy the requirements will depend upon the character of the business;

(5) That sales are made regularly in the usual course of business to the public, i.e., to purchasers other than Federal, State, or local government agencies; this requirement is not satisfied if the applicant concern merely

Small Business Administration

§ 124.101

or, in the case of a start-up applicant, that SIC Code designation which best describes the industry which it intends to do the most business.

"Regular dealer" means a person who owns, operates, or maintains a warehouse, or other establishment in which materials, supplies, or equipment of the general character described in the business are bought for the account of a person, kept in stock and sold to the public in the usual course of business. In order to qualify as a regular dealer, the concern must be able to

That he has an establishment or an assigned space in which he regularly maintains a stock of goods in which he claims to be a dealer; if the stock is in a public warehouse, it must be maintained on a continuing, and not on a demand basis;

That the stock maintained is a general inventory from which sales are made; the requirement is not satisfied if the stock consists of surplus goods remaining from prior orders, or stock unrelated to the supplies which are the subject of the business; or by a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made;

That the goods stocked are of the same general character as the goods in which he claims to be a dealer; to be supplied must be either with those in stock or be those which dealers in the same business would be an obvious

That sales are made regularly on a recurring basis; they are not only occasional and constitute an exception to the usual operation of the business; the proportion of sales from stock that will satisfy requirements will depend upon the nature of the business;

That sales are made regularly in the usual course of business to the extent, to purchasers other than the State, or local government, and this requirement is not satisfied if the applicant concern merely

seeks to sell to the public but has not yet made such sales; if government agencies are the sole purchasers, the applicant concern will not qualify as a regular dealer; the number and amount of sales which must be made to the public will necessarily vary with the amount of total sales and the nature of the business; and

(6) That his business is an established and going concern; it is not sufficient to show that arrangements have been made to set up such a business.

This definition is based upon the Walsh-Healy Public Contracts Act.

(k) "Requirement support" means contract opportunities from Federal procuring agencies to acquire articles, equipment, supplies, services, materials or construction work which a section 8(a) business concern could perform.

(l) "Self-marketing" of an item occurs when a section 8(a) marketing firm identifies a requirement that has not been committed to the section 8(a) program and through its marketing efforts causes the procuring activity to offer that specific requirement to the section 8(a) program on its behalf.

(m) *Applicability to participating section 8(a) concerns.* Business plans for all participating section 8(a) concerns shall reflect Standard Industrial Classification Code designations consistent with the requirements of § 124.207 of these regulations. Within 120 calendar days of publication of this final rule, the appropriate SBA field office will review the business plan and related documents of each participating section 8(a) concern and within the same 120-day period will notify each concern by certified mail to its address of record of the SIC Code designations for which it has been approved to receive section 8(a) program contract awards. Within 30 calendar days from the date on which the notice is mailed, a participating concern may request in writing that SBA make a correction in the approved SIC Code designations in its presently approved business plan in order to conform to the approved business plan to these regulations. Written approval or disapproval of any such request will be provided by SBA

within 60 calendar days of the receipt of the request. Any correction of one or more SIC Code designations will be effective only when SBA gives written approval of such request. After the process is completed as to all concerns participating in the section 8(a) program on the effective date of these regulations, any subsequent changes in SIC Code designations appearing in their business plans must be accomplished pursuant to § 124.207(b).

§ 124.101 The section 8(a) program: General eligibility.

(a) In order to be eligible to participate in the section 8(a) program, an individual or an applicant concern must meet all of the eligibility criteria set forth in § 124.102 through § 124.110 hereunder. All determinations made pursuant to §§ 124.102, 124.103, 124.104, 124.105, 124.106, and 124.107 shall be in writing, setting forth the grounds and relevant facts upon which the determination is based, by the AA/MSB-COD, whose decision shall be final.

(b) It is the intent of the Small Business Administration to limit participation in the section 8(a) program to eligible individuals and concerns, and to process applications for participation in a fair and consistent manner. Toward that end, the Small Business Administration invites the participation of the public in preventing fraud and assuring the integrity of the section 8(a) program. The AA/MSB-COD shall review any determination that an individual or applicant concern is eligible to participate in the section 8(a) program whenever a member of the public submits credible evidence that such determination was based on fraudulent information, or that SBA did not follow the requirements of these regulations in rendering the determination. The AA/MSB-COD shall determine whether the facts developed during any such review warrant further action; provided that any review of potential misconduct by SBA shall be concluded with a detailed report of the findings to the member of the public whose information gave rise to the review.

## § 124.102

13 CFR Ch. I (1-1-87 Edition)

### § 124.102 Small business concern.

(a) In order to be eligible to participate in the section 8(a) program, an applicant concern must qualify as a small business concern as defined in § 124.4 of the SBA Rules and Regulations (13 CFR 121.4). The particular size standard to be applied will be based on the primary industry classification of the applicant concern.

(b) In order to continue to participate in the section 8(a) program once a concern is admitted to the program, the concern must certify to SBA that it is a small business pursuant to the provisions of § 121.4 for the purpose of performing each individual contract which it is awarded. SBA, in turn, will verify such certifications.

(c) Once admitted to the section 8(a) program, a concern will only be permitted to perform 8(a) contracts which are classified according to the standard industrial classification code numbers which appear in its business plan as established pursuant to § 124.207 of these regulations. A participating section 8(a) business concern is free to pursue any non-section 8(a) contract regardless of its Standard Industrial Classification Code number which it is capable and competent to perform.

### § 124.103 Ownership.

In order to be eligible to participate in the section 8(a) program, an applicant concern must be one which is at least 51 percent owned by an individual(s) who is a citizen of the United States (specifically excluding resident alien(s)) and who is determined to be socially and economically disadvantaged by SBA.

(a) In the case of an applicant concern which is a partnership, 51 percent of the partnership interest must be owned by an individual(s) determined to be socially and economically disadvantaged.

(b) In the case of an applicant concern which is a corporation, 51 percent of all classes of voting stock must be owned by an individual(s) determined to be socially and economically disadvantaged.

(c) Part ownership in an applicant concern by nondisadvantaged individual(s) is permitted and may be

necessary to insure adequate capital and management for the concern's development. However, any property, equipment, supplies, services and/or financial assistance other than personal services which are sold, rented or donated to the 8(a) concern by such nondisadvantaged individual(s) must be reported to SBA on an annual basis. Such nondisadvantaged individual(s), their spouses or immediate family members may not:

(1) Be former employers of the disadvantaged owner(s) of the applicant concern without prior approval of SBA;

(2) Be affiliated with another business in the same or similar type of business as the applicant concern;

(3) Hold ownership interest in any other 8(a) concern in an amount deemed excessive by SBA;

(4) Exercise negative control over the applicant concern as defined in 13 CFR 121.3(a)(i) (formerly 13 CFR 121.3-2(a)(i)); or

(5) Receive compensation for personal services from the applicant concern as directors or employees which is deemed to be excessive by SBA

(d) Non-section 8(a) concerns in the same or similar line of business are prohibited from having an ownership interest in an applicant concern which is deemed by SBA to cause negative control over the applicant concern, as defined in 13 CFR 121.3(a)(i) (formerly 13 CFR 121.3-2(a)(i)).

(e) A section 8(a) business concern may continue participation in the program subsequent to a change in its ownership. However, any change of ownership of an 8(a) business concern requires the prior written approval of SBA. Continued participation of the 8(a) concern under new ownership requires compliance with all individual and business eligibility requirements of these regulations by the concern and the new owners. Failure of either an individual owner or the concern to maintain compliance constitutes a ground for program termination.

(f) Applicant concerns owned and controlled by an Indian Tribe are eligible for participation in the section 8(a) program if the individuals who manage and control the concern are found to be socially and economically

to insure adequate capital management for the concern's debt. However, any property, equipment, supplies, services and/or assistance other than personal services which are sold, rented or leased to the 8(a) concern by such disadvantaged individual(s) must be reported to SBA on an annual basis.

Such nondisadvantaged individual(s), their spouses or immediately preceding members may not:

(1) be former employers of the disadvantaged owner(s) of the applicant concern without prior approval of

(2) be affiliated with another business in the same or similar type of business as the applicant concern;

(3) have an ownership interest in any other 8(a) concern in an amount that is excessive by SBA;

(4) exercise negative control over any other 8(a) concern as defined in 13 CFR 121.3(a)(1) (formerly 13 CFR 121.3(a)(1)); or

(5) receive compensation for personal services from the applicant concern or its employees which is excessive by SBA.

Section 8(a) concerns in the same or similar line of business are prohibited from having an ownership interest in an applicant concern which would be controlled by SBA to cause negative impact on the applicant concern, as defined in 13 CFR 121.3(a)(1) (formerly 13 CFR 121.3-2(a)(1)).

Continued participation in the 8(a) business concern subsequent to a change in its ownership. However, any change of ownership of an 8(a) business concern requires the prior written approval of the SBA for continued participation of the concern under new ownership to ensure compliance with all individual eligibility requirements and regulations by the concern's new owners. Failure of either the individual owner or the concern to comply constitutes a basis for program termination.

Applicant concerns owned and controlled by an Indian Tribe are eligible for participation in the section 8(a) program if the individuals who manage and control the concern are not socially and economically

## Small Business Administration

## § 124.105

disadvantaged by SBA, and the Tribe is found to be economically disadvantaged by SBA.

(g) Applicant concerns owned and controlled by a Regional Corporation or a Village Corporation as defined in 43 U.S.C. 1602 (Alaska Native Claims Settlement Act, Pub. L. 92-203, December 18, 1971) are eligible for participation in the section 8(a) program if the individuals who manage and control the concern are found to be socially and economically disadvantaged by SBA, and the Regional or Village Corporation is found to be economically disadvantaged by SBA.

## § 124.104 Control and management.

Except in the case of applicant concerns owned and controlled by an Indian tribe or a Regional Corporation or Village Corporation (see § 124.103(g)), an applicant concern's management and daily business operations must be controlled by an owner(s) of the applicant concern who has been (have been) determined to be socially and economically disadvantaged, and such owner(s) must own a greater percentage of the business entity than any nondisadvantaged owner, or in the case of a corporation, more voting stock than any nondisadvantaged stockholder.

(a) Individuals who are not socially and economically disadvantaged may be involved in the management of an applicant concern, and may be stockholders, officers, directors, or employees of such concern. However, such individuals shall not exercise actual control or have the power to control the operations of the applicant or section 8(a) business concern. The existence of control or the power to control shall be determined by the facts of each case.

(b) An applicant concern must be managed on a full-time basis by one or more persons who have been found by SBA to be socially and economically disadvantaged, and such person(s) must possess requisite management capabilities as determined by SBA. This precludes outside employment or other business interests by the individual which conflict with the management of the firm or prevent it from achieving the objectives of its business

development plan. Any disadvantaged person upon whom section 8(a) eligibility is based, who is engaged in the management and daily business operations of the section 8(a) concern and who wishes to engage in regular outside employment must notify SBA of the nature and anticipated duration of the outside employment prior to engaging in such employment. SBA will review such notification for compliance with the requirement of day-to-day management and control of the 8(a) concern.

## § 124.105 Social disadvantage.

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because their identity as a member of a group without regard to their individual qualities. The social disadvantage of individuals must stem from circumstances beyond their control.

(b) *Members of designated groups.* In the absence of evidence to the contrary, the following individuals are considered socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, or Taiwan); Subcontinent Asian Americans; and members of other groups designated from time to time by SBA according to procedures set forth at § 124.105(d) of this part.

(c) *Individuals not members of designated groups.* (1) Individuals who are not members of the above-named groups must establish their social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(i) The individual's social disadvantage must stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause not common to small business

persons who are not socially disadvantaged.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant.

(v) The individual's social disadvantage must have negatively impacted on his or her entry into, and/or advancement in, the business world. SBA will entertain any relevant evidence in assessing this element of an applicant's case. SBA will particularly consider and place emphasis on the following experiences of the individual, where relevant: education, employment, and business history.

(A) *Education.* SBA shall consider, as evidence of an individual's social disadvantage, denial of equal access to business or professional schools; denial of equal access to curricula; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(B) *Employment.* SBA shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into non-professional or non-business fields; and other similar factors.

(C) *Business history.* SBA shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt

(award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.

(d) *Minority group inclusion—(1) General.* Upon an adequate showing to SBA by representatives of a minority group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a minority group not specifically named in section 201 of Pub. L. 95-507 to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the section 8(a) program. The notice shall adequately identify the minority group making the request; and if a hearing is requested on the matter, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AAMSB-COD.

(2) *Standards to be applied.* In determining whether a minority group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:

(i) If the group has suffered the effects of discriminatory practices or similar invidious circumstances over which its members have no control.

(ii) If the group has generally suffered from prejudice or bias.

(iii) If such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95-507, and

(iv) If such conditions have produced impediments in the business world for members of the group over which they have no control which are not common to all small business people.

If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish a notice under this regulation.

(3) *Procedure.* Once a notice is published under this regulation, SBA shall

ward and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded individual's business development.

**d) Minority group inclusion—(1) General.** Upon an adequate showing to A by representatives of a minority group that the group has suffered from chronic racial or ethnic prejudice or cultural bias, and upon the request of representatives of the group that A do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a minority group not specifically named in section 201 of Pub. L. 95-507 to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the section 8(a) program. The notice shall adequately identify the minority group making the request, and if a hearing is requested on the matter, the time, date and location at which such hearing is to be held. All information submitted in support of a request should be addressed to the AAMSB-COD.

**Standards to be applied.** In determining whether a minority group has an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine

If the group has suffered the effect of discriminatory practices or other invidious circumstances over which its members have no control,

If the group has generally suffered from prejudice or bias,

If such conditions have resulted in economic deprivation for the group of a type which Congress has found to be the groups named in Pub. L. 95-507, and

If such conditions have produced significant impediments in the business world for members of the group over which they have no control which are not common to all small business people.

When demonstrated to SBA by a particular group that it satisfies the criteria, SBA will publish a notice under this regulation.

**Procedure.** Once a notice is published under this regulation, SBA shall

adduce further information on the record of the proceeding which tends to support or refute the group's request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in written form, or orally at such hearings as SBA may hold on the matter.

**(4) Decision.** Once SBA has published a notice under this regulation, it shall afford a reasonable comment period of not more than thirty (30) days for public comment upon a request. It shall complete the reception of comments, including the holding of hearings within such comment period. Thereafter, SBA shall consider the comments received as expeditiously as possible, and shall render its final decision within 30 days of the close of receipt of information on the matter. Such decision shall take the form of a notice in the FEDERAL REGISTER, and SBA shall also inform the subject group representatives who have appeared in the proceeding of such decision in writing at the time it is made.

#### § 124.106 Economic disadvantage.

**(a) General.** For purposes of the section 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged.

**(b) Factors to be considered.** In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the applicant concern with which he or she is affiliated. Factors to be analyzed depend upon the particular industry in which the applicant concern is involved. Such factors may include, but are not limited to, the following:

**(1) Personal financial condition of the disadvantaged individual.** This criterion is designed to assess the relative degree of economic disadvantage of the individual in comparison to

other individuals, as well as the potential to capitalize or otherwise provide financial support to the business. The specific factors considered are: personal income for at least the past two years; total fair market value of all assets (except that the equity value of the individual's primary residence will be considered); and the net worth of all holdings of the individual.

**(2) Business financial condition.** This criterion is designed to evaluate liquidity, leverage, operating efficiency and profitability of the applicant concern using commonly accepted financial ratios and percentages. This evaluation will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same business area who are not socially disadvantaged. These factors are considered as indicators of a firm's economic disadvantage relative to businesses owned by non-socially disadvantaged individuals. Factors to be considered are business assets, net worth, income and profit. Also, factors to be compared include, but are not limited to: Current ratios, quick ratios, inventory turnover; accounts receivable turnover; sales to working capital; returns on assets; debt to net worth ratio; percentage return on investment; percentage gross profit margin; and percentage return on sales.

**(3) Access to credit and capital.** This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. The factors to be considered are: Access to long-term financing; access to working capital financing; equipment trade credit; access to raw materials and/or supplier trade credit; bonding capability.

**(4) Additional considerations.** A comparison will be made of the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business and competitive market area. It is not the intent of the section 8(a) program to allow program participation to concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, have unlimited growth potential and have

§ 124.107

not experienced or have overcome impediments to obtaining access to financing, markets and resources.

§ 124.107 Potential for success.

To be eligible to participate in the section 8(a) program, an otherwise eligible applicant concern must be determined to be one that with contract, financial, technical and management support will be able to successfully perform subcontracts awarded under the section 8(a) program, and further, with such support, will have a reasonable prospect for success in competition in the private sector within the maximum amount of time that a concern may be in the section 8(a) program (up to seven years). In addition, the AA/MSB-COD must make a determination that the procurement, financial, technical and management support necessary to enable the applicant concern to successfully complete the section 8(a) program is available from SBA or other identified and acceptable sources before the applicant concern may be admitted to the section 8(a) program.

§ 124.108 Additional eligibility requirements.

(a) *Individual character review.* If, during the processing of an application, adverse information is obtained from the section 8(a) program application or a credible source regarding criminal conduct by an individual applicant, no further action will be taken on the application until the adverse information has been forwarded through appropriate channels to the SBA's Inspector General for evaluation and that evaluation has been completed. The Inspector General will advise the AA/MSB-COD of his or her findings and the AA/MSB-COD will consider those findings as part of the process of evaluation of a particular application.

(b) *Standard of conduct.* The SBA Standards of Conduct regulations, 13 CFR 105, *et seq.*, apply to eligibility questions involving SBA employees and their relatives.

(c) *Individual eligibility limitations.* An individual's or business concern's eligibility may be used only once in

13 CFR Ch. I (1-1-87 Edition)

qualifying for section 8(a) program participation.

(1) The AA/MSB-COD may reinstate a former section 8(a) program participant if:

(i) The section 8(a) concern has totally ceased its business operations; and

(ii) The section 8(a) concern voluntarily withdrew from the section 8(a) program due to—

(A) The health of a disadvantaged owner;

(B) Acts of God which destroyed or severely disrupted the operation of such concern; or

(C) Such other circumstances beyond the control of the section 8(a) concern which inequitably interrupted the continued participation of the concern in the section 8(a) program.

(2) Where a section 8(a) concern is reinstated pursuant to paragraph (c)(1) of this section, it will continue in the section 8(a) program for that amount of time which remained in its Fixed Program Participation Term at the time it withdrew from the program. A new Fixed Program Participation Term shall not be established for such concern.

(d) *Manufacturers and regular dealers.* Each applicant concern which intends to manufacture or furnish materials, supplies, articles and equipment in the performance of section 8(a) subcontracts must be determined to be a manufacturer or regular dealer as defined in the Walsh-Healey Public Contracts Act Regulations found at 48 CFR Subpart 22.6.

§ 124.109 Ineligible businesses.

(a) *Brokers and Packagers.* Brokers and packagers are ineligible to participate in the section 8(a) program. These types of businesses do not satisfy the definition of a manufacturer or regular dealer, as stated in § 124.100 of this part.

(b) *Debarred or Suspended Person or Concern.* Individuals or concerns who are debarred, suspended, or are found to be an ineligible bidder by any contracting agency of the Federal Government pursuant to 48 CFR Chapter I, Subpart 9.4 are ineligible for admission into the section 8(a) program

qualifying for section 8(a) program participation.

(1) The AA/MSB-COD may reinstate a former section 8(a) program participant if:

(i) The section 8(a) concern has totally ceased its business operations;

(ii) The section 8(a) concern voluntarily withdrew from the section 8(a) program due to—

(A) The health of a disadvantaged enterprise;

(B) Acts of God which destroyed or severely disrupted the operation of the concern; or

(C) Such other circumstances and the control of the section 8(a) concern which inequitably interrupted continued participation of the concern in the section 8(a) program.

Where a section 8(a) concern is reinstated pursuant to paragraph (1) of this section, it will continue in the section 8(a) program for that amount of time which remained in its Fixed Program Participation Term at the time it withdrew from the program. A new Fixed Program Participation Term shall not be established for the concern.

*Manufacturers and regular dealers.* Each applicant concern which intends to manufacture or furnish materials, supplies, articles and equipment for performance of section 8(a) subcontract must be determined to be a manufacturer or regular dealer as defined in the Walsh-Healey Public Contract Act Regulations found at 48 CFR Subpart 22.6.

**9 Ineligible businesses.**

*Brokers and Packagers.* Brokers and packagers are ineligible to participate in the section 8(a) program. Types of businesses do not satisfy the definition of a manufacturer or dealer, as stated in § 124.100 of this part.

*Debarred or Suspended Person or Concern.* Individuals or concerns who are debarred, suspended, or are found to be ineligible bidder by any contract awarding agency of the Federal Government pursuant to 48 CFR Chapter 1, Part 9.4 are ineligible for admission to the section 8(a) program

**Small Business Administration**

during the period of debarment, suspension, or status as an ineligible bidder. Prior to approval of any applicant concern, the applicant concern will certify that the applicant concern and the disadvantaged individual(s) upon whom eligibility is based is not at that time debarred, suspended or otherwise an ineligible bidder.

**§ 124.110 Fixed program participation term.**

(a) Every section 8(a) program participant is subject to a Fixed Program Participation Term. A Fixed Program Participation Term and any extension thereof establishes the ultimate time period during which a concern may remain in the section 8(a) program and the conditions of participation, regardless of whether competitiveness is reached by the concern.

(b) The Fixed Program Participation Term must be negotiated between SBA and each small concern which has applied for participation in the program and must be established by mutual agreement prior to the concern's admission to the program.

(c) The provisions of the Fixed Program Participation Term, including the time limitation thereof, will be set forth in the SBA approved business plan of the section 8(a) concern which must be established prior to the applicant concern's admission to the program.

(d) For concerns applying for entry into the program, the Fixed Program Participation Term will begin on the date of award of the concern's first section 8(a) subcontract.

(e) The maximum Fixed Program Participation Term for any concern is five years.

(f) Not less than one year prior to the expiration of the Fixed Program Participation Term, a concern may request SBA to review and extend its Fixed Program Participation Term for a period not to exceed the difference between the Fixed Program Participation Term established in the business plan and the maximum Fixed Program Participation Term of five years, plus two years. For business concerns which have a Fixed Program Participation Term of one year, a request for extension shall be deemed to be timely

if postmarked no later than 10 days subsequent to the receipt by the concern of notification of award of the concern's first section 8(a) subcontract. There may be no further extensions.

(g) The criteria which SBA will use in negotiating a Fixed Program Participation Term or in considering a request for an extension thereof are as follows:

(1) The factors referenced in § 124.106 of these regulations for determining economic disadvantage.

(2)(i) The number and dollar amount, and the progressively decreasing importance, of section 8(a) contract support that it is anticipated will be necessary to achieve competitiveness. In order to maximize limited program resources, SBA will emphasize business plans anticipating lesser amounts of section 8(a) contract support to reach competitiveness.

(ii) In considering whether to grant an extension of a Fixed Program Participation Term, the section 8(a) contract support previously received by the concern will be a factor. An SBA determination that such previous contract support has failed to appreciably contribute toward a timely achievement of competitiveness will be a significant factor in consideration of the request for extension.

(3)(i) The number and dollar amount and the progressively increasing importance of contract support, other than section 8(a) contract support, that it is anticipated will be necessary to achieve competitiveness. SBA will emphasize business plans having greater reliance on this non-section 8(a) contract support to reach competitiveness.

(ii) In considering a Fixed Program Participation Term extension request, the non-section 8(a) contract support previously received by the firm will be a factor. An SBA determination that the concern has failed to progressively increase the importance of such non-section 8(a) contract support during its previous participation in the program will be a significant factor in SBA's consideration of the request for extension.

(4)(i) The length of time that it is anticipated will be necessary to



§ 124.110

13 CFR Ch. I (1-1-87 Edition)

achieve competitiveness. In order to maximize limited program resources, SBA will emphasize program participation for those concerns closer to achieving competitiveness.

(i) In considering requests for Fixed Program Participation Term extensions, the length of time during which the concern has previously participated in the program will be a factor.

(5)(i) The degree to which it is anticipated that Advance Payments and Business Development Expense will be necessary to enable a concern to successfully complete section 8(a) contracts and the extent to which reliance upon such proceeds will progressively decrease in importance. In order to maximize limited SBA resources and to increase exposure to regular competitive procedures, SBA will emphasize maximum use of conventional governmental and private resources in performing such contracts.

(ii) In considering requests for a Fixed Program Participation Term extension, the previous Advance Payments and Business Development Expense already received by the concern will be a factor. An SBA determination that such Advance Payments and Business Development Expense support has failed to progressively decrease in importance during the concern's previous participation in the program will be a factor toward limiting or denying extension of the Fixed Program Participation Term and the conditions thereof.

(6)(i) The rate at which it is anticipated that a concern will decrease its reliance upon all forms of program support, especially section 8(a) contracts support, in reaching competitiveness at the end of the Fixed Program Participation Term.

(ii) In considering Fixed Program Participation Term extensions, a factor will be the previous rate at which the concern has decreased its reliance upon program support and correspondingly increased its reliance upon conventional governmental and private contract business. An SBA determination that the concern has failed to appreciably improve its rate of business reliance in this manner will be a factor toward limiting or denying the Fixed Program Participa-

tion Term extension and the conditions thereof.

(h) No section 8(a) contracts may be awarded to any section 8(a) concern unless it has received and is operating under an SBA approved Fixed Program Participation Term.

(i) Nothing in this section shall be construed to limit SBA from initiating termination, completion or suspension actions, pursuant to §§ 124.111, 124.110(k), or 124.113, respectively, during any Fixed Program Participation Term granted hereunder.

(j) Upon the conclusion of its Fixed Program Participation Term, including any extension thereof, a concern will cease to be a program participant. This cessation of program participation will occur without the necessity of any additional action by SBA. It will not give rise to any rights, claim or prerogatives on behalf of the concern. Cessation of program participation at the conclusion of the Fixed Program Participation Term is not subject to the requirements of section 8(a)(9) of the Small Business Act (1 U.S.C. 637(a)(9)), or any of SBA's implementing rules and regulations.

(k) *Program completion.* (1) When section 8(a) business concern has substantially achieved the goals and objectives set forth in its business plan prior to the expiration of its Fixed Program Participation Term, and has demonstrated the ability to compete in the marketplace without assistance under the section 8(a) program, its participation within the program shall be determined by SBA to be completed.

(2) In determining whether a concern has substantially achieved the goals and objectives of its business plan and has attained the ability to compete in the marketplace without section 8(a) program assistance, the following factors, among others, shall be considered by SBA.

(i) Positive overall financial trends, including but not limited to:

- (A) Profitability;
- (B) Sales, including improved ratio of non-section 8(a) sales;
- (C) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
- (D) Ability to obtain bonding;

Term extension and the conditions thereof.

(1) No section 8(a) contracts may be awarded to any section 8(a) concern unless it has received and is operating under an SBA approved Fixed Program Participation Term.

Nothing in this section shall be construed to limit SBA from initiating termination, completion or suspension actions, pursuant to §§ 124.112, 124.110(k), or 124.113, respectively, regarding any Fixed Program Participation Term granted hereunder.

Upon the conclusion of its Fixed Program Participation Term, including any extension thereof, a concern shall cease to be a program participant. Cessation of program participation will occur without the necessity of any additional action by SBA. It shall not give rise to any rights, claims or prerogatives on behalf of the concern. Cessation of program participation at the conclusion of the Fixed Program Participation Term is not subject to the requirements of section 8(a) of the Small Business Act (15 U.S.C. 637(a)(9)), or any of SBA's implementing rules and regulations.

**Program completion.** (1) When a section 8(a) business concern has substantially achieved the goals and objectives set forth in its business plan at the expiration of its Fixed Program Participation Term, and has demonstrated the ability to compete in the marketplace without assistance from the section 8(a) program, its participation within the program shall be determined by SBA to be completed.

determining whether a concern has substantially achieved the goals and objectives of its business plan and has attained the ability to compete in the marketplace without assistance from the section 8(a) program, the following factors, among others, shall be considered by SBA:

- (a) Positive overall financial trends, but not limited to:
  - (1) Profitability;
  - (2) Sales, including improved ratios;
  - (3) Section 8(a) sales;
  - (4) Net worth, financial ratios, workability;
  - (5) Access to capital, capitalization, access to capital;
  - (6) Ability to obtain bonding;

Small Business Administration

(E) A positive comparison of the section 8(a) business concern's business and financial profile with profiles of non-section 8(a) businesses in the same area or similar business category; and

(F) Good management capacity and capability.

(3) Upon determination by SBA that a section 8(a) business concern's participation in the section 8(a) program has been completed pursuant to paragraph (k)(1) of this section, SBA shall so advise the firm and shall issue it an order to show cause why its participation in the section 8(a) program should not be deemed to be completed. The section 8(a) business concern shall be afforded an opportunity for a hearing on the record in accordance with chapter 5 of Title 5 of the United States Code, at which hearing it may contest such determination. Such a hearing will be held pursuant to the procedures of SBA's Office of Hearings and Appeals set forth at Part 134 of these regulations.

(4) Subsequent to the completion of such hearing, based upon the record established therein, and after consideration of the initial decision of the Administrative Law Judge who has conducted the hearing, the AA/MSB-COD shall render a final decision regarding the completion of the section 8(a) business concern's participation in the program. Prior to a final decision, the subject section 8(a) business concern may have full rights of participation in the section 8(a) program.

§ 124.111 Mechanics for extension of a fixed program participation term.

As stated in § 124.110(f), a section 8(a) concern's Fixed Program Participation Term (FPPT) may be extended only once, and only if the application for such an extension is made not less than one year prior to the expiration of the firm's original Fixed Program Participation Term.

(a) *The request.* The section 8(a) concern must make a request for extension in writing by certified mail, return receipt requested, or by registered mail, to the SBA field office servicing its account, not less than one year prior to the expiration of the

FPPT, specifically requesting an extension of its FPPT.

(b) *SBA response.* Upon receipt of a timely request, the appropriate SBA field office will forward to the section 8(a) concern all forms needed to process the request. All required forms must be completed and returned to SBA within 45 days of receipt along with a persuasive narrative rationale to establish the basis for justifying the requested extension.

(c) *Narrative rationale.* The narrative rationale submitted by the section 8(a) concern must detail the following:

- (1) The firm's progress since admission into the 8(a) program;
- (2) Areas where the firm has failed to make progress anticipated when the original FPPT was set;
- (3) Reasons for lack of progress;
- (4) Benefits to be derived from an extension, other than increase in contract support;
- (5) Any extenuating circumstances unique to the firm which cause an extension to be necessary and appropriate;
- (6) Any other facts which the firm believes support its request.

(d) *Non waiver of time limits.* Neither the requirement of § 124.110(f) to make a request for an extension of a concern's FPPT not less than one year prior to the expiration of a concern's original FPPT, nor the requirement of § 124.111(b) to return all forms and documentation completed along with the supporting narrative within 45 days may be waived. Failure to meet either time limit will result in denial of an extension of an FPPT.

(e) *Approval authority.* Unless otherwise delegated by the Administrator, the AA/MSB-COD has final authority to approve the concern's request for an extension, and may in his discretion approve an extension less than that requested, set terms and conditions for any extension granted, or deny any extension. The concern will be advised in writing of the Agency's final decision.

§ 124.112 Program termination.

(a) Participation of a section 8(a) business concern in the section 8(a) program may be terminated by SBA

prior to the expiration of the concern's fixed program participation term or extension thereof, if any, for good cause. The term good cause as used in the regulation means conduct violative of applicable State and Federal law or regulations or the pursuit of business practices detrimental to business development of an 8(a) concern. Examples of good cause include, but are not limited to, the following:

- (1) Failure to continue to meet any one of the standards of program eligibility set forth in these regulations.
- (2) Failure by the concern to maintain status as a small business under the Small Business Act, as amended, and the regulations promulgated thereunder for each of the Standard Industrial Code designations contained in the participating concern's business plan.
- (3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership and control by the persons(s) who has (have) been determined to be socially and economically disadvantaged pursuant to these regulations.
- (4) Failure by the concern to obtain written approval from SBA prior to any changes in ownership and management control.
- (5) Failure by the concern to disclose to SBA the extent to which nondisadvantaged persons or firms participate in the management of the section 8(a) business concern.
- (6) Failure by the concern to provide SBA with required quarterly or annual financial statements within ninety days of the close of the reporting period, or required audited financial statements within 180 days of the close of the reporting period. Failure to provide SBA with requested tax returns, reports, or other available data within 30 days of the date of request.
- (7) Failure by the concern to submit an updated business plan within 30 days of receipt of request, without an extension of time which has been approved by SBA.
- (8) Failure by the concern to provide documents or otherwise respond to requests for information relating to the section 8(a) program from SBA or other authorized government officials.

(9) Cessation of business operations by the concern.

(10) Failure by the concern to achieve the goals cited in its original or modified business plan as a result of repeated refusals to accept or utilize SBA assistance.

(11) Failure by the concern to pursue competitive and commercial business in accordance with the business plan, or failure to make reasonable efforts to achieve competitive status.

(12) Inadequate performance of awarded section 8(a) procurement subcontracts by the concern.

(13) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(14) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters.

(15) Diversion of funds from the section 8(a) business concern to any other individual, subsidiary, firm, or enterprise which is detrimental to the achievement of the section 8(a) business concern's business plan.

(16) Unauthorized use of business development expense funds and/or advance payment funds. Violation of an advance payment or business development expense agreement.

(17) Failure by the concern to obtain prior SBA approval of any management agreement or joint venture agreement relative to the performance of a section 8(a) subcontract. Violation of any requirements of a management or joint venture agreement approved by SBA by either the section 8(a) concern or one of the joint venturers.

(18) Failure by the concern to obtain approval from SBA before subcontracting under a section 8(a) subcontract, or failure by the concern to abide by any conditions imposed by SBA upon such approval.

(19) Violation by the concern of a section 8(a) subcontract provision which prohibits contingent fees and gratuities; or failure to disclose to SBA fees paid or to be paid, or costs incurred or committed to third parties, directly or indirectly, in the process of obtaining section 8(a) contracts or subcontracts.

(20) Knowing submission of false information to SBA on behalf of a sec-

ation of business operations concern.

Failure by the concern to achieve the goals cited in its original business plan as a result of refusals to accept or utilize assistance.

Failure by the concern to be competitive and commercial in accordance with the business plan or failure to make reasonable efforts to achieve competitive

adequate performance of section 8(a) procurement contracts by the concern.

Failure by the concern to pay or incur significant financial obligations to the Federal Government.

Failure by the concern to obtain current and all required licenses, and charters.

Diversion of funds from the section 8(a) business concern to any other subsidiary, firm, or enterprise which is detrimental to the success of the section 8(a) business plan.

Unauthorized use of business expense funds and/or advance funds. Violation of a management or business development agreement.

Failure by the concern to obtain approval of any management agreement or joint venture agreement relative to the performance of a section 8(a) subcontract. Violation of the terms and conditions of a management agreement approved by the section 8(a) concern or the joint venturers.

Failure by the concern to obtain approval from SBA before subcontracting a section 8(a) subcontract.

Failure by the concern to obtain approval by the concern to subcontract provision of contingent fees and failure to disclose to SBA the amount to be paid, or costs incurred, or to be paid, or costs incurred, directly, in the process of performing section 8(a) contracts or sub-

Contracting submission of false information to SBA on behalf of a sec-

tion 8(a) business concern by its principals, officers, or agents, or by its employees, where the principal(s) of the section 8(a) concern knows or should have known such submission to be false.

(21) Debarment or suspension of the concern by the Comptroller General, the Secretary of Labor, Director of the Office of Federal Contract Compliance, or any contracting agency pursuant to FAR subpart 9.4, 48 CFR Ch. 1.

(22) Conviction of a section 8(a) business concern or a principal of a section 8(a) business concern for any of the following:

(i) Commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract, thereunder, or in the performance of such contract or subcontract;

(ii) Violation of the Organized Crime Control Act of 1970;

(iii) Embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility as a government contractor;

(iv) Violation of any Federal Antitrust Statute; or

(v) Commission of any felony not specifically listed above by the concern or any of its principals.

(23) Willful failure on behalf of a section 8(a) business concern to comply with applicable labor standards obligations.

(24) Violation of any terms and conditions of the 8(a) program Participation Agreement.

(25) Violation by a section 8(a) business concern, or any of its principals, of any of SBA's significant rules and regulations.

(b) Upon determination by the SBA that a section 8(a) business concern's participation in the section 8(a) program should be terminated for good cause, the section 8(a) business concern shall be afforded an opportunity for a hearing on the record in accordance with chapter 5 of Title 5 of the United States Code, at which hearing it may contest such determination. Such a hearing will be held pursuant

to the procedures established for SBA's Office of Hearings and Appeals set forth at Part 134 of this title.

(c) Subsequent to the completion of such hearing, upon the record established therein, and after consideration of the initial decision of the Administrative Law Judge who has conducted the hearing, pursuant to §§ 134.32 and 134.34 of these regulations, the AA/MSB-COD shall render a final decision regarding the termination, for good cause, of the 8(a) business concern's participation in the program.

(d) After the effective date of a program termination as provided for herein, a section 8(a) business concern is no longer eligible to receive any section 8(a) program assistance. Such concern is obligated to complete previously awarded section 8(a) subcontracts.

§ 124.113 Suspension of program assistance.

(a) Only upon the issuance of an order to show cause why a section 8(a) business concern should not be terminated from the program, the Administrator of SBA or the AA/MSB-COD may suspend contract support and other forms of 8(a) program assistance to that concern for a period of time not to exceed the time necessary to resolve the issue of the concern's termination from the program under the procedures set forth in Part 134 of these regulations. The institution of such a suspension will not occur in conjunction with each proposed termination, but will only occur when the SBA Administrator or AA/MSB-COD determines that the Government's interests are jeopardized by continuing to make assistance available to a section 8(a) business concern and immediate action to protect those interests is necessary.

(b) Immediately upon SBA's determination to suspend a section 8(a) concern, SBA will furnish that concern with a notice of the suspension by certified mail, return receipt requested, to the last known address of the concern. If no receipt is returned within ten calendar days from the mailing of the notice, notice will be presumed to have occurred as of that time. The

§ 124.201

13 CFR Ch. I (1-1-87 Edition)

notice of suspension will provide the following information:

(1) The reason for the suspension which will be the grounds upon which the order to show cause has been issued;

(2) That the suspension will continue pending the completion of further investigation or the termination proceeding or some other specified period of time;

(3) That awards of section 8(a) subcontracts, including those which have been "self-marketed" by an 8(a) concern, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or his or her authorized representative to be in the best interest of the Government to do so, and the SBA Administrator or the AA/MSB-COD adopts that determination;

(4) That the concern is obligated to complete previously awarded section 8(a) subcontracts;

(5) That the suspension is effective nationally throughout the SBA;

(6) That a request for a hearing on the suspension will be considered by the Administrative Law Judge hearing the termination proceeding and granted or denied as a matter of his or her discretion. It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the participant requests one. However, no such hearing may be granted if the suspension is based upon advice from either the Department of Justice or the Department of Labor that such a hearing would prejudice substantial interests of the Government. A hearing on the suspension will commence as soon as possible following the decision of the Administrative Law Judge to grant a request; but in no case more than 20 calendar days after the Administrative Law Judge's ruling if the request is granted. At the close of such suspension hearing, the Administrative Law Judge will make a recommended decision on the matter to the AA/MSB-COD who will then issue a final decision upholding or lifting the suspension.

(c) Any suspension which occurs in accord with these regulations will continue in effect until such time as the

SBA lifts it or the section 8(a) business concern's participation in the program is fully terminated. If all program assistance to a section 8(a) business concern has been suspended under these regulations, and that concern's participation in the program is not terminated, an amount of time equal to the duration of the suspension will be added to the concern's fixed program participation term.

§ 124.201 Processing applications.

It is SBA's policy that an individual or business has the right to apply for section 8(a) assistance, whether or not there is an appearance of eligibility.

§ 124.202 Place of filing.

An application for admission is to be filed, and approved cases are to be serviced in the SBA field office serving the territory in which the principal place of business of the applicant concern is located. Principal place of business means the location at which the business records of the applicant concern are maintained.

§ 124.203 Applicant representatives.

An applicant concern may employ at its option outside representatives in connection with an application for section 8(a) program participation. If the applicant chooses to employ outside representation such as an attorney, accountant, or others, the requirements of 13 CFR 103 dealing with the appearance and compensation of persons appearing before SBA are applicable to the conduct of the representative.

§ 124.204 Requirement support determination.

SBA shall first make a determination that there is a reasonable likelihood of section 8(a) requirements available to support the applicant concern. If the necessary requirement support is not available, the applicant concern shall be informed in writing that no further action can be taken on its application for participation in the section 8(a) program. If the necessary requirements support is determined to be available, the applicant concern may continue to submit the required application forms.

its it or the section 8(a) business concern's participation in the program is terminated. If all program assistance to a section 8(a) business concern has been suspended under these provisions, and that concern's participation in the program is not terminated, the amount of time equal to the duration of the suspension will be added to the concern's fixed program participation term.

**1 Processing applications.**

SBA's policy that an individual business has the right to apply for section 8(a) assistance, whether or not an appearance of eligibility.

**Place of filing.**

An application for admission is to be filed in approved cases are to be filed in the SBA field office serving the territory in which the principal business of the applicant concerned. Principal place of business is the location at which the records of the applicant are maintained.

**Applicant representatives.**

An applicant concern may employ at least one outside representative in connection with an application for section 8(a) program participation. If the applicant chooses to employ outside assistance such as an attorney, accountant, or others, the requirements of FAR 103 dealing with the appearance and compensation of persons before SBA are applicable to the conduct of the representative.

**Requirement support determination.**

All applicants must first make a determination as to whether there is a reasonable likelihood that the section 8(a) requirements to support the applicant concern can be met. If the necessary requirement is not available, the applicant shall be informed in writing whether further action can be taken on the application for participation in the section 8(a) program. If the necessary requirements support is determined to be insufficient, the applicant concern must continue to submit the required forms.

**Small Business Administration**

**§ 124.301**

**§ 124.205 Forms and documents required.**

Each section 8(a) applicant concern must submit the forms and attachments thereto required by SBA when making application for admission to the section 8(a) program including but not limited to financial statements and Federal personal and business tax returns.

**§ 124.206 Approval and declination of applications for eligibility.**

The AA/MSB-COD has final authority over approval or declination of applications for admission to the section 8(a) program. If the AA/MSB-COD declines an application, he or she will notify the applicant in writing giving detailed reasons for the decline and informing the applicant of the right to request a reconsideration within 30 days of receipt of the decline letter. The AA/MSB-COD will also inform the applicant to submit in writing to the field office any subsequent information and documentation pertinent to rebutting the reason(s) for decline. If the application is declined by the AA/MSB-COD on reconsideration, no new application will be accepted within one year of the reconsideration decision.

**§ 124.207 Business activity.**

(a) Eligible concerns will be approved for section 8(a) program participation according to their primary industry classification, as defined in § 124.100 of this part. The primary industry classification relevant to a given concern and related Standard Industrial Classification Code designations will be stated in a participating concern's business plan upon the concern's entry into the section 8(a) program and will be subject to change thereafter only if a condition of subsection (b) is met. A participating section 8(a) business concern will be eligible to receive only Government contracts pursuant to the section 8(a) program which are classified under the Standard Industrial Classification Codes stated in its business plan. (See definition of "business plan," § 124.100(a).) A participating section 8(a) business concern may, however, receive Government contracts classified in other Standard Industrial Clas-

sification Codes through other Government procurement procedures. As section 8(a) concerns develop, it is essential that they pursue commercial and competitive Government contracts to supplement section 8(a) sales and to achieve logical business progression or diversification.

(b) Requests for changes in Standard Industrial Classification Code designations stated in a business plan will be considered by the relevant SBA Regional Administrator only under the circumstances indicated below.

(1) Such Regional Administrator may approve an amendment to the Standard Industrial Classification Code designations in a section 8(a) concern's business plan if:

(i) The new Standard Industrial Classification Code designation relates to a unique procedure or product that the section 8(a) concern has developed; or

(ii) SBA determines that an additional Standard Industrial Classification Code designation is needed to correct significant limitations in section 8(a) contract support which result from administrative or regulatory actions by a contracting agency, which are beyond the control of the section 8(a) concern, and which were not contemplated by the original business plan.

(2) The Administrator or his designee may approve an amendment to the Standard Industrial Classification Code designations in a section 8(a) concern's business plan if the Administrator or his designee determines that absent a Standard Industrial Classification Code designation change, the section 8(a) concern would be unable to achieve reasonable section 8(a) development.

**§ 124.301 The provision of requirements support for 8(a) firms.**

(a) These regulations govern the mechanics of the provision of requirements (contract) support to section 8(a) business concerns. They are to be read in conjunction with § 124.302 below.

(b) Basic Principles of Requirements Support.

§ 124.301

13 CFR Ch. I (1-1-87 Edition)

(1) An 8(a) subcontract will be provided to a section 8(a) concern only when consistent with that concern's business development needs.

(2) An 8(a) concern will be provided a section 8(a) contract only when the procurement is consistent with the concern's capabilities as identified in its business plan by means of Standard Industrial Classification (SIC) codes.

(3) The aggregate dollar amount of 8(a) contracts to an 8(a) concern for any Federal fiscal year may not exceed by more than 25 percent the applicable annual 8(a) contract support level approved by SBA as reflected in the concern's business plan. This shall not preclude an 8(a) concern from requesting an increase in its approved 8(a) contract support level on other than an annual basis. Such request must be supported by a revised business plan and evidence that the firm has the capability to perform at the increased level.

(4) SBA does not guarantee any particular level of contract support to a section 8(a) business concern by the approval of its business plan.

(5) SBA is not required to make an award of any particular contract, and should it make an award, SBA is not required to award a contract to a particular 8(a) concern. Nonetheless, SBA will usually reserve a procurement for possible 8(a) award in favor of an 8(a) concern which initially self-marketed the procurement, provided the firm needs the requirement to satisfy its business plan projections without exceeding them.

(6) In cases in which SBA must select an 8(a) concern for possible award from among more than one concern which appear to be qualified to perform the contract, the selection will be based upon consideration of relevant factors, including the following:

(i) Technical capability, including the ability to perform the contract, the concern's organizational structure, the experience and technical knowledge of its key employees, and technical equipment and facilities.

(ii) Financial capacity, including the availability of adequate

(iii) Ability to comply with the required delivery or performance schedules.

(iv) Ability to obtain any necessary bonding.

(v) Any applicable geographic limitations.

(vi) The concern's need for the specific contract to further the development objectives of the concern's business plan, in light of any other potential contracts under consideration.

(vii) The overall likelihood of successful performance of the proposed requirement.

(viii) Past amount of 8(a) contract support received by the concern and the performance record on past 8(a) contracts.

(ix) Current contracts in process, and progress toward timely delivery of those contracts.

(x) Length of time in the 8(a) program and the proximity of the FPPT date. (xi) Amount of BDE and advance payment support received since entering the 8(a) program and required to perform the present requirement. (xii) Which 8(a) concern initially identified the procurement, if any.

(7) In cases in which SBA must select an 8(a) concern for possible award of a professional service contract (except CPA audit services) SBA may, in its discretion, arrange for the evaluation of technical capabilities of several concerns, which appear to be most qualified, by the procuring agency itself. In such cases, SBA will request a written report of the evaluation including the criteria used, the results found, and an overall evaluation of each concern as technically or not technically acceptable for their particular procurement. SBA will make the final selection.

(8) SBA will not accept for 8(a) award proposed procurements not previously in the section 8(a) program if any of the following circumstances exist:

(i) Public solicitation has already been issued for the procurement as a small business set-aside in the form of an Invitation for Bid (IFB), Request for Proposal (RFP) or a Request for

13 CFR Ch. I (1-1-87 Edition)

Ability to comply with the re-delivery or performance schedule.

Ability to obtain any necessary supplies within any applicable geographic limitations.

The concern's need for the subcontract to further the development objectives of the concern's business, in light of any other potential contracts under consideration. The overall likelihood of successful performance of the proposed contract.

Past amount of 8(a) contract received by the concern and performance record on past 8(a) contracts.

Current contracts in process, progress toward timely delivery of contracts.

Amount of time in the 8(a) program, the proximity of the FPPT, (i) Amount of BDE and advance payment support received since entered into the 8(a) program and required to meet the present requirement. (xii) Whether the 8(a) concern initially identified as a procurement, if any.

In cases in which SBA must identify a possible 8(a) concern for possible award of a professional service contract (except CPA audit services) SBA, in its discretion, arrange for the review of technical capabilities of the concern, which appear to be qualified, by the procuring agency itself. In such cases, SBA will prepare a written report of the evaluation including the criteria used, the recommendation, and an overall evaluation of the concern as technically or not technically acceptable for their participation in the procurement. SBA will make its selection.

SBA will not accept for 8(a) proposed procurements not previously in the section 8(a) program if the following circumstances

Public solicitation has already been issued for the procurement as a business set-aside in the form of Invitation for Bid (IFB), Request for Proposal (RFP) or a Request for Quote (RFQ). Provision of a general set-aside, such as Procurement Information Notices (PIN's),

Small Business Administration

§ 124.301

annual procurement forecasts or past procurements by set aside, is insufficient reasons to preclude the procurement from 8(a) consideration.

(ii) The procuring agency will award the contract by noncompetitive means to a small disadvantaged concern whether or not it is presently in the 8(a) program.

(iii) There is a reasonable probability that a small disadvantaged concern, whether or not a section 8(a) concern, can successfully compete for the contract under conventional competitive procedures.

(iv) SAB has made a written determination that acceptance of the procurement for an 8(a) award would have an adverse impact on other small business programs or individual small business, whether or not the affected small business, is in the section 8(a) program.

(A) In determining whether or not an adverse impact exists, SBA will consider relevant factors, including but not limited to:

(1) Whether or not SBA's acceptance of a proposed *National* buy requirement is likely to result in SBA's taking an inordinate portion of total procurements in subject industry to the detriment of the small business set-aside program, or

(2) Whether or not SBA's acceptance of a proposed *local* buy requirement is likely to result in SBA taking an inordinate portion of total procurements, in subject industry within a given SBA region to the detriment of the small business set-aside program.

(B) SBA presumes adverse impact to exist when a small business concern has been the recipient of two or more consecutive awards of the item or service within the last 24 months, and the estimated dollar value of the award would be 25 percent or more of its most recent annual gross sales (including those of its affiliates).

(c) Procedures for Obtaining Requirements Support. (1) SBA procurement center representatives (PCR's) will screen proposed procurements for possible 8(a) contracts, in accordance with 13 CFR Part 125.6.

(2) A requirement for possible award may be identified by SBA, a particular 8(a) concern, or the procuring activity

itself. Once identified by whatever means, SBA shall verify the appropriateness of the SIC Code designation assigned to the requirement and shall select and nominate to the procuring agency an 8(a) concern for possible award. The selection will be made pursuant to these regulations and will be based on the business plan and such supplemental materials as SBA may request. If the 8(a) concern fails to provide SBA with the supplemental materials requested within any particular time specified by SBA, SBA will make its selection based solely on information contained in the concern's business plan.

(3) SBA's nomination of a section 8(a) concern to perform an identified procurement shall be communicated to the procuring activity in writing with notice to the 8(a) concern.

(4) If the procuring activity responds to SBA's nomination, or request for commitment, by making a commitment to SBA, SBA will then match the specific needs of the procurement with the specific capabilities of the selected 8(a) concern, relying upon the business plan and such supplemental or updated material as SBA in its discretion shall require. To facilitate matching, and to the extent reasonably available, SBA will obtain from the procuring activity the complete procurement package, which contains plans, specifications, delivery schedules, labor rates and so forth, along with the following:

(i) The title or name or work to be performed or items to be delivered.

(ii) The estimated period of performance.

(iii) The SIC code of the item or service.

(iv) The PSC number used by the Federal Procurement Data Center.

(v) The procuring agency dollar estimate of the requirement (current government estimate).

(vi) Any special requirement restrictions or geographical limitations.

(vii) Any special capabilities or disciplines needed for contract performance.

(viii) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials.



§ 124.302

13 CFR Ch. I (1-1-87 Edition)

(ix) A list of contractors who have performed on this specific procurement during the previous 36 months.

(x) A statement that public solicitation for the specific procurement has not been issued for small business set aside.

(xi) A statement that the procurement cannot reasonably be expected to be won by a disadvantaged concern under normal competition.

(xii) The nomination of any particular 8(a) concern designated for consideration, including a brief justification, such as one of the following:

(A) The requirement is a result of an unsolicited proposal and the buying activity is unable to justify a sole-source award.

(B) The 8(a) concern through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) program.

(C) The procuring agency has determined that the recommended concern has unusual technical qualifications to perform.

(5) Within ten working days of a commitment from a procuring activity identifying a particular 8(a) concern, SBA will determine whether a proper match exists, and will contract the procuring activity to arrange for initiation of contact negotiations. A letter accepting the commitment should normally be sent to the procuring activity at this time. Should contract negotiations be successful and result in a proposed award to the 8(a) concern, SBA will provide a Certification of SBA's Competency as a contract provision pursuant to § 124.302(c) of these regulations. Should SBA determine that a proper match does not exist, it will so advise the affected 8(a) concern, and may then select and nominate an alternative 8(a) concern to the procuring activity which, in the opinion of SBA, does match with the procurement, if any such concern exists.

(6) Should a procuring activity offer a contract to SBA as an open requirement, SBA will select and nominate in accordance with these regulations an 8(a) concern which appears to be qualified, subject to the following additional procedures:

(i) If the contract is a local buy item, the portfolio of 8(a) concerns main-

tained by the SBA district office where all or most of the work is to be performed or the items delivered will be examined initially for selection of a qualified 8(a) concern. If none are found to be qualified, the requirement may be considered for other 8(a) concerns located within the appropriate SBA region, or the requirement may be considered for 8(a) concerns located in immediately adjacent regions.

(ii) If the procurement is a national buy item, it shall be referred to SBA's Central Office. Central Office will allocate national buy requirements to the regional offices on an equitable basis, and regional offices will allocate national buy requirements to the districts on an equitable basis.

§ 124.302 8(a) Contracts and subcontracts.

(a) *General.* It is the policy of SBA to enter into contracts with other government agencies and subcontract the performance of such contract to concerns admitted to the section 8(a) program pursuant to section 8(a)(1)(C) of the Small Business Act, at prices which will enable a company to perform the contract and earn a reasonable profit.

(b) *Performance of work by the 8(a) subcontractor.* To assure the accomplishment of the purposes of the program, each 8(a) subcontractor shall be required to perform work equivalent to the following percentages of the total dollar amount of each subcontract, exclusive of material costs, with its own labor force:

(1) Manufacturing—50 percent.

(2) Construction:

(i) General Construction—15 percent.

(ii) Special Trades, Such as Electrical, Plumbing, Mechanical, etc.—25 percent.

(3) Professional Services—55 percent.

(4) Nonprofessional Services—75 percent.

The 8(a) concern is required to include in its proposal to perform a given contract a statement that it agrees to perform the required percentage of the work with its own labor force. Refusal of the concern to provide such a state-

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by the SBA district office all or most of the work is to be done or the items delivered will be used initially for selection of a section 8(a) concern. If none are so qualified, the requirement will be considered for other 8(a) concerns located within the appropriate region, or the requirement may be considered for 8(a) concerns located in immediately adjacent regions.

If the procurement is a national concern, it shall be referred to SBA's Central Office. Central Office will allocate national buy requirements to regional offices on an equitable basis and regional offices will allocate local buy requirements to the district office on an equitable basis.

**8(a) Contracts and subcontracts.** It is the policy of SBA to award contracts with other government agencies and subcontract the performance of such contract to concerns committed to the section 8(a) program pursuant to section 8(a)(1)(C) of the Small Business Act, at prices which will enable a company to perform the contract and earn a reasonable profit.

**Performance of work by the 8(a) contractor.** To assure the accomplishment of the purposes of the program, each 8(a) subcontractor shall be required to perform work equivalent to the following percentages of the total amount of each subcontract, exclusive of material costs, with its own labor force:

- Manufacturing—50 percent.
- Construction:
  - General Construction—15 percent.
  - Special Trades, Such as Electrical, Plumbing, Mechanical, etc.—25 percent.
  - Professional Services—55 percent.
  - Other Professional Services—75 percent.

When a concern is required to include its own labor force to perform a given contract, it is required to agree to perform the contract with the required percentage of its own labor force. Refusal to provide such a state-

ment will result in the contract not being awarded.

**(c) Certification of SBA's competency.** (1) SBA will not certify as to its competency, as provided by section 8(a)(1)(A) of the Small Business Act, without first determining that the section 8(a) concern it intends to subcontract to is responsible to perform the contract in question. If SBA determines that the concern lacks the capability, competency, capacity, credit, integrity, perseverance, and tenacity to perform on a specific 8(a) subcontract, the contract will not be awarded. In addition, SBA will also certify that an 8(a) concern is eligible under the Walsh-Healey Public Contracts Act, 41 U.S.C. 35(a) for each individual 8(a) subcontract. An 8(a) concern which has not submitted required financial statements to SBA will be deemed not responsible to receive 8(a) subcontracts.

(2) SBA's determination not to award an 8(a) subcontractor a specific 8(a) subcontract because the concern lacks an element of responsibility, or is ineligible under the Walsh-Healey Public Contracts Act, does not constitute a denial of total section 8(a) program participation for the purposes of section 8(a)(9) of the Small Business Act.

**(d) Contract administration.** SBA may delegate its authority to administer section 8(a) subcontracts to the procuring agency or any Federal agency designated by it. This is done through the use of special clauses in the contract between SBA and the procuring agency, or by letter, as appropriate.

**(e) Contract termination.** (1) A decision to terminate a specific section 8(a) subcontract for default is made by the procuring activity contracting officer in cooperation with SBA. The contracting officer will advise SBA in advance of his/her intent to terminate for default the 8(a) subcontract. SBA may provide whatever program benefits as are reasonably available to the 8(a) concern in order to prevent termination for default of the contract. The contracting officer will be made aware of this effort. If, despite the efforts of SBA, in the opinion of the procuring activity contracting officer grounds

for termination continue to exist, he/she may terminate the 8(a) subcontract for default.

(2) In cooperation with SBA, the procuring activity contracting officer may terminate a section 8(a) subcontract for convenience at any time it is determined in the best interest of the government to do so.

**(f) Disputes and appeals.** (1) SBA is not subject to the Disputes Clause of a specific contract, and SBA is not a party to and does not appear at or participate in appeals brought under such a clause in its own behalf or on behalf of an 8(a) concern.

(2) If a dispute between an 8(a) subcontractor and the procuring activity contracting officer arises under the subcontract, it will be decided unilaterally by the procuring activity contracting officer. The 8(a) subcontractor has the right to appeal the decision of the procuring activity contracting officer under the Contract Disputes Act of 1978.

§ 124.401 Advance payments.

**(a) General.** (1) Advance payments are disbursements of money made by SBA to a section 8(a) business concern prior to the completion of performance of a specific section 8(a) subcontract. Advance payments are made for the purposes of assisting the section 8(a) business concern in meeting financial requirements pertinent to the performance of the subcontract. The gross amount of advance payments must be determined by SBA prior to commencement of performance of the contract. Any subsequent change in the gross amount of advance payments must be justified in writing by SBA as to amount and purpose. Advance payments are to be awarded only after all other forms of financing have been considered by SBA and rejected as unacceptable to support performance of the subcontract. Advance payments must be liquidated from proceeds derived from the performance of the specific section 8(a) subcontract to which they pertain. However, this does not preclude repayment of such advance payments from other revenues of the business, except from other advance payments and business development

expenses (as defined hereinafter in these regulations); provided such repayment must occur according to the liquidation schedule established by the subcontract under which the advance payments were made. The proceeds derived from the performance of the specific section 8(a) subcontract must be deposited by the procuring agency in a special bank account established exclusively for the purpose of administering the advance payments. These proceeds will be used to liquidate the advance payments. No withdrawals of such subcontract proceeds from the special bank account may be made by the section 8(a) business concern which are inconsistent with the disbursement schedule established by the subcontract under which the advance payments were made.

(2) Advance payments shall not be made to a section 8(a) business concern in any case in which the section 8(a) business concern has assigned its rights to receive any payment under the specific section 8(a) subcontract to any person or entity, unless such assignment shall be made to SBA or to a Federal agency in regard to the receipt by the section 8(a) business concern of a progress payment for any specific section 8(a) subcontract.

(3) In no event shall the total amount of advance payments for a section 8(a) business concern exceed 90 percent of the outstanding unpaid proceeds of the section 8(a) subcontract to which the advance payments relate.

(4) SBA shall not charge interest on advance payments disbursed pursuant to these regulations.

(b) *Requirements.* (1) Advance payments may be approved for a section 8(a) business concern when all of the following conditions are found by SBA to exist:

(i) A section 8(a) business concern does not have adequate working capital to perform a specific section 8(a) contract.

(ii) Adequate and timely financing is not available on reasonable terms to provide necessary capital.

(iii) The section 8(a) business concern has established or agrees to establish and maintain financial records and controls which will provide for complete accountability and required

reporting of advance payment funds. These records must be made available upon request for review and copying by SBA and other appropriate Federal officials.

(iv) A company may receive an advance payment on a section 8(a) subcontract only in instances in which that company has no unliquidated advance payments outstanding on another section 8(a) subcontract which is completed, terminated or in default, unless such unliquidated advance payment is due *only* to the contracting agency's delay in making final payment to the section 8(a) concern which has successfully completed the subcontract.

(c) *Procedure.* To be eligible to receive advance payments, a section 8(a) business concern must meet the conditions set forth above and must comply with the following procedure.

(1) A section 8(a) business concern desiring to receive an advance payment in connection with any section 8(a) subcontract shall:

(i) Submit a written request for advance payment to the appropriate SBA Regional Administrator or his designee. Such request must include detailed documentation requested by SBA as evidence to support the need for such funds and proof that working capital financing cannot be found upon terms acceptable pursuant to § 124.401(b)(ii) above, from financing institutions.

(ii) The section 8(a) business concern must select a commercial bank which is a member of the Federal Reserve System in which it must establish a special non-interest bearing bank account for the deposit of payments made to it by the procuring agency pursuant to the performance of the subcontract(s). This special account must be a demand deposit account. The appropriate SBA Regional Administrator shall designate at least two SBA employees to serve as countersignatories on the special bank account.

(A) Disbursements from the account will be made only upon the authorized signatures of the section 8(a) concern and one of the designated SBA employees.

or services rendered pursuant to the subject section 8(a) subcontract shall be paid into the special bank account by the procuring agency, and shall be applied by SBA first against the balance of advance payments according to the liquidation schedule. Any amounts remaining in the special bank account may be disbursed to the section 8(a) concern, *provided, however*, that the unpaid balance on the section 8(a) subcontract is sufficient to allow the 8(a) concern to comply with its advance payment liquidation schedule.

(e) *Cancellation.* (1) SBA may determine that advance payments should be cancelled under the following circumstances:

(i) The terms and conditions of the advance payment agreement have not been adhered to by a section 8(a) small business concern.

(ii) The section 8(a) business concern's participation in the section 8(a) program has ended by expiration of the Fixed Program Participation Term and any extension, or has been suspended pursuant to § 124.113 of these regulations or has been terminated by administrative action under section 8(a)(9) of the Small Business Act, 15 U.S.C. 637(a)(9).

(2) In the event of cancellation of advance payments to a section 8(a) business concern, all previous advance payments made to that section 8(a) business concern shall become due and payable to SBA prior to the receipt of final contract payment.

§ 124.402 Business development expense.

(a) *Purpose.* Business Development Expense (BDE) funds are made available by SBA at the time of the execution of a specific section 8(a) subcontract for the purpose of assisting a section 8(a) business concern with the performance of that subcontract. The authority to approve the uses and amount of BDE rests with the Administrator who has the power to delegate the authority. An award of BDE is justified only if, prior to the execution of the related section 8(a) subcontract, SBA conducts a complete analysis of the written request and determines that the proposed BDE will promote the long term development objectives

of the section 8(a) concern as described in the business plan.

(b) At the discretion of SBA, BDE funds may be added to the section 8(a) subcontract price and may be used for the following purposes and in the following order of priority.

(1) *Capital equipment.* For the purchase of capital equipment which has been determined by SBA to be essential to the section 8(a) business concern's performance of a specific section 8(a) subcontract at a fair market price and for which acquisition cannot reasonably be made by other financing means.

(2) *Other capital improvements.* To assist in the acquisition of other necessary production/technical assets or to subsidize the cost of other capital improvements directly related to reduction of production costs, or to increase productivity and/or production capacity in connection with a specific section 8(a) subcontract. This category includes, but is not limited to, such items as quality control systems, inventory control systems, and other business systems.

(3) *Price differential.* To make up the difference between Government's established fair market price and the price required by the section 8(a) contractor to provide the product or service in connection with a specific section 8(a) subcontract. This type of BDE should be granted to a firm only one time for any specific type of requirement and only if the analysis demonstrates that the firm will be able to produce the item/service competitively in the future.

(c) BDE shall not be provided to satisfy:

(1) Price differentials for professional and nonprofessional service firms;

(2) Any contingency arising subsequent to execution of the section 8(a) subcontract for which the BDE is proposed;

(3) Cost overruns;

(4) Entertainment expenses;

(5) The cost of capital equipment and other capital improvements when one of the following conditions exists:

(i) Funds are available from outside sources to the concern, including SBA financing and the personal resources of the principal(s); or

section 8(a) concern as defined in the business plan.

At the discretion of SBA, BDE may be added to the section 8(a) contract price and may be used for following purposes and in the following order of priority:

(i) *Capital equipment.* For the purchase of capital equipment which has been determined by SBA to be essential to the section 8(a) business concern's performance of a specific section 8(a) subcontract at a fair market price and for which acquisition cannot be made by other financing

(ii) *Other capital improvements.* To defray the acquisition of other necessary production/technical assets or to reduce the cost of other capital improvements directly related to reducing production costs, or to increase productivity and/or production capacity in connection with a specific section 8(a) subcontract. This category is not limited to, such as quality control systems, inventory control systems, and other systems.

(iii) *Price differential.* To make up the difference between Government's established fair market price and the price required by the section 8(a) contract to provide the product or service in connection with a specific section 8(a) subcontract. This type of price differential would be granted to a firm only for any specific type of request and only if the analysis indicates that the firm will be able to produce the item/service contract in the future.

(iv) BDE shall not be provided to satisfy

(v) price differentials for professional or nonprofessional service firms; (vi) contingency arising subsequent to execution of the section 8(a) contract for which the BDE is provided;

(vii) overruns; (viii) entertainment expenses; (ix) the cost of capital equipment for capital improvements when the following conditions exist: (a) funds are available from outside the concern, including SBA and the personal resources of principal(s); or

(ii) Adequate and timely financing from outside sources is available at a reasonable rate.

(6) Costs of interest expenses to be borne by the section 8(a) concern.

(d) *Participatory BDE.* Where appropriate and feasible, section 8(a) concerns will participate to the fullest extent possible in funding the acquisition of assets acquired with BDE funds.

(e) *Requirements.* To be eligible for business development expense funds, a section 8(a) business concern must submit a written request to the appropriate SBA Regional Administrator or his designee. The request must include detailed documentation to support the need for funds, proof that adequate financing is not available at current market rates, and such additional information as required by SBA to adequately consider the request.

(f) When BDE, including participating BDE, will be used to purchase capital equipment, the section 8(a) concern shall comply with the following requirements. The section 8(a) concern shall:

(1) Execute and record a lien on the equipment in favor of SBA. SBA will remove the lien on the assets acquired with BDE funds upon successful completion of the section 8(a) subcontract, except in the case of the firm which has outstanding obligations owed to SBA. Upon full repayment of such outstanding obligations, SBA shall release the lien.

(2) Execute a BDE agreement with SBA which among other things contains the following covenants that:

(i) The concern will use the funds exclusively for the purposes stated in the BDE approval;

(ii) The concern shall maintain records to substantiate the uses for which BDE funds have been expended; and

(iii) In the event of default on the contract to which the BDE relates, the section 8(a) concern shall be liable for repayment of the full amount of the BDE.

#### § 124.403 Letter of credit.

(a) *General policy.* The letter of credit method of payment will be utilized under certain circumstances to

disburse advance payments to section 8(a) business concerns performing subcontracts under the section 8(a) program when SBA has made a decision approving the use of advance payments pursuant to the requirements and conditions provided for in these regulations.

(b) *Eligibility requirements.* SBA may disburse advance payments through the letter of credit method of payment through the Federal Reserve Bank System to a section 8(a) business concern when all of the following conditions are found by SBA to exist:

(1) SBA determines that the section 8(a) business concern may be awarded more than one section 8(a) subcontract during a period of at least one year.

(2) The aggregate amount of letter of credit advance payment funds made to one section 8(a) business concern will exceed \$120,000 annually.

(3) The section 8(a) business concern has submitted a schedule of its projected monthly advance requirements for section 8(a) subcontract disbursements, SBA has reviewed it, and SBA has found it to be reasonable.

(4) The section 8(a) business concern has established or agrees to establish and maintain financial records and controls which will provide for complete accountability and required reporting of program funds. These records must be made available upon request for review and audit by SBA and the General Accounting Office.

(c) *Procedures.* The procedures for the utilization of the letter of credit method of payment shall be in accord with 48 CFR § 32.406.

#### § 124.501 Development assistance program.

(a) *General.* Section 7(j)(1) of the Small Business Act provides for financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or enterprises eligible for assistance under sections 7(a)(11), 7(j)(10), and 8(a) of the Small Business Act. The AA/MSB-COD is responsible for coordinating and formulating policies relating to the dissemination of such information.

nation of this assistance to small business concerns eligible for assistance under sections 7(a)(11), 7(j)(10) and 8(a) of the Small Business Act.

(b) *Services.* (1) Section 7(j)(1-2) of the Small Business Act empowers the SBA to provide through public and private organizations the management and technical assistance enumerated below to those individuals or concerns who meet the eligibility criteria contained in section 7(a)(1) and 8(a) of the Small Business Act.

(2) The SBA shall give preference to projects which promote the ownership, participation in ownership, or management of small businesses owned by low-income individuals and small businesses eligible to participate in the section 8(a) program.

(3) This assistance may include any or all of the following:

(i) Planning and research, including feasibility studies and market research;

(ii) The identification and development of new business opportunities;

(iii) The furnishing of centralized services with regard to public services and Federal Government programs including programs authorized under sections 7(a)(11), 7(j)(10) and 8(a) of the Small Business Act;

(iv) The establishment and strengthening of business service agencies, including trade associations and cooperatives;

(v) The furnishing of business counseling, management training, and legal and other related services, with special emphasis on the development of management training programs using the resources of the business community, including the development of management training opportunities in existing business, and with emphasis in all cases upon providing management training of sufficient scope and duration to develop entrepreneurial and managerial self-sufficiency on the part of the individuals served.

(4) Sections 7(j)(3) and 7(j)(9) of the Small Business Act authorize SBA to:

(i) Encourage the placement of subcontracts by businesses with small business concerns located in areas of high concentration of unemployed or low-income individuals, with small businesses owned by low-income indi-

viduals, and with small businesses eligible to receive contracts pursuant to section 8(a) of this Act. SBA may provide incentives and assistance to such businesses that will aid in the training and upgrading of potential subcontractors or other small business concerns eligible for assistance under sections 7(a)(11), 7(j), and 8(a) of the Small Business Act, and

(ii) Coordinate and cooperate with the heads of other Federal departments and agencies, to insure that contracts, subcontracts, and deposits made by the Federal Government or with programs aided with Federal funds are placed in such a way as to further the purposes of sections 7(a)(11), 7(j), and 8(a) of the Small Business Act.

(c) *Eligibility.* (1) Eligibility for the assistance enumerated under § 124.501(b) above shall include, but not be limited to:

(i) Businesses which qualify as small within the meaning of size standards prescribed in 13 CFR Part 121, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(ii) Businesses eligible to receive contracts pursuant to section 8(a) of the Small Business Act.

(d) *Delivery of services.* (1) The financial assistance authorized for projects under paragraph (b) of this section includes assistance advanced by grant, cooperative agreement, or contract.

(2) To the extent feasible, services available under paragraph (b) of this section shall be provided in a location which is easily accessible to the individuals and small business concerns served.

(e) *Coordination and cooperation with other government agencies.* (1) The AA/MSB-COD may utilize the resources of other agencies and departments whenever practicable which can directly or indirectly support or augment the purposes of sections 7(a)(11), 7(j) and 8(a) of the Small Business Act.

(2) The AA/MSB-COD shall enter into agreements with Federal agencies and departments to further effective

is, and with small businesses eligible to receive contracts pursuant to section 8(a) of this Act. SBA may provide incentives and assistance to such entities that will aid in the training and upgrading of potential subcontractors or other small business concerns eligible for assistance under sections 7(j), 7(j), and 8(a) of the Small Business Act, and

Coordinate and cooperate with the heads of other Federal departments and agencies, to insure that contracts, subcontracts, and deposits by the Federal Government or programs aided with Federal funds are placed in such a way as to further the purposes of sections 7(j), 7(j), and 8(a) of the Small Business Act.

**Eligibility.** (1) Eligibility for the assistance enumerated under section 8(b) above shall include, but not be limited to:

Businesses which qualify as small businesses within the meaning of size standards established in 13 CFR Part 121, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

Businesses eligible to receive contracts pursuant to section 8(a) of the Small Business Act.

**Delivery of services.** (1) The full assistance authorized for contracts under paragraph (b) of this section includes assistance advanced pursuant to cooperative agreement, or contract.

To the extent feasible, services authorized under paragraph (b) of this section shall be provided in a location which is easily accessible to the individuals and small business concerns involved.

**Coordination and cooperation with other government agencies.** (1) The AA/MSB-COD may utilize the resources of other agencies and departments whenever practicable which can provide directly or indirectly support or assistance for the purposes of sections 7(a)(11), 7(j), and 8(a) of the Small Business Act.

The AA/MSB-COD shall enter into agreements with Federal agencies and departments to further effective

## Small Business Administration

sections 7(a)(11), 7(j) and 8(a) of the Small Business Act.

(3) The AA/MSB-COD shall encourage the placement of deposits made by the Federal Government, or by programs aided with Federal funds, in such a way as to further the purposes of section 7(a)(11), 7(j) and 8(a) of the Small Business Act.

### § 124.502 Small Business and Capital Ownership Development program.

(a) **General.** Section 7(j)(10) of the Small Business Act establishes a Small Business and Capital Ownership Development program which shall provide additional assistance exclusively for small business concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act. The management of the Capital Ownership Development program is vested in the AA/MSB-COD who is responsible for the oversight of the program and activities set forth in this part of these regulations. The development assistance described below shall be provided exclusively to those small business concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act. Such small business concerns shall be participants in the Small Business Capital Ownership Development program. This program shall:

(1) Assist small business concerns participating in the program to develop comprehensive business plans with specific business targets, objects, and goals;

(2) Provide for such other nonfinancial services as deemed necessary for the establishment, preservation, and growth of small business concerns participating in the program, including but not limited to:

(i) Loan packaging.

(ii) Financial counseling.

(iii) Accounting and bookkeeping assistance.

(iv) Marketing assistance, and

(v) Management assistance;

(3) Assist small business concerns participating in the program to obtain equity and debt financing;

(4) Establish regular performance monitoring and reporting systems for small business concerns participating

in the program to assure compliance with their business plans;

(5) Analyze and report the causes of success and failure of small business concerns participating in the program; and

(6) Provide assistance necessary to help small business concerns participating in the program to procure surety bonds. Such assistance shall include, but not be limited to:

(i) The preparation of surety bond participation forms;

(ii) Special management and technical assistance designed to meet the specific needs of small business concerns participating in the program and which have received or are applying to receive a surety bond, and

(iii) Preparation of all forms necessary to receive a surety bond guarantee form from the SBA pursuant to Title IV, Part B of the Small Business Investment Act of 1958.

### § 124.503 Compliance with the Paperwork Reduction Act of 1980.

(a) In compliance with the Paperwork Reduction Act of 1980 (Title 44, U.S.C., Chapter 35) and its implementing regulations, the recordkeeping or reporting requirements and forms appearing in the following sections of this part have been approved by the Office of Management and Budget (OMB) under number 3245-0015: §§ 124.105(b), 124.106(b), 124.106(b)(1), 124.106(b)(2), 124.106(b)(3), 124.202, 124.204, 124.205, 124.403(b)(4), 124.502(a)(1) and 124.502(a)(6).

(b) The recordkeeping or reporting requirements and forms appearing in the following sections of this final rule have also been approved by OMB:

§ 124.103(c) [OMB Approval No. 3245-0145];  
§ 124.103(e) [OMB Approval No. 3245-0145];  
§ 124.111(c) [OMB Approval No. 3245-0147];  
§ 124.112(a)(7) [OMB Approval No. 3245-0146]; § 124.205 [OMB Approval No. 3245-0015]; § 124.206 [OMB Approval No. 3245-0143]; § 124.401(c)(1)(i), 124.401(c)(1)(iii) and 124.403(b)(3) [OMB Approval No. 3245-0148]; § 124.402(e) [OMB Approval No. 3245-0149]; and §§ 124.112(a)(6), 124.205 (financial statements) and 124.502(a)(4) [OMB Approval No. 3245-0151]

**§ 95.207 (R/C Rule 7) On what channels may I operate?**

(a) Your R/C station may transmit only on the following channels (frequencies):

(1) The following channels may be used to operate any kind of device (any object or apparatus, except an R/C transmitter), including a model aircraft device (any small imitation of an aircraft) or a model surface craft device (any small imitation of a boat, car or vehicle for carrying people or objects, except aircraft): 26.995, 27.045, 27.095, 27.145, 27.195 and 27.255 MHz.

(2) The following channels may only be used to operate a model aircraft device: 72.01, 72.03, 72.05, 72.07, 72.09, 72.11, 72.13, 72.15, 72.17, 72.19, 72.21, 72.23, 72.25, 72.27, 72.29, 72.31, 72.33, 72.35, 72.37, 72.39, 72.41, 72.43, 72.45, 72.47, 72.49, 72.51, 72.53, 72.55, 72.57, 72.59, 72.61, 72.63, 72.65, 72.67, 72.69, 72.71, 72.73, 72.75, 72.77, 72.79, 72.81, 72.83, 72.85, 72.87, 72.89, 72.91, 72.93, 72.95, 72.97 and 72.99 MHz.

(3) The following channels may only be used to operate a model surface craft devices: 75.41, 75.43, 75.45, 75.47, 75.49, 75.51, 75.53, 75.55, 75.57, 75.59, 75.61, 75.63, 75.65, 75.67, 75.69, 75.71, 75.73, 75.75, 75.77, 75.79, 75.81, 75.83, 75.85, 75.87, 75.89, 75.91, 75.93, 75.95, 75.97 and 75.99 MHz.

(4) Channels 72.16, 72.32 and 72.98 MHz may also be used to operate a model aircraft device or a model surface craft device until December 20, 1987.

(5) Channels 72.08, 72.24, 72.40 and 75.64 MHz may also be used to operate a model aircraft device until December 20, 1987.

(e) (Reserved.)

[FR Doc. 87-9784 Filed 5-1-87; 8:45 am]  
BILLING CODE 6712-01-M

**DEPARTMENT OF DEFENSE**

48 CFR Parts 204, 205, 206, 219 and 252

**Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Pub. L. 99-661; Set-Asides for Small Disadvantaged Business Concerns**

**AGENCY:** Department of Defense (DoD).  
**ACTION:** Interim rule and request for comment.

**SUMMARY:** The Defense Acquisition Regulatory (DAR) Council invites public comment concerning an interim rule amending the Defense Federal Acquisition Regulation Supplement

(DFARS) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), entitled "Contract Goal for Minorities." The statute permits DoD to enter into contracts using less than full and open competitive procedures, when practical and necessary to facilitate achievement of a goal of awarding 5 percent of contract dollars to small disadvantaged business (SDB) concerns during FY 1987, 1988 and 1989, provided the contract price does not exceed fair market cost by more than 10 percent. The interim rule implements the statute by requiring that contracting officers set aside acquisitions, other than small purchases conducted under procedures of Federal Acquisition Regulation (FAR) Part 13, for exclusive competition among SDB concerns, whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns and that the contract award price will not exceed fair market price by more than 10 percent.

**DATES:** *Effective Date:* June 1, 1987 (effective for all solicitations issued on or after June 1, 1987).

*Comment Date:* Comments concerning the interim rule must be received on or before August 3, 1987, to be considered in formulating a final rule. Please cite DAR Case 87-33 in all correspondence related to these subjects.

**ADDRESS:** Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, ODASD (P) DARS, c/o OASD (P&L) (M&RS), Room 3C841, The Pentagon, Washington, DC 20301-3062.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7268.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

As summarized above, section 1207(a), Pub. L. 99-661 established an objective that 5 percent of total combined DoD obligations (i.e., procurement; research, development, test and evaluation; construction; and, operation and maintenance) for contracts and subcontracts awarded during FY 1987 through FY 1989, be entered into with (1) small disadvantaged business (SDB) concerns, (2) historically Black colleges and universities, and (3) minority institutions. To facilitate attainment of that goal, Congress permitted DoD, in Section 1207(e) to use less than full and open competitive procedures in awarding contracts, provided contract prices do not exceed fair market price by more than 10 percent. The scope of

the present rule addresses achievement of the goal as it pertains to SDB concerns; other aspects of Section 1207 will be addressed in subsequent issuances.

The interim rule establishes a "rule of two" regarding set-asides for SDB concerns, which is similar in approach to long-standing criteria used to determine whether acquisitions should be set aside for small businesses as a class. Specifically, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns, and that there is a reasonable expectation that the award price will not exceed fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among such SDB firms. The rule provides guidance concerning *Commerce Business Daily* notices to bidders concerning the SDB set-aside reservation, as well as a "sources sought" announcement to ensure that competition is enhanced while also ensuring that non-SDB concerns are not misled in incurring bid or proposal costs. However, should effective competition not materialize or pricing exceed the 10 percent factor, guidance is provided to the contracting officer concerning withdrawal of the set-aside.

In order to ensure that small businesses as a class are not penalized by the new SDB set-aside procedure, it was decided not to apply SDB set-asides to small purchases conducted under FAR Part 13 procedures, upon which heavy reliance is placed in ensuring that small businesses as a class receive a fair proportion of DoD contract dollars. This approach should tend to reduce impact upon non-SDB small businesses resulting from the new procedure, while facilitating attainment of the goal established by Congress.

**B. Regulatory Flexibility Act**

The interim rule may have significant economic impact upon a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and an Initial Regulatory Flexibility Analysis is deemed necessary. However, as another proposed rule will be issued shortly, affecting the same topic, the DoD has determined that it is necessary to delay preparation of that analysis, under authority of 5 U.S.C. 608, in order that the cumulative impact of both rules might be considered. The initial analysis will be provided to the Chief Counsel for Advocacy, U.S. Small Business Administration, at the time of



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**DEPARTMENT OF DEFENSE**

48 CFR Parts 204, 205, 206, 219 and 252

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**A. Background**

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**B. Regulatory Flexibility Act**

The interim rule may have significant economic impact upon a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and an Initial Regulatory Flexibility Analysis is deemed necessary. However, as another proposed rule will be issued shortly, affecting the same topic, the DoD has determined that it is necessary to delay preparation of that analysis, under authority of 5 U.S.C. 608, in order that the cumulative impact of both rules might be considered. The initial analysis will be provided to the Chief Counsel for Advocacy, U.S. Small Business Administration, at the time of

publication of the referenced proposed rule. Comments are invited.

Comments from small entities concerning DFARS Subpart 219.8 will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DAR Case 87-610D in correspondence.

C. Paperwork Reduction Act

The interim rule does not impose information collection requirements within the meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., and OMB approval of the interim rule is not required pursuant to 5 CFR Part 1320 et seq.

D. Determination to Issue an Interim Regulation

In order to achieve the 5 percent goal established by Congress during FY 1987, DoD has determined pursuant to Pub. L. 99-577 that compelling reasons exist to publish interim DFARS changes without prior public comment, inasmuch as present procurement procedures have been determined inadequate to attain the prescribed goal. Comments received in response to this Notice will be evaluated and incorporated in future revisions to this rule.

List of Subjects in 48 CFR Parts 204, 205, 206, 219 and 252

Government procurement: Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, 48 CFR Parts 204, 205, 206, 219 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 204, 205, 206, 219 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

PART 204—ADMINISTRATIVE MATTERS

2. Section 204.671-5 is amended by adding at the end of the introductory text and before "Code A" in paragraph (d)(9) the sentence "Small Disadvantaged Business set-asides will use Code K-Set-aside."; by changing the period at the end of paragraph (e)(3)(iii) to a comma and adding the words "unless the action is reportable under code 4 or 5 below."; by adding paragraphs (iv) and (v) to paragraph (e)(3); and by revising paragraph (f), to read as follows:

204.671.5 Instructions for completion of DD Form 350.

- (e) \* \* \*
(3) \* \* \*

(iv) Enter Code 4 if the award was totally set-aside for small disadvantaged businesses pursuant to 219.502-72.

(v) Enter Code 5, if the award was made to a small disadvantaged business pursuant to 19.7001 an award was made based on the application of a price differential. If award was made to a small disadvantaged business concern without the application of a price differential (i.e., the small disadvantaged business was the low offeror without the differential), enter Code 3.

(f) Part E, DD Form 350. Data elements E2-E4 shown below are to be reported in accordance with the appropriate departmental or OSD instructions.

(1) Item E1, Ethnic Group. If the award was made to a small disadvantaged business firm and the contractor submitted the certification required by 252.219-7005, enter the code below which corresponds to the ethnic group of the contractor.

(i) Enter Code A if the contractor categorizes the firm as being owned by Asian-Indian-Americans.

(ii) Enter Code B if the contractor categorizes the firm as being owned by Asian-Pacific Americans.

(iii) Enter Code C if the contractor categorizes the firm as being owned by Black Americans.

(iv) Enter Code D if the contractor categorizes the firm as being owned by Hispanic Americans.

(v) Enter Code E if the contractor categorizes the firm as being owned by Native Americans.

(vi) Enter Code F if the contractor categorizes the firm as being owned by other minority group Americans.

- (2) Reserved for OSD.
(3) Reserved for OSD.
(4) Reserved for OSD.

PART 205—PUBLICIZING CONTRACT ACTIONS

3. Section 205.202 is amended by adding paragraph (a)(4)(S-70) to read as follows:

205.202 Exceptions.

(a)(4)(S-70) The exception at FAR 5.202(a)(4) may not be used for contract actions under 206.203-70. (See 205.207(d)(S-72) and (S-73).)

4. Section 205.207 is amended by adding paragraphs (d) (S-72) and (d) (S-73) to read as follows:

205.207 Preparation and transmittal of synopses.

(d) (S-72) When the proposed acquisition provides for a total small disadvantaged business (SDB) set-aside under 206.203 (S-72), state: "The proposed contract listed here is a 100 percent small disadvantaged business set-aside. Offers from concerns other than small disadvantaged business concerns are not solicited."

(d) (S-73) When the proposed acquisition is being considered for possible total small disadvantaged-business set-aside under 206.203 (S-70), state: "The proposed contract listed here is being considered for 100 percent set-aside for small disadvantaged business (SDB) concerns. Interested SDB concerns should, as early as possible but not later than 15 days of this notice, indicate interest in the acquisition by providing to the contracting office above evidence of capability to perform and a positive statement of eligibility as a small socially and economically disadvantaged business concern. If adequate interest is not received from SDB concerns, the solicitation will be issued as \_\_\_\_\_ (enter basis for continuing the acquisition, e.g. 100% small business set-aside, unrestricted, 100% small business set-aside with evaluation preference for SDB concerns, etc.) without further notice. Therefore, replies to this notice are requested from \_\_\_\_\_ (enter all types business to be solicited in the event a SDB set-aside is not made; e.g., all small business concerns, all business concerns, etc.) as well as from SDB concerns."

PART 206—COMPETITION REQUIREMENTS

5. A new Subpart 206.2, consisting of sections 206.203 and 206.203-70, is added to read as follows:

Subpart 206.2—Full and Open Competition After Exclusion of Sources

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

206.203-70 Set-asides for small disadvantaged business concerns.

(a) To fulfill the objective of section 1207 of Pub. L. 99-661, contracting officers may, for Fiscal Years 1987, 1988, and 1989, set-aside solicitations to allow only small disadvantaged business concerns as defined at 219.001 to compete under the procedures in Subpart 219.5. No separate justification or determination and findings is required under this Part to set-aside a contract action for small disadvantaged business.

specific detailed evidence supporting the protestant's claim.

(2) In order to apply to the acquisition in question, such protest must be filed with and received by the contracting officer prior to the close of business on the fifth business day after the bid opening date for sealed bids. In negotiated acquisitions, the contracting officer shall notify the apparently unsuccessful offerors of the apparently successful SDB offeror(s) in accordance with FAR 15.1001 and establish a deadline date by which any protest on the instant acquisition must be received.

(3) To be considered timely, a protest must be delivered to the contracting officer by hand or telegram within the period allotted or by letter post marked within the period. A protest shall also be considered timely if made orally to the contracting officer within the period allotted, and if the contracting officer thereafter receives a confirming letter postmarked no later than one day after the date of such telephone protest.

(4) Upon receipt of a protest of disadvantaged business status, the contracting officer shall forward the protest to the Small Business Administration (SBA) District Office for the geographical area where the principal office of the SDB concern in question is located. In the event of a protest which is not timely, the contracting officer shall notify the protestor that its protest cannot be considered on the instant acquisition but has been referred to SBA for consideration in any future acquisition; however, the contracting officer may question the SDB status of an apparently successful offeror at any time. A contracting officer's protest is always timely whether filed before or after award.

(5) The SBA will determine the disadvantaged business status of the questioned offeror and notify the contracting officer and the offeror of its determination. Award will be made on the basis of that determination. This determination is final.

(6) If the SBA determination is not received by the contracting officer within 10 working days after SBA's receipt of the protest, it shall be presumed that the questioned offeror is a SDB concern. This presumption will not be used as a basis for award without first ascertaining when a determination can be expected from SBA, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government.

#### 219.304 Solicitation provisions.

(b) Department of Defense activities shall use the provision at 252.7005, Small Disadvantaged Business Concern Representation, in lieu of the provision at FAR 52.219-2, Small Disadvantaged Business Concern Representation.

10. Section 219.501 is amended by adding paragraph (b); by adding at the end of paragraph (c) the words "The contracting officer is responsible for reviewing acquisitions to determine whether they can be set-aside for SDBs."; by adding at the end of paragraph (d) the words "Actions that have been set-aside for SDBs are not referred to the SBA representative for review."; by adding at the end of paragraph (g) the words "except that the prior successful acquisition of a product or service on the basis of a small business set-aside does not preclude consideration of a SDB set-aside for future requirements for that product or service."; to read as follows:

#### 219.501 General.

(b) The determination to make a SDB set-aside is a unilateral determination by the contracting officer.

11. Section 219.501-70 is added to read as follows:

#### 219.501-70 Small disadvantaged business set-asides.

As authorized by the provisions of section 1207 of Pub. L. 99-661, a special category of set-asides, identified as SDB set-aside, has been established for Department of Defense acquisitions awarded during Fiscal Years 1987, 1988, and 1989, except those subject to small purchase procedures. The authorization to effect small disadvantaged business set-asides shall remain in effect during these fiscal years, unless specifically revoked by the Secretary of Defense. A "set-aside for SDB" is the reserving of an acquisition exclusively for participation by SDB concerns.

12. Sections 219.502-3 and 219.502-4 are added to read as follows:

#### 219.502-3 Partial set-asides

These procedures do not apply to SDB set-asides. SDB set-asides are authorized for use only when the entire amount of an individual acquisition is to be set-aside.

#### 219.502-4 Methods of conducting set-asides.

(a) SDB set-asides may be conducted by using sealed bids or competitive proposals.

(b) Offers received on a SDB set-aside from concerns that do not qualify as

SDB concerns shall be considered nonresponsive and shall be rejected.

#### 219.502-70 [Amended]

13. Section 219.502-70 is amended by inserting in the second sentence of paragraph (b) between the word "others" and the word "when" the words "except SDB set-asides."

14. Section 219.502-72 is added to read as follows:

#### 219.502-72 SDB set-aside.

(a) Except those subject to small purchase procedures, the entire amount of an individual acquisition shall be set-aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns offering the supplies or services of different SDB concerns and (2) award will be made at a price not exceeding the fair market price by more than ten percent. In making SDB set-asides for R&D or architect-engineer acquisitions, there must also be a reasonable expectation of obtaining from SDB scientific and technological or architectural talent consistent with the demands of the acquisition.

(b) The contracting officer must make a determination under (a) above when any of the following circumstances are present: (1) the acquisition history shows that within the past 12 month period, a responsive bid or offer of at least one responsible SDB concern was within 10 percent of an award price on a previous procurement and either (i) at least one other responsible SDB source appears on the activity's solicitation mailing list or (ii) a responsible SDB responds to the notice in the Commerce Business Daily; or (2) multiple responsible section 8(a) concerns express an interest in having the acquisition placed in the 8(a) program; or (3) the contracting officer has sufficient factual information, such as the results of capability surveys by DoD technical teams, to be able to identify at least two responsible SDB sources.

(c) If it is necessary to obtain information in accordance with (b)(1) above, the contracting officer will include a notice in the synopsis indicating that the acquisition may be set-aside for exclusive SDB participation if sufficient SDB sources are identified prior to issuance of the solicitation (see 205.207(d) (S-73)). The notice should encourage such firms to make their interest and capabilities known as expeditiously as possible. If prior to synopsis, the determination has been

July 28, 1987

Mr. Charles W. Lloyd, Executive  
Secretary, DAR Council  
Room 3C841/The Pentagon  
Washington, DC 20301-3062

Dear Mr. Lloyd:

We are a small, minority-owned business specializing in medical equipment and supplies. We need your help and support in changing Public Law 99-661 dealing with the 5% goal for distributors.

In medical equipment and supplies there are very few small manufacturer-ers and if we have to buy from a small manufacturer in order to participate, the law will be there but small and minority distributors will have few opportunities.

I spoke to Mrs. Rita Strausburg, SBA, Defense Personnel Support Center, she stated that out of 461 million plus dollars that was spent by the Department of Defense, minority-owned medical supply dealers including 8(a) firms received 1.5%. If minorities don't have opportunities the figure will remain the same.

I would like to see the following implemented:

1. The 8(a) program remain funded at the same level or higher.
2. Keep Public Law 99-661 separate from the 8(a) program.
3. Extend the 8(a) program participation to 14 years.
4. Monitor the small business specialist and heads of Government facilities to make sure they have a direct outline in reaching their goals with small, minority-owned businesses. SBA need to play a real part in making sure goals are met by Government agencies.
5. Penalize agencies that donot reach thier goals and make it public knowledge to the Congressman.

I look forward to hearing from you as soon as possible because fiscal year 87 ends in October.

Sincerely,

*Theresa McCurdy*  
Theresa McCurdy

tlm/

8/13  
no phone # or  
return address  
- can't respond  
of

*This letter is  
representative of  
many identical  
letters.*

July 24, 1987

RONALD L COOPER  
1802 METZEROTT RD #305  
ADELPHI, MD 20783

Mr. Charles W. Lloyd  
Secretary  
ODSAD (P) DARS  
c/o OASD (P&L) (M&RS)  
Room 3C841 The Pentagon  
Washington, DC 20301-3082

Dear Mr. Lloyd:

As an employee of a disadvantaged business, I am very concerned with the Interim Rule implementing Public Law 99-661.

I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,

*Ronald L. Cooper*

§ 124.402

13 CFR Ch. I (1-1-87 Edition)

or services rendered pursuant to the subject section 8(a) subcontract shall be paid into the special bank account by the procuring agency, and shall be applied by SBA first against the balance of advance payments according to the liquidation schedule. Any amounts remaining in the special bank account may be disbursed to the section 8(a) concern, *provided, however*, that the unpaid balance on the section 8(a) subcontract is sufficient to allow the 8(a) concern to comply with its advance payment liquidation schedule.

(e) *Cancellation.* (1) SBA may determine that advance payments should be cancelled under the following circumstances:

(i) The terms and conditions of the advance payment agreement have not been adhered to by a section 8(a) small business concern.

(ii) The section 8(a) business concern's participation in the section 8(a) program has ended by expiration of the Fixed Program Participation Term and any extension, or has been suspended pursuant to § 124.113 of these regulations or has been terminated by administrative action under section 8(a)(9) of the Small Business Act, 15 U.S.C. 637(a)(9).

(2) In the event of cancellation of advance payments to a section 8(a) business concern, all previous advance payments made to that section 8(a) business concern shall become due and payable to SBA prior to the receipt of final contract payment.

§ 124.402 Business development expense.

(a) *Purpose.* Business Development Expense (BDE) funds are made available by SBA at the time of the execution of a specific section 8(a) subcontract for the purpose of assisting a section 8(a) business concern with the performance of that subcontract. The authority to approve the uses and amount of BDE rests with the Administrator who has the power to delegate the authority. An award of BDE is justified only if, prior to the execution of the related section 8(a) subcontract, SBA conducts a complete analysis of the written request and determines that the proposed BDE will promote the long term development objectives

of the section 8(a) concern as described in the business plan.

(b) At the discretion of SBA, BDE funds may be added to the section 8(a) subcontract price and may be used for the following purposes and in the following order of priority.

(1) *Capital equipment.* For the purchase of capital equipment which has been determined by SBA to be essential to the section 8(a) business concern's performance of a specific section 8(a) subcontract at a fair market price and for which acquisition cannot reasonably be made by other financing means.

(2) *Other capital improvements.* To assist in the acquisition of other necessary production/technical assets or to subsidize the cost of other capital improvements directly related to reduction of production costs, or to increase productivity and/or production capacity in connection with a specific section 8(a) subcontract. This category includes, but is not limited to, such items as quality control systems, inventory control systems, and other business systems.

(3) *Price differential.* To make up the difference between Government's established fair market price and the price required by the section 8(a) contractor to provide the product or service in connection with a specific section 8(a) subcontract. This type of BDE should be granted to a firm only one time for any specific type of requirement and only if the analysis demonstrates that the firm will be able to produce the item/service competitively in the future.

(c) BDE shall not be provided to satisfy:

(1) Price differentials for professional and nonprofessional service firms;

(2) Any contingency arising subsequent to execution of the section 8(a) subcontract for which the BDE is proposed;

(3) Cost overruns;

(4) Entertainment expenses;

(5) The cost of capital equipment and other capital improvements when one of the following conditions exists:

(i) Funds are available from outside sources to the concern, including SBA financing and the personal resources of the principal(s); or

section 8(a) concern as defined in the business plan.

At the discretion of SBA, BDE may be added to the section 8(a) contract price and may be used for the following purposes and in the following order of priority:

(i) *Capital equipment.* For the purchase of capital equipment which has been determined by SBA to be essential to the section 8(a) business concern's performance of a specific section 8(a) subcontract at a fair market price and for which acquisition cannot be made by other financing

(ii) *Other capital improvements.* To fund the acquisition of other necessary production/technical assets or to reduce the cost of other capital improvements directly related to reducing production costs, or to increase production capacity and/or production capacity in connection with a specific section 8(a) subcontract. This category is not limited to, such as quality control systems, inventory control systems, and other systems.

(iii) *Price differential.* To make up the difference between Government's established fair market price and the price required by the section 8(a) contract to provide the product or service in connection with a specific section 8(a) subcontract. This type of price adjustment could be granted to a firm only for any specific type of request and only if the analysis indicates that the firm will be able to produce the item/service committed in the future.

(iv) BDE shall not be provided to satisfy

(v) price differentials for professional or non-professional service firms; (vi) contingency arising subsequent to execution of the section 8(a) contract for which the BDE is provided;

(vii) overruns; (viii) entertainment expenses; (ix) the cost of capital equipment for capital improvements when the following conditions exist: (a) funds are available from outside the concern, including SBA and the personal resources of principal(s); or

## Small Business Administration

§ 124.501

(ii) Adequate and timely financing from outside sources is available at a reasonable rate.

(6) Costs of interest expenses to be borne by the section 8(a) concern.

(d) *Participatory BDE.* Where appropriate and feasible, section 8(a) concerns will participate to the fullest extent possible in funding the acquisition of assets acquired with BDE funds.

(e) *Requirements.* To be eligible for business development expense funds, a section 8(a) business concern must submit a written request to the appropriate SBA Regional Administrator or his designee. The request must include detailed documentation to support the need for funds, proof that adequate financing is not available at current market rates, and such additional information as required by SBA to adequately consider the request.

(f) When BDE, including participatory BDE, will be used to purchase capital equipment, the section 8(a) concern shall comply with the following requirements. The section 8(a) concern shall:

(1) Execute and record a lien on the equipment in favor of SBA. SBA will remove the lien on the assets acquired with BDE funds upon successful completion of the section 8(a) subcontract, except in the case of the firm which has outstanding obligations owed to SBA. Upon full repayment of such outstanding obligations, SBA shall release the lien.

(2) Execute a BDE agreement with SBA which among other things contains the following covenants that:

(i) The concern will use the funds exclusively for the purposes stated in the BDE approval;

(ii) The concern shall maintain records to substantiate the uses for which BDE funds have been expended; and

(iii) In the event of default on the contract to which the BDE relates, the section 8(a) concern shall be liable for repayment of the full amount of the BDE.

### § 124.403 Letter of credit.

(a) *General policy.* The letter of credit method of payment will be utilized under certain circumstances to

disburse advance payments to section 8(a) business concerns performing subcontracts under the section 8(a) program when SBA has made a decision approving the use of advance payments pursuant to the requirements and conditions provided for in these regulations.

(b) *Eligibility requirements.* SBA may disburse advance payments through the letter of credit method of payment through the Federal Reserve Bank System to a section 8(a) business concern when all of the following conditions are found by SBA to exist:

(1) SBA determines that the section 8(a) business concern may be awarded more than one section 8(a) subcontract during a period of at least one year.

(2) The aggregate amount of letter of credit advance payment funds made to one section 8(a) business concern will exceed \$120,000 annually.

(3) The section 8(a) business concern has submitted a schedule of its projected monthly advance requirements for section 8(a) subcontract disbursements, SBA has reviewed it, and SBA has found it to be reasonable.

(4) The section 8(a) business concern has established or agrees to establish and maintain financial records and controls which will provide for complete accountability and required reporting of program funds. These records must be made available upon request for review and audit by SBA and the General Accounting Office.

(c) *Procedures.* The procedures for the utilization of the letter of credit method of payment shall be in accord with 48 CFR § 32.406.

### § 124.501 Development assistance program.

(a) *General.* Section 7(j)(1) of the Small Business Act provides for financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or enterprises eligible for assistance under sections 7(a)(11), 7(j)(10), and 8(a) of the Small Business Act. The AA/MSB-COD is responsible for coordinating and formulating policies relating to the dissemination of such information.

(c) **DIS SECURITY INVESTIGATIONS.**—After consulting with the Secretary of Defense, the Director of the Defense Investigative Service may conduct such security inspections of special access programs as the Director considers appropriate, unless otherwise directed by the Secretary of Defense.

**SEC. 1207. CONTRACT GOAL FOR MINORITIES**

(a) **GOAL.**—Except as provided in subsection (d), a goal of 5 percent of the amount described in subsection (b) shall be the objective of the Department of Defense in each of fiscal years 1987, 1988, and 1989 for the total combined amount obligated for contracts and subcontracts entered into with—

(1) small business concerns, including mass media, owned and controlled by socially and economically disadvantaged individuals (as defined by section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and regulations issued under such section), the majority of the earnings of which directly accrue to such individuals;

(2) historically Black colleges and universities; or

(3) minority institutions (as defined by the Secretary of Education pursuant to the General Education Provisions Act (20 U.S.C. 1221 et seq.)).

(b) **AMOUNT.**—The requirements of subsection (a) for any fiscal year apply to the combined total of the following amounts:

(1) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for procurement.

(2) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for research, development, test, and evaluation.

(3) Funds obligated for contracts entered into with the Department of Defense for such fiscal year for military construction.

(4) Funds obligated for contracts entered into with the Department of Defense for operation and maintenance.

(c) **TECHNICAL ASSISTANCE.**—To attain the goal of subsection (a), the Secretary of Defense shall provide technical assistance services to potential contractors described in subsection (a). Such technical assistance shall include information about the program, advice about Department of Defense procurement procedures, instruction in preparation of proposals, and other such assistance as the Secretary considers appropriate. If Department of Defense resources are inadequate to provide such assistance, the Secretary of Defense may enter into contracts with minority private sector entities with experience and expertise in the design, development, and delivery of technical assistance services to eligible individuals, business firms and institutions, defense acquisition agencies, and defense prime contractors. Department of Defense contracts with such entities shall be awarded annually, based upon, among other things, the number of minority small business concerns, historically Black colleges and universities, and minority institutions that each such entity brings into the program.

(d) **APPLICABILITY.**—Subsection (a) does not apply—

(1) to the extent to which the Secretary of Defense determines that compelling national security considerations require otherwise; and

(2) if the Secretary making such a determination notifies Congress of such determination and the reasons for such determination.



publication of the referenced proposed rule. Comments are invited.

Comments from small entities concerning DFARS Subpart 219.8 will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DAR Case 87-610D in correspondence.

#### C. Paperwork Reduction Act

The interim rule does not impose information collection requirements within the meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., and OMB approval of the interim rule is not required pursuant to 5 CFR Part 1320 et seq.

#### D. Determination to Issue an Interim Regulation

In order to achieve the 5 percent goal established by Congress during FY 1987, DoD has determined pursuant to Pub. L. 99-577 that compelling reasons exist to publish interim DFARS changes without prior public comment, inasmuch as present procurement procedures have been determined inadequate to attain the prescribed goal. Comments received in response to this Notice will be evaluated and incorporated in future revisions to this rule.

#### List of Subjects in 48 CFR Parts 204, 205, 206, 219 and 252

Government procurement:

Charles W. Lloyd,  
Executive Secretary, Defense Acquisition  
Regulatory Council.

Therefore, 48 CFR Parts 204, 205, 206, 219 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 204, 205, 206, 219 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

#### PART 204—ADMINISTRATIVE MATTERS

2. Section 204.671-5 is amended by adding at the end of the introductory text and before "Code A" in paragraph (d)(9) the sentence "Small Disadvantaged Business set-asides will use Code K-Set-aside."; by changing the period at the end of paragraph (e)(3)(iii) to a comma and adding the words "unless the action is reportable under code 4 or 5 below."; by adding paragraphs (iv) and (v) to paragraph (e)(3); and by revising paragraph (f), to read as follows:

#### 204.671.5 Instructions for completion of DD Form 350.

- (e) \* \* \*  
(3) \* \* \*

(iv) Enter Code 4 if the award was totally set-aside for small disadvantaged businesses pursuant to 219.502-72.

(v) Enter Code 5, if the award was made to a small disadvantaged business pursuant to 19.7001 an award was made based on the application of a price differential. If award was made to a small disadvantaged business concern without the application of a price differential (i.e., the small disadvantaged business was the low offeror without the differential), enter Code 3.

(f) *Part E, DD Form 350.* Data elements E2-E4 shown below are to be reported in accordance with the appropriate departmental or OSD instructions.

(1) *Item E1, Ethnic Group.* If the award was made to a small disadvantaged business firm and the contractor submitted the certification required by 252.219-7005, enter the code below which corresponds to the ethnic group of the contractor.

(i) Enter Code A if the contractor categorizes the firm as being owned by Asian-Indian Americans.

(ii) Enter Code B if the contractor categorizes the firm as being owned by Asian-Pacific Americans.

(iii) Enter Code C if the contractor categorizes the firm as being owned by Black Americans.

(iv) Enter Code D if the contractor categorizes the firm as being owned by Hispanic Americans.

(v) Enter Code E if the contractor categorizes the firm as being owned by Native Americans.

(vi) Enter Code F if the contractor categorizes the firm as being owned by other minority group Americans.

(2) Reserved for OSD.

(3) Reserved for OSD.

(4) Reserved for OSD.

#### PART 205—PUBLICIZING CONTRACT ACTIONS

3. Section 205.202 is amended by adding paragraph (a)(4)(S-70) to read as follows:

#### 205.202 Exceptions.

(a)(4)(S-70) The exception at FAR 5.202(a)(4) may not be used for contract actions under 206.203-70. (See 205.207(d)(S-72) and (S-73).)

4. Section 205.207 is amended by adding paragraphs (d) (S-72) and (d) (S-73) to read as follows:

#### 205.207 Preparation and transmittal of synopses.

(d) (S-72) When the proposed acquisition provides for a total small disadvantaged business (SDB) set-aside under 206.203 (S-72), state: "The proposed contract listed here is a 100 percent small disadvantaged business set-aside. Offers from concerns other than small disadvantaged business concerns are not solicited."

(d) (S-73) When the proposed acquisition is being considered for possible total small disadvantaged business set-aside under 206.203 (S-70), state: "The proposed contract listed here is being considered for 100 percent set-aside for small disadvantaged business (SDB) concerns. Interested SDB concerns should, as early as possible but not later than 15 days of this notice, indicate interest in the acquisition by providing to the contracting office above evidence of capability to perform and a positive statement of eligibility as a small socially and economically disadvantaged business concern. If adequate interest is not received from SDB concerns, the solicitation will be issued as \_\_\_\_\_ (enter basis for continuing the acquisition, e.g. 100% small business set-aside, unrestricted, 100% small business set-aside with evaluation preference for SDB concerns, etc.) without further notice. Therefore, replies to this notice are requested from \_\_\_\_\_ (enter all types business to be solicited in the event a SDB set-aside is not made; e.g., all small business concerns, all business concerns, etc.) as well as from SDB concerns."

#### PART 206—COMPETITION REQUIREMENTS

5. A new Subpart 206.2, consisting of sections 206.203 and 206.203-70, is added to read as follows:

#### Subpart 206.2—Full and Open Competition After Exclusion of Sources

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

206.203-70 Set-asides for small disadvantaged business concerns.

(a) To fulfill the objective of section 1207 of Pub. L. 99-661, contracting officers may, for Fiscal Years 1987, 1988, and 1989, set-aside solicitations to allow only small disadvantaged business concerns as defined at 219.001 to compete under the procedures in Subpart 219.5. No separate justification or determination and findings is required under this Part to set-aside a contract action for small disadvantaged business.

**PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS**

6. Sections 219.000 and 219.001 are added immediately before Subpart 219.1 to read as follows:

**219.000 Scope of part.**

(a) (S-70) This part also implements the provisions of Section 1207, Pub. L. 99-661, which establishes for DoD a five percent goal for dollar awards during Fiscal Years 1987, 1988 and 1989 to small disadvantaged business (SDB) concerns, and which provides certain discretionary authority to the Secretary of Defense for achievement of that objective.

**219.001 Definitions.**

"Asian-Indian American," means a United States citizen whose origins are India, Pakistan, or Bangladesh.

"Asian-Pacific American," means a United States citizen whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa; Guam, the U.S. Trust Territory of the Pacific Islands, the Northern Mariana Islands, Laos, Cambodia, or Taiwan.

"Economically disadvantaged individuals" means socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged.

"Fair Market Price." For purposes of this part, fair market price is a price based on reasonable costs under normal competitive conditions and not on lowest possible costs. For methods of determining fair market price see FAR 19.806-2.

"Native American," means American Indians, Eskimos, Aleuts, and native Hawaiians.

"Small business concern," means a concern including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR Part 121.

"Small disadvantaged business (SDB) concern," as used in this part, means a small business concern that (a) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals, (b) has its management and daily business

controlled by one or more such individuals, and (c) the majority of the earning of which accrue to such socially and economically disadvantaged individuals.

"Socially disadvantaged individuals" means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

7. Section 219.201 is amended by adding paragraph (a) to read as follows:

**219.201 General policy.**

(a) In furtherance of the Government policy of placing a fair proportion of its acquisitions with small business concerns and small disadvantaged business (SDBs) concerns, section 1207 of the FY 1987 National Defense Authorization Act (Pub. L. 99-661) established an objective for the Department of Defense of awarding five percent of its contract dollars during Fiscal Years 1987, 1988, and 1989 to SDBs and of maximizing the number of such concerns participating in Defense prime contracts and subcontracts. It is the policy of the Department of Defense to strive to meet these objectives through the enhanced use of outreach efforts, technical assistance programs, the section 8(a) program, and the special authorities conveyed through section 1207 (e.g., through the creation of a total SDB set-aside). In regard to technical assistance programs, it is the Department's policy to provide SDB concerns technical assistance, to include information about the Department's SDB Program, advice about acquisition procedures, instructions on preparation of proposals, and such other assistance as is consistent with the Department's mission.

8. Section 219.202-5 is amended by designating the existing paragraph as paragraph (a); and by adding a new paragraph (b) to read as follows:

**219.202-5 Data collection and reporting requirements.**

(b) The Contracting Officer shall complete the following report for initial awards of \$25,000 or greater, whenever such award is the result of a Total SDB set-aside (219.502-72). This report shall be completed within three days of award and forwarded through channels to the Departmental or Staff Director of Small and Disadvantaged Business Utilization.

**Total Small Disadvantaged Business (SDB) Set-Aside**

(DFARS 206.203-70)

**Individual Contract Action Report**

(Over \$25,000)

1. Contract Number \_\_\_\_\_

2. Action Date \_\_\_\_\_

Whole dollars

3. Total dollars awarded \_\_\_\_\_

4. Total value of fair market price (See FAR 19.806-2) \_\_\_\_\_

5. Difference ((3) minus (4)) \_\_\_\_\_

9. A new Subpart 219.3, consisting of sections 219.301, 219.302 and 219.304, is added to read as follows:

**Subpart 219.3—Determination of Status as a Small Business Concern****219.301 Representation by the offeror.**

(S-70) (1) To be eligible for award under 219.502-72, an offeror must represent in good faith that it is a small disadvantaged business (SDB) at the time of written self certification.

(2) The contracting officer shall accept an offeror's representation in a specific bid or proposal that it is a SDB unless another offeror or interested party challenges the concern's SDB representation, or the contracting officer has reason to question the representation. The contracting officer may presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Asian Indian Americans and other minorities or any other individual found to be disadvantaged by the SEA pursuant to section 8(a) of the Small Business Act. Challenges of the questions concerning the size of the SDB shall be processed in accordance with FAR 19.302. Challenges of and questions concerning the social or economic status of the offeror shall be processed in accordance with 219.302.

**219.302 Protesting a small business representation.**

(S-70) *Protesting a SDB representation.* (1) Any offeror or other interested party may, in connection with a contract involving a SDB set-aside or otherwise involving award to a SDB based on preferential consideration, challenge the disadvantaged business status of any offeror by sending or delivering a protest to the contracting officer responsible for the particular acquisition. The protest shall contain the basis for the challenge together with

made to set-aside the acquisition for SDB the synopsis should so indicate (see 205.207(d) (S-72)).

(d) If prior to award under a SDB set-aside, the contracting officer finds that the lowest responsive, responsible offer exceeds the fair market price by more than ten percent, the set-aside will be withdrawn in accordance with 219.506(a).

15. Section 219.503 is amended by adding paragraph (S-70) to read as follows:

**219.503 Setting aside a class of acquisitions.**

(S-70) If the criteria in 219.502-72 have been met for an individual acquisition, the contracting officer may withdraw the acquisition from the class set-aside by giving written notice to SBA procurement center representative (if one is assigned) that the acquisition will be set-aside for SDB.

16. Section 219.504 is amended by adding to paragraph (b) a new paragraph (1) and by redesignating paragraphs (1) through (4) as paragraphs (2) through (5) respectively, to read as follows:

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

- (b) \* \* \*
- (1) Total SDB Set-Aside (219.502-72).

17. Section 219.506 is amended by adding paragraph (a), and by adding at the end of paragraph (b) the words "These procedures do not apply to SDB set-aside.", to read as follows:

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

(a) SDB set-aside determinations will not be withdrawn for reasons of price reasonableness unless the low responsive responsible offer exceeds the fair market price by more than ten percent. If the contracting officer finds that the low responsive responsible offer under a SDB set-aside exceeds the fair market price by more than ten percent, the contracting officer shall initiate a withdrawal.

18. Section 219.507 is added to read as follows:

**219.507 Automatic dissolution of a set-aside.**

The dissolution of a SDB set-aside does not preclude subsequent solicitation as a small business set aside.

19. Section 219.508 is amended by

adding paragraph (S-71) to read as follows:

**219.508 Solicitation provisions and contract clauses.**

(S-71) The contracting officer shall insert the clause at 252.219-7006, Notice of Total Small Disadvantaged Business Set-Aside, in solicitations and contracts for SDB set-asides (see 219.502-72).

20. A new Subpart 219.8, consisting of sections 219.801 and 219.803, is added to read as follows:

**Subpart 19.8—Contracting with the Small Business Administration (the 8(a) Program)**

**219.801 General.**

The Department of Defense, to the greatest extent possible, will award contracts to the SBA under the authority of section 8(a) of the Small Business Act and will actively identify requirements to support the business plans of 8(a) concerns.

**219.803 Selecting acquisitions for the 8(a) Program.**

(c) In cases where SBA requests follow-on support for the incumbent 8(a) firm, the request will be honored, if otherwise appropriate, and will not be placed under a SDB set-aside. When the follow-on requirement is requested for other than the incumbent 8(a) and the conditions at 219.502-72(b)(2) exist, the acquisition may be considered for a SDB set-aside, if appropriate.

21. Section 252.219-7005 and 252.219-7006 are added to read as follows:

**202.219-7005 Small disadvantaged business concern representation.**

As prescribed in 219.304(b), insert the following provision in solicitations (other than those for small purchases), when the contract 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:

**Small Disadvantaged Business Concern Representation**

XXX (1987)

(a) *Certification.* The Offeror represents and certifies, as part of its offer, that it

XXX is, not a small disadvantage business concern.

(b) *Representation.* The offeror represents, in terms of section 8(d) of the Small Business Act, that its qualifying ownership falls in the following category:

- \_\_\_\_\_ Asian Indian Americans
- \_\_\_\_\_ Asian-Pacific Americans

- \_\_\_\_\_ Black Americans
  - \_\_\_\_\_ Hispanic Americans
  - \_\_\_\_\_ Native Americans
  - \_\_\_\_\_ Other Minority \_\_\_\_\_
- (Specify)

(End of Provision)

**§ 252.219-7006 Notice of total small disadvantaged business set-aside.**

As prescribed in 219.508-71, insert the following clause in solicitations and contracts involving a small disadvantaged business set-aside.

**Notice of Total Small Disadvantaged Business Set-Aside (\_\_\_\_\_ 1987)**

(a) *Definitions.*

"Small disadvantaged business concern," as used in this clause, means a small business concern that (1) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals, (2) has its management and daily business controlled by one or more such individuals and (3) the majority of the earnings of which accrue to such socially and economically disadvantaged individuals.

"Socially disadvantaged individuals" means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

"Economically disadvantaged individuals" means socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged.

(b) *General.*

(1) Offers are solicited only from small disadvantaged business concerns. Offers received from concerns that are not small disadvantaged business concerns shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to a small disadvantaged business concern.

(c) *Agreement.* A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small disadvantaged business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

(End of clause)

[FR Doc. 87-10099 Filed 5-1-87; 8:45 am]

BILLING CODE 3810-01-M

July 28, 1987

Mr. Charles W. Lloyd, Executive  
Secretary, DAR Council  
Room 3C841/The Pentagon  
Washington, DC 20301-3062

Dear Mr. Lloyd:

We are a small, minority-owned business specializing in medical equipment and supplies. We need your help and support in changing Public Law 99-661 dealing with the 5% goal for distributors.

In medical equipment and supplies there are very few small manufacturer-ers and if we have to buy from a small manufacturer in order to participate, the law will be there but small and minority distributors will have few opportunities.

I spoke to Mrs. Rita Strausburg, SBA, Defense Personnel Support Center, she stated that out of 461 million plus dollars that was spent by the Department of Defense, minority-owned medical supply dealers including 8(a) firms received 1.5%. If minorities don't have opportunities the figure will remain the same.

I would like to see the following implemented:

1. The 8(a) program remain funded at the same level or higher.
2. Keep Public Law 99-661 separate from the 8(a) program.
3. Extend the 8(a) program participation to 14 years.
4. Monitor the small business specialist and heads of Government facilities to make sure they have a direct outline in reaching their goals with small, minority-owned businesses. SBA need to play a real part in making sure goals are met by Government agencies.
5. Penalize agencies that donot reach thier goals and make it public knowledge to the Congressman.

I look forward to hearing from you as soon as possible because fiscal year 87 ends in October.

Sincerely,

*Theresa McCurdy*  
Theresa McCurdy

tlm/

8/13  
no phone # or  
return address  
- can't respond  
of

COMMUNICATIONS INTERNATIONAL, INC.

A Telecommunications Corporation

Atlanta  
Washington  
Corpus Christi  
Los Angeles  
Chicago  
New York

August 3, 1987

Acquisition Regulatory Council  
Attn: Mr. Charles W. Lloyd, Executive Secretary  
ODASD(P) DARS, c/o ODASD  
(P&L) (M&RS)  
Room 3C841  
The Pentagon  
Washington, D.C. 20301-3062

Ref: DAR Case 87-33:  
DOD FAR Supplement;  
Implementation of Section 1207,  
PL99-661 Set-Asides for SDB concerns

Dear Mr. Lloyd:

These comments are submitted for your consideration on behalf of Communications International, Inc., an 8(a) contractor pursuant to the Small Business Act as amended, and the Region IV, Contractors Association, representing some three hundred and fifty 8(a) firms located throughout the Southeastern United States.

A: Background

While specific language provides for not penalizing small businesses as a class, it appears that no such concern is expressed in the interest of 8(a) firms that might be negatively impacted by the procedures set forth under 219-502-72, notwithstanding the language under 219.601. It is submitted that the long history of DOD's positive relationship with, and support of procurements let under section 8(a) should not be ignored, and indeed could be increased in furtherance of the 5 percent goal established by the act. In summary, the absence of SDB interest in procurements for specific industry sectors, should not release contracting officers from setting aside under 8(a) requirements that would otherwise not be let for want of "rule of two" entities under 219.502-72. This is particularly important where requirements are relatively large, and may lend themselves to partial set-asides under section 8(a), but not under 219.502-72.

Implementation of SDB Set-Aside Regulations Is Not Necessary Nor Authorized for Military Construction

Section 1207(e)(3) of the National Defense Authorization Act for Fiscal Year 1987 provides the Secretary of Defense with authority to enter into contracts using less than full and open competitive procedures and to award such contracts to SDB firms at a price in excess of fair market price by no more than 10 percent only "when necessary to facilitate achievement of the 5 percent goal." The legislative intent is clear that only when existing resources are inadequate to achieve the 5 percent objective should the Secretary of Defense consider using less than full and open competitive procedures such as set-asides.

While such restrictive procurement procedures may be necessary to achieve the 5 percent objective in certain classifications of Department of Defense procurements, such procedures are clearly not necessary in military construction. In fiscal year 1985 disadvantaged businesses were awarded 9 percent of Department of Defense construction contracts (\$709 million out of \$7.9 billion). Clearly the 5 percent objective has already been achieved and exceeded through the full and open competitive procurement process for military construction contracts.

Applying the "Rule of Two" SDB set-aside procedures to military construction procurements is not only not necessary, but clearly not authorized by the legislation since such set-asides are not "necessary to facilitate achievement of the 5 percent goal."

Contract Award to SDB Firms at Prices That Do Not Exceed 10 Percent of Fair Market Cost Is Not Necessary Nor Authorized for Military Construction

Application of the legislative authority to award contracts to SDB firms at a price not exceeding fair market cost by more than 10 percent to military construction procurements is also not authorized by the legislation since the same condition is placed on that provision as is placed on the provision allowing the use of procurement procedures utilizing less than full and open competition; that is, the 10 percent price differential is to be utilized only "when necessary to facilitate achievement of the 5 percent goal."

The routine and arbitrary use of the 10 percent price differential provision in military construction procurements will only serve to increase the cost of construction to the taxpaying public and yet bear no relationship to achieving the 5 percent objective.

The ten percent allowance is nothing more than an add-on cost, to the detriment of taxpayers, particularly since the definition of fair market cost contained in the interim regulations is based on reasonable costs under normal competitive conditions and not on the lowest possible costs. This definition ignores the market realities of how prices are derived. Fair market prices are exclusively the