MARLOWE HEATING & AIR COND.
10680 Southern Maryland Blvd.
DUNKIRK, MARYLAND 20754
(301) 855-8237

855-8237

May 23, 1987

Honorable Paul D. Sarbanes
Dirksen Senate Office Building
Room 332
Washington, D.C. 20510

RE: Defense Department Implementation of Section 1207.
"Contract Goal for Minorities"
All contracts to be set-aside for minority owned contractors

Dear Senator Sarbanes;

We are a small construction firm, who for the last seven years, bid on and received Government contracts in the "Set-aside for Small Business Category." We depend 100% on this type of work. Since I am not a minority, I suddenly find myself on the brink of extinction. Action has been taken by the Department of Defense to set aside all contracts to minority owned contractors, to begin June 1, 1987, and to remain in effect until 1989. So what happens to all the companies like us who are not minority owned?

This is absolutely the most absurd action ever taken by a Government that I used to think had some degree of logic and fairness. If logic were used, it would be obvious that this action will establish a breeding ground for fraudulant fronts for ownership. Other problems would be construction delays, cost over-runs, and bonding problems. Obviously no logic has been used in this action. As for fairness, it's the most blatent use of reverse discrimination I have ever seen.

I believe it's fair for all people to have equal rights. It is not equal rights when five contractors are put out of business so that one contractor can get rich.

It seems to me that one small area of the Defense budget is being manipulated to achieve a 5% set-aside for Small Disadvantaged Businesses. It's obvious that the upper end of the budget is being neglected in this area.

If something is not done immediately to turn this around, we and hundreds of other small businesses like us will be put out of business. We solicit your help in this matter.

Sincerely,

Lloyd A. Marlowe

Lloyd A. Marlowe
President

87-33

# JOWETT INCORPORATED

*Contractors*

JOWETT INC.

An Equal Opportunity Employer

P.O. Box 340
Clinton, MD 20735
868-2880

June 24, 1987

Defense Acquisition Regulatory Council
ODASD (P) DARS, c/0 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

Dear Sir:

On June 1, 1987 the Department of Defense (D.O.D) implemented a new rule which will bar small businesses that are not disadvantaged from obtaining D.O.D. contracts for the next three years! The new rule was published in the May 4, 1985 Federal Register and implements Section 1207 of Pub. L 99-66; Set-Asides for Small Disadvantaged Business concerns (S.D.B.). This rule is in addition to the 8A Program which is already in effect.

We are a small business that performs mainly D.O.D. construction contracts in the Maryland, Virginia and Washington, D.C. area and this new rule will have a devastating impact on our company and its 100 employees.

It seems totally unfair to obtain practically the whole 5% S.D.B. concern obligation for the D.O.D. construction program from the small business set-aside work. Over 5% of the small business set-aside work in our area is given to S.D.B. concerns already, so why penalize non-S.D.B. concerns for the total D.O.D. obligation?

We cannot believe that it was Congress's or D.O.D's intention to award the majority of the small business set-aside work to S.D.B. concerns, but only that they should receive their fair share. We are not opposed to set-asides; however, in this instance the whole market is being pulled out from under contractors who have performed this work in the past.

If this rule is allowed to stand, it will seriously jeopardize the existence of our company and others like us, who have been dependable bidders and contractors for the D.O.D. in the past.

Very truly yours,

W. T. Jowett, Jr.
President

WTJ/dh

87-33

# Atlantic Risk Management CORPORATION

INSURANCE • BONDING • ESTATE PLANNING

June 24, 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

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

Dear Mr. Lloyd:

We are writing to express our concern regarding the subject "interim rule".

As surety bond agents, we represent both non-minority and minority government contractors. In our opinion, due to the rapid increase in demand, there are just not enough qualified minority contractors. The additional cost to taxpayers resulting from the Federal Government's increased use of these inexperienced firms at the expense of other small businesses, as in the case of the "interim rule", is another example of waste in our well meaning but misguided federal buearacracy.

Even if the contract price of the set aside job could be kept within 10% of the so called "fair market price" at the time of award, as proposed by DOD, it is not always realistic to assume the job will finish at that price. The record is full of cases of contract overruns, delay claims, and business failures when unqualified "disadvantaged" contractors bite off more than they can chew.

Moreover, the financial impact on non-disadvantaged government contractors could be significant. Many of them have achieved success in this difficult field of endeavor through hard work and good management. It is patently unfair to them to restrict their source of business in the manner proposed by this interim rule.

We urge you to reconsider this ruling based on the need for both fairness to non-disadvantaged contractors and better cost control in government.

Yours very truly,

Peter J. Marcelli
Chairman

4041 Powder Mill Rd.-Suite 220 • Beltsville, MD 20705 • Baltimore (301) 792-4471 • Washington (301) 595-4533

NATIONAL CONSTRUCTION INDUSTRY COUNCIL

1919 Pennsylvania Avenue, N.W. • Suite 850 • Washington, D.C. 20006 • (202) 887-1494

June 17, 1987

Armed Services

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

As you may know, the Department of Defense recently issued a regulation which dramatically changes the way in which DOD contracts will be let in the future. The new regulation was published on an "interim basis" in the May 4, 1987 Federal Register and is entitled "Department of Defense Federal Acquisition Regulation."

We are writing to convey our strong objection to the proposal. 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 bidding DOD-related projects for the next three fiscal years. Simply stated, that prospect is unacceptable. We cannot believe that effect was intended by Congress.

The new rule will in most cases foreclose 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.

Contracting officers around the country are now telling engineer and contractors, some of whom have built DOD facilities for decades, that they need not apply for the next three years. Accordingly, NCIC believes that hundreds of such firms will either go out of business or establish false disadvantaged fronts in order to qualify.

We have attached a series of questions to this letter which have yet to be answered. We encourage you to convey these concerns to the Defense Department and ask them to formally respond. Additionally, we have attached a recent editorial in the Engineering News-Record on the subject.

In the final analysis, this issue involves simple fairness. A "rule of two" should not become a rule of 100 per cent. And yet that is the effect of the interim rule. Telling small businesses around the country to "go away" for three years, particularly in an industry which is in compliance with all Congressionally mandated utilization goals, cannot be sound public policy.

If you have any questions regarding NCIC or our views on this policy, please call us at 887-1494. We would be pleased to meet with you at your convenience to discuss our position.

Sincerely,

Gregg Ward

Gregg Ward
Executive Director

GW:ldt

Enclosures (2)

cc: American Consulting Engineers Council
American Rental Association
American Society of Civil Engineers
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors of America
Associated Landscape Contractors of America
Association of the Wall & Ceiling Industries - International
Mechanical Contractors Association of America
National Association of Surety Bond Producers
National Association of Women in Construction
National Constructors Association
National Electrical Contractors Association
National Society of Professional Engineers
Prestressed Concrete Institute
Sheet Metal and Air Conditioning Contractors National Association
The Surety Association of America

## Catch up on computers—or else

Architects, engineers and contractors entering their respective disciplines in the early 1950s were probably more concerned with their slide rules than the promise of a seemingly complicated tool that could automate repetitive and tedious calculations. If they started families within the first five years of their careers, they could be grandparents by now. But in those same years, the first commercial computer has become a great-grandparent to the new machines on the market. Such sharply accelerated life cycles increase greatly the responsibility of those in construction to understand and manage these powerful tools.

Computer users in other industries are way ahead of the game. They've developed computer planning strategies that direct their computer purchases, they've joined computer standards organizations, and they belong to user groups that carry a lot of clout with powerful computer suppliers.

Construction industry users are playing catch-up (see p. 34). That requires a corporate commitment to the expensive computer equipment acquired and a responsibility to monitor the trends that could render it obsolete. This cannot be achieved unless construction industry users attempt to master computer technology as it applies to their business. Some users will respond that their primary business is construction, not computer technology. But with the rate technology is changing, almost all phases of construction now have some computer input, and users who are slow to follow will surely be left behind.

## Trashing the Rule of Two

There comes a point when special emphasis programs in federal construction procurement become more like the tail wagging the dog. The ever expanding use of the so-called Rule of Two concept in the Dept. of Defense is a good example (see p. 74). This rule started out as a way to channel more of the $8 billion a year in defense construction work to small businesses. But now it is also being used to set aside work for small disadvantaged businesses (SDBs).

There is a place in federal contracting for programs that allow small businesses and those owned by minorities and women to compete with the giants of industry. The federal government has a social responsibility in addition to its function as a procurer of goods and services. But the social responsibility that calls for fairness also demands that special interests be cut off at a certain point. It is ludicrous that small disadvantaged and minority-owned firms be given first crack at the cream of a multibillion-dollar construction budget, while experienced and efficient mainstream producers sit on their hands.

By definition, SDBs lack opportunity, experience, financing and skills. Programs to remedy that must be tailored carefully to address those problems. Projects should be selected accordingly, with an eye toward maximizing contracting experience while limiting the potential impact that a business's failure to perform will have on national defense. We suggest that the Defense Dept. go back to the drawing board when it crafts its final rule. The Rule of Two concept is simply an administrative expedient to meet arbitrary goals and it has an unnecessarily severe impact on the competitive bidding process.

## Emphasizing technology

The creation of a National Institute of Technology, proposed in a Senate bill, could help put technology transfer in the U.S. on the front burner, where it belongs. As proposed by the influential chairman of the Senate Commerce, Science and Transportation Committee, Ernest F. Hollings, the bill would move the National Bureau of Standards (with its building and fire technology centers) into NIT (ENR 6/4 p. 7). And there's much more than a name change.

Money authorized by the bill would stimulate technology transfer through creation of regional federal-state centers around the country. For the current work of NBS there might be little additional money, but results of that work could be more effectively made available to industry for commercial application. It is a good idea.

## The landfill as art

The nation's abundance of garbage, piling up in unsightly "Mount Trashmores" from coast to coast, is a source of pride to nobody. But there is new hope.

Within a few years, a dump in New Jersey could give new meaning to the disparaging term "junk art." Following a design by artist Nancy Holt, the Hackensack Meadowlands Development Commission (HMDC) is planning to transform a 57-acre landfill into a piece of landscape art. It will be visible to millions of commuters and tourists who travel to and from New York City via the New Jersey Turnpike, Amtrak or Newark Airport (see p. 28).

The landfill will be closed and sculpted into mounds, with a covering of grass and other plants. Sky Mound, as it will be called, will provide carefully arranged vistas of the rising and setting sun and moon through mounds and steel structures. Its design is meant to provide an interesting appearance to those who pass by, as well as to those who stop at the site.

While landfills elsewhere have been turned to recreational use such as parks, HMDC says this would be the first used to create public art. To the extent that the public's trash cannot be recycled for the public good, here's another way to find something positive in a growing national problem.

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. Is the construction industry -- the very industry currently in compliance -- the only industry impacted 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 was 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?

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

June 3, 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: Comments on DAR Case 87-33: DoD's Notice of Intent to Develop a Proposed Rule to Help Achieve a Goal of Awarding Five Percent (5%) of Contract Dollars to Small Disadvantaged Businesses

Dear Mr. Lloyd:

The following are the comments of the National Association of Minority Contractors (NAMC) with regard to the Department of Defense (DoD) notice of intent to develop a proposed rule to help achieve a goal of awarding five percent (5%) of contract dollars to small disadvantaged businesses.

## Introduction

The National Association of Minority Contractors (NAMC) is a business trade association established in 1969 to address the needs and concerns of minority-owned construction firms. NAMC is the oldest and only organization representing the economic interests of the 60,000 minority construction contractors nationwide. One of NAMC's primary objectives is the increase of procurement opportunities for minority contractors in the public and private sectors.

Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (P.L. 99-661) requires the Department of Defense to award five percent (5%) of its contract procurement to small disadvantaged businesses. The Defense Acquisition Regulatory (DAR) Council has already published an interim rule to implement Section 1207. That interim rule requires that contracting officers set aside acquisitions, other than small purchases conducted under procedures of Federal Acquisition Regulation (FAR) Part 13, for exclusive competition among Small Disadvantaged 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 ten percent (10%).

The Department of Defense now invites public comment concerning other procurement methods which can reasonably be used to attain the five percent (5%) goal. Accordingly, NAMC submits the following recommendations.

## Recommendation

### 1. Size Standards

It is very probable that the DoD will rely heavily upon minority concerns already certified as small disadvantaged businesses under the Small Business Administration (SBA) 8(a) set-aside program to achieve its five percent goal. This could be an ill-fated effort, however, if certain precautions are not taken.

Under the 8(a) program a firm is entitled to procure government contracts which are set-aside by the various federal agencies for such purpose. Most of such contracts are negotiated rather than bid. This allows minority contractors to build performance track records in order to more smoothly move into the economic mainstream once they graduate from the 8(a) program.

Studies conducted by NAMC as well as Senator Lowell Weicker of the Senate Small Business Committee indicates, however, that once a firm graduates from the 8(a) program the contract dollars such firm is able to procure decreases dramatically. Thus, the "size" of an 8(a) firm is inflated during the time it is in the SBA program.

This phenomena could present a situation in which the most capable small disadvantaged firms will not be eligible to be included in the DoD program during the time period of the legislation because once such firms perform even one substantial DoD contract they will no longer be considered "small" by legislative definition. They will, thus, be unable to bid on any future DoD contracts under the program and will probably be "graduated" from the 8(a) program. **NAMC recommends, therefore, that for purposes of implementing Section 1207, contracts procurred under the SBA's 8(a) program not be counted in determining whether a particular firm is "small."**

### 2. Dissemination of Procurement Information

There are several thousand minority contractors in the construction marketplace which are more than capable, from both a management and financial standpoint, to perform DoD contracts. Most of such firms, however, have never done business with the Department of Defense, although they so desire. The reason for this is that such firms are rarely aware of information regarding specific DoD procurements.

Although it is true that substantial information is available regarding DoD procurements, the small disadvantaged business person frequently does not know where to find such information. Even when he is able to find such information, however, it may be presented in such a context that leads the minority businessman to believe that he does not have the time nor the resources to effectively read and analyze such information.

Minority contractors need timely, edited DoD procurement information. NAMC currently publishes Procurement Bulletins for its members in which public and private sector information on procurement opportunities is broken down to make it simple and relevant to the targeted minority firms. NAMC has enjoyed great success in getting minority firms to respond to such bulletins. **The DoD Office of Small and Disadvantaged Business Utilization (OSDBU) should work very closely with trade associations such as NAMC to assure that information on DoD procurements is properly and effectively disseminated.**

## 3. Availability of Small Disadvantaged Businesses

DoD's interim rule gives contracting officers the authority to determine whether or not offers for acquisitions will be received from two or more small disadvantaged businesses. Often, however, the contracting officer is in no position to determine such information as he has no knowledge of either the availability or the eligibility of minority firms which can perform certain work.

NAMC keeps business profiles on thousands of minority construction firms nationwide which contain such pertinent information as the company's gross sales for the past three (3) years, bonding capacity, years in business, etc. Other trade associations maintain similar records in other specialty areas. **It is recommended, therefore, that DoD require that a contracting officer may only make a determination that two or more SDB's are not available for any given acquisition only after checking with the national trade association pertinent to such procurement area of specialty.**

## 4. Bonding

Under the Miller Act, as amended (40 U.S.C. 270a - 270e), performance and payment bonds, with certain exception, are required for all United States government construction contracts. It is this requirement that has eliminated many capable minority contractors from bidding or performing DoD contracts. Corporate surety companies have simply not provided bonding to minority firms at anywhere near the level that they have provided such service for majority-owned firms. Regardless of the reasons given by the surety companies for not awarding bonds to minority businesses,

and regardless of reasons perceived by minorities that they have not received them, the problem is still an inescapable reality that threatens to impede DoD efforts to achieving its five percent small disadvantaged business goal. A very practical solution is emerging which may resolve much of the current problem, however.

A hardly-noticed amendment to the Miller Act authorizes the use of individual sureties to award bid, performance and payment bonds to contractors. These bonds are backed by individuals rather than corporations. Individual sureties are not required to be listed on the U.S. Treasury List yet they are authorized and acceptable to the U.S. Government in almost all cases. Federal Regulation 41 CFR 1.10.203 dilineates the authority and use of these bonds.

During the past year NAMC has been very successful in obtaining individual surety bonds for its members. Although this is a legal form of bonding, many federal contracting officers are still not aware of these types of bonds nor have they ever seen one. Educating such contracting officers on a case-by-case basis has sometimes been an arduous and time-consuming task. **It is recommended that DoD educate all of its contracting officers of the acceptability of individual surety bonds in whatever manner it deems feasible and effective.**

5. The Protest Process

There are several predominantly-white national trade associations which have opposed any and all government efforts to bring minority businesses into economic mainstream. They often seek to sabatoge on stonewall any government program which seeks to facilitate the increased utilization of minority businesses. The most-often used tactic is the administrative legal procedure.

Through their members, such organizations will challenge or protest an award to a small disadvantaged business in the administrative arena. Such protest may take up to two years to resolve. The minority firm is not only precluded from performing the contract but its financial resources are diluted from the necessity of obtaining legal assistance. Most importantly, however, is the fact that many other capable minority firms are discouraged from bidding on government jobs, thus fulfilling the intent of protagonist in taking such action.

**For purposes of implementing Section 1207 NAMC recommends that the "interested party" which may challenge an award be limited to qualified small disadvantaged business offerors. A special, expedited process should be designed for dealing with such protests. A procedure should also be implemented for summarily dismissing protests which appear on their face to be frivilous.**

**Conclusion**

NAMC thanks you for allowing it the opportunity to submit comments in this matter. We stand ready to assist DoD in any possible way to make this program a success.

Very truly yours,

Ralph C. Thomas, III

Ralph C. Thomas, III
Executive Director

RCT:cps

87-33

# TIGHE, CURHAN & PILIERO

ATTORNEYS AT LAW
1750 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

(202) 628-0300

DANIEL J. PILIERO II
KEVIN P. TIGHE, P.C.
ALLAN R. CURHAN, P.C.
PAMELA J. MAZZA
MARK K. STEPHENS
MICHAEL A. HISER
LOUISE E. HANSEN*
MAUREEN T. KELLY*
JOAN DAVENPORT*
ROBERT D. WAGMAN
TAMMY M. DOURIS
RICHARD J. SHEA*
DAVID J. NOONAN*
ELLEN BORKUM SCULT*
*Not admitted in D.C.

BOSTON, MASSACHUSETTS OFFICE
30 FEDERAL STREET
BOSTON, MASS. 02110
(617) 451-0308

NEW YORK, NEW YORK OFFICE
(SUITE 2700)
26 BROADWAY
NEW YORK, N.Y. 10006
(212) 269-4420

June 3, 1987

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

ATTN: Charles W. Lloyd, Executive Secretary

Dear Mr. Lloyd:

Tighe, Curhan & Piliero represents a number of small, minority owned firms and has been asked to submit these comments on their behalf.

Pursuant to the Department of Defense (DOD) "Notice of Intent to Develop a Proposed Rule to Help Achieve a Goal of Awarding Five Percent of Contract Dollars to Small Disadvantaged Businesses," 52 Fed. Reg. 1628 (May 4, 1987) we hereby submit this written comment concerning the two Defense Acquisition Regulatory Council (DAR Council) proposals which may form the basis of a proposed rule on this topic.

The first proposal would establish a procedure whereby direct award could be made to a small and disadvantaged business (SDB) firm, without providing for full and open competition in those circumstances where a market survey and a "sources sought" Commerce Business Daily (CBD) notice identified only one responsible SDB concern which could fulfill DOD's requirements. The authority for this proposal is found in exception 5 of the Competition in Contracting Act (CICA), 10 U.S.C. § 2304(c)(5). Use of the authority would be limited to those circumstances where SDB set-aside criteria are not met, where realistic pricing is possible and where award without full and open competition is necessary to achieve the five percent goal.

The second proposal involves establishing a ten percent preference differential for SDB concerns in certain sealed bid competition acquisitions when this preference is determined necessary to attain the five percent goal. Under this proposal,

award would be made to an otherwise responsible SDB concern whose bid is within ten percent of the low offeror's bid.

We support both proposals and would urge the DAR Council to prepare regulations to implement these proposals. However, we believe that the proposals are very narrow and it may be that other methods should be considered as well in order to increase the likelihood of achievement of the five percent goal.

With respect to the first proposal, we believe that implementation of this proposal will assist in achieving the five percent goal by eliminating, under very limited circumstances, the "rule of two" requirement for SDB set-asides. We recommend that the DAR Council authorize this procedure where a "sources sought" CBD notice identifies only one responsible SDB concern without the additional requirement for a market survey in all circumstances. It appears that there may be situations where a notice is published but a market survey has not been undertaken. Under these circumstances, it appears appropriate for the contracting officer to pursue an SDB set-aside although the CBD notice identified only one responsible SDB concern. The proposal, as reflected in the Notice appears too restrictive to cover these situations.

We support implementation of the second proposal. In addition, we believe that the five percent goal would be better fulfilled if this proposal were extended for use in competitive negotiated acquisitions where source selection is based primarily on price. Under those circumstances, if an SDB concern's cost proposal was within ten percent of the low offeror's bid, the SDB could be awarded the contract. The intent of the five percent goal would be better fulfilled by enactment of this proposal and it would be appropriate to provide a provision parallel to that proposed for sealed bid competitive negotiated acquisitions where source selection will be based primarily on price.

Again, we urge the DAR Council to consider other alternatives that may be implemented in order to fulfill the five percent goal.

Very truly yours,

Daniel J. Piliero II

87-33

INTEGRATED SYSTEMS ANALYSTS, INC.

*C. Michael Gooden*
*President*

June 9, 1987
Serial: 87-C-506

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

Ref: DAR Case 87-33

Dear Mr. Lloyd:

The timely response by the Department of Defense in implementing Section 1207 of PL99-661, the National Defense Authorization Act for Fiscal Year 1987, is commendable. We at Integrated Systems Analysts, Inc. (ISA) believe that the proposed regulations as set forth in the May 4, 1987 Federal Register will certainly 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 USC, the Small Business Act, to the detriment of the realization of the goal.

Corporate Offices
1215 Jefferson Davis Hwy.
Crystal Gateway III, Suite 1304
Arlington, VA 22202
703-685-1800

Four specific areas which could significantly enhance the probability of attaining the goal, within the framework of the legislation, are set forth below.

1. The DOD implementation does not adequately address the degree of subcontracting which a Small Disadvantaged Business (SDB) will be permitted to pursue under a SDB set-aside procurement. This creates the potential for a significant portion of the revenues earmarked for the minority community to end up in the businesses 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.

2. The DOD implementation 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 PL99-661, the authority that should accompany these responsibilities is nonexistent in DOD's procedures. The

procedures in DFARS 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 DFARS 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 SADBU 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.

3. The DOD implementation 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 SB 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.

4. The DOD implementation defines SDBs by referencing Section 8(d) of 15 USC. 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, HR1807, 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 awarded to 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.

I appreciate having the opportunity to offer these comments regarding the implementation of this legislation. I sincerely believe that Section 1207 of PL99-661, if properly implemented, could have the most significant positive impact on the minority community of any legislation which has preceded it.

Sincerely,

INTEGRATED SYSTEMS ANALYSTS, INC.

C. Michael Gooden
President

Enclosure

REED SMITH SHAW & McCLAY

MEMORANDUM

June 9, 1987

SUBJECT: Small Business Administration (SBA) Authority to Revise Size Standards in Response to P.L. 99-661 Objectives

FROM: Weldon H. Latham *
Virginia D. Green *

## I. EXECUTIVE SUMMARY

Congress recently enacted legislation intended to offer disadvantaged businesses an increased opportunity for participation in Department of Defense (DoD) contracts. Unfortunately, P.L. 99-661[1] as implemented by the Interim Rule,[2] would fall far short of fulfilling the Congressional intent. In order to achieve the fair participation intended for all disadvantaged businesses, SBA in concert with DoD, must promulgate separate size standards specifically intended to address the objectives of the Minority Contract Goal Program.

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[1] Specifically, Section 1207, entitled "Contract Goal for Minorities", of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661) which creates a goal of five (5) percent of the total DoD contract dollars for small disadvantaged business (SDB) concerns during FY1987, 1988 and 1989.

[2] See "Interim Rule" -- 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 [Federal Register, Vol. 52, No. 85, Monday, May 4, 1987, page 16263 et. seq.].

SBA clearly has the legal authority to establish or revise the size standards by which it defines "small" businesses for purposes of program eligibility. It also has the authority to set different size standards for each of the various programs mandated by the Small Business Act, other pertinent statutes and their implementing regulations. As currently written, these standards exclude many disadvantaged businesses from meaningful participation in the DoD program established by Section 1207 of P.L. 99-661. There is adequate legal authority in the relevant statutes, regulations, and judicial opinions to permit SBA to expand the definition of "small" businesses to enable disadvantaged businesses not currently denominated as "small" to participate in the DoD program.

## II. ANALYSIS

### A. The Regulatory Path

Section 1207 of the 1987 National Defense Authorization Act, Public Law 99-661 ("the Act") establishes a goal for small disadvantaged business involvement in Department of Defense contracts that greatly exceeds the current participation of such entities. The Act specifically provides that the small business concerns eligible for these contracts are those which are "... 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 ... ." Public Law 99-661, Section 1207(a)(1).

Section 8(d) of the Small Business Act ("SBA Act"), which is expressly referred to as interpretative authority for Section 1207 of the 1987 National Defense Authorization Act, refers to other sources for the meaning of the term "small business concern."

> "[T]he term 'small business concern' shall mean a small business as defined pursuant to Section 3 of the Small Business Act (15 U.S.C. 632) and relevant regulations promulgated pursuant thereto." 15 U.S.C. 637(d)(3)(C) [emphasis added].

Section 3 of the Small Business Act, in turn, grants the Administrator of the Small Business Administration the authority to make a detailed definition of what constitutes a "small-business concern" using criteria such as "number of employees and dollar volume of business." 15 U.S.C. 632(a).

The Administrator has issued regulations defining a small business concern, in many industries, in terms of the number of its employees and the dollar volume of the business. 13 CFR 121.2. These quantifications are determined by the Administrator and are referred to as Standard Industrial Classification ("SIC") size standards. 13 CFR 121.2.

SBA regulations further provide that these SIC standards govern the eligibility of minority small business under the Section 8(a) program:

> "(1) 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 for purposes of Government procurement in Section 121.2 of these rules. The particular size standard to

> be applied will be based on the primary industry classification of the applicant concern." 13 CFR 121.4(g)(1).

Thus, the size standards of the SBA were intended by Congress in the 1987 National Defense Authorization Act to aid in identifying small business concerns under the Act. However, neither the Act, the SBA Act, nor the SBA regulations implementing the SBA Act requires that size standards remain constant.

B. The Regulatory Authority

The SBA has the authority to change its size standards without the further assent of Congress. "It is clear, both from the Act itself and from the legislative history, that the specification of what is a small business has been left to administrative, rather than legislative determination." 13 CFR 121.1(b) "The actual setting of size standards, i.e. the size specification of 'small' is delegated to the Administrator of the SBA." 13 CFR 121.1(a). This authority is crucial since "eligibility for SBA programs requires that a firm be `small'." Id.

At present, as set forth above, the same size standards for SBA "small business concerns," in general, are applied specifically to "Section 8(a) small business concerns." 13 CFR 121.4(g)(1). This, too, could be altered by the SBA. SBA is authorized to establish "different" size standards for its various "different" programs. This is perhaps best demonstrated by a review of the distinction set forth in the size regulation:

> "(a) The following industry size standards apply to all SBA programs except the sales of government property (§121.6); physical disaster loans (no size standards); Small Business Investment Companies, Development Companies, and Pollution Control Bonds (see §121.4)..." 13 CFR 121.2(a) [emphasis added].

The United States District Court for the District of Columbia concurred in this view, wherein it stated that "SBA could have administratively created different size standards for 8(a) as opposed to non-8(a) concerns." Systems and Applied Sciences Corp. v. Sanders, 544 F.Supp. 576, 581 (D.D.C. 1982).

C. Proposals For Modification of Size Standards

The following paragraphs include two (2) alternative proposals aimed at securing more equitable participation by disadvantaged businesses in the DoD Minority Contract Goal Program. Both alternative proposals are based on recognition of the fact that if DoD is to achieve its goal, it must not exclude the very disadvantaged businesses which are best suited to provide the quality of goods and services essential to accomplishing the DoD mission. SBA and, in many instances, DoD have invested large sums of federal 8(a) assistance and contract dollars in developing small disadvantaged businesses and "other than small" disadvantaged businesses to a point where they have become significant contributors in the federal procurement system. Experience has shown that once formerly certified 8(a) firms have

"graduated" from the 8(a) program, their failure rate[3] has been substantial and, thus, the loss of the federal investment therein, has likewise been substantial. Effective utilization of the SBA 8(a) program standards and experience, in cooperation with the goals and objectives of the DoD Minority Contract Goal Program (which were expressly linked in Section 1207(a)(1) of P.L. 99-661), can result in both an effective DoD program and a transition program for graduating 8(a) firms. This approach will enable those firms to move into the larger DoD arena on an increasingly competitive basis. Either of the two alternatives set forth below would be accomplished by SBA establishing a new and different size category for disadvantaged businesses participating in the Section 1207 program.

1. Alternative One: Establish a Different Size Standard for Disadvantaged Businesses Participating in Section 1207 Program by Excluding 8(a) Contract Receipts from the Dollar Volume Calculations of the Business.

This proposal, which would establish a new and different SBA size standard for purposes of P.L. 99-661, would simultaneously promote the long-term viability of participating disadvantaged businesses (particularly those firms which have exceeded their size standards). Gauging the size of a disadvantaged business by totaling only those receipts not

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[3] See Senate Comm. on Small Business, 100th Cong., 1st Sess., Survey of the Graduates of the Small Business Administrative Section 8(a) Minority Business Development Program (Comm. Print, May 12, 1987). The Committee sought to determine the "Out of Business Rate" for graduated 8(a) firms. Based on the survey and independent source data it is estimated that 21 to 30 percent of 8(a) firms which graduated between 1982-86 had gone out of business.

attributable to 8(a) contracts offers one means by which the purposes of the 8(a) program can be furthered, while still enabling somewhat larger disadvantaged businesses to participate in the DoD program. This concept was recently advanced in a bill before the United States House of Representatives, H.R. 1807[4], which would provide the following amendment to Section 8(a) of the Small Business Act:

> "No portion of the gross receipts or employment of a business concern attributable to the performance of a contract or contracts awarded, pursuant to this subsection shall be included in determining the size of such concern for any program or activity conducted under the authority of this Act or the Small Business Investment Act of 1958." H.R. 1807, Section 7.

The purposes of the 8(a) program are stated explicitly in the regulations:

> "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." 13 CFR 124.1(b)(1).

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[4] See H.R. 1807, introduced by Congressman Nicholas Mavroules (D-Mass.), entitled "A Bill to Amend the Small Business Act to Reform the Capital Ownership Development Program...".

These purposes, with regard to small disadvantaged businesses, are ultimately furthered by the continued success of such businesses (even after they cease being small) and are clearly hampered by the failure of such businesses. A fledgling disadvantaged business as well as one which embarks on an ambitious plan of growth in conjunction with the 8(a) program, both often encounter a destabilizing impact on their business upon the conclusion of their 8(a) program participation. This has occurred most acutely in disadvantaged businesses which have outgrown the "small" category, largely on the basis of the volume of their 8(a) contracts. These businesses face termination from the program, even though their corporate infrastructure, non 8(a) contract volume and ownership by socially and economically disadvantaged individuals makes them the paradigm of organizations the 8(a) program was designed to assist.

SBA regulations caution that "[s]mall business should not rely on Federal [8(a)] assistance from the cradle to the grave, but should plan for the day when they can compete without assistance." 13 CFR 121.2(e). This proposal would not frustrate that regulation; rather, it would represent a natural progression to the next level of development for the disadvantaged business. Under this proposal, 8(a) contracts would still be counted for purposes of the size standards used for the 8(a) program (unless H.R. 1807 or some form of it is enacted); however, under a new size standard established <u>solely</u> for purposes of P.L. 99-661, the 8(a) contracts would be omitted from the size calculation. Such

businesses, which are, for all purposes, regarded as successes under the SBA regulatory scheme, often experience the effects of their socially and economically disadvantaged status once again after their ability to secure new 8(a) contracts ends prematurely. Thus, the "other than small" 8(a) firms which could no longer receive new 8(a) contracts would be eligible to "compete" among a class of similarly situated disadvantaged businesses for a substantially larger pool of DoD contracts -- which by all estimates will greatly exceed the total contracts generated by the 8(a) program in the last several years.

SBA regulations support the proposition that small disadvantaged businesses should achieve competitive stature independent of the 8(a) program.

> "SBA assistance should not be regarded as permanent nor as the primary source of a firm's sales. It should be used to assist a firm to compete in the regular business world, without becoming dependent on continuing Government aid." 13 CFR 121.1(e).

These SBA regulations also reinforce the legislative purpose of the program, namely, to create economically viable, competitive and self-sustaining companies. With SBA support, the small disadvantaged business should "... 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)..." 13 CFR 124.107.

This proposal would create the urgently needed next step

or "Transition Program"[5] for other than small disadvantaged firms coming out of the 8(a) program, to continue to develop their competitive skills and business viability. The P.L. 99-661 regulations should clearly delineate the terms under which the "other than small" companies would be eligible to engage in "less than full and open" competition[6] among their disadvantaged business peers on a reasonable and rational basis. Obviously, the details of the "less than full and open competitive procedures" must be more fully set forth in the "Final Rule." The concept set forth in Alternative One is clearly sanctioned by the express legislative and regulatory goals of the two programs -- the SBA 8(a) and DoD Minority Goal Programs.

2. Alternative Two: The Size Standards for Small Disadvantaged Businesses Should be Increased for Those Businesses Which Otherwise Qualify as Disadvantaged Business Concerns Under Public Law 99-661.

The reality of the market in which DoD contractors compete offers the plain justification to significantly increase the size standards for those disadvantaged businesses which would qualify for contracts under the Act, "but for" their current

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5 See S. Comm. Rep., Survey of the Graduates, supra, also revealed that "Many firms felt that they were `dropped' from the program and that ... SBA ... provided transitional help or a phase-out period of assistance to or after graduation." (emphasis added).

6 See P.L. 99-661, Section 1207(d) clearly contemplated the developing levels of competition, preparatory to developing the disadvantaged businesses participating in the DoD Program to the level where they would be equipped to engage in "full and open competition."

status as "other than small" businesses. The DoD contracts in question, often are valued in multi-million dollar amounts and the DoD companies and industries which compete for these contracts are predominated by large and "super" large firms. Each of the top 10 government contractors, for example, exceed one billion dollars in annual revenues. Such factors are relevant and must be weighed in establishing new and more appropriate size standards "solely" for purposes of this DoD program. Given the order of magnitude these DoD contracts and contractors represent, a significantly larger standard of measure is demonstrably in order. Size standards to be utilized solely for this DoD program, perhaps are acceptable at a level as much as ten fold larger than the present standard.

As SBA states, in pertinent part, in its own size regulation:

> "...Size standards vary by industry with particular attention to the structure of the designated industry, Administration policy and the needs of the various Federal programs to which they apply. In its most basic sense, this is the approach of establishing size standards. Factors, among others, which are examined for the purpose if setting size standards include maximum size of firms, average firm size, the extent of the industry dominance by large firms, the number of firms, the distribution by firm size of sales and employees in the industry, the presence if Federal procurement, and relation to other SBA programs. The development of size standards is not an exact quantitative procedure. No single measure or simple numerical device is the basis for establishing size standards." 13 CFR 121.1(b) (emphasis added).

Thus, the special circumstance of this particular Federal program and the dominance of especially large firms in the industries doing business with DoD makes the need for the substantially larger size standards, in this instance, compelling.

Public Law 99-661 provides that, for the next three fiscal years, the Department of Defense is to achieve a goal for contracts for minorities that, in effect, more than quadruples the current participation of disadvantaged businesses in all federal contracts, including DoD. This legislation presents a ready opportunity for disadvantaged businesses, which are "other than small," to petition the SBA and DoD and, if necessary, the Congress, seeking their quite appropriate inclusion in this new program. Their inclusion in this program may well be essential for the DoD to reach its assigned goal and would serve to assist SBA in fulfilling the broader minority business and capital development purposes of the Section 8(a) program.

In several informal discussions with ranking DoD officials familiar with DoD's efforts to increase contracting opportunities for disadvantaged businesses, one consistent opinion was reiterated, i.e. it is highly unlikely that DoD will fulfill the Congressionally mandated five (5) percent goal because "there are not enough small disadvantaged businesses to adequately perform the work". This view is both pervasive throughout DoD and somewhat substantiated by DoD's performance in recent years. According to DoD officials, in government fiscal year 1986, DoD contracts with all disadvantaged businesses accounted for 2.3% of the DoD budget. Although their present estimates suggest an increase from the FY86 level, most officials that would express an opinion freely stated the view that DoD would not fulfill the five (5) percent goal, but would fall short due to the unavailability

of a sufficient number of qualified "small" disadvantaged firms to meet the goal and effectively assist DoD in accomplishing its overall mission. The inclusion of the "other than small" disadvantaged firms which are minuscule by DoD contractor standards (but which represent the "biggest and best" the minority business community presently has to offer), would go a long way to satisfy the ultimate objective Congress intended.

For all of the foregoing reasons, it is emphatically clear that either alternative proposal to include "other than small" disadvantaged businesses (many of which have for years successfully performed DoD contracts under the 8(a) program) within the group eligible to participate in this program would greatly facilitate the accomplishment of the goals of Section 1207 of P.L. 99-661.

## III. CONCLUSION

On May 4, 1987, the Department of Defense promulgated its Interim Rule and requested comments on Section 1207 of P.L. 99-661. All comments concerning the Interim Rule must be received at the Pentagon by August 3, 1987. It is our view, based on considerable analysis of the legislative history, background and the objectives of both the DoD program and the pertinent SBA legislation and regulations that Alternatives One and Two (presented herein) are legally well founded and would substantially increase the fairness and equity of the DoD program. Either alternative would also increase the effectiveness of both minority assistance programs, as the Congress intended.

The Section 8(a) program, originally a response to the 1967 Report of the Commission on Civil Disorders, was intended to increase the level of business ownership by minorities so that they would have a better opportunity "to become an integral part of the free enterprise system." S.Rep. No. 1070, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. Code Cong. & Ad. News 3835, 3836. By promulgating either of the alternative regulatory proposals recommended herein, SBA and DoD would significantly improve the likelihood of continued success of many disadvantaged businesses. In so doing, SBA and DoD will have taken a major action to address the objective originally espoused in the aforementioned 1967 Commission Report and echoed in subsequent Congressional enactments such as P.L. 99-661.

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* Weldon Latham and Virginia Green are both partners in the national law firm of Reed Smith Shaw & McClay. Mr. Latham also served in the Honors Program of the General Counsel's Office of the Air Force; as Assistant General Counsel, Executive Office of the President (OMB); and as General Deputy Assistant Secretary, U. S. Department of H.U.D. Ms. Green served as Deputy Assistant Secretary of the Air Force (MRA&L); as Deputy Special Assistant to the Secretary of Defense; and Associate General Counsel, Department of Defense.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

87-33

June 8, 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: Interim rule amending 48 CFR sections 204-206, 219 and 252 to implement section 1207 of Public Law 99-661 and to establish a set-aside program for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

The Small Business Administration has the following comments and concerns with respect to the above-referenced interim regulation proposed by the Department of Defense (DoD) on May 4, 1987 (52 Fed. Reg. 16263).

1. We note that the regulation does not appear to recognize in the procedures provisions the possibility of challenges to the size status of participating concerns pursuant to the procedures contained in 13 C.F.R. §121.9. Inasmuch as participation in this new set-aside program is limited by both the disadvantaged and size status of the business entity, challenges could be mounted as to both eligibility criteria.

2. Section 219.201. This section does not adequately discuss the relationship of the section 8(a) program to the Small Disadvantaged Business Program. We would recommend that this section be rewritten to state clearly that: (a) the SDB program is not intended as a substitute for or to diminish in any way DoD's participation in the section 8(a) program; (b) that section 8(a) contracts count towards the 5 percent goal mandated by the law; and (c) after the SDB program is implemented, many procurements will continue to be suitable for the section 8(a) program.

3. Section 219.301(1). Representation by the offeror: This section does not specify when in the procurement process the SDB is to certify as to its size and disadvantaged status and would appear to permit a concern to make such a certification at any time. We believe this regulation should conform to SBA's size regulations, which require that a business provide a size certification "in connection with an initial bid or offer including price." Our suggested language would conform this provision to the pertinent provision of SBA's current section 8(a) program rules, as well as to the small business set-aside rules.

4. Section 219.301(2). The second sentence of this subsection permits the contracting officer (CO) to presume social and economic disadvantage for certain named groups and "other minorities". The regulation contains no guidance as to who might qualify as an "other minority". As we understand the underlying statute, Congress intended that this program adopt the definitions found in section 8(d) of the Small Business Act (15 U.S.C. 636(d)). SBA has interpreted the words "and other minorities" in section 8(d) to mean those minority groups designated administratively as socially disadvantaged under section 8(a)(5). For reasons of clarity and consistency, we would urge DoD to incorporate SBA's interpretation of the section 8(d) language by deleting the term "minorities" and substituting in its place the phrase: "minority groups recognized by SBA for section 8(a) program participation under SBA regulations at 13 C.F.R. Part 124,".

5. Section 219.302. We recognize that our early discussions did relate to the issues addressed by this section. However, we regret that we were not consulted as to the specific language in this section. This section establishes a protest procedure for challenging the disadvantaged business status of a concern to the SBA. At present, SBA has devised an internal procedure governing protests of social and economic disadvantage status under section 8(d), but has not yet promulgated regulations in this area. Nevertheless, we wish to follow those procedures here. In light of SBA's interest in procedures affecting our agency, we would appreciate the opportunity to work with you in drafting the final regulations regarding protests of disadvantaged status of companies participating in the SDB program. We have the following specific concerns with the interim regulation:

> Section 219.302(1). The term "other interested party" is undefined by either the authorizing statute or the regulation. As written, the regulation would appear to permit large businesses to challenge the

disadvantaged status of a SDB, where, for example, the large business might have been eligible for the procurement had it not been set-aside for SDBs. This ambiguity may result in undesirable and unintended complications in implementing the new set-aside program, which could delay procurements and result in harassment of SDBs. In the size context, the Agency has restrictively interpreted the phrase "other interested party" to mean only those other small concerns that have submitted an offer for the procurement in issue and that also have a reasonable prospect of being awarded the contract if the protest succeeds. Under our interpretation other interested party is effectively synymous with "offeror".

We note also that the provision, as written, does not give SBA standing to challenge the disadvantaged certification of a participating concern. In view of SBA's substantial interest in implementing small business program policy and in preserving the integrity of small business programs, we urge that SBA be recognized as having the right to protest a small business's disadvantaged certification. Also, this provision does not expressly recognize the right of the CO to protest a SDB's certification.

To address these concerns, we suggest that you amend this subsection of the regulation by deleting the phrase "Any offeror or other interested party" and by substituting in its place the phrase "The contracting officer, any offeror, or the Small Business Administration". In view of the Agency's interpretation in the size context, we do not believe that the phrase "other interested party" should be included in the regulation. Its inclusion would serve only to create an unnecessary ambiguity.

Section 219.302(4). This subsection requires the CO to send the protest to the SBA District Office. To the extent this was intended to suggest that that Office would issue the final decision, this provision is not consistent with the Agency's internal procedure. We have decided that, while protests should be filed and initially processed at that level, decision authority should rest initially with the Regional Office, as in the Certificate of Competency context, with a right of appeal to the Associate Administrator for Minority Small Business and Capital Ownership Development, the administrative head of the SBA's Minority Small Business and Capital Ownership Development programs.

Section 219.302(6). In view of the preceding comment, the time-frame permitted for SBA to issue a decision concerning a firm's disadvantaged status is insufficient. We request that the period of time afforded SBA to render its initial decision be 15 days from the date of SBA's receipt of such protest. This would permit 7 days for issuance of a recommendation by the SBA District Office, and 5 days for the decision of the Regional Office, and 3 days transmittal time between the various offices and/or for receipt of information from the protested concern upon which the decision will be based. Our internal procedure under section 8(d) affords a right of appeal from this initial decision to the Associate Administrator for Minority Small Business and Capital Ownership Development, and we believe such a right of appeal should be provided here as well. In view of the need to expedite such appeals, we believe that an appeal must be filed with the Associate Administrator no later than five (5) days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of the determination made by the Regional Office, consistent with the rules governing such appeals in the size context. See 13 C.F.R. §121.11(e)(2). If the appeal is not filed within the prescribed time limit, the appellant will be deemed to have waived all rights of appeal insofar as the pending procurement or sale is concerned, but the appeal may proceed to final determination and shall apply to future procurements. While we would anticipate expedited processing of such appeals, we do not wish to designate a time limit for issuance of the final Agency decision in the regulation.

We also believe that the standard for making an award notwithstanding a pending protest, "disadvantageous to the Government", is too broad. We urge adoption of a more restrictive standard: "of significant detriment to the Government". We recommend that the provision be amended by deleting the phrase "disadvantageous to the Government" and inserting in its place the phrase "have a significant detrimental effect on the Government".

We note also that the regulation as written is ambiguous as to the effect of a decision by SBA to sustain a protest, whether made before or after an award. The regulation could be read to limit the effect to the procurement in issue. We believe that the same approach taken in the Agency's size regulations should be followed here. If made before

award, a size determination pertains to both the pending and all future procurements, unless and until the business is recertified by SBA as qualifying as a small business. If made after award, the determination pertains only to future awards. See 13 C.F.R. §121.8 and 121.9. Comparable language could be fashioned for inclusion in the final regulation.

6. Section 219.502-72(a). SBA has several concerns about this subsection. The first numbered clause appears to be modeled in part after the "rule of two" in the section 15 small business set-aside program and in part after the SBA's size rule for government procurement. As written, however, the provision appears to be incomplete at least with respect to incorporation of the latter. Here, the decision to set aside a procurement is based on whether the contracting officer anticipates receiving bids from "at least two SDB concerns offering the supplies or services of different SDB concerns".

We have three difficulties with this formulation. First, the provision permits a SDB to provide the services of another small business. This is not permitted under the SBA's non-manufacturer rule. That rule addresses only the situation where the small business is a regular dealer in goods produced by other small businesses. Service providers must generally provide the services of their own labor force, except to the extent that the subcontracting of specific tasks is authorized by the cognizant contracting officer. Second, this provision is, in our view, inappropriately focused. As written, the provision limits eligibility to those firms who would supply goods (or services) manufactured by other SDBs. This incorporates part of the SBA non-manufacturer rule, and facially excludes manufacturers and direct service providers. Third, the rule requires, in the case of a non-manufacturer, that the goods provided were produced by a SDB. SBA believes the numbers of SDB manufacturers are inadequate to serve the SDB set-aside needs and that such an extension of SBA's so-called "non-manufacturer rule" would unfairly exclude some SDB dealers from the program.

SBA suggests instead that the current non-manufacturer rule be used. We urge that this provision be revised to incorporate the full size rule such that a SDB set-aside would be made whenever the contracting officer determines it reasonable to anticipate receipt of bids from at least two responsible SDBs, whether such SDBs qualify under the manufacturer or non-manufacturer rule, or as a service provider. This would open the program to any SDB providing its own supplies and services or the supplies of another

small business. To adopt this change in the final regulation, the first numbered clause should be amended to read: "(1) offers will be obtained from at least two responsible SDB concerns or SDB concerns offering the supplies of small business concerns."

7. Section 252.219-7006. Our concerns with respect to 219.502-72(a) apply equally to the amendment to 252.219-7006. Subsection (c) of the clause set out there similarly restricts SDBs to supplying the supplies or services of another SDB. This clause must be changed in the same manner as set out above.

Should you wish to discuss these comments, please feel free to contact David R. Kohler, Associate General Counsel for General Law, at 653-6660.

Sincerely,

Robert B. Webber
General Counsel

INTEGRATED SYSTEMS ANALYSTS, INC.

July 23, 1987

Serial: 87-M-0174

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 Senior Manager of a disadvantaged business, I am extremely concerned with Public Law 99-661 and Interim Rule implementation.

I strongly support the enclosed recommended changes on the Coalition to Improve DOD Minority Contracting.

Sincerely,

James C. Froman

James C. Froman
Operations Center Manager

Enclosure
JCF:stj
Copy to: Honorable Caspar Weinberger
Honorable James Abdnor
Honorable Gus Savage

Merrifield Executive Center
8220 Lee Highway
Fairfax, VA 22031
703-641-9155

INTEGRATED SYSTEMS ANALYSTS, INC.

21 July 1987

Mr. Charles W. Lloyd
Secretary
ODASD (P) DATS
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,

INTEGRATED SYSTEMS ANALYSTS, INC.

C. A. Skinner, Jr.
Executive Vice President
for Operations

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

Coalition to Improve DoD Minority Contracting
c/o Weldon H. Latham, Esquire
Reed Smith Shaw & McClay
8201 Greensboro Drive
McLean, Virginia 22102

Senator Alan Cranston
744 G Street, Suite 106
San Diego, CA. 92101

Senator Pete Wilson
401 B Street, Suite 2209
San Diego, CA. 92101

Congressman Jim Bates
3450 College Avenue, Suite 231
San Diego, CA. 92115

Congressman Duncan Hunter
366 So. Pierce Street
El Cajon, CA. 92020

Marina Gateway
740 Bay Blvd.
Chula Vista, CA 92010
619-422-7100

INTEGRATED SYSTEMS ANALYSTS, INC.
MARINA GATEWAY
740 BAY BOULEVARD
CHULA VISTA, CA 92010
619 422-7100

23 July 1987

Mr. Charles W. Lloyd
Secretary
ODASD (P) DARS
c/o OASD (P&L) (M&RS)
Room 3C841 The Pentagon
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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,

Owen G. O'Brien

cc: Honorable Caspar Weinberger
Secretary
Department of Defense
The Pentagon, 3E880
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1441 L Street, N.W.
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366 So. Pierce Street
El Cajon, CA 92020

(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.

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 SADBU 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

location, more information on SDB companies and capabilities than any of the sources listed in the policy. It is specifically recommended that the SADBU 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 unsurpation 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.

**INTEGRATED MICROCOMPUTER SYSTEMS, INC.**

2 RESEARCH PLACE • ROCKVILLE, MARYLAND 20850 • (301) 948-4790 • (301) 869-2950 (TDD)

July 29, 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

Re: DAR Case 87-33

Dear Mr. Lloyd:

Integrated Microcomputer Systems, Inc., (IMS), is a small disadvantaged business (SDB) which has been participating in Government contracting through the Section 8(a) Program, small business set-asides, and full and open competition. We would like to offer recommendations and comments regarding the Interim Rules authorizing an SDB set-aside program to assist the Department of Defense (DoD) in achieving the 5% goal for contracts awarded to the minority community in fiscal years 87, 88, and 89 established by Public Law 99-661.

We would like to commend DoD for its timely action in promulgating procedures to provide additional opportunities for SDBs to participate in Government contracts. We believe that the concept is completely sound and is the methodology which will best assist DoD in achieving the desired goals. However, there are still certain major deficiencies which do not appear to have been addressed in the Council's Interim Rules. These deficiencies could militate against goal achievement if not addressed. Additionally, there appear to be several minor procedural areas which could, if changed, facilitate the contractual process for both parties. It is recognized that not all the major deficiences noted are under the purview of the DAR Council (or even DoD), but DoD appears to be the most logical sponsor of the required changes, regulatory and/or statutory.

Major policy questions and deficiencies which are considered critical to the long term achievement of the goal are provided in the attached comments 1, 2, and 3. Comments 4 through 7 are recommended procedural changes which are furnished for your consideration. We believe that these changes could make the process easier for everyone.

IMS appreciates the opportunity to comment on the proposed procedures. We hope that these comments will be helpful to the Department of Defense in offering increased opportunities to small disadvantaged businesses to participate in providing DoD requirements for supplies and services.

Sincerely,

John T.C. Yeh
President

cc: Honorable Caspar W. Weinberger
Secretary
Department of Defense
The Pentagon, 3E880
Washington, D.C. 20301

Ms. Norma Leftwich
Director
Office of Small and Disadvantaged Business Utilization
Under Secretary of Defense for Acquisition
The Pentagon, 2A340
Washington, D.C. 20301

Honorable James Abdnor
Administrator
Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416

Honorable Dale Bumpers, Chairman
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Lowell P. Weicker, Jr.
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Robert Dole
United States Senate
SH 141, Hart Senate Office Bldg.
Washington, D.C. 20510-1601

Honorable John Warner
United States Senate
SR 421, Russell Senate Office Bldg.
Washington, D.C. 20510-4601

Honorable Sam Nunn
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Paul S. Sarbanes
United States Senate
SD 332, Dirksen Senate Office Bldg.
Washington D.C. 20510-2002

Honorable Barbara A. Mikulski
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Rudy Boschurtz
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Warren Rudman
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Alfonse M. D'Amato
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Robert W. Kasten
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Larry Pressler
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Malcom Wallop
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Christopher S. Bond
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable James R. Sasser
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Max Baucus
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Carl Sevin
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Alan J. Dixon
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable David L. Boren
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Tom Harkin
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable John F. Kerry
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Constance Morella
U.S. House of Representatives
1024 Longworth House Office Bldg.
Washington, D.C. 20515-2008

Honorable Roy P. Dyson
U.S. House of Representatives
224 Cannon House Office Bldg.
Washington, D.C. 20515-2001

Honorable Helen Delich Bentley
U.S. House of Representatives
1610 Longworth House Office Bldg.
Washington, D.C. 20515-2002

Honorable Benjamin L. Cardin
U.S. House of Representatives
507 Cannon House Office Bldg.
Washington, D.C. 20515-2003

Honorable Tom McMillen
U.S. House of Representatives
1508 Longworth House Office Bldg.
Washington, D.C. 20515-2004

Honorable Steny H. Hoyer
U.S. House of Representatives
1513 Longworth House Office Bldg.
Washington, D.C. 20515-2005

Honorable Beverly B. Byron
U.S. House of Representatives
2430 Rayburn House Office Bldg.
Washington, D.C. 20515-2006

Honorable Nicholas Mavroules, Chairman
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Kweisi Mfume
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Charles Hayes
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable John Conyers
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Dennis Eckart
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Gus Savage
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Esteban Torres
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable H. Martin Lancaster
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Silvio Conte
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable John Rhodes
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Dean Gallo
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Frederick Upton
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Elton Gallegly
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

# MAJOR POLICY ISSUES

1. Orientation towards Services-Type Contracts. The entire proposed program established by the Interim Rules is structured to fit into the context of the current small business set-aside program and the general tenor of existing contracting regulations. Both of these are completely oriented toward supply contracting and the manufacturing industries. However, the recent Senate Committee on Small Business' report on its survey of graduates of the 8(a) program developed statistics showing that only 3-4% of the responding minority business enterprises were engaged in manufacturing; the large majority were either in construction or some type of services. It would only appear logical that the necessary dollar increases to meet DoD's goal will have to be obtained in the industry concentrations where the potential awardees are. The orientation of the detailed implementing instructions for the program are currently not in that direction. Although the intent and the broad concept are both excellent and we concur completely, it is suggested that a complete review of the detailed implementation procedures to convert them more to a services/construction orientation would probably produce much higher end results for DoD, i.e., award dollars to SDBs.

2. Small Business Size Standards. We recognize that the DAR council does not establish small business standards but must conform its policies to the size standards promulgated by SBA. However, achieving the directed goal initially may well militate against its achievement downstream because of the much greater volume of dollars which would be flowing into the SDB community. Strict adherence to current size standards could cause many SDBs to rapidly attain large business status, rendering them no longer eligible for awards either through the 8(a) program or the SDB set-aside procedure being established by the Interim Rules and/or DAR Case 87-33. This could dramatically reduce the number of highly qualified, responsible minority business enterprises available to DoD, restricting competition and potentially severely downgrading the quality of supplies and services received by DoD since they would be then dealing mostly with newer, less experienced sources. A most logical solution to this potential problem seems to be for DoD to actively support the proposal in H.R. 1807 to exempt revenues obtained through 8(a) Program awards from the three year revenue computation used for size determination where the standard is expressed in dollar volume. The DAR Council would appear to be the logical originator of a recommendation within DoD for active Executive Department support of this proposal.

An alternate approach, either as an interim measure or if H.R. 1807 should fail passage, would be a DoD request to the SBA to take such an action within its already existing statutory authority. A final alternative, contingent upon the absolute intent of the Congress in passing Section 1207 of P.L. 99-661, would be for DoD to sponsor a legislative proposal to redefine the goal to be awards to entities simply specified as 'minority

business enterprises', dropping the term 'small'. It is not inconceivable that the contracting community has become so ingrained in the use of the term 'small disadvantaged business', particularly since all contracting regulations and programs are designed around that particular term, that it has become equated to 'minority business enterprise'. Minority business enterprises or disadvantaged businesses are not, of necessity, also small. The real intent may well have been to direct awards to minority owned businesses but the wrong, albeit familiar, terminology was inadvertently used.

However, regardless of the approach, we believe this to be a real problem which must be addressed and solved if any program is to be successful. We also believe that DoD, through OUSD(A), ODASD(P) and the DAR council, must take the lead in obtaining a solution.

3. Non-Degradation of 8(a) Program. The direction to the contracting officer at proposed paragraph 219.502-72(b)(2) appears to be in direct conflict with the policy expressed at paragraph 219.801. Making a determination that an acquisition will be set-aside will, of necessity, remove that acquisition from the 8(a) program. Contracts awarded to the SBA through the 8(a) program certainly count toward the dollar goal for DoD; diverting the acquisition from the 8(a) program both deprives the SBA Minority Business Development staff of the opportunity to determine the best match between the business development plans of its 8(a) firms and the acquisition, and could deny the acquisition to any 8(a) firm since many SDBs are not 8(a) program participants. The 219.502-72(b)(2) procedures appear to be an attempt to maximize award dollars which can both be attributed toward the 5% goal and reported by DoD as competitive awards. We strongly believe the policy statement at 219.801 to be the only correct and equitable position and recommend the deletion of the procedure at 219.502-72(b)(2) in its entirety. Further, since the incorrect use of the term 'set-aside' to also refer to 8(a) Program acquisitions has become endemic within the contracting community, language should be added to Subpart 19.8 paragraph 219.801 to provide that the newly authorized SDB set-aside procedure shall in no way divert acquisitions from the traditional 8(a) Program. Otherwise, the 8(a) Program should be inserted as (b)(1) in Paragraph 219.504 with each other category being dropped one notch to ensure that the 8(a) Program is designated as first priority.

## RECOMMENDED PROCEDURAL CHANGES

4. Size Standards in Synopsis. It is recommended that the instructions regarding preparation of synopses at 205.207 be expanded to also direct the contracting activity submitting the synopsis to determine and clearly indicate the applicable size standard, preferably by identification of the applicable SICC. This precludes potential offerors

from either requesting the solicitation only to determine that they are not eligible or having to call the designated point of contact to attempt to determine the size standard. Particularly in the services area, a given functional description could be judged to be in any of multiple SICCs, with differing size standards. Current FAR/DFARS directions for synopsis preparation do not explicitly require inclusion of the size standard.

5. Subcontracting from Non Minority Business Sources. It is recommended that direction be provided to the Contracting Officer to the effect that each solicitation must clearly specify the degree of subcontracting which will be permitted with other than small disadvantaged businesses. It is believed that the Contracting Officer, with the advice and assistance of the SBA and/or supporting SADBU representative, is in the best position to make this determination. Determinations should be based upon an analysis of the individual requirement being set-aside and knowledge of the marketplace. Although 'fronting' should definitely be prevented insofar as possible, the nature of the subcontracting effort logically required and the availability from minority business sources varies with each acquisition. The requirement for a relatively large percentage of subcontracting, particularly where the subcontracting would be for equipment to be provided as a portion of a services type contract, and the SDB can otherwise perform the requirement and will provide a significant effort, should not be a barrier to selecting an acquisition for a SDB set-aside.

6. Small Disadvantaged Business Protests. The detailed instructions regarding protesting a small disadvantaged business representation appear redundant and unnecessary since they almost duplicate FAR 19.302. It is recommended that the last two sentences of the proposed paragraph 219.301 and the entire proposed paragraph 219.302 be deleted. The following substitution is recommended:

> 219.302 Protesting a small business representation
>
> Challenges of questions concerning the size or the disadvantaged business status of any SDB shall be processed in accordance with the procedures of FAR 19.302.

7. Partial Small Disadvantaged Business Set-Asides. There appears to be no particular justification for the policy contained in 219.502-3 excluding partial set-asides. Minority business enterprises should not be considered any less likely to perform satisfactorily under the procedures for partial set-asides than any other small business. It is recommended that the currently proposed policy statement be rescinded and replaced by a policy that, if appropriate, allows partial set-asides to be used for the SDB set-aside program as well.

**NATIONAL SECURITY INDUSTRIAL ASSOCIATION**

**National Headquarters**

**1015 15th Street, N.W.**
**Suite 901**
**Washington, D.C. 20005**
**Telephone: (202) 393-3620**



AUG 0 3 1987

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

Dear Mr. Lloyd:

The National Security Industrial Association (NSIA) is pleased to comment on the notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses. (DAR CASE 87-33). This interim rule would amend the Defense Federal Acquisition Regulatory Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for the Fiscal Year 1987 (PL 99-661) entitled "Contract Goal for Minorities".

There is a concern especially among "small businesses" that under the proposed rule, the new percentage goals will infringe on the business opportunities of "small business" section not identified as "small disadvantaged businesses" (SDB). The same concern has been expressed by women-owned businesses, both of which are now competing against large businesses.

Many large businesses (some of who are NSIA member companies) that are active in Defense Contracts through earnest outreach programs are now spending 1.9% of their subcontracting dollars with small disadvantaged businesses. They would be hard tasked to increase their purchases approximately 150% with Small Disadvantaged Businesses (SDB).

This is extremely difficult in high-technology/manufacturing industries where the capacity for SDB to produce has not yet been demonstrated.

Some NSIA smaller company members are further concerned that using less than full and open competitive procedures and making awards for prices that may exceed fair market costs by up to 10 percent would definitely impact the strides they have made in being truly competitive with big business.

A further concern of both large and small companies is that the emphasis on percentage and the potential of receiving 10 percent above fair market value without meeting competitive requirements could encourage a surge of business individuals to place a small disadvantaged person at the head of their firm representing 51% ownership, thereby creating "false fronts" to more easily reap the benefits of Defense business.

Also of concern is the reporting by code for each "Ethnic Group " such as Asian-Indian Americans, Asian-Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Other minority groups. The potential for comparisons among ethnic groups, and potentially later requests, to "even-out" individual ethnic groups because of one or more ethnic groups not getting their share appears to be administratively perilous. In addition, if this requirement were passed on to large business the administrative costs for systems and reporting would be sizeable. This would appear to impact also on the information collection requirements found in the "Paperwork Reduction Act".

Finally, the National Security Industrial Association encourages the proposed "enhanced use" of technical assistance programs by DoD to SDB since this would help increase the vendor base, increase potential for SDB, and eventually help efforts to provide the available products at the lowest life cycle cost to the Federal Government.

We would be pleased to meet with you to further discuss this issue. Point of contact is Colonel E.H. Schiff of my staff.

Sincerely,

for Wallace H. Robinson, Jr.
President

WHR: ff

INTEGRATED SYSTEMS ANALYSTS, INC.

*C. Michael Gooden*
*President*

July 27, 1987
Serial: 87-C-648

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

Ref: DAR Case 87-33

Dear Mr. Lloyd:

By letter dated June 9, 1987, Serial: 87-C-506, Integrated Systems Analysts, Inc. (ISA), provided recommendations that addressed four specific areas wherein the DoD implementation of Section 1207 of P.L. 99-661 could be significantly enhanced within the framework of the existing legislation.

Since submission of the June 9th letter, ISA has been a participant in a number of discussion groups established within the minority business community for the purpose of developing a united and cohesive position on the proposed regulations. As a result of these discussions, ISA wishes to provide comments on three (3) additional areas which are complementary to our earlier submission.

Additional comments are set forth below:

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.

Corporate Offices
1215 Jefferson Davis Hwy.
Crystal Gateway III, Suite 1304
Arlington, VA 22202
703-685-1800

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 SADBU 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 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.

3. 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 omnibus 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.

As with my earlier letter, I sincerely appreciate the opportunity to offer these comments. The importance of Section 1207 of P.L. 99-661 and these regulations to the minority business community cannot be underestimated. I look forward to final regulations which will provide the means for DoD and the minority business community to work together toward achievement of the legislative goals.

Sincerely,

INTEGRATED SYSTEMS ANALYSTS, INC.

C. Michael Gooden
President

# United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 05 1987

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

Dear Mr. Lloyd:

The following comments are submitted in compliance with DAR Case 87-33 and the procedures specified in the Federal Register, Wednesday July 1, 1987.

The Department is happy to note the Department of Defense (DOD) attempt to set a "goal of awarding 5 percent of contract dollars to small disadvantaged businesses." Achieving this goal will affect the Indian communities in a positive way. As you may be aware, there are presently four Indian communities enjoying the benefits of DOD contracting and we would like to see that number expanded. There are at least 245 additional Indian communities that suffer from acute unemployment. We have searched for ways to get these communities more involved with Defense contracting and we see your setting of five percent as a positive step in that direction. In order for the five percent goal to become a reality, we believe that an incentive system designed to allow the prime and sub-contractors a five to ten percent additional cost support fee should be made part of the system. Without such an incentive, it is difficult, if not impossible, to attract to the rural isolated areas, those businesses that are the core of the Indian communities' need.

In addition to an incentive system being included, we strongly suggest that a reporting system that breaks out the Indian businesses (both 8(a) and non-8(a)) that receive Defense related contracts be developed and that the report be shared with the Bureau of Indian Affairs. This information would assist us to better coordinate our own economic development programs.

It has come to our attention that a very practical way of increasing the number of contracts to small businesses might be achieved by increasing the number of Break Out Specialists (Procurement Outreach Representatives (PCR's) in SBA's Procurement program). These specialists "break-out" procurements for small businesses within major requirements. It is our understanding that there are only ten of these specialists nationwide; to double or triple their staff could assist in meeting the five percent goal.

Sincerely,

Hazel E. Elbert

ACTING Assistant Secretary - Indian Affairs

NORTHWEST FLORIDA CHAPTER
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
201 S. "F" STREET, TELEPHONE 438-0551
PENSACOLA, FLORIDA 32501

June 19, 1987

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ADASD(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,

The Northwest Florida Chapter of Associated General Contractors regards the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, as a gilt-edged invitation to further abuse of construction procurement process and opposes the interim regulations for that, and the following reasons:

1. The "Rule of Two" set-aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

3. The use of a "Rule of Two" mechanism as the criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective. A similar "Rule of Two" mechanism used in small businesses set-asides resulted in 80% of Defense construction contract actions being set aside in FY 1984.

Implementation of SDB Set-Aside 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 prices 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 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 for 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 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 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 taxpaying, 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 products of competition. Competition forces business firms to seek the lowest possible cost methods of producing or providing service. The fair market prices must be one arrived at through competition, not developed by in-house cost estimates and catalogue prices. The price estimating methods proposed in the interim regulations are not subject to pressure from, and condition in, the marketplace and must not be used to develop a fair market price.

The pressures to exceed the five percent goal are likely to influence government estimators to inflate their estimates in order to provide SDBs with the opportunity to develop a non-competitive price within the protective ten percent statutory allowance. Not only will the pressure to inflate the "fair market price" increase the taxpayer's costs, but the subsequent contract award price submitted by the SDB in the absence of full and open competition will further increase the taxpayer's costs.

Use of "Rule of Two" Will Set Aside An Inordinate Number of Military Construction Projects

The use of a "Rule of Two" mechanism as the criteria for setting aside contracts for SDBs will force contracting officers to set aside contracts in numbers which bear no relationship to the 5 percent objective. Experience with the existing small business Rule of Two, as contained in the FAR and the Defense Supplement to the Federal Acquisition Regulation (DFAR), bears evidence to the indiscriminate results of a "Rule of Two" procedure.

In testimony on the Rule of Two before the House Small Business Committee last June, the SBA's Chief Counsel for Advocacy stated that the Rule of Two "is a convenient tool for determining when set-asides should be made." AGC agrees that contracting officers find the Rule of Two to be a "convenient tool" for determining when to set aside procurements for restricted competition--a "tool" which, in construction at least, has resulted in a near-compulsion on the part of contracting officers to set aside nearly every construction contract on the agencies' procurement schedule. AGC is confident that exactly the same abuse will occur with the adoption of the "Rule of Two" for SDBs; that is, contracting officers will indiscriminately set aside any and every solicitation in order to meet and far exceed the "objective."

An example of the problem that will result by the use of the Rule of Two as the criteria for determining SDB set-asides is the disproportionate number of contracts for restricting competition set aside by the Defense Department using the existing small business Rule of Two. In FY 1984, the Defense Department removed 80 percent of its construction contract actions from the open, competitive market. Of 21,188 contract actions, 17,055 were set aside for exclusive bidding by small businesses.

Contracting officers are delegated the responsibility to determine which acquisitions should be set aside for SDB participation. Contracting officers are directed, in Section 219.502-72, that in making SDB set-asides for research and development or architect-engineer acquisition, there must be a reasonable expectation of obtaining from SDBs scientific and technological or architectural talent consistent with the demands of the acquisition. There are construction acquisitions, as well, in which the complexity of construction demands an adequate experiential and competency level. Recognition of this is not included in Section 219.502.72(a), leaving the distinct impression that contracting officers will indiscriminately set aside virtually all construction solicitations.

Section 219.502-72(b)(1) is gilt-edged invitation for abuse in that SDBs have merely to offer a bid in a highly competitive marketplace within 10% of what could reasonably be expected to be the award price. Thus, having established their "credentials!", and their non-competitiveness, the government would then sanction and encourage this non-competitiveness by setting aside subsequent construction projects. This proposal is ludicrous and the personification of abuse of the taxpaying public through the procurement process.

AGC urges that the interim regulations: 1) not be implemented on June 1 for military construction procurement; and 2) not be implemented for military construction procurement until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely,

Tillman C. Burks, Jr.
Executive Vice President

TCBJ/ljg

*Building A Better New Mexico*

**NEW MEXICO BUILDING BRANCH**
Associated General Contractors of America

1615 University Blvd. N.E.
Albuquerque, New Mexico 87102
Phone: (505) 842-1462

June 18, 1987

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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The New Mexico Building Branch, Associated General Contractors, representing over 200 construction companies which are responsible for over 50 per cent of New Mexico's commercial construction volume each year, opposes the interim regulations allowing for the "Rule of Two" set aside for Disadvantaged Businesses in Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

We oppose the "Rule of Two" interim policy for the following reasons:

1. We believe that it is not necessary, nor has it been authorized by Congress, to achieve a five per cent goal of military construction contract dollars to small disadvantaged businesses through the "Rule of Two" set aside.

2. Nor is it necessary, we believe, to use legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 per cent in order to achieve the goal of awarding five per cent of military construction contract dollars to small disadvantaged businesses.

87-33

LANG DIXON & ASSOCIATES

June 12, 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 businesses 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.

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,

Lang Dixon

LD/mdm

FINANCIAL STRATEGIES
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87-33

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MR. LLOYD
EXECUTIVE SECRETARY
DEFENSE ACQUISITION
REGULATORY COUNCIL
WASHINGTON, D.C., 20301-3062

JUNE, 17, 1987

DEAR SIR:
THIS LETTER CONCERNS DAR CASE 87-33, MINORITY SET-ASIDE REGULATIONS.

YOUR REGULATIONS DO NOT CONFORM OR MEET THE STANDARDS AS SET PER UNITED STATES SUPREME COURT DECISION FULLILOVE V. KLUTZNICK FOR MINORITY SETASIDE REGULATIONS. PLEASE READ ATTACHED DECISION. PLEASE READ PAGES 918 AND 933 TO 935. THIS DECISION WILL HELP YOU UNDERSTAND A GOOD AND LEGAL MINORITY SETASIDE PROGRAM THROUGH REGULATION.

YOUR REGULATIONS ARE MISSING PARTS REQUIRED BY PUBLIC LAW 99-661 SECTION 1201 FOR EXAMPLES:
(1.) THE LAW REQUIRES YOU TO HAVE ADMINISTRATIVE WAIVERS" IN ORDER TO EXEMPT CERTAIN CONTRACTS BUT YOUR REGULATIONS DO NOT CONTAIN "WAIVERS".
(2.) IT IS IMPLIED IN THE LAW THAT 5% OF CONTRACT FUNDS FOR EACH CONTRACT SHOULD BE EXPENDE[illegible] MINORITY BUSINESS, OTHERWISE BIDS SHOU[illegible]ED BY DEPT. OF DEFENSE CONTRACT

GOAL FOR MINORITY SETASIDE.

EXAMPLE

LOCKHEED HAS AN ENGINEERING CONTRACT FOR RESEARCH AND DEVELOPMENT OF TRIDENT II MISSILE FOR U.S. NAVY FOR $1.1 BILLION DOLLARS. LOCKHEED SHOULD HAVE THE FOLLOWING

$1,000,000,000.00
X .05 5 PERCENT MINORITY SETASIDE
$50,000,000
(50 MILLION DOLLARS TO MINORITY FIRMS)

BUT

LOCKHEED SUBMITS A BID WITH ONLY 5 MILLION DOLLARS AWARDED TO MINORITY BUSINESS. THE U.S. NAVY CONTRACT OFFICER SHOULD REJECT THIS BID AS BEING NOT RESPONSIVE. WITH MOST CONTRACTS THE CONTRACTING OFFICER LETS THE PRIME GET AWAY WITH THE LESSER AWARD TO MINORITIES

THEREFORE PLEASE READ SUPREME COURT DECISION AND MAKE RECOMMENDED CHANGES.

SINCERELY YOURS
Wilbert C. Lapivey.

TO MR. LLOYD:

PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION REGULATIONS ARE ON PAGES 933 TO 935 IMPORTANT PAGES TO READ ARE 918, 933, 934 AND 935 REGULATIONS IN THIS DECISION ARE ON A FIRMER LEGAL FOONDATION THAN YOURS.



[448 US 448]

H. EARL FULLILOVE et al., Petitioners,

v

PHILIP M. KLUTZNICK, Secretary of Commerce of the United States, et al.

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

[No. 78–1007]

Argued November 27, 1980. Decided July 2, 1980.

**Decision:** Minority business enterprise provision of Public Works Employment Act, requiring "10% set-aside" of federal funds for minority businesses on local public works projects, held not violative of equal protection.

SUMMARY

Associations of construction contractors and subcontractors, along with a firm engaged in heating, ventilation, and air conditioning work, brought an action in the United States District Court for the Southern District of New York against the Secretary of the United States Department of Commerce, as the administrator of federal programs for local public works projects, and against the State and City of New York, as actual and potential grantees of federally funded local public work projects, alleging that the "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116)—a provision implemented in regulations of the Secretary of Commerce and guidelines of the Commerce Department's Economic Development Administration—on its face, violated, among other things, the equal protection component of the Fifth Amendment's due process clause and various federal statutes prohibiting discrimination, including Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.) proscribing racial discrimination in any program receiving federal financial assistance, the focus of the plaintiffs' challenge to the minority business enterprise provision being the so called "ten percent set-aside requirement" of the provision whereby, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in

Briefs of Counsel, p 1324, infra.

TO MR. LLOYD:

PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION REGULATIONS ARE ON PAGES 933 TO 935 IMPORTANT PAGES TO READ ARE 918, 933, 934 AND 935 REGULATIONS IN THIS DECISION ARE ON A FIRMER LEGAL FOONDATION THAN YOURS.



[448 US 448]

H. EARL FULLILOVE et al., Petitioners,

v

PHILIP M. KLUTZNICK, Secretary of Commerce of the United States, et al.

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

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Briefs of Counsel, p 1324, infra.

INTEGRATED SYSTEMS ANALYSTS, INC.

July 23, 1987

Serial: 87-M-0174

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 Senior Manager of a disadvantaged business, I am extremely concerned with Public Law 99-661 and Interim Rule implementation.

I strongly support the enclosed recommended changes on the Coalition to Improve DOD Minority Contracting.

Sincerely,

James C. Froman

James C. Froman
Operations Center Manager

Enclosure
JCF:stj
Copy to: Honorable Caspar Weinberger
Honorable James Abdnor
Honorable Gus Savage

Merrifield Executive Center
8220 Lee Highway
Fairfax, VA 22031
703-641-9155

INTEGRATED SYSTEMS ANALYSTS, INC.

21 July 1987

Mr. Charles W. Lloyd
Secretary
ODASD (P) DATS
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,

INTEGRATED SYSTEMS ANALYSTS, INC.

C. A. Skinner, Jr.
Executive Vice President
for Operations

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

Coalition to Improve DoD Minority Contracting
c/o Weldon H. Latham, Esquire
Reed Smith Shaw & McClay
8201 Greensboro Drive
McLean, Virginia 22102

Senator Alan Cranston
744 G Street, Suite 106
San Diego, CA. 92101

Senator Pete Wilson
401 B Street, Suite 2209
San Diego, CA. 92101

Congressman Jim Bates
3450 College Avenue, Suite 231
San Diego, CA. 92115

Congressman Duncan Hunter
366 So. Pierce Street
El Cajon, CA. 92020

Marina Gateway
740 Bay Blvd.
Chula Vista, CA 92010
619-422-7100

INTEGRATED SYSTEMS ANALYSTS, INC.
MARINA GATEWAY
740 BAY BOULEVARD
CHULA VISTA, CA 92010
619 422-7100

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, 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,

Owen G. O'Brien

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

Alan Cranston
744 G Street, Suite 106
San Diego, CA 92101

cc: 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

(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.

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 SADBU 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

location, more information on SDB companies and capabilities than any of the sources listed in the policy. It is specifically recommended that the SADBU 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 unsurpation 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.

**INTEGRATED MICROCOMPUTER SYSTEMS, INC.**

2 RESEARCH PLACE • ROCKVILLE, MARYLAND 20850 • (301) 948-4790 • (301) 869-2950 (TDD)

July 29, 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

Re: DAR Case 87-33

Dear Mr. Lloyd:

Integrated Microcomputer Systems, Inc., (IMS), is a small disadvantaged business (SDB) which has been participating in Government contracting through the Section 8(a) Program, small business set-asides, and full and open competition. We would like to offer recommendations and comments regarding the Interim Rules authorizing an SDB set-aside program to assist the Department of Defense (DoD) in achieving the 5% goal for contracts awarded to the minority community in fiscal years 87, 88, and 89 established by Public Law 99-661.

We would like to commend DoD for its timely action in promulgating procedures to provide additional opportunities for SDBs to participate in Government contracts. We believe that the concept is completely sound and is the methodology which will best assist DoD in achieving the desired goals. However, there are still certain major deficiencies which do not appear to have been addressed in the Council's Interim Rules. These deficiencies could militate against goal achievement if not addressed. Additionally, there appear to be several minor procedural areas which could, if changed, facilitate the contractual process for both parties. It is recognized that not all the major deficiences noted are under the purview of the DAR Council (or even DoD), but DoD appears to be the most logical sponsor of the required changes, regulatory and/or statutory.

Major policy questions and deficiencies which are considered critical to the long term achievement of the goal are provided in the attached comments 1, 2, and 3. Comments 4 through 7 are recommended procedural changes which are furnished for your consideration. We believe that these changes could make the process easier for everyone.

IMS appreciates the opportunity to comment on the proposed procedures. We hope that these comments will be helpful to the Department of Defense in offering increased opportunities to small disadvantaged businesses to participate in providing DoD requirements for supplies and services.

Sincerely,

John T.C. Yeh
President

cc: Honorable Caspar W. Weinberger
Secretary
Department of Defense
The Pentagon, 3E880
Washington, D.C. 20301

Ms. Norma Leftwich
Director
Office of Small and Disadvantaged Business Utilization
Under Secretary of Defense for Acquisition
The Pentagon, 2A340
Washington, D.C. 20301

Honorable James Abdnor
Administrator
Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416

Honorable Dale Bumpers, Chairman
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Lowell P. Weicker, Jr.
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Robert Dole
United States Senate
SH 141, Hart Senate Office Bldg.
Washington, D.C. 20510-1601

Honorable John Warner
United States Senate
SR 421, Russell Senate Office Bldg.
Washington, D.C. 20510-4601

Honorable Sam Nunn
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Paul S. Sarbanes
United States Senate
SD 332, Dirksen Senate Office Bldg.
Washington D.C. 20510-2002

Honorable Barbara A. Mikulski
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Rudy Boschurtz
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Warren Rudman
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Alfonse M. D'Amato
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Robert W. Kasten
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Larry Pressler
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Malcom Wallop
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Christopher S. Bond
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable James R. Sasser
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Max Baucus
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Carl Sevin
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Alan J. Dixon
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable David L. Boren
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Tom Harkin
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable John F. Kerry
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Constance Morella
U.S. House of Representatives
1024 Longworth House Office Bldg.
Washington, D.C. 20515-2008

Honorable Roy P. Dyson
U.S. House of Representatives
224 Cannon House Office Bldg.
Washington, D.C. 20515-2001

Honorable Helen Delich Bentley
U.S. House of Representatives
1610 Longworth House Office Bldg.
Washington, D.C. 20515-2002

Honorable Benjamin L. Cardin
U.S. House of Representatives
507 Cannon House Office Bldg.
Washington, D.C. 20515-2003

Honorable Tom McMillen
U.S. House of Representatives
1508 Longworth House Office Bldg.
Washington, D.C. 20515-2004

Honorable Steny H. Hoyer
U.S. House of Representatives
1513 Longworth House Office Bldg.
Washington, D.C. 20515-2005

Honorable Beverly B. Byron
U.S. House of Representatives
2430 Rayburn House Office Bldg.
Washington, D.C. 20515-2006

Honorable Nicholas Mavroules, Chairman
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Kweisi Mfume
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Charles Hayes
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable John Conyers
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Dennis Eckart
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Gus Savage
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Esteban Torres
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable H. Martin Lancaster
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Silvio Conte
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable John Rhodes
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Dean Gallo
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Frederick Upton
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Elton Gallegly
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

# MAJOR POLICY ISSUES

1. Orientation towards Services-Type Contracts. The entire proposed program established by the Interim Rules is structured to fit into the context of the current small business set-aside program and the general tenor of existing contracting regulations. Both of these are completely oriented toward supply contracting and the manufacturing industries. However, the recent Senate Committee on Small Business' report on its survey of graduates of the 8(a) program developed statistics showing that only 3-4% of the responding minority business enterprises were engaged in manufacturing; the large majority were either in construction or some type of services. It would only appear logical that the necessary dollar increases to meet DoD's goal will have to be obtained in the industry concentrations where the potential awardees are. The orientation of the detailed implementing instructions for the program are currently not in that direction. Although the intent and the broad concept are both excellent and we concur completely, it is suggested that a complete review of the detailed implementation procedures to convert them more to a services/construction orientation would probably produce much higher end results for DoD, i.e., award dollars to SDBs.

2. Small Business Size Standards. We recognize that the DAR council does not establish small business standards but must conform its policies to the size standards promulgated by SBA. However, achieving the directed goal initially may well militate against its achievement downstream because of the much greater volume of dollars which would be flowing into the SDB community. Strict adherence to current size standards could cause many SDBs to rapidly attain large business status, rendering them no longer eligible for awards either through the 8(a) program or the SDB set-aside procedure being established by the Interim Rules and/or DAR Case 87-33. This could dramatically reduce the number of highly qualified, responsible minority business enterprises available to DoD, restricting competition and potentially severely downgrading the quality of supplies and services received by DoD since they would be then dealing mostly with newer, less experienced sources. A most logical solution to this potential problem seems to be for DoD to actively support the proposal in H.R. 1807 to exempt revenues obtained through 8(a) Program awards from the three year revenue computation used for size determination where the standard is expressed in dollar volume. The DAR Council would appear to be the logical originator of a recommendation within DoD for active Executive Department support of this proposal.

An alternate approach, either as an interim measure or if H.R. 1807 should fail passage, would be a DoD request to the SBA to take such an action within its already existing statutory authority. A final alternative, contingent upon the absolute intent of the Congress in passing Section 1207 of P.L. 99-661, would be for DoD to sponsor a legislative proposal to redefine the goal to be awards to entities simply specified as 'minority

business enterprises', dropping the term 'small'. It is not inconceivable that the contracting community has become so ingrained in the use of the term 'small disadvantaged business', particularly since all contracting regulations and programs are designed around that particular term, that it has become equated to 'minority business enterprise'. Minority business enterprises or disadvantaged businesses are not, of necessity, also small. The real intent may well have been to direct awards to minority owned businesses but the wrong, albeit familiar, terminology was inadvertently used.

However, regardless of the approach, we believe this to be a real problem which must be addressed and solved if any program is to be successful. We also believe that DoD, through OUSD(A), ODASD(P) and the DAR council, must take the lead in obtaining a solution.

3. Non-Degradation of 8(a) Program. The direction to the contracting officer at proposed paragraph 219.502-72(b)(2) appears to be in direct conflict with the policy expressed at paragraph 219.801. Making a determination that an acquisition will be set-aside will, of necessity, remove that acquisition from the 8(a) program. Contracts awarded to the SBA through the 8(a) program certainly count toward the dollar goal for DoD; diverting the acquisition from the 8(a) program both deprives the SBA Minority Business Development staff of the opportunity to determine the best match between the business development plans of its 8(a) firms and the acquisition, and could deny the acquisition to any 8(a) firm since many SDBs are not 8(a) program participants. The 219.502-72(b)(2) procedures appear to be an attempt to maximize award dollars which can both be attributed toward the 5% goal and reported by DoD as competitive awards. We strongly believe the policy statement at 219.801 to be the only correct and equitable position and recommend the deletion of the procedure at 219.502-72(b)(2) in its entirety. Further, since the incorrect use of the term 'set-aside' to also refer to 8(a) Program acquisitions has become endemic within the contracting community, language should be added to Subpart 19.8 paragraph 219.801 to provide that the newly authorized SDB set-aside procedure shall in no way divert acquisitions from the traditional 8(a) Program. Otherwise, the 8(a) Program should be inserted as (b)(1) in Paragraph 219.504 with each other category being dropped one notch to ensure that the 8(a) Program is designated as first priority.

## RECOMMENDED PROCEDURAL CHANGES

4. Size Standards in Synopsis. It is recommended that the instructions regarding preparation of synopses at 205.207 be expanded to also direct the contracting activity submitting the synopsis to determine and clearly indicate the applicable size standard, preferably by identification of the applicable SICC. This precludes potential offerors

from either requesting the solicitation only to determine that they are not eligible or having to call the designated point of contact to attempt to determine the size standard. Particularly in the services area, a given functional description could be judged to be in any of multiple SICCs, with differing size standards. Current FAR/DFARS directions for synopsis preparation do not explicitly require inclusion of the size standard.

5. Subcontracting from Non Minority Business Sources. It is recommended that direction be provided to the Contracting Officer to the effect that each solicitation must clearly specify the degree of subcontracting which will be permitted with other than small disadvantaged businesses. It is believed that the Contracting Officer, with the advice and assistance of the SBA and/or supporting SADBU representative, is in the best position to make this determination. Determinations should be based upon an analysis of the individual requirement being set-aside and knowledge of the marketplace. Although 'fronting' should definitely be prevented insofar as possible, the nature of the subcontracting effort logically required and the availability from minority business sources varies with each acquisition. The requirement for a relatively large percentage of subcontracting, particularly where the subcontracting would be for equipment to be provided as a portion of a services type contract, and the SDB can otherwise perform the requirement and will provide a significant effort, should not be a barrier to selecting an acquisition for a SDB set-aside.

6. Small Disadvantaged Business Protests. The detailed instructions regarding protesting a small disadvantaged business representation appear redundant and unnecessary since they almost duplicate FAR 19.302. It is recommended that the last two sentences of the proposed paragraph 219.301 and the entire proposed paragraph 219.302 be deleted. The following substitution is recommended:

> 219.302 Protesting a small business representation
>
> Challenges of questions concerning the size or the disadvantaged business status of any SDB shall be processed in accordance with the procedures of FAR 19.302.

7. Partial Small Disadvantaged Business Set-Asides. There appears to be no particular justification for the policy contained in 219.502-3 excluding partial set-asides. Minority business enterprises should not be considered any less likely to perform satisfactorily under the procedures for partial set-asides than any other small business. It is recommended that the currently proposed policy statement be rescinded and replaced by a policy that, if appropriate, allows partial set-asides to be used for the SDB set-aside program as well.

**NATIONAL SECURITY INDUSTRIAL ASSOCIATION**

**National Headquarters**

**1015 15th Street, N.W.**
**Suite 901**
**Washington, D.C. 20005**
**Telephone: (202) 393-3620**



AUG 0 3 1987

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

Dear Mr. Lloyd:

The National Security Industrial Association (NSIA) is pleased to comment on the notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses. (DAR CASE 87-33). This interim rule would amend the Defense Federal Acquisition Regulatory Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for the Fiscal Year 1987 (PL 99-661) entitled "Contract Goal for Minorities".

There is a concern especially among "small businesses" that under the proposed rule, the new percentage goals will infringe on the business opportunities of "small business" section not identified as "small disadvantaged businesses" (SDB). The same concern has been expressed by women-owned businesses, both of which are now competing against large businesses.

Many large businesses (some of who are NSIA member companies) that are active in Defense Contracts through earnest outreach programs are now spending 1.9% of their subcontracting dollars with small disadvantaged businesses. They would be hard tasked to increase their purchases approximately 150% with Small Disadvantaged Businesses (SDB).

This is extremely difficult in high-technology/manufacturing industries where the capacity for SDB to produce has not yet been demonstrated.

Some NSIA smaller company members are further concerned that using less than full and open competitive procedures and making awards for prices that may exceed fair market costs by up to 10 percent would definitely impact the strides they have made in being truly competitive with big business.

A further concern of both large and small companies is that the emphasis on percentage and the potential of receiving 10 percent above fair market value without meeting competitive requirements could encourage a surge of business individuals to place a small disadvantaged person at the head of their firm representing 51% ownership, thereby creating "false fronts" to more easily reap the benefits of Defense business.

Also of concern is the reporting by code for each "Ethnic Group " such as Asian-Indian Americans, Asian-Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Other minority groups. The potential for comparisons among ethnic groups, and potentially later requests, to "even-out" individual ethnic groups because of one or more ethnic groups not getting their share appears to be administratively perilous. In addition, if this requirement were passed on to large business the administrative costs for systems and reporting would be sizeable. This would appear to impact also on the information collection requirements found in the "Paperwork Reduction Act".

Finally, the National Security Industrial Association encourages the proposed "enhanced use" of technical assistance programs by DoD to SDB since this would help increase the vendor base, increase potential for SDB, and eventually help efforts to provide the available products at the lowest life cycle cost to the Federal Government.

We would be pleased to meet with you to further discuss this issue. Point of contact is Colonel E.H. Schiff of my staff.

Sincerely,

for Wallace H. Robinson, Jr.
President

WHR: ff

INTEGRATED SYSTEMS ANALYSTS, INC.

*C. Michael Gooden*
*President*

July 27, 1987
Serial: 87-C-648

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

Ref: DAR Case 87-33

Dear Mr. Lloyd:

By letter dated June 9, 1987, Serial: 87-C-506, Integrated Systems Analysts, Inc. (ISA), provided recommendations that addressed four specific areas wherein the DoD implementation of Section 1207 of P.L. 99-661 could be significantly enhanced within the framework of the existing legislation.

Since submission of the June 9th letter, ISA has been a participant in a number of discussion groups established within the minority business community for the purpose of developing a united and cohesive position on the proposed regulations. As a result of these discussions, ISA wishes to provide comments on three (3) additional areas which are complementary to our earlier submission.

Additional comments are set forth below:

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.

Corporate Offices
1215 Jefferson Davis Hwy.
Crystal Gateway III, Suite 1304
Arlington, VA 22202
703-685-1800

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 SADBU 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 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.

3. 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 omnibus 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.

As with my earlier letter, I sincerely appreciate the opportunity to offer these comments. The importance of Section 1207 of P.L. 99-661 and these regulations to the minority business community cannot be underestimated. I look forward to final regulations which will provide the means for DoD and the minority business community to work together toward achievement of the legislative goals.

Sincerely,

INTEGRATED SYSTEMS ANALYSTS, INC.

C. Michael Gooden
President

# United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 05 1987

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

Dear Mr. Lloyd:

The following comments are submitted in compliance with DAR Case 87-33 and the procedures specified in the Federal Register, Wednesday July 1, 1987.

The Department is happy to note the Department of Defense (DOD) attempt to set a "goal of awarding 5 percent of contract dollars to small disadvantaged businesses." Achieving this goal will affect the Indian communities in a positive way. As you may be aware, there are presently four Indian communities enjoying the benefits of DOD contracting and we would like to see that number expanded. There are at least 245 additional Indian communities that suffer from acute unemployment. We have searched for ways to get these communities more involved with Defense contracting and we see your setting of five percent as a positive step in that direction. In order for the five percent goal to become a reality, we believe that an incentive system designed to allow the prime and sub-contractors a five to ten percent additional cost support fee should be made part of the system. Without such an incentive, it is difficult, if not impossible, to attract to the rural isolated areas, those businesses that are the core of the Indian communities' need.

In addition to an incentive system being included, we strongly suggest that a reporting system that breaks out the Indian businesses (both 8(a) and non-8(a)) that receive Defense related contracts be developed and that the report be shared with the Bureau of Indian Affairs. This information would assist us to better coordinate our own economic development programs.

It has come to our attention that a very practical way of increasing the number of contracts to small businesses might be achieved by increasing the number of Break Out Specialists (Procurement Outreach Representatives (PCR's) in SBA's Procurement program). These specialists "break-out" procurements for small businesses within major requirements. It is our understanding that there are only ten of these specialists nationwide; to double or triple their staff could assist in meeting the five percent goal.

Sincerely,

Hazel E. Elbert

ACTING Assistant Secretary - Indian Affairs

NORTHWEST FLORIDA CHAPTER
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
201 S. "F" STREET, TELEPHONE 438-0551
PENSACOLA, FLORIDA 32501

June 19, 1987

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ADASD(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,

The Northwest Florida Chapter of Associated General Contractors regards the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, as a gilt-edged invitation to further abuse of construction procurement process and opposes the interim regulations for that, and the following reasons:

1. The "Rule of Two" set-aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

3. The use of a "Rule of Two" mechanism as the criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective. A similar "Rule of Two" mechanism used in small businesses set-asides resulted in 80% of Defense construction contract actions being set aside in FY 1984.

Implementation of SDB Set-Aside 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 prices 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 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 for 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 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 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 taxpaying, 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 products of competition. Competition forces business firms to seek the lowest possible cost methods of producing or providing service. The fair market prices must be one arrived at through competition, not developed by in-house cost estimates and catalogue prices. The price estimating methods proposed in the interim regulations are not subject to pressure from, and condition in, the marketplace and must not be used to develop a fair market price.

The pressures to exceed the five percent goal are likely to influence government estimators to inflate their estimates in order to provide SDBs with the opportunity to develop a non-competitive price within the protective ten percent statutory allowance. Not only will the pressure to inflate the "fair market price" increase the taxpayer's costs, but the subsequent contract award price submitted by the SDB in the absence of full and open competition will further increase the taxpayer's costs.

Use of "Rule of Two" Will Set Aside An Inordinate Number of Military Construction Projects

The use of a "Rule of Two" mechanism as the criteria for setting aside contracts for SDBs will force contracting officers to set aside contracts in numbers which bear no relationship to the 5 percent objective. Experience with the existing small business Rule of Two, as contained in the FAR and the Defense Supplement to the Federal Acquisition Regulation (DFAR), bears evidence to the indiscriminate results of a "Rule of Two" procedure.

In testimony on the Rule of Two before the House Small Business Committee last June, the SBA's Chief Counsel for Advocacy stated that the Rule of Two "is a convenient tool for determining when set-asides should be made." AGC agrees that contracting officers find the Rule of Two to be a "convenient tool" for determining when to set aside procurements for restricted competition--a "tool" which, in construction at least, has resulted in a near-compulsion on the part of contracting officers to set aside nearly every construction contract on the agencies' procurement schedule. AGC is confident that exactly the same abuse will occur with the adoption of the "Rule of Two" for SDBs; that is, contracting officers will indiscriminately set aside any and every solicitation in order to meet and far exceed the "objective."

An example of the problem that will result by the use of the Rule of Two as the criteria for determining SDB set-asides is the disproportionate number of contracts for restricting competition set aside by the Defense Department using the existing small business Rule of Two. In FY 1984, the Defense Department removed 80 percent of its construction contract actions from the open, competitive market. Of 21,188 contract actions, 17,055 were set aside for exclusive bidding by small businesses.

Contracting officers are delegated the responsibility to determine which acquisitions should be set aside for SDB participation. Contracting officers are directed, in Section 219.502-72, that in making SDB set-asides for research and development or architect-engineer acquisition, there must be a reasonable expectation of obtaining from SDBs scientific and technological or architectural talent consistent with the demands of the acquisition. There are construction acquisitions, as well, in which the complexity of construction demands an adequate experiential and competency level. Recognition of this is not included in Section 219.502.72(a), leaving the distinct impression that contracting officers will indiscriminately set aside virtually all construction solicitations.

Section 219.502-72(b)(1) is gilt-edged invitation for abuse in that SDBs have merely to offer a bid in a highly competitive marketplace within 10% of what could reasonably be expected to be the award price. Thus, having established their "credentials!", and their non-competitiveness, the government would then sanction and encourage this non-competitiveness by setting aside subsequent construction projects. This proposal is ludicrous and the personification of abuse of the taxpaying public through the procurement process.

AGC urges that the interim regulations: 1) not be implemented on June 1 for military construction procurement; and 2) not be implemented for military construction procurement until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely,

Tillman C. Burks, Jr.
Executive Vice President

TCBJ/ljg

*Building A Better New Mexico*

**NEW MEXICO BUILDING BRANCH**
Associated General Contractors of America

1615 University Blvd. N.E.
Albuquerque, New Mexico 87102
Phone: (505) 842-1462

June 18, 1987

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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The New Mexico Building Branch, Associated General Contractors, representing over 200 construction companies which are responsible for over 50 per cent of New Mexico's commercial construction volume each year, opposes the interim regulations allowing for the "Rule of Two" set aside for Disadvantaged Businesses in Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

We oppose the "Rule of Two" interim policy for the following reasons:

1. We believe that it is not necessary, nor has it been authorized by Congress, to achieve a five per cent goal of military construction contract dollars to small disadvantaged businesses through the "Rule of Two" set aside.

2. Nor is it necessary, we believe, to use legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 per cent in order to achieve the goal of awarding five per cent of military construction contract dollars to small disadvantaged businesses.

87-33

LANG DIXON & ASSOCIATES

June 12, 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 businesses 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.

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,

Lang Dixon

LD/mdm

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87-33

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WILBERT C. SCIPIO

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CHICAGO, IL 60619

MR. LLOYD
EXECUTIVE SECRETARY
DEFENSE ACQUISITION
REGULATORY COUNCIL
WASHINGTON, D.C., 20301-3062

JUNE, 17, 1987

DEAR SIR:
THIS LETTER CONCERNS DAR CASE 87-33, MINORITY SET-ASIDE REGULATIONS.

YOUR REGULATIONS DO NOT CONFORM OR MEET THE STANDARDS AS SET PER UNITED STATES SUPREME COURT DECISION FULLILOVE V. KLUTZNICK FOR MINORITY SETASIDE REGULATIONS. PLEASE READ ATTACHED DECISION. PLEASE READ PAGES 918 AND 933 TO 935. THIS DECISION WILL HELP YOU UNDERSTAND A GOOD AND LEGAL MINORITY SETASIDE PROGRAM THROUGH REGULATION.

YOUR REGULATIONS ARE MISSING PARTS REQUIRED BY PUBLIC LAW 99-661 SECTION 1201 FOR EXAMPLES:
(1.) THE LAW REQUIRES YOU TO HAVE ADMINISTRATIVE WAIVERS" IN ORDER TO EXEMPT CERTAIN CONTRACTS BUT YOUR REGULATIONS DO NOT CONTAIN "WAIVERS".
(2.) IT IS IMPLIED IN THE LAW THAT 5% OF CONTRACT FUNDS FOR EACH CONTRACT SHOULD BE EXPENDE[illegible] MINORITY BUSINESS, OTHERWISE BIDS SHOU[illegible]ED BY DEPT. OF DEFENSE CONTRACT

GOAL FOR MINORITY SETASIDE.

EXAMPLE

LOCKHEED HAS AN ENGINEERING CONTRACT FOR RESEARCH AND DEVELOPMENT OF TRIDENT II MISSILE FOR U.S. NAVY FOR $1.1 BILLION DOLLARS. LOCKHEED SHOULD HAVE THE FOLLOWING

$1,000,000,000.00
X .05 5 PERCENT MINORITY SETASIDE
$50,000,000
(50 MILLION DOLLARS TO MINORITY FIRMS)

BUT

LOCKHEED SUBMITS A BID WITH ONLY 5 MILLION DOLLARS AWARDED TO MINORITY BUSINESS. THE U.S. NAVY CONTRACT OFFICER SHOULD REJECT THIS BID AS BEING NOT RESPONSIVE. WITH MOST CONTRACTS THE CONTRACTING OFFICER LETS THE PRIME GET AWAY WITH THE LESSER AWARD TO MINORITIES

THEREFORE PLEASE READ SUPREME COURT DECISION AND MAKE RECOMMENDED CHANGES.

SINCERELY YOURS
Wilbert C. Lapivey.

TO MR. LLOYD:

PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION REGULATIONS ARE ON PAGES 933 TO 935 IMPORTANT PAGES TO READ ARE 918, 933, 934 AND 935 REGULATIONS IN THIS DECISION ARE ON A FIRMER LEGAL FOONDATION THAN YOURS.



[448 US 448]

H. EARL FULLILOVE et al., Petitioners,

v

PHILIP M. KLUTZNICK, Secretary of Commerce of the United States, et al.

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

[No. 78–1007]

Argued November 27, 1980. Decided July 2, 1980.

**Decision:** Minority business enterprise provision of Public Works Employment Act, requiring "10% set-aside" of federal funds for minority businesses on local public works projects, held not violative of equal protection.

SUMMARY

Associations of construction contractors and subcontractors, along with a firm engaged in heating, ventilation, and air conditioning work, brought an action in the United States District Court for the Southern District of New York against the Secretary of the United States Department of Commerce, as the administrator of federal programs for local public works projects, and against the State and City of New York, as actual and potential grantees of federally funded local public work projects, alleging that the "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116)—a provision implemented in regulations of the Secretary of Commerce and guidelines of the Commerce Department's Economic Development Administration—on its face, violated, among other things, the equal protection component of the Fifth Amendment's due process clause and various federal statutes prohibiting discrimination, including Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.) proscribing racial discrimination in any program receiving federal financial assistance, the focus of the plaintiffs' challenge to the minority business enterprise provision being the so called "ten percent set-aside requirement" of the provision whereby, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in

Briefs of Counsel, p 1324, infra.

TO MR. LLOYD:

PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION REGULATIONS ARE ON PAGES 933 TO 935 IMPORTANT PAGES TO READ ARE 918, 933, 934 AND 935 REGULATIONS IN THIS DECISION ARE ON A FIRMER LEGAL FOONDATION THAN YOURS.



[448 US 448]

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Briefs of Counsel, p 1324, infra.

the Public Works Employment Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Ultimately, the District Court upheld the validity of the minority business enterprise provision, denying the declaratory and injunctive relief which the plaintiffs had sought (443 F Supp 253). Thereafter, the United States Court of Appeals for the Second Circuit affirmed, expressly rejecting the contention that the ten percent set-aside requirement violated equal protection, and also rejecting, as the District Court had done, the various statutory arguments which the plaintiffs had raised (584 F2d 600).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, six members of the court nonetheless agreed that the minority business enterprise provision of the Public Works Employment Act, by virtue of its ten percent set-aside requirement, did not violate equal protection under the due process clause of the Fifth Amendment nor Title VI of the Civil Rights Act of 1964.

BURGER, Ch. J., announced the judgment of the court, and in an opinion joined by WHITE and POWELL, JJ., expressed the views that (1) in terms of Congress' objective in the minority business enterprise provision of the Public Works Employment Act—to ensure that, to the extent federal funds were granted under the Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities —such objective being within the spending power of Congress under the United States Constitution (Art I, § 8, cl 1), the provision's limited use of racial and ethnic criteria constituted a valid means of achieving the objective so as not to violate the equal protection component of the due process clause of the Fifth Amendment, and (2) the minority business enterprise provision was not inconsistent with the requirements of Title VI of the Civil Rights Act of 1964.

POWELL, J., concurring, expressed the views that the racial classification reflected in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was not violative of equal protection, being justified as a remedy serving the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress, and that since the requirement was constitutional, there was also no violation of Title VI of the Civil Rights Act of 1964.

MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., concurred in the judgment, expressing the views that (1) under the appropriate standard for determining the constitutionality of racial classifications which provide benefits to minorities so as to remedy the present effects of past racial discrimination—which standard necessitates an inquiry into whether a classification on racial grounds serves important governmental objectives and is substantially related to the achievement of those objectives—the ten percent set-aside requirement of the minority business enterprise provision

of the Public Works Employment Act was not violative of equal protection under the due process clause of the Fifth Amendment, since the racial classifications employed in the set-aside provision was substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination in the area of public contracting, and (2) the ten percent set-aside requirement also did not violate Title VI of the Civil Rights Act of 1964 in that the prohibition of Title VI against racial discrimination in any program or activity receiving federal financial assistance was coextensive with the guarantee of equal protection under the United States Constitution.

STEWART, J., joined by REHNQUIST, J., dissenting, expressed the view that the minority business enterprise provision of the Public Works Employment Act, on its face, denied equal protection of the law, barring one class of business owners from the opportunity to partake of a government benefit on the basis of the owners' racial and ethnic attributes.

STEVENS, J., dissented, expressing the view that since Congress had not demonstrated that the unique statutory preference established in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was justified by a relevant characteristic shared by members of the preferred class, Congress had failed to discharge its duty, embodied in the Fifth Amendment, to govern impartially.

capital, and to give guidance through the intricacies of the bidding process. The administrative program, which recognizes that contracts will be awarded to bona fide MBE's even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination, provides for handling grantee applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. The program also provides an administrative mechanism to ensure that only bona fide MBE's are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The District Court upheld the validity of the MBE program, and the Court of Appeals affirmed.

*Held:* The judgment is affirmed.

584 F2d 600, affirmed.

Mr. Chief Justice Burger, joined by Mr. Justice White and Mr. Justice Powell, concluded that the MBE provision of the 1977 Act, on its face, does not violate the Constitution.

(1) Viewed against the legislative and administrative background of the 1977 Act, the legislative objectives of the MBE provision, and the administrative program thereunder, were to ensure—without mandating the allocation of federal funds according to inflexible percentages solely based on race or ethnicity—that, to the extent federal funds were granted under the 1977 Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities.

(2) In considering the constitutionality of the MBE provision, it first must be determined whether the *objectives* of the legislation are within Congress' power.

(a) The 1977 Act, as primarily an exercise of Congress' spending power under Art I, § 8, cl 1, "to provide for the . . . general Welfare," conditions receipt of federal moneys upon the recipient's compliance with federal statutory and administrative directives. Since the reach of the spending power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the spending power.

(b) Insofar as the MBE program pertains to the actions of private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. The legislative history shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce.

(c) Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the equal protection guarantee of that Amendment. Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority busi-

nesses, could perpetuate the effects of prior discrimination, and that the prospective elimination of such barriers to minority-firm access to public contracting opportunities was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Cf., e.g., Katzenbach v Morgan, 384 US 641, 16 L Ed 2d 828, 86 S Ct 1717; Oregon v Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260.

(d) Thus, the *objectives* of the MBE provision are within the scope of Congress' spending power. Cf. Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786.

(3) Congress' use here of racial and ethnic criteria as a condition attached to a federal grant is a valid *means* to accomplish its constitutional objectives, and the MBE provision on its face does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

(a) In the MBE program's remedial context, there is no requirement that Congress act in a wholly "color-blind" fashion. Cf., e.g., Swann v Charlotte-Mecklenberg Board of Education, 402 US 1, 28 L Ed 2d 554, 91 S Ct 1267; McDaniel v Barresi, 402 US 39, 28 L Ed 2d 582, 91 S Ct 1287; North Carolina Board of Education v Swann, 402 US 43, 28 L Ed 2d 586, 91 S Ct 1284.

(b) The MBE program is not constitutionally defective because it may disappoint the expectations of access to a portion of government contracting opportunities of nonminority firms who may themselves be innocent of any prior discriminatory actions. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. Franks v Bowman Transportation Co., 424 US 747, 777, 47 L Ed 2d 444, 96 S Ct 1251.

(c) Nor is the MBE program invalid as being underinclusive in that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities, and there has been no showing that Congress inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program.

(d) The contention that the MBE program, on its face, is overinclusive in that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination, is also without merit. The MBE provision, with due account for its administrative program, provides a reasonable assurance that application of racial or ethnic criteria will be narrowly limited to accomplishing Congress' remedial objectives and that misapplications of the program will be promptly and adequately remedied administratively. In particular, the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBE's who are not "bona fide," or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Moreover, grantees may obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.

(4) In the continuing effort to achieve

the goal of equality of economic opportunity, Congress has latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives, especially in programs where voluntary cooperation is induced by placing conditions on federal expenditures. When a program narrowly tailored by Congress to achieve its objectives comes under judicial review, it should be upheld if the courts are satisfied that the legislative objectives and projected administration of the program give reasonable assurance that the program will function within constitutional limitations.

Mr. Justice Marshall, joined by Mr. Justice Brennan and Mr. Justice Blackmun, concurring in the judgment, concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives, University of California Regents v Bakke, 438 US 265, 359, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part), and that, judged under this standard, the 10% minority set-aside provision of the 1977 Act is plainly constitutional, the racial classifications being substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.

Burger, C. J., announced the judgment of the Court and delivered an opinion, in which White and Powell, JJ., joined. Powell, J., filed a concurring opinion. Marshall, J., filed an opinion concurring in the judgment, in which Brennan and Blackmun, JJ., joined. Stewart, J., filed a dissenting opinion, in which Rehnquist, J., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

**Robert G. Benisch** argued the cause for petitioners Fullilove et al.

**Robert J. Hickey** argued the cause for petitioner General Building Contractors of New York State, Inc.

**Drew S. Days III,** argued the cause for respondents.

Briefs of Counsel, p 1324, infra.

SEPARATE OPINIONS

[448 US 453]

Mr. Chief Justice **Burger** announced the judgment of the Court and delivered an opinion in which Mr. Justice **White** and Mr. Justice **Powell** joined.

**[1a]** We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 US 960, 60 L Ed 2d 1064, 99 S Ct 2403 (1979).

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub L 95-28, 91 Stat 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub L 94-369, 90 Stat 999, 42 USC § 6701 et seq. [42 USCS § 6701 et seq.]. The 1977 amendments authorized an addi-

TO MR LLOYD: PLEASE SUBSTITUTE CONTRACT OFFICER FOR THE WORD GRANTEE



TO DOD: IF BID OF PRIME CONTRACTOR DOES NOT EXPEND 5% OF CONTRACT FUNDS TO MINORITY BUSINESS CONTRACT OFFICER HAS AN OBLIGATION TO REJECT BID AS BEING NOT RESPONSIVE

Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[56] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they also restate the MBE requirement.[57]

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where

[448 US 469]

feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process.[58]

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement.[59] The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's."[60] The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention.[61]

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The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process.[62] The Technical Bulletin issued by EDA discusses in greater detail the process-

56. 91 Stat 117, 42 USC § 6706 (1976 ed Supp II) [42 USCS § 6706]; 13 CFR Part 317 (1978).

57. 91 Stat 116, 42 USC § 6705(e)(1) (1976 ed Supp II) [42 USCS § 6705(e)(1)]; 13 CFR § 317.19 (1978).

58. Guidelines 2–7; App 157a–160a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 1.

59. Guidelines 2; App 157a; see 123 Cong Rec 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

60. Guidelines 8; App 161a.

61. See 123 Cong Rec 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

62. Guidelines 13–16; App 165a–167a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 2.

(1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const, Amdt 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. South Carolina v Katzenbach, 383 US 301, 15 L Ed 2d 769, 86 S Ct 8031 (1966); cf. City of Rome, supra.

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated

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the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

[448 US 479]

(4)

There are relevant similarities between the MBE program and the federal spending program reviewed in Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786 (1974). In Lau, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. Id., at 564–566, 39 L Ed 2d 1, 94 S Ct 786. It had not been shown that this had resulted from any discrimina-

ance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious

[448 US 487]

effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and

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eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." Supra, at 472, 65 L Ed 2d, at 920. And even as to specific contract awards,

73. The MBE provision, 42 USC § 6705(f)(2) (1976 ed Supp II) [42 USCS § 6705(f)(2)], classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 USC § 803 [45 USCS § 803], see 49 CFR § 265.5(i) (1978), on which Congress relied as precedent for the MBE provision. See 123 Cong Rec 7156 (1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." HR Rep No. 94-468, pp 20–21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination. Supra, at 469–471, 65 L Ed 2d, at 918–919. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

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Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the EDA to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See Steelworkers v Weber, 443 US 193, 200, 61 L Ed 2d 480, 99 S Ct 2721 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

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IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity.

74. Cf. GAO, Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

TO MR LLOYD: PLEASE SUBSTITUTE CONTRACT OFFICER FOR THE WORD GRANTEE



change to 5%

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48 US 491]

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of Government 61–62

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932)(dissenting opinion).

**[1c, 2a]** Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind

[448 US 492]

of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as University of California Regents v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several Bakke opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.[77]

Affirmed.

DEPT. OF DEFENSE (CONTRACT OFFICER)

APPENDIX TO OPINION OF BURGER, C. J.

REGULATION START HERE

¶ 1. The EDA guidelines, at 2–7, provide in relevant part:

"The primary obligation for carrying out the 10% MBE participation requirement rests with ~~EDA Grantees~~. . . . The ~~Grantee~~ and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available bona fide MBE's and make every effort to use as many of them as possible on the project.

"An MBE is bona fide if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership

[448 US 493]

on which the claim of minority ownership status is based. . . .

"An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . ~~EDA~~ will require that ~~Grantees~~ and prime contractors engage MBE's from as wide a market area as is economically feasible.

change to DOD

"An MBE is qualified if it can

CONTRACTING OFFICERS

77. **[2b]** Although the complaint alleged that the MBE program violated several federal statutes, n 5, supra, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Rights Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later, more specific enactment—must be deemed to control. See, e.g., Morton v Mancari, 417 US 535, 550–551, 41 L Ed 2d 290, 94 S Ct 2474 (1974); Preiser v Rodriguez, 411 US 475, 489–490, 36 L Ed 2d 439, 93 S Ct 1827 (1973); Bulova Watch Co. v United States, 365 US 753, 758, 6 L Ed 2d 72, 81 S Ct 864 (1961); United States v Borden Co. 308 US 188, 198–202, 84 L Ed 181, 60 S Ct 182 (1939).

TO MR. LLOYD: SUBSTITUTE CONTRACT OFFICER FOR GRANTEE.



DEPT. OF DEFENSE (CONTRACT OFFICER)

perform the services or supply the materials that are needed. ~~Grantees~~ and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an ~~LPW [local public works] project~~. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. ~~Grantees~~ and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

LAW SPECIFIES THAT YOU HAVE THIS IN YOUR REGULATIONS BUT YOO DO NOT.

FEDERAL DEFENSE CONTRACTS

DEPT. OF DEFENSE (CONTRACT OFFICER)

DEPT. OF DEFENSE CONTRACT OFFICER

". . . [E]very ~~Grantee~~ should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. . . . Grantees should also hold prebid conferences to which they invite interested contractors and representatives of . . . MBE support organizations.

"Arrangements have been made through the Office of Minority Business Enterprise . . . to provide assistance

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~~Grantees~~ and prime contractors in fulfilling the 10% MBE requirement. . . .

DEPT. OF DEFENSE CONTRACT OFFICERS

CHANGE TO 5%

"Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration. . . .

(DEPT. OF DEFENSE CONTRACT OFFICER

". . . [T]he ~~Grantee~~ must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. . . . Grantees should administer every project tightly. . . ."

¶ 2. The EDA guidelines, at 13–15, provide in relevant part:

"Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. . . .

(DEPT. OF DEFENSE CONTRACT OFFICER

"Only the ~~Grantee~~ can request a waiver. . . . Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. . . .

DEPT. OF DEFENSE CONTRACT OFFICER

"[A] ~~Grantee~~ situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. . . ."

¶ 3. The EDA Technical Bulletin, at 1, provides the following definitions:

"a) Negro—An individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

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"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

¶ 4. The EDA Technical Bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

"If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

Mr. Justice **Powell,** concurring.

Although I would place greater emphasis than The Chief Justice on the need to articulate judicial standards of review

[448 US 496]

in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in University of California Regents v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978) (hereinafter Bakke).

The question in this case is whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. Bakke, supra, at 299, 305, 57 L Ed 2d 750, 98 S Ct 2733; see In re Griffiths, 413 US 717, 721–722, 37 L Ed 2d 910, 93 S Ct 2851 (1973); Loving v Virginia, 388 US 1, 11, 18 L Ed 2d 1010, 87 S Ct 1817 (1967); McLaughlin v Florida, 379 US 184, 196, 13 L Ed 2d 222, 85 S Ct 283 (1964). For the reasons stated in my Bakke opin-

were to be distributed quickly,[10] any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance.[11] And Congress knew that the

[448 US 512]

ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades.[12] The set-aside program adopted as part of this emergency

[448 US 513]

legislation serves each of these concerns because it takes effect as soon as funds are expended under PWEA and because it provides minority contractors with experience that could enable them to compete without governmental assistance.

10. The PWEA provides that federal moneys be committed to state and local grantees by September 30, 1977. 42 USC § 6707(h)(1) (1976 ed Supp II) [42 USCS § 6707(h)(1)]. Action on applications for funds was to be taken within 60 days after receipt of the application, § 6706, and on-site work was to be begin within 90 days of project approval, § 6705(d).

11. In 1972, a congressional oversight Committee addressed the "complex problem—how to achieve economic prosperity despite a long history of racial bias." See HR Rep No. 92-1615, p 3 (Select Committee on Small Business). The Committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepreneur is faced initially with the lack of capital, the most serious problem of all beginning minorities or other entrepreneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

. . . . . .

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." Id., at 3–4.

12. When Senator Brooke introduced the PWEA set-aside in the Senate, he stated that aid to minority businesses also would help to alleviate problems of minority unemployment. 123 Cong Rec 7156 (1977). Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See Contractors Association of Eastern Pennsylvania v Secretary of Labor, 442 F2d 159, 163 (CA3), cert denied, 404 US 854, 30 L Ed 2d 95, 92 S Ct 98 (1971). Later that year, the House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overruling the Labor Department's order. 115 Cong Rec 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. Id., at 40749.

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity. See id., at 40740 (remarks on Sen. Scott); id., at 40741 (remarks of Sen. Griffith); id., at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. Id., at 40742–40743. The day following the Senate vote to recede from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." Id., at 41072.

BACKGROUND AND HISTORY OF MINORITY SETASIDE PROGRAMS

AGC of St. Louis
SKILL RESPONSIBILITY INTEGRITY

THE ASSOCIATED GENERAL CONTRACTORS OF ST. LOUIS

2301 HAMPTON AVE. • ST. LOUIS, MISSOURI 63139 • PHONE: 314/781-2356

June 16, 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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The Associated General Contractors of St. Louis is in agreement with the letter sent to you on June 1, 1987 by Hubert Beatty, Executive Vice President of the Associated General Contractors of America regarding the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

We support their position that the interim regulations: 1) not be implemented on June 1 for military construction procurement; and 2) not be implemented for military construction procurement until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

The Associated General Contractors of St. Louis represents some 400 construction-related firms in the St. Louis Metropolitan Area and in Southeast Missouri. Thank you for your consideration of our comments.

Sincerely,

ASSOCIATED GENERAL CONTRACTORS
OF ST. LOUIS

Joseph F. Shaughnessy
President

JFS:af

**Michigan Chapter ASSOCIATED GENERAL CONTRACTORS of America, Inc.**

2323 N. LARCH • BOX 27005 • LANSING, MICHIGAN 48909 • 517/371-1550

*THE FULL SERVICE CONSTRUCTION ASSOCIATION*

**President**
**RAYMOND E. JOHNSON**
*Serenus Johnson & Son Company*
*Bay City*

**Vice President**
**M. William Lang**
*Owen-Ames-Kimball Co.*
*Grand Rapids*

**Treasurer**
**JOHN C. FLOOK**
*Wagner-Flook Builders*
*Battle Creek*

*Secretary - Manager*
**BART O. CARRIGAN**

*Director*
*Employer Relations*
**JACK RAMAGE**

June 19, 1987

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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The Michigan Chapter of Associated General Contractors of America (AGC) is a full-service trade association representing commercial building contractors in Michigan. AGC supports the sentiments expressed by Hubert Beatty, AGC of America Executive Vice President, in his letter of June 1, 1987.

In that letter, Mr. Beatty voiced his opposition to the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act of Fiscal Year 1987, for these reasons:

1. The "Rule of Two" set aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to SDB firms.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to SDB firms.

3. The use of a "Rule of Two" mechanism as a criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective.

(more)

MICHIGAN CHAPTER
Associated General Contractors
of America, Inc.



The implementation of the interim regulations will be an open invitation to abuse the construction procurement process. Further, it will discourage competition in the procurement process. AGC urges that the regulations not be implemented until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely yours,

Jack W. Ramage, Director
Employer Relations

JWR:bss

CURT PETERSON
Executive Vice President

Associated General Contractors of North Dakota

422 2nd STREET, P.O. BOX 1624, BISMARCK, NORTH DAKOTA 58502, PHONE 701-223-2770

June 22, 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. Lloyd:

The Associated General Contractors of North Dakota regards the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, as a gilt-edged invitation to further abuse of the construction procurement process and opposes the interim regulations for that, and the following reasons:

1. The "Rule of Two" set-aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

3. The use of a "Rule of Two" mechanism as the criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective. A similar "Rule of Two" mechanism used in small business set-asides resulted in 80% of Defense construction contract actions being set aside in FY 1984.

Section 219.502-72(b) (1) is an invitation for abuse in that SDBs have merely to offer a bid in a highly competitive marketplace within 10% of what could reasonably be expected to be the award price. Thus, having established their "credentials!", and their non-competitiveness, the government would then sanction and encourage this non-competitiveness by setting aside subsequent construction projects. This proposal is ludicrous and the personification of abuse of the taxpaying public through the procurement process.

WHITE HOUSE
ELECTRICAL SUPPLY corporation

2619 W. HUNTING PARK AVE., PHILADELPHIA, PA 19129-1303 (215) 223-8600

June 18,1987

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.

# H. Pinckney General Contractor Inc.

6035 CHESTNUT ST. - PHILADELPHIA, PENNSYLVANIA 19139 • PHONE 471-6510


June 17, 1987

Defense Acquistion 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 it 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 businesses 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.

I urge the Defense Department to address the above issues quickly, and to move forward aggressively in pursing the 5% goal set by law.

Sincerely,

HENRY PINCKNEY
President, H. Pinckney General Contracting Inc.

HP/yw

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

JUN 23 1987

Mr. Charles Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
Room 3C841, The Pentagon
Washington D. C. 20301

Dear Mr. Lloyd:

Enclosed for Council consideration are comments, dated May 22, 1987, from Ms. Eva Poling of the Mechanical Contractors District of Columbia Association, Inc. The comments, which were provided to us by Congressman Frank Wolf, concern the Department's interim rule for contract awards to small minority business concerns (DAR Case 87-33).

Thank you for your consideration.

Sincerely,

Allan V. Burman
Deputy Administrator

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUN 24 1987

Honorable Frank R. Wolf
U.S. House of Representatives
Constituent Services Office
Suite 115
1651 Old Meadow Road
McLean, Virginia 22102

Dear Congressman Wolf:

This is in response to your recent inquiry on behalf of Ms. Eva Poling of the Mechanical Contractors District of Columbia Association, Inc. In her letter of May 22, 1987, Ms. Poling expressed concern about the interim rule recently issued by the Department of Defense on contract awards to small minority business concerns, and the economic impact of such a rule.

This interim rule is in direct implementation of Public Law 99-661, which the Congress enacted with the objective of assuring that 5 percent of Defense funds in certain categories of contracts, including construction, were awarded to small minority firms. It is not a final rule. Rather, it is an interim rule on which public comments have been solicited and will be accepted until August 3, 1987. It should also be noted that the program established by the law and implementing rule is limited to a three-year period, during which annual assessments of price, performance and economic impact will be made.

In light of the comment period that is currently underway, we have taken the liberty of forwarding a copy of your constituent's letter to the Executive Secretary of the Defense Acquisition Regulatory Council at the Pentagon. A copy of our referral letter is enclosed. We are certain that Ms. Poling's views will be carefully and thoroughly considered by the Council.

Thank you for bringing Ms. Poling's concerns to our attention. If we can be of further assistance, please contact me.

Sincerely,

Signed

Gordon Wheeler
Associate Director for
Legislative Affairs

Enclosure

Because we basically are small business and do not have the resources to twist arms and lobby, we have become a "dumping" ground for every "quick fix" designed, such as that proposed for fiscal years 1987, 1988 and 1989. It is much easier to use the 8(a) program than to carve out set asides in the mega industries that also do work with DoD.

We have no quarrel with set asides per se; however, what has been done in this instance is to close a specific market to specific contractors who have had access to it in the past.

Your help is needed in resolving this situation.

Sincerely,

Eva S. Poling

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

WASHINGTON OFFICE:
130 CANNON BUILDING
WASHINGTON, DC 20515
(202) 225-5136

CONSTITUENT SERVICES OFFICES:
[redacted]
SUITE 115
MCLEAN, VA [redacted]
(703) 734-1500

19 E. MARKET ST.
ROOM 4B
LEESBURG, VA 22075
(703) 777-4422

COMMITTEE ON APPROPRIAT

SUBCOMMITTEES:
TRANSPORTATION

TREASURY—POSTAL SERVICE—GENE GOVERNMENT

SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES

# Congress of the United States
## House of Representatives
Washington, DC 20515

87 JUN 15 AM : 46

June 9, 1987

Mr. Fred Upton
Acting Assistant Director
Office of Legislative Affairs
Office of Management and Budget
243 Old Executive Office Building
Washington, D.C. 20503

ar Mr. Upton:

I have enclosed a copy of a letter which I have received from one of my constituents regarding a matter under your department's jurisdiction.

I would appreciate it if you would review the letter and address the issues which it discusses. It would be helpful if you would address your response to me, attention, Judy McCary.

Thank you for your time and courtesy in being attentive to the concerns of my constituent.

With best regards,

Sincerely,

Frank R. Wolf
Member of Congress

FW:jsm/kmk

Enclosure

25548

mechanical contractors district of columbia association, inc.

suite 807, 5200 auth rd., suitland, md. 20746

301 899-2988

MAY 28 1987

MCA DISTRICT OF COLUMBIA

Eva S. Poling
Executive Vice-President

Lois DaCrema
Executive Secretary

May 22, 1987

Honorable Frank R. Wolf
1651 Old Meadow Road
Suite 115
McLean, Virginia 22102

Dear Congressman Wolf:

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 percent 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 percent.

The changes incurred by the interim rule are made without prior public comment and are effective June 1, 1987.

Implementation of the rule will have a drastic economic impact upon small construction contractors who have depended on the small business market for their survival. No prior study was made of this impact. The DoD is using the 8(a) program of the Small Business Administration as one method to reach the 5%. As a result, the effect on SBA's who do not fit the SDB category will be catastrophic. Worse still, at this point in time about 99% do not realize what will be happening on June 1st.

Congressman Wolf, the construction industry in this country is made up of many, many small businesses, what I refer to as a "mom and pop" industry. For every mega company, there are thousands of small companies that perform the work to keep the this country moving, including those small firms that perform construction for the DoD under the SBA program.

required corrective action(s) will be reviewed by this office in making a recommendation on the continued reliance which the Government can place on the costs generated by and charged to Government contracts under the *(CONTRACTORS SYSTEM NAMED) system.*

Please provide your written plan of action to address this matter within 30 days. Should you have any questions on this matter, please contact *(FAO REPRESENTATIVE)* at *(Telephone number)* or the undersigned.

Sincerely,

JOHN DOE, FAO Manager

Enclosure
Common MRP Deficiencies

MATERIAL REQUIREMENTS PLANNING (MRP) SYSTEMS COMMON DEFICIENCIES IDENTIFIED

- Costing to contracts based on requirements, in lieu of actual contract usage (costing of paper transactions only). Thus the Government is billed for "reserved" items which may or may not be used on the contract.
- Treating contract inventory as company-owned inventory and, therefore, costing among contracts using the company-owned inventory valuation method in lieu of actual costs incurred.
- Recurring usage of "informal"/other contract inventory to satisfy contract requirements (whole cost/no cost transfers) without proper disclosure to the Government.
- Pricing of manufactured parts using open "actual history" work orders which can have excess costs built in until the work order is closed.
- Inclusion of an allocated portion of company-owned inventory costs in public voucher/progress payment requests.
- Transferring material without the *prior* approval of the designated contracting administrative official which can result in the loss of contractually conveyed Government title to the material.
- Fabricated part transfers generated by the MRP system are not costed at the same value as the original charges.
- Pricing of proposed bills of national without adequate consideration of available inventory.
- Failure to fully disclose the impact of the MRP netting process (also sometimes referred to as dynamic rescheduling) at the time of negotiation which can result in a violation of Public Law 10 U.S.C. 2306.
- Failure adequately disclose that spare orders which are proposed based on future purchases are being completed with minimal material purchases supplemented, in whole or in part, by material transfers from an "informal"/other contract inventory with the reprocurement costs being charged to production contracts.

## DOD'S INTERIM RULES IMPLEMENTING STATUTORY 5 PERCENT MINORITY CONTRACTING GOAL

### 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, Combodia, 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 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 consideriation 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 SBD 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 252.7006, 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)

[FR Doc. 87-10099 Filed 5-1-87; 8:45 am]

INTERNATIONAL CREATIVE DATA INDUSTRIES, INC.
P.O. BOX 451 • DANBURY • CONNECTICUT 06813 • TELEPHONE (203) 797-8551 • CABLES: 'ICDI' DANBURY

May 29, 1987

The Honorable William Howard Taft, IV
Deputy Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301-1155

Dear Mr. Secretary:

I have been asked by Senator Weicker to review and comment on the contents of your memorandum pertaining to the 5% DOD goal for contract awards to Small Disadvantaged Businesses.

As president of an 8 (a) Small Disadvantaged Business for the past twelve years it has been my experience, that clearly defined and detailed procedures must be established, to insure that the spirit and intent of Public Law 99-661 is implemented and achieved. The concept of this new program as an extension of the SBA 8 (a) program is commendable but the past short-comings of the 8 (a) program have shown that a better structure must be used initially if this new program is to be successful. Therefore, I also recommend that a method of monitoring and measuring compliance with the program's objectives be set-up in order to ensure that the established target is met.

Thank you for giving me the opportunity to comment.

Sincerely,

INTERNATIONAL CREATIVE DATA INDUSTRIES, INC

J. Villodas
President

JV/mam

TRESP Associates, Inc.
Automated Data Processing • Management Services • Research and Development

June 1, 1987

REGISTERED MAIL
RETURN RECEIPT REQUESTED

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

Reference: DAR Case 87-33

Dear Mr. Lloyd:

The Department of Defense (DoD) is to be commended on its aggressive efforts to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661), entitled "Contract Goal for Minorities." We, at Tresp Associates, believe that the proposed regulations published in the Federal Register, (Volume 52, No. 85 on Monday, May 4, 1987), are certainly a step in the right direction. We support your proposed implementation regulations with few exceptions, and submit the following comments for your consideration:

ISSUE:

(1) The Rule of Two: The interim rule establishes a "rule of two (ROT)" regarding set-asides for Small Disadvantaged Business (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 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...."

RECOMMENDATION: The rule of two implementation procedures as currently presented gives the Contracting Officer complete authority in the ROT process, and fails to address the role of the Department's Small and Disadvantaged Business Specialists (SDBS). DoD has a cadre of over 700 SDBS who have done an outstanding job in the implementation of other legislation; Public Law 95-507, as an example. Therefore, we recommend that the regulations be written to mandate active participation on the part of the SDBS and

the Contracting Officer in rule of two decisions. We feel that the foregoing will result in more balanced and unbiassed ROT opinions.

ISSUE:

2. Protesting small disadvantaged business representation. Paragraph 219.302 (S-70) found at 16265, states in part, "...(1) Any offeror or an interested party, may in connection with a contract 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...." We believe that such loose wording will tend to encourage frivolous protests. In our opinion, this will become a "delay tactic" on the part of that segment of the business community, not qualified to participate in the acquisition by reasons of their non-small disadvantaged business status.

RECOMMENDATION: The regulations should be more specific with respect to who can protest. The right to protest the SDB status in acquisitions involving SDB set asides, should be limited to only effected parties (i.e., other small disadvantaged business firms.) Further, to discourage frivolous protests, penalities should be invoked in those cases where frivolity is determined. Definite time frames should also be established with each step of the protest process.

ISSUE:

(3) Subcontracting under SDB set asides. The proposed regulations do not address the degree of subcontracting to minority business concerns under Section 1207 or the Statute.

RECOMMENDATION:

In those cases where subcontracting opportunities exist, we recommend that the successful prime SDB offerors be required to award a mandatory percentage of such subcontracts to qualified minority business firms. You may wish to consider language similar to that contained in Section 211 of Public Law 95507. This will encourage networking among the Minority Business Enterprises.

Again, DoD is to be commended for its work in the various socio-economic programs, and if Tresp Associates can be of any assistance to you, please do not hesitate to contact me.

Very truly yours,

WILLIAM F. MADISON
Vice President
Corporate Affairs

cc: NEDCO Conference
716 South Sixth Street
Las Vegas, NV 89101

National Federation of 8(a) Companies
2011 Crystal Drive, Suite 813
Arlington, Virginia 22202

Mr. C. Michael Gooden
President,
Integrated Systems Analysts, Inc.
1215 Jefferson Davis Highway
Crystal Gateway III, Suite 1304
Arlington, VA 22202

Mr. Dan Gill
Office of Small & Disadvantaged Business Utilization
OSD, The Pentagon, Washington, DC 20301

87-33

SAMPLE COMMENT LETTER TO DoD

June __, 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 businesses 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.

(Add any other comments you think appropriate.)

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, Mike Pone

THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301

LEGISLATIVE
AFFAIRS

See Mr. Taft's comment

JUN 1 1987

2 MAY 1987 SEC HAS SEEN

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE

SUBJECT: Call from Senator Gramm (R-TX) Regarding Small Minority Business 5 Percent Goal - INFORMATION MEMORANDUM

Senator Gramm called this morning regarding the 5 percent goal for small minority businesses contained in Section 1207 of the 1987 Authorization Act. Senator Gramm met with Mrs. Leftwich yesterday afternoon and learned for the first time that the term "fair market cost" used in Section 1207 was a term of art defined in the FAR's and has no relationship, necessarily, to the lowest price for which DOD could obtain the product in the marketplace. The result, according to the Senator, is to authorize up to a 30 percent premium on top of an already inflated price.

Section 1207 was apparently a last minute compromise during the House-Senate Conference on the Bill and the Senator was not aware of the significance of the term proposed by the House Conferees. He is not pleased.

Senator Gramm plans to offer an amendment this year to delete "fair market cost" and substitute language referring to the lowest or reasonable price for which DOD could obtain the product in the market place. He requests that the Section 1207 implementation regulations be "slowed down" sufficiently to allow this amendment to be reflected in those regulations.

M. D. B. Carlisle

AGUCI 4427 87

Reid 1
23 MAY

# Gomez Electrical Contractors, Inc.

P.O. Box 357, Latham, New York 12110
Tel. (518) 785-3000

CAROLINE P. GOMEZ
SECRETARY TREASURER

JOSEPH A. GOMEZ
PRESIDENT

STATE OF CONNECTICUT
MASTER ELECTRICIAN
CERTIFICATE #103252

STATE OF NEW HAMPSHIRE
MASTER ELECTRICIAN
LIC. #7340

STATE OF VERMONT
MASTER ELECTRICIAN
LIC. #2272

COUNTY OF GREENE, NY
MASTER ELECTRICIAN
LIC. #2476

COUNTY OF SULLIVAN, NY
MASTER ELECTRICIAN
LIC. #228

CITY OF ALBANY, NY
MASTER ELECTRICIAN
LIC. #58

CITY OF AMSTERDAM, NY
MASTER ELECTRICIAN
LIC. #48

CITY OF SCHENECTADY, NY
MASTER ELECTRICIAN
LIC. #54

[redacted]OY, NY
M[redacted]LECTRICIAN
LIC. #96


June 15, 1987

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

Attn: Mr. Charles W. Lloyd
Executive Secretary

Re: DOD 48 CFR Parts 204, 205, 206, 219, & 252

Dear Sir:

We would like to comment on the following section A - Background. The new regulation would require:

a) that the cost will not exceed 10% of the fair market value and

b) That at least two or more firms will be bidding on the project.

Through some twenty-four (24) years in the construction industry we have seen the Engineers or Owner's budget (usually called by the agency as the fair market value) (see also 219.506) swing from very low compared to the competitive bid received and on rare occasion it swings high when then compared to the bids received.

In the cases where the government estimate is substantially low (10% or more), we have seen more than one course of action taken. We have seen the projects re-advertised for a second round of bids (usually some redesigning takes place to cut the costs). Another way is to ask the lowest responsible bidder for an extension so that the agency has some additional time in which to seek additional funding. The third avenue which is the least likely approached is cancellation of the project.

Our question to you Mr. Lloyd is simple. Government estimates are seldom within the 10% fair market value as determined by competitive bidding. How is then that DOD is going to determine what the "fair market value" is?

Why is it then, that DOD is taking a different approach from those practices used under "regular" bidding process.

# Gomez Electrical Contractors, Inc.

P.O. Box 357, Latham, New York 12110
Tel. (518) 785-3000

CAROLINE P. GOMEZ
SECRETARY TREASURER

JOSEPH A. GOMEZ
PRESIDENT

STATE OF CONNECTICUT
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LIC. #48

CITY OF SCHENECTADY, NY
MASTER ELECTRICIAN
LIC. #54

[redacted] TROY, NY
[redacted] ELECTRICIAN
[redacted]96


During the course of bid offers, we have seen during regular bidding that, though in rare occasions, only one bid is received, both Federal and State Agencies have awarded such bids in the vast majority of said occasions.

Why is it again, that if the DOD's program is designed to help minorities, rules and regulations, effecting bids null and void, are enacted when a greater flexibility is granted to contracting officers during receipt of regular bids.

We hope our comments and constructive criticizm is of value to you.

Very truly yours,

Joseph A. Gomez

cc: Mr. Harvey Davies
Small Business Administration

23DoDwashington

THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-8000

ACQUISITION AND
LOGISTICS

In reply refer to:
DAR Case 87-33

Norma

MEMORANDUM FOR MS. NORMA LEFTWICH
DIRECTOR, SADBU

SUBJECT: Letter from Mr. Wilbert C. Scipio, Jr., May 1, 1987

Subject letter is referred to your office for direct reply to Mr. Scipio. I have retained a copy of his letter for consideration by the DAR Council with other comments received under DAR Case 87-33.

As you will note, Mr. Scipio mentions the 5% figure used in implementing Section 1207 of Public Law 99-661 (DAR Case 87-33) and this implementation is not effective until June 1, 1987. I have forwarded a copy of the Federal Register Notice to Mr. Scipio.

OTTO J. GUENTHER, COL, USA
Director
Defense Acquisition
Regulatory Council

Attachment
Ltr from Mr. Scipio

87-33

**DEPARTMENT OF THE AIR FORCE**
**HEADQUARTERS ELECTRONIC SYSTEMS DIVISION (AFSC)**
**HANSCOM AIR FORCE BASE, MASSACHUSETTS 01731-5000**

REPLY TO ATTN OF: JAN

SUBJECT: DAR Case 87-33, DFARS Implementation of PL 99-661, Set-Asides for Small Disadvantaged Business Concerns

TO: DARC (Attn: Mr. Charles W. Lloyd)
Executive Secretary
ODASD (P) DARS
c/o OASD (P & L) (M & RS)
Rm. 3C841, The Pentagon
Washington, D.C. 20301-3062

1. AFAC 87-16 (27 May 1987), interim rules were distributed to implement Section 1207 of PL 99-661 "Contract Goal for Minorities". Under the interim rules, Contracting Officers are required to set-aside certain acquisitions for exclusive competition among small disadvantaged business (SDB) concerns whenever it is anticipated that two or more SDB concerns will submit offers and award will be made at not more than 110% of a "fair market price".

2. Proposed DFARS 19.502-72 (a) recognizes that, in making SDB set-asides for R & D or architect-engineer acquisitions, there is a need to consider the availability of SDB scientific, technological, or architectural talent consistent with the demands of the acquisition. It is noted that in such acquisitions, the offered price/cost is not the primary consideration in selecting the successful offeror for award.

3. Proposed DFARS 19.502-72 (a) and (d) imply that the SDB set-aside rule should apply only to acquisitions to be awarded at the lowest offered price (but not to exceed 110% of fair market price) on the basis of the responsive (technically acceptable, qualified) offer made by a responsible offeror. Otherwise, under proposed DFARS 19.502-72 (d), for source-selections to be made on the basis of considerations other than only price, it would be necessary to make the source-selection decision as to the most advantageous offer and then could make award only if the price offered by the successful offeror was also within the 110% of fair market value limitation. If not, then presumably, the set-aside must be withdrawn under 19.502-72 (d) and the requirements resolicited. Such a procedure, however, would be extremely time-consuming and would cripple the ability of the agency to contract for critical requirements which do not fall within the categories of R & D or A & E services, but require that award be made on primary considerations other than price/cost. Examples of such acquisitions include management and engineering support services (where management and technical factors are more important than price) and production awards which require the successful offeror to reverse-engineer pre-existing products for which reprocurement data is unavailable and then manufacture production quantities to a performance specification. Neither of these examples would fall within the categories of R & D or A & E services so as to permit the contracting officer to exercise judgment as to whether it would be appropriate to set such acquisitions aside

for exclusive SDB participation as proposed DFARS 19.502-72 (a) is presently written. It is suggested that this situation could be resolved if the last sentence of proposed DFARS 19.502-72 (a) were deleted and the introduction to the first sentence were changed to read:

> Except for acquisitions subject to small purchases and, except for negotiated acquisitions where award will be made on the basis of factors other than only the lowest evaluated price/cost for a proposal which conforms to solicitation requirements, the entire amount of an individual acquisition shall be set-aside for.....

Roger T. McAvoy

ROGER J. MCAVOY, Chief
Contract Law Division

Cy: ESD/PK (Mr. Fowler)
ESD/TC (Mr. Kalkman)
AFSC/JAN

87-83
EXEC.SEC
7/9/87

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION

WASHINGTON, DC 20301-3061

OFFICE OF SMALL AND
DISADVANTAGED BUSINESS
UTILIZATION

30 JUN 1987

Mr. Wilbert C. Scipio
Scipio Engineering Co.
8013 Champlain
Chicago, IL 60619

Dear Mr. Scipio:

Please refer to your identical letters of June 17, 1987 to the Deputy Secretary of Defense, Department of Defense (DoD) and to me regarding your proposal to alter the DoD implementation of section 1207 of Public Law 99-661 along the lines suggested in the 1980 Supreme Court decision on minority set-asides.

Your letters are timely because the Defense Acquisition Regulation (DAR) Council is currently reviewing various public comments by those interested in the DoD proposed implementation of Public Law 99-661.

Accordingly, we have forwarded your letters to the DAR Council for their examination. We would expect careful review of your comments and those of others.

Thank you very much for your interest in the Department of Defense.

Sincerely,

Horace J. Comish

for NORMA B. LEFTWICH
Director

cc: DAR Council

1987 JUN 24 AM 9:48

OFFICE OF
THE SECRETARY OF DEFENSE

PHONE (312) 873-2456

SCIPIO ENGINEERING CO.
MECHANICAL ENGINEERING CONSULTANTS FOR
ENERGY - CONSTRUCTION - ELECTRONICS
(FROM CONCEPT TO FINISH PRODUCT)
MINORITY SMALL BUSINESS
WILBERT C. SCIPIO
8013 CHAMPLAIN
CHICAGO, IL 60619

WILLIAM TAFT
DEPUTY SECRETARY OF
DEFENSE
U.S. DEPT. OF DEFENSE
THE PENTAGON
WASHINGTON, D.C., 20301

JUNE, 17, 1987

DEAR SIR:

THIS LETTER CONCERNS YOUR MINORITY SET-ASIDE REGULATIONS PER PUBLIC LAW 99-661 SECTION 1201.

YOUR REGULATIONS DO NOT MEET THE STANDARDS SET BY UNITED STATES SUPREME COURT DECISION FULLILOVE V. KLUTZNICK. PLEASE READ ATTACHED DECISION. PLEASE READ PAGES 918, AND 933-935. READING THIS DECISION WILL HELP YOU UNDERSTAND A GOOD AND LEGAL MINORITY SETASIDE PROGRAM THROUGH REGULATION.

YOUR REGULATIONS ARE MISSING PARTS REQUIRED BY PUBLIC LAW 99-661 SECTION 1201, FOR EXAMPLES;

(1.) YOUR REGULATIONS SHOULD CONTAIN "ADMINISTRATIVE WAIVERS" IN ORDER TO EXEMPT CERTAIN CONTRACTS FROM MINORITY SETASIDE. BUT YOUR REGULATIONS DO NOT CONTAIN WAIVERS.

(2.) IT IS IMPLIED IN PUBLIC LAW 99-661 SECTION 1201 THAT 5% OF CONTRACT FUNDS SHOULD BE EXPENDED WITH MINORITY BUSINESS FOR EACH CONTRACT AS SPECIFIED IN 15 U.S.C. 637 (d) 4 & 6. 11212 87

(2) Cont'd

And that Dept. of Defense Contracting Officers are mandated to reject bids of Prime Contractors that do not meet 5% Goal of Minority Business Expenditures as being Non Responsibile. This part is not written your regulations.

Your Regulations are written in a manner that assumes Minority Business can build tanks, airplanes, and ships.

In the real world that is not true. In most cases (probably 90 percent) minority business will be subcontracting under a large white prime contractor.

Your Regulations should show that 5% of contract funds being expended to minorities primarily as subcontractors.

You may want to rewrite your regulations to that found in U.S. Supreme Court Decision.

Sincerely Yours
Willmit C. Scipio Jr.

To SEC. TAFT:
PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION
REGULATIONS ARE ON PAGES 933 TO 935.
IMPORTANT PAGES TO READ, 918, 933, 934 AND 935!!
THESE REGULATIONS ARE ON A FIRMER LEGAL FOUNDATION THAN YOURS.



[448 US 448]

H. EARL FULLILOVE et al., Petitioners,

v

PHILIP M. KLUTZNICK, Secretary of Commerce of the United States, et al.

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

[No. 78-1007]

Argued November 27, 1980. Decided July 2, 1980.

**Decision:** Minority business enterprise provision of Public Works Employment Act, requiring "10% set-aside" of federal funds for minority businesses on local public works projects, held not violative of equal protection.

SUMMARY

Associations of construction contractors and subcontractors, along with a firm engaged in heating, ventilation, and air conditioning work, brought an action in the United States District Court for the Southern District of New York against the Secretary of the United States Department of Commerce, as the administrator of federal programs for local public works projects, and against the State and City of New York, as actual and potential grantees of federally funded local public work projects, alleging that the "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116)—a provision implemented in regulations of the Secretary of Commerce and guidelines of the Commerce Department's Economic Development Administration—on its face, violated, among other things, the equal protection component of the Fifth Amendment's due process clause and various federal statutes prohibiting discrimination, including Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.) proscribing racial discrimination in any program receiving federal financial assistance, the focus of the plaintiffs' challenge to the minority business enterprise provision being the so called "ten percent set-aside requirement" of the provision whereby, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in

Briefs of Counsel, p 1324, infra.

INTEGRATED SYSTEMS ANALYSTS, INC.

July 23, 1987

Serial: 87-M-0174

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 Senior Manager of a disadvantaged business, I am extremely concerned with Public Law 99-661 and Interim Rule implementation.

I strongly support the enclosed recommended changes on the Coalition to Improve DOD Minority Contracting.

Sincerely,

James C. Froman

James C. Froman
Operations Center Manager

Enclosure
JCF:stj
Copy to: Honorable Caspar Weinberger
Honorable James Abdnor
Honorable Gus Savage

Merrifield Executive Center
8220 Lee Highway
Fairfax, VA 22031
703-641-9155

INTEGRATED SYSTEMS ANALYSTS, INC.

21 July 1987

Mr. Charles W. Lloyd
Secretary
ODASD (P) DATS
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,

INTEGRATED SYSTEMS ANALYSTS, INC.

C. A. Skinner, Jr.
Executive Vice President
for Operations

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

Coalition to Improve DoD Minority Contracting
c/o Weldon H. Latham, Esquire
Reed Smith Shaw & McClay
8201 Greensboro Drive
McLean, Virginia 22102

Senator Alan Cranston
744 G Street, Suite 106
San Diego, CA. 92101

Senator Pete Wilson
401 B Street, Suite 2209
San Diego, CA. 92101

Congressman Jim Bates
3450 College Avenue, Suite 231
San Diego, CA. 92115

Congressman Duncan Hunter
366 So. Pierce Street
El Cajon, CA. 92020

Marina Gateway
740 Bay Blvd.
Chula Vista, CA 92010
619-422-7100

INTEGRATED SYSTEMS ANALYSTS, INC.
MARINA GATEWAY
740 BAY BOULEVARD
CHULA VISTA, CA 92010
619 422-7100

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, 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,

Owen G. O'Brien

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

Alan Cranston
744 G Street, Suite 106
San Diego, CA 92101

cc: 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

(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.

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 SADBU 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

location, more information on SDB companies and capabilities than any of the sources listed in the policy. It is specifically recommended that the SADBU 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 unsurpation 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.

**INTEGRATED MICROCOMPUTER SYSTEMS, INC.**

2 RESEARCH PLACE • ROCKVILLE, MARYLAND 20850 • (301) 948-4790 • (301) 869-2950 (TDD)

July 29, 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

Re: DAR Case 87-33

Dear Mr. Lloyd:

Integrated Microcomputer Systems, Inc., (IMS), is a small disadvantaged business (SDB) which has been participating in Government contracting through the Section 8(a) Program, small business set-asides, and full and open competition. We would like to offer recommendations and comments regarding the Interim Rules authorizing an SDB set-aside program to assist the Department of Defense (DoD) in achieving the 5% goal for contracts awarded to the minority community in fiscal years 87, 88, and 89 established by Public Law 99-661.

We would like to commend DoD for its timely action in promulgating procedures to provide additional opportunities for SDBs to participate in Government contracts. We believe that the concept is completely sound and is the methodology which will best assist DoD in achieving the desired goals. However, there are still certain major deficiencies which do not appear to have been addressed in the Council's Interim Rules. These deficiencies could militate against goal achievement if not addressed. Additionally, there appear to be several minor procedural areas which could, if changed, facilitate the contractual process for both parties. It is recognized that not all the major deficiences noted are under the purview of the DAR Council (or even DoD), but DoD appears to be the most logical sponsor of the required changes, regulatory and/or statutory.

Major policy questions and deficiencies which are considered critical to the long term achievement of the goal are provided in the attached comments 1, 2, and 3. Comments 4 through 7 are recommended procedural changes which are furnished for your consideration. We believe that these changes could make the process easier for everyone.

IMS appreciates the opportunity to comment on the proposed procedures. We hope that these comments will be helpful to the Department of Defense in offering increased opportunities to small disadvantaged businesses to participate in providing DoD requirements for supplies and services.

Sincerely,

John T.C. Yeh
President

cc: Honorable Caspar W. Weinberger
Secretary
Department of Defense
The Pentagon, 3E880
Washington, D.C. 20301

Ms. Norma Leftwich
Director
Office of Small and Disadvantaged Business Utilization
Under Secretary of Defense for Acquisition
The Pentagon, 2A340
Washington, D.C. 20301

Honorable James Abdnor
Administrator
Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416

Honorable Dale Bumpers, Chairman
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Lowell P. Weicker, Jr.
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Robert Dole
United States Senate
SH 141, Hart Senate Office Bldg.
Washington, D.C. 20510-1601

Honorable John Warner
United States Senate
SR 421, Russell Senate Office Bldg.
Washington, D.C. 20510-4601

Honorable Sam Nunn
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Paul S. Sarbanes
United States Senate
SD 332, Dirksen Senate Office Bldg.
Washington D.C. 20510-2002

Honorable Barbara A. Mikulski
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Rudy Boschurtz
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Warren Rudman
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Alfonse M. D'Amato
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Robert W. Kasten
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Larry Pressler
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Malcom Wallop
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Christopher S. Bond
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable James R. Sasser
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Max Baucus
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Carl Sevin
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Alan J. Dixon
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable David L. Boren
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Tom Harkin
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable John F. Kerry
Committee on Small Business
United States Senate
428-A, Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Constance Morella
U.S. House of Representatives
1024 Longworth House Office Bldg.
Washington, D.C. 20515-2008

Honorable Roy P. Dyson
U.S. House of Representatives
224 Cannon House Office Bldg.
Washington, D.C. 20515-2001

Honorable Helen Delich Bentley
U.S. House of Representatives
1610 Longworth House Office Bldg.
Washington, D.C. 20515-2002

Honorable Benjamin L. Cardin
U.S. House of Representatives
507 Cannon House Office Bldg.
Washington, D.C. 20515-2003

Honorable Tom McMillen
U.S. House of Representatives
1508 Longworth House Office Bldg.
Washington, D.C. 20515-2004

Honorable Steny H. Hoyer
U.S. House of Representatives
1513 Longworth House Office Bldg.
Washington, D.C. 20515-2005

Honorable Beverly B. Byron
U.S. House of Representatives
2430 Rayburn House Office Bldg.
Washington, D.C. 20515-2006

Honorable Nicholas Mavroules, Chairman
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Kweisi Mfume
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Charles Hayes
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable John Conyers
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Dennis Eckart
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Gus Savage
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Esteban Torres
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable H. Martin Lancaster
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Silvio Conte
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable John Rhodes
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Dean Gallo
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Frederick Upton
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

Honorable Elton Gallegly
Subcommittee on Procurement
U.S. House of Representatives
2361 Rayburn House Office Bldg.
Washington, D.C. 20515

# MAJOR POLICY ISSUES

1. Orientation towards Services-Type Contracts. The entire proposed program established by the Interim Rules is structured to fit into the context of the current small business set-aside program and the general tenor of existing contracting regulations. Both of these are completely oriented toward supply contracting and the manufacturing industries. However, the recent Senate Committee on Small Business' report on its survey of graduates of the 8(a) program developed statistics showing that only 3-4% of the responding minority business enterprises were engaged in manufacturing; the large majority were either in construction or some type of services. It would only appear logical that the necessary dollar increases to meet DoD's goal will have to be obtained in the industry concentrations where the potential awardees are. The orientation of the detailed implementing instructions for the program are currently not in that direction. Although the intent and the broad concept are both excellent and we concur completely, it is suggested that a complete review of the detailed implementation procedures to convert them more to a services/construction orientation would probably produce much higher end results for DoD, i.e., award dollars to SDBs.

2. Small Business Size Standards. We recognize that the DAR council does not establish small business standards but must conform its policies to the size standards promulgated by SBA. However, achieving the directed goal initially may well militate against its achievement downstream because of the much greater volume of dollars which would be flowing into the SDB community. Strict adherence to current size standards could cause many SDBs to rapidly attain large business status, rendering them no longer eligible for awards either through the 8(a) program or the SDB set-aside procedure being established by the Interim Rules and/or DAR Case 87-33. This could dramatically reduce the number of highly qualified, responsible minority business enterprises available to DoD, restricting competition and potentially severely downgrading the quality of supplies and services received by DoD since they would be then dealing mostly with newer, less experienced sources. A most logical solution to this potential problem seems to be for DoD to actively support the proposal in H.R. 1807 to exempt revenues obtained through 8(a) Program awards from the three year revenue computation used for size determination where the standard is expressed in dollar volume. The DAR Council would appear to be the logical originator of a recommendation within DoD for active Executive Department support of this proposal.

An alternate approach, either as an interim measure or if H.R. 1807 should fail passage, would be a DoD request to the SBA to take such an action within its already existing statutory authority. A final alternative, contingent upon the absolute intent of the Congress in passing Section 1207 of P.L. 99-661, would be for DoD to sponsor a legislative proposal to redefine the goal to be awards to entities simply specified as 'minority

business enterprises', dropping the term 'small'. It is not inconceivable that the contracting community has become so ingrained in the use of the term 'small disadvantaged business', particularly since all contracting regulations and programs are designed around that particular term, that it has become equated to 'minority business enterprise'. Minority business enterprises or disadvantaged businesses are not, of necessity, also small. The real intent may well have been to direct awards to minority owned businesses but the wrong, albeit familiar, terminology was inadvertently used.

However, regardless of the approach, we believe this to be a real problem which must be addressed and solved if any program is to be successful. We also believe that DoD, through OUSD(A), ODASD(P) and the DAR council, must take the lead in obtaining a solution.

3. Non-Degradation of 8(a) Program. The direction to the contracting officer at proposed paragraph 219.502-72(b)(2) appears to be in direct conflict with the policy expressed at paragraph 219.801. Making a determination that an acquisition will be set-aside will, of necessity, remove that acquisition from the 8(a) program. Contracts awarded to the SBA through the 8(a) program certainly count toward the dollar goal for DoD; diverting the acquisition from the 8(a) program both deprives the SBA Minority Business Development staff of the opportunity to determine the best match between the business development plans of its 8(a) firms and the acquisition, and could deny the acquisition to any 8(a) firm since many SDBs are not 8(a) program participants. The 219.502-72(b)(2) procedures appear to be an attempt to maximize award dollars which can both be attributed toward the 5% goal and reported by DoD as competitive awards. We strongly believe the policy statement at 219.801 to be the only correct and equitable position and recommend the deletion of the procedure at 219.502-72(b)(2) in its entirety. Further, since the incorrect use of the term 'set-aside' to also refer to 8(a) Program acquisitions has become endemic within the contracting community, language should be added to Subpart 19.8 paragraph 219.801 to provide that the newly authorized SDB set-aside procedure shall in no way divert acquisitions from the traditional 8(a) Program. Otherwise, the 8(a) Program should be inserted as (b)(1) in Paragraph 219.504 with each other category being dropped one notch to ensure that the 8(a) Program is designated as first priority.

## RECOMMENDED PROCEDURAL CHANGES

4. Size Standards in Synopsis. It is recommended that the instructions regarding preparation of synopses at 205.207 be expanded to also direct the contracting activity submitting the synopsis to determine and clearly indicate the applicable size standard, preferably by identification of the applicable SICC. This precludes potential offerors

from either requesting the solicitation only to determine that they are not eligible or having to call the designated point of contact to attempt to determine the size standard. Particularly in the services area, a given functional description could be judged to be in any of multiple SICCs, with differing size standards. Current FAR/DFARS directions for synopsis preparation do not explicitly require inclusion of the size standard.

5. Subcontracting from Non Minority Business Sources. It is recommended that direction be provided to the Contracting Officer to the effect that each solicitation must clearly specify the degree of subcontracting which will be permitted with other than small disadvantaged businesses. It is believed that the Contracting Officer, with the advice and assistance of the SBA and/or supporting SADBU representative, is in the best position to make this determination. Determinations should be based upon an analysis of the individual requirement being set-aside and knowledge of the marketplace. Although 'fronting' should definitely be prevented insofar as possible, the nature of the subcontracting effort logically required and the availability from minority business sources varies with each acquisition. The requirement for a relatively large percentage of subcontracting, particularly where the subcontracting would be for equipment to be provided as a portion of a services type contract, and the SDB can otherwise perform the requirement and will provide a significant effort, should not be a barrier to selecting an acquisition for a SDB set-aside.

6. Small Disadvantaged Business Protests. The detailed instructions regarding protesting a small disadvantaged business representation appear redundant and unnecessary since they almost duplicate FAR 19.302. It is recommended that the last two sentences of the proposed paragraph 219.301 and the entire proposed paragraph 219.302 be deleted. The following substitution is recommended:

> 219.302 Protesting a small business representation
>
> Challenges of questions concerning the size or the disadvantaged business status of any SDB shall be processed in accordance with the procedures of FAR 19.302.

7. Partial Small Disadvantaged Business Set-Asides. There appears to be no particular justification for the policy contained in 219.502-3 excluding partial set-asides. Minority business enterprises should not be considered any less likely to perform satisfactorily under the procedures for partial set-asides than any other small business. It is recommended that the currently proposed policy statement be rescinded and replaced by a policy that, if appropriate, allows partial set-asides to be used for the SDB set-aside program as well.

**NATIONAL SECURITY INDUSTRIAL ASSOCIATION**

**National Headquarters**

**1015 15th Street, N.W.**
**Suite 901**
**Washington, D.C. 20005**
**Telephone: (202) 393-3620**



AUG 0 3 1987

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

Dear Mr. Lloyd:

The National Security Industrial Association (NSIA) is pleased to comment on the notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses. (DAR CASE 87-33). This interim rule would amend the Defense Federal Acquisition Regulatory Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for the Fiscal Year 1987 (PL 99-661) entitled "Contract Goal for Minorities".

There is a concern especially among "small businesses" that under the proposed rule, the new percentage goals will infringe on the business opportunities of "small business" section not identified as "small disadvantaged businesses" (SDB). The same concern has been expressed by women-owned businesses, both of which are now competing against large businesses.

Many large businesses (some of who are NSIA member companies) that are active in Defense Contracts through earnest outreach programs are now spending 1.9% of their subcontracting dollars with small disadvantaged businesses. They would be hard tasked to increase their purchases approximately 150% with Small Disadvantaged Businesses (SDB).

This is extremely difficult in high-technology/manufacturing industries where the capacity for SDB to produce has not yet been demonstrated.

Some NSIA smaller company members are further concerned that using less than full and open competitive procedures and making awards for prices that may exceed fair market costs by up to 10 percent would definitely impact the strides they have made in being truly competitive with big business.

A further concern of both large and small companies is that the emphasis on percentage and the potential of receiving 10 percent above fair market value without meeting competitive requirements could encourage a surge of business individuals to place a small disadvantaged person at the head of their firm representing 51% ownership, thereby creating "false fronts" to more easily reap the benefits of Defense business.

Also of concern is the reporting by code for each "Ethnic Group " such as Asian-Indian Americans, Asian-Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Other minority groups. The potential for comparisons among ethnic groups, and potentially later requests, to "even-out" individual ethnic groups because of one or more ethnic groups not getting their share appears to be administratively perilous. In addition, if this requirement were passed on to large business the administrative costs for systems and reporting would be sizeable. This would appear to impact also on the information collection requirements found in the "Paperwork Reduction Act".

Finally, the National Security Industrial Association encourages the proposed "enhanced use" of technical assistance programs by DoD to SDB since this would help increase the vendor base, increase potential for SDB, and eventually help efforts to provide the available products at the lowest life cycle cost to the Federal Government.

We would be pleased to meet with you to further discuss this issue. Point of contact is Colonel E.H. Schiff of my staff.

Sincerely,

for Wallace H. Robinson, Jr.
President

WHR: ff

INTEGRATED SYSTEMS ANALYSTS, INC.

*C. Michael Gooden*
*President*

July 27, 1987
Serial: 87-C-648

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

Ref: DAR Case 87-33

Dear Mr. Lloyd:

By letter dated June 9, 1987, Serial: 87-C-506, Integrated Systems Analysts, Inc. (ISA), provided recommendations that addressed four specific areas wherein the DoD implementation of Section 1207 of P.L. 99-661 could be significantly enhanced within the framework of the existing legislation.

Since submission of the June 9th letter, ISA has been a participant in a number of discussion groups established within the minority business community for the purpose of developing a united and cohesive position on the proposed regulations. As a result of these discussions, ISA wishes to provide comments on three (3) additional areas which are complementary to our earlier submission.

Additional comments are set forth below:

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.

Corporate Offices
1215 Jefferson Davis Hwy.
Crystal Gateway III, Suite 1304
Arlington, VA 22202
703-685-1800

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 SADBU 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 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.

3. 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 omnibus 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.

As with my earlier letter, I sincerely appreciate the opportunity to offer these comments. The importance of Section 1207 of P.L. 99-661 and these regulations to the minority business community cannot be underestimated. I look forward to final regulations which will provide the means for DoD and the minority business community to work together toward achievement of the legislative goals.

Sincerely,

INTEGRATED SYSTEMS ANALYSTS, INC.

C. Michael Gooden
President

# United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 05 1987

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

Dear Mr. Lloyd:

The following comments are submitted in compliance with DAR Case 87-33 and the procedures specified in the Federal Register, Wednesday July 1, 1987.

The Department is happy to note the Department of Defense (DOD) attempt to set a "goal of awarding 5 percent of contract dollars to small disadvantaged businesses." Achieving this goal will affect the Indian communities in a positive way. As you may be aware, there are presently four Indian communities enjoying the benefits of DOD contracting and we would like to see that number expanded. There are at least 245 additional Indian communities that suffer from acute unemployment. We have searched for ways to get these communities more involved with Defense contracting and we see your setting of five percent as a positive step in that direction. In order for the five percent goal to become a reality, we believe that an incentive system designed to allow the prime and sub-contractors a five to ten percent additional cost support fee should be made part of the system. Without such an incentive, it is difficult, if not impossible, to attract to the rural isolated areas, those businesses that are the core of the Indian communities' need.

In addition to an incentive system being included, we strongly suggest that a reporting system that breaks out the Indian businesses (both 8(a) and non-8(a)) that receive Defense related contracts be developed and that the report be shared with the Bureau of Indian Affairs. This information would assist us to better coordinate our own economic development programs.

It has come to our attention that a very practical way of increasing the number of contracts to small businesses might be achieved by increasing the number of Break Out Specialists (Procurement Outreach Representatives (PCR's) in SBA's Procurement program). These specialists "break-out" procurements for small businesses within major requirements. It is our understanding that there are only ten of these specialists nationwide; to double or triple their staff could assist in meeting the five percent goal.

Sincerely,

Hazel E. Elbert

ACTING Assistant Secretary - Indian Affairs

NORTHWEST FLORIDA CHAPTER
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
201 S. "F" STREET, TELEPHONE 438-0551
PENSACOLA, FLORIDA 32501

June 19, 1987

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ADASD(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,

The Northwest Florida Chapter of Associated General Contractors regards the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, as a gilt-edged invitation to further abuse of construction procurement process and opposes the interim regulations for that, and the following reasons:

1. The "Rule of Two" set-aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

3. The use of a "Rule of Two" mechanism as the criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective. A similar "Rule of Two" mechanism used in small businesses set-asides resulted in 80% of Defense construction contract actions being set aside in FY 1984.

Implementation of SDB Set-Aside 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 prices 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 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 for 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 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 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 taxpaying, 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 products of competition. Competition forces business firms to seek the lowest possible cost methods of producing or providing service. The fair market prices must be one arrived at through competition, not developed by in-house cost estimates and catalogue prices. The price estimating methods proposed in the interim regulations are not subject to pressure from, and condition in, the marketplace and must not be used to develop a fair market price.

The pressures to exceed the five percent goal are likely to influence government estimators to inflate their estimates in order to provide SDBs with the opportunity to develop a non-competitive price within the protective ten percent statutory allowance. Not only will the pressure to inflate the "fair market price" increase the taxpayer's costs, but the subsequent contract award price submitted by the SDB in the absence of full and open competition will further increase the taxpayer's costs.

Use of "Rule of Two" Will Set Aside An Inordinate Number of Military Construction Projects

The use of a "Rule of Two" mechanism as the criteria for setting aside contracts for SDBs will force contracting officers to set aside contracts in numbers which bear no relationship to the 5 percent objective. Experience with the existing small business Rule of Two, as contained in the FAR and the Defense Supplement to the Federal Acquisition Regulation (DFAR), bears evidence to the indiscriminate results of a "Rule of Two" procedure.

In testimony on the Rule of Two before the House Small Business Committee last June, the SBA's Chief Counsel for Advocacy stated that the Rule of Two "is a convenient tool for determining when set-asides should be made." AGC agrees that contracting officers find the Rule of Two to be a "convenient tool" for determining when to set aside procurements for restricted competition--a "tool" which, in construction at least, has resulted in a near-compulsion on the part of contracting officers to set aside nearly every construction contract on the agencies' procurement schedule. AGC is confident that exactly the same abuse will occur with the adoption of the "Rule of Two" for SDBs; that is, contracting officers will indiscriminately set aside any and every solicitation in order to meet and far exceed the "objective."

An example of the problem that will result by the use of the Rule of Two as the criteria for determining SDB set-asides is the disproportionate number of contracts for restricting competition set aside by the Defense Department using the existing small business Rule of Two. In FY 1984, the Defense Department removed 80 percent of its construction contract actions from the open, competitive market. Of 21,188 contract actions, 17,055 were set aside for exclusive bidding by small businesses.

Contracting officers are delegated the responsibility to determine which acquisitions should be set aside for SDB participation. Contracting officers are directed, in Section 219.502-72, that in making SDB set-asides for research and development or architect-engineer acquisition, there must be a reasonable expectation of obtaining from SDBs scientific and technological or architectural talent consistent with the demands of the acquisition. There are construction acquisitions, as well, in which the complexity of construction demands an adequate experiential and competency level. Recognition of this is not included in Section 219.502.72(a), leaving the distinct impression that contracting officers will indiscriminately set aside virtually all construction solicitations.

Section 219.502-72(b)(1) is gilt-edged invitation for abuse in that SDBs have merely to offer a bid in a highly competitive marketplace within 10% of what could reasonably be expected to be the award price. Thus, having established their "credentials!", and their non-competitiveness, the government would then sanction and encourage this non-competitiveness by setting aside subsequent construction projects. This proposal is ludicrous and the personification of abuse of the taxpaying public through the procurement process.

AGC urges that the interim regulations: 1) not be implemented on June 1 for military construction procurement; and 2) not be implemented for military construction procurement until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely,

Tillman C. Burks, Jr.
Executive Vice President

TCBJ/ljg

*Building A Better New Mexico*

**NEW MEXICO BUILDING BRANCH**
Associated General Contractors of America

1615 University Blvd. N.E.
Albuquerque, New Mexico 87102
Phone: (505) 842-1462

June 18, 1987

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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The New Mexico Building Branch, Associated General Contractors, representing over 200 construction companies which are responsible for over 50 per cent of New Mexico's commercial construction volume each year, opposes the interim regulations allowing for the "Rule of Two" set aside for Disadvantaged Businesses in Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

We oppose the "Rule of Two" interim policy for the following reasons:

1. We believe that it is not necessary, nor has it been authorized by Congress, to achieve a five per cent goal of military construction contract dollars to small disadvantaged businesses through the "Rule of Two" set aside.

2. Nor is it necessary, we believe, to use legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 per cent in order to achieve the goal of awarding five per cent of military construction contract dollars to small disadvantaged businesses.

87-33

LANG DIXON & ASSOCIATES

June 12, 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 businesses 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.

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,

Lang Dixon

LD/mdm

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87-33

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WILBERT C. SCIPIO

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CHICAGO, IL 60619

MR. LLOYD
EXECUTIVE SECRETARY
DEFENSE ACQUISITION
REGULATORY COUNCIL
WASHINGTON, D.C., 20301-3062

JUNE, 17, 1987

DEAR SIR:
THIS LETTER CONCERNS DAR CASE 87-33, MINORITY SET-ASIDE REGULATIONS.

YOUR REGULATIONS DO NOT CONFORM OR MEET THE STANDARDS AS SET PER UNITED STATES SUPREME COURT DECISION FULLILOVE V. KLUTZNICK FOR MINORITY SETASIDE REGULATIONS. PLEASE READ ATTACHED DECISION. PLEASE READ PAGES 918 AND 933 TO 935. THIS DECISION WILL HELP YOU UNDERSTAND A GOOD AND LEGAL MINORITY SETASIDE PROGRAM THROUGH REGULATION.

YOUR REGULATIONS ARE MISSING PARTS REQUIRED BY PUBLIC LAW 99-661 SECTION 1201 FOR EXAMPLES:
(1.) THE LAW REQUIRES YOU TO HAVE ADMINISTRATIVE WAIVERS" IN ORDER TO EXEMPT CERTAIN CONTRACTS BUT YOUR REGULATIONS DO NOT CONTAIN "WAIVERS".
(2.) IT IS IMPLIED IN THE LAW THAT 5% OF CONTRACT FUNDS FOR EACH CONTRACT SHOULD BE EXPENDE[illegible] MINORITY BUSINESS, OTHERWISE BIDS SHOU[illegible]ED BY DEPT. OF DEFENSE CONTRACT

GOAL FOR MINORITY SETASIDE.

EXAMPLE

LOCKHEED HAS AN ENGINEERING CONTRACT FOR RESEARCH AND DEVELOPMENT OF TRIDENT II MISSILE FOR U.S. NAVY FOR $1.1 BILLION DOLLARS. LOCKHEED SHOULD HAVE THE FOLLOWING

$1,000,000,000.00
X .05 5 PERCENT MINORITY SETASIDE
$50,000,000
(50 MILLION DOLLARS TO MINORITY FIRMS)

BUT

LOCKHEED SUBMITS A BID WITH ONLY 5 MILLION DOLLARS AWARDED TO MINORITY BUSINESS. THE U.S. NAVY CONTRACT OFFICER SHOULD REJECT THIS BID AS BEING NOT RESPONSIVE. WITH MOST CONTRACTS THE CONTRACTING OFFICER LETS THE PRIME GET AWAY WITH THE LESSER AWARD TO MINORITIES

THEREFORE PLEASE READ SUPREME COURT DECISION AND MAKE RECOMMENDED CHANGES.

SINCERELY YOURS
Wilbert C. Lapivey.

TO MR. LLOYD:

PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION REGULATIONS ARE ON PAGES 933 TO 935 IMPORTANT PAGES TO READ ARE 918, 933, 934 AND 935 REGULATIONS IN THIS DECISION ARE ON A FIRMER LEGAL FOONDATION THAN YOURS.



[448 US 448]

H. EARL FULLILOVE et al., Petitioners,

v

PHILIP M. KLUTZNICK, Secretary of Commerce of the United States, et al.

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

[No. 78–1007]

Argued November 27, 1980. Decided July 2, 1980.

**Decision:** Minority business enterprise provision of Public Works Employment Act, requiring "10% set-aside" of federal funds for minority businesses on local public works projects, held not violative of equal protection.

SUMMARY

Associations of construction contractors and subcontractors, along with a firm engaged in heating, ventilation, and air conditioning work, brought an action in the United States District Court for the Southern District of New York against the Secretary of the United States Department of Commerce, as the administrator of federal programs for local public works projects, and against the State and City of New York, as actual and potential grantees of federally funded local public work projects, alleging that the "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116)—a provision implemented in regulations of the Secretary of Commerce and guidelines of the Commerce Department's Economic Development Administration—on its face, violated, among other things, the equal protection component of the Fifth Amendment's due process clause and various federal statutes prohibiting discrimination, including Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.) proscribing racial discrimination in any program receiving federal financial assistance, the focus of the plaintiffs' challenge to the minority business enterprise provision being the so called "ten percent set-aside requirement" of the provision whereby, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in

Briefs of Counsel, p 1324, infra.

TO MR. LLOYD:

PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION REGULATIONS ARE ON PAGES 933 TO 935 IMPORTANT PAGES TO READ ARE 918, 933, 934 AND 935 REGULATIONS IN THIS DECISION ARE ON A FIRMER LEGAL FOONDATION THAN YOURS.



[448 US 448]

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Briefs of Counsel, p 1324, infra.

the Public Works Employment Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Ultimately, the District Court upheld the validity of the minority business enterprise provision, denying the declaratory and injunctive relief which the plaintiffs had sought (443 F Supp 253). Thereafter, the United States Court of Appeals for the Second Circuit affirmed, expressly rejecting the contention that the ten percent set-aside requirement violated equal protection, and also rejecting, as the District Court had done, the various statutory arguments which the plaintiffs had raised (584 F2d 600).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, six members of the court nonetheless agreed that the minority business enterprise provision of the Public Works Employment Act, by virtue of its ten percent set-aside requirement, did not violate equal protection under the due process clause of the Fifth Amendment nor Title VI of the Civil Rights Act of 1964.

BURGER, Ch. J., announced the judgment of the court, and in an opinion joined by WHITE and POWELL, JJ., expressed the views that (1) in terms of Congress' objective in the minority business enterprise provision of the Public Works Employment Act—to ensure that, to the extent federal funds were granted under the Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities —such objective being within the spending power of Congress under the United States Constitution (Art I, § 8, cl 1), the provision's limited use of racial and ethnic criteria constituted a valid means of achieving the objective so as not to violate the equal protection component of the due process clause of the Fifth Amendment, and (2) the minority business enterprise provision was not inconsistent with the requirements of Title VI of the Civil Rights Act of 1964.

POWELL, J., concurring, expressed the views that the racial classification reflected in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was not violative of equal protection, being justified as a remedy serving the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress, and that since the requirement was constitutional, there was also no violation of Title VI of the Civil Rights Act of 1964.

MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., concurred in the judgment, expressing the views that (1) under the appropriate standard for determining the constitutionality of racial classifications which provide benefits to minorities so as to remedy the present effects of past racial discrimination—which standard necessitates an inquiry into whether a classification on racial grounds serves important governmental objectives and is substantially related to the achievement of those objectives—the ten percent set-aside requirement of the minority business enterprise provision

of the Public Works Employment Act was not violative of equal protection under the due process clause of the Fifth Amendment, since the racial classifications employed in the set-aside provision was substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination in the area of public contracting, and (2) the ten percent set-aside requirement also did not violate Title VI of the Civil Rights Act of 1964 in that the prohibition of Title VI against racial discrimination in any program or activity receiving federal financial assistance was coextensive with the guarantee of equal protection under the United States Constitution.

STEWART, J., joined by REHNQUIST, J., dissenting, expressed the view that the minority business enterprise provision of the Public Works Employment Act, on its face, denied equal protection of the law, barring one class of business owners from the opportunity to partake of a government benefit on the basis of the owners' racial and ethnic attributes.

STEVENS, J., dissented, expressing the view that since Congress had not demonstrated that the unique statutory preference established in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was justified by a relevant characteristic shared by members of the preferred class, Congress had failed to discharge its duty, embodied in the Fifth Amendment, to govern impartially.

capital, and to give guidance through the intricacies of the bidding process. The administrative program, which recognizes that contracts will be awarded to bona fide MBE's even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination, provides for handling grantee applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. The program also provides an administrative mechanism to ensure that only bona fide MBE's are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The District Court upheld the validity of the MBE program, and the Court of Appeals affirmed.

*Held:* The judgment is affirmed.

584 F2d 600, affirmed.

Mr. Chief Justice Burger, joined by Mr. Justice White and Mr. Justice Powell, concluded that the MBE provision of the 1977 Act, on its face, does not violate the Constitution.

(1) Viewed against the legislative and administrative background of the 1977 Act, the legislative objectives of the MBE provision, and the administrative program thereunder, were to ensure—without mandating the allocation of federal funds according to inflexible percentages solely based on race or ethnicity—that, to the extent federal funds were granted under the 1977 Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities.

(2) In considering the constitutionality of the MBE provision, it first must be determined whether the *objectives* of the legislation are within Congress' power.

(a) The 1977 Act, as primarily an exercise of Congress' spending power under Art I, § 8, cl 1, "to provide for the . . . general Welfare," conditions receipt of federal moneys upon the recipient's compliance with federal statutory and administrative directives. Since the reach of the spending power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the spending power.

(b) Insofar as the MBE program pertains to the actions of private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. The legislative history shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce.

(c) Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the equal protection guarantee of that Amendment. Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority busi-

nesses, could perpetuate the effects of prior discrimination, and that the prospective elimination of such barriers to minority-firm access to public contracting opportunities was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Cf., e.g., Katzenbach v Morgan, 384 US 641, 16 L Ed 2d 828, 86 S Ct 1717; Oregon v Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260.

(d) Thus, the *objectives* of the MBE provision are within the scope of Congress' spending power. Cf. Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786.

(3) Congress' use here of racial and ethnic criteria as a condition attached to a federal grant is a valid *means* to accomplish its constitutional objectives, and the MBE provision on its face does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

(a) In the MBE program's remedial context, there is no requirement that Congress act in a wholly "color-blind" fashion. Cf., e.g., Swann v Charlotte-Mecklenberg Board of Education, 402 US 1, 28 L Ed 2d 554, 91 S Ct 1267; McDaniel v Barresi, 402 US 39, 28 L Ed 2d 582, 91 S Ct 1287; North Carolina Board of Education v Swann, 402 US 43, 28 L Ed 2d 586, 91 S Ct 1284.

(b) The MBE program is not constitutionally defective because it may disappoint the expectations of access to a portion of government contracting opportunities of nonminority firms who may themselves be innocent of any prior discriminatory actions. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. Franks v Bowman Transportation Co., 424 US 747, 777, 47 L Ed 2d 444, 96 S Ct 1251.

(c) Nor is the MBE program invalid as being underinclusive in that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities, and there has been no showing that Congress inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program.

(d) The contention that the MBE program, on its face, is overinclusive in that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination, is also without merit. The MBE provision, with due account for its administrative program, provides a reasonable assurance that application of racial or ethnic criteria will be narrowly limited to accomplishing Congress' remedial objectives and that misapplications of the program will be promptly and adequately remedied administratively. In particular, the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBE's who are not "bona fide," or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Moreover, grantees may obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.

(4) In the continuing effort to achieve

the goal of equality of economic opportunity, Congress has latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives, especially in programs where voluntary cooperation is induced by placing conditions on federal expenditures. When a program narrowly tailored by Congress to achieve its objectives comes under judicial review, it should be upheld if the courts are satisfied that the legislative objectives and projected administration of the program give reasonable assurance that the program will function within constitutional limitations.

Mr. Justice Marshall, joined by Mr. Justice Brennan and Mr. Justice Blackmun, concurring in the judgment, concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives, University of California Regents v Bakke, 438 US 265, 359, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part), and that, judged under this standard, the 10% minority set-aside provision of the 1977 Act is plainly constitutional, the racial classifications being substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.

Burger, C. J., announced the judgment of the Court and delivered an opinion, in which White and Powell, JJ., joined. Powell, J., filed a concurring opinion. Marshall, J., filed an opinion concurring in the judgment, in which Brennan and Blackmun, JJ., joined. Stewart, J., filed a dissenting opinion, in which Rehnquist, J., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

**Robert G. Benisch** argued the cause for petitioners Fullilove et al.

**Robert J. Hickey** argued the cause for petitioner General Building Contractors of New York State, Inc.

**Drew S. Days III,** argued the cause for respondents.

Briefs of Counsel, p 1324, infra.

SEPARATE OPINIONS

[448 US 453]

Mr. Chief Justice **Burger** announced the judgment of the Court and delivered an opinion in which Mr. Justice **White** and Mr. Justice **Powell** joined.

**[1a]** We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 US 960, 60 L Ed 2d 1064, 99 S Ct 2403 (1979).

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub L 95-28, 91 Stat 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub L 94-369, 90 Stat 999, 42 USC § 6701 et seq. [42 USCS § 6701 et seq.]. The 1977 amendments authorized an addi-

TO MR LLOYD: PLEASE SUBSTITUTE CONTRACT OFFICER FOR THE WORD GRANTEE



TO DOD: IF BID OF PRIME CONTRACTOR DOES NOT EXPEND 5% OF CONTRACT FUNDS TO MINORITY BUSINESS CONTRACT OFFICER HAS AN OBLIGATION TO REJECT BID AS BEING NOT RESPONSIVE

Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[56] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they also restate the MBE requirement.[57]

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where

[448 US 469]

feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process.[58]

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement.[59] The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's."[60] The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention.[61]

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The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process.[62] The Technical Bulletin issued by EDA discusses in greater detail the process-

56. 91 Stat 117, 42 USC § 6706 (1976 ed Supp II) [42 USCS § 6706]; 13 CFR Part 317 (1978).

57. 91 Stat 116, 42 USC § 6705(e)(1) (1976 ed Supp II) [42 USCS § 6705(e)(1)]; 13 CFR § 317.19 (1978).

58. Guidelines 2–7; App 157a–160a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 1.

59. Guidelines 2; App 157a; see 123 Cong Rec 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

60. Guidelines 8; App 161a.

61. See 123 Cong Rec 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

62. Guidelines 13–16; App 165a–167a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 2.

(1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const, Amdt 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. South Carolina v Katzenbach, 383 US 301, 15 L Ed 2d 769, 86 S Ct 8031 (1966); cf. City of Rome, supra.

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated

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the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

[448 US 479]

(4)

There are relevant similarities between the MBE program and the federal spending program reviewed in Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786 (1974). In Lau, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. Id., at 564–566, 39 L Ed 2d 1, 94 S Ct 786. It had not been shown that this had resulted from any discrimina-

ance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious

[448 US 487]

effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and

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eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." Supra, at 472, 65 L Ed 2d, at 920. And even as to specific contract awards,

73. The MBE provision, 42 USC § 6705(f)(2) (1976 ed Supp II) [42 USCS § 6705(f)(2)], classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 USC § 803 [45 USCS § 803], see 49 CFR § 265.5(i) (1978), on which Congress relied as precedent for the MBE provision. See 123 Cong Rec 7156 (1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." HR Rep No. 94-468, pp 20–21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination. Supra, at 469–471, 65 L Ed 2d, at 918–919. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

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Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the EDA to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See Steelworkers v Weber, 443 US 193, 200, 61 L Ed 2d 480, 99 S Ct 2721 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

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IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity.

74. Cf. GAO, Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

TO MR LLOYD: PLEASE SUBSTITUTE CONTRACT OFFICER FOR THE WORD GRANTEE



change to 5%

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48 US 491]

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of Government 61–62

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932)(dissenting opinion).

**[1c, 2a]** Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind

[448 US 492]

of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as University of California Regents v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several Bakke opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.[77]

Affirmed.

DEPT. OF DEFENSE (CONTRACT OFFICER)

APPENDIX TO OPINION OF BURGER, C. J.

REGULATION START HERE

¶ 1. The EDA guidelines, at 2–7, provide in relevant part:

"The primary obligation for carrying out the 10% MBE participation requirement rests with ~~EDA Grantees~~. . . . The ~~Grantee~~ and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available bona fide MBE's and make every effort to use as many of them as possible on the project.

"An MBE is bona fide if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership

[448 US 493]

on which the claim of minority ownership status is based. . . .

"An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . ~~EDA~~ will require that ~~Grantees~~ and prime contractors engage MBE's from as wide a market area as is economically feasible.

change to DOD

"An MBE is qualified if it can

CONTRACTING OFFICERS

77. **[2b]** Although the complaint alleged that the MBE program violated several federal statutes, n 5, supra, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Rights Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later, more specific enactment—must be deemed to control. See, e.g., Morton v Mancari, 417 US 535, 550–551, 41 L Ed 2d 290, 94 S Ct 2474 (1974); Preiser v Rodriguez, 411 US 475, 489–490, 36 L Ed 2d 439, 93 S Ct 1827 (1973); Bulova Watch Co. v United States, 365 US 753, 758, 6 L Ed 2d 72, 81 S Ct 864 (1961); United States v Borden Co. 308 US 188, 198–202, 84 L Ed 181, 60 S Ct 182 (1939).

TO MR. LLOYD: SUBSTITUTE CONTRACT OFFICER FOR GRANTEE.



DEPT. OF DEFENSE (CONTRACT OFFICER)

perform the services or supply the materials that are needed. ~~Grantees~~ and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an ~~LPW [local public works] project~~. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. ~~Grantees~~ and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

LAW SPECIFIES THAT YOU HAVE THIS IN YOUR REGULATIONS BUT YOO DO NOT.

FEDERAL DEFENSE CONTRACTS

DEPT. OF DEFENSE (CONTRACT OFFICER)

DEPT. OF DEFENSE CONTRACT OFFICER

". . . [E]very ~~Grantee~~ should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. . . . Grantees should also hold prebid conferences to which they invite interested contractors and representatives of . . . MBE support organizations.

"Arrangements have been made through the Office of Minority Business Enterprise . . . to provide assistance

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~~Grantees~~ and prime contractors in fulfilling the 10% MBE requirement. . . .

DEPT. OF DEFENSE CONTRACT OFFICERS

CHANGE TO 5%

"Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration. . . .

(DEPT. OF DEFENSE CONTRACT OFFICER

". . . [T]he ~~Grantee~~ must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. . . . Grantees should administer every project tightly. . . ."

¶ 2. The EDA guidelines, at 13–15, provide in relevant part:

"Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. . . .

(DEPT. OF DEFENSE CONTRACT OFFICER

"Only the ~~Grantee~~ can request a waiver. . . . Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. . . .

DEPT. OF DEFENSE CONTRACT OFFICER

"[A] ~~Grantee~~ situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. . . ."

¶ 3. The EDA Technical Bulletin, at 1, provides the following definitions:

"a) Negro—An individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

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"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

¶ 4. The EDA Technical Bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

"If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

Mr. Justice **Powell,** concurring.

Although I would place greater emphasis than The Chief Justice on the need to articulate judicial standards of review

[448 US 496]

in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in University of California Regents v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978) (hereinafter Bakke).

The question in this case is whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. Bakke, supra, at 299, 305, 57 L Ed 2d 750, 98 S Ct 2733; see In re Griffiths, 413 US 717, 721–722, 37 L Ed 2d 910, 93 S Ct 2851 (1973); Loving v Virginia, 388 US 1, 11, 18 L Ed 2d 1010, 87 S Ct 1817 (1967); McLaughlin v Florida, 379 US 184, 196, 13 L Ed 2d 222, 85 S Ct 283 (1964). For the reasons stated in my Bakke opin-

were to be distributed quickly,[10] any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance.[11] And Congress knew that the

[448 US 512]

ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades.[12] The set-aside program adopted as part of this emergency

[448 US 513]

legislation serves each of these concerns because it takes effect as soon as funds are expended under PWEA and because it provides minority contractors with experience that could enable them to compete without governmental assistance.

10. The PWEA provides that federal moneys be committed to state and local grantees by September 30, 1977. 42 USC § 6707(h)(1) (1976 ed Supp II) [42 USCS § 6707(h)(1)]. Action on applications for funds was to be taken within 60 days after receipt of the application, § 6706, and on-site work was to be begin within 90 days of project approval, § 6705(d).

11. In 1972, a congressional oversight Committee addressed the "complex problem—how to achieve economic prosperity despite a long history of racial bias." See HR Rep No. 92-1615, p 3 (Select Committee on Small Business). The Committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepreneur is faced initially with the lack of capital, the most serious problem of all beginning minorities or other entrepreneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

. . . . . .

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." Id., at 3–4.

12. When Senator Brooke introduced the PWEA set-aside in the Senate, he stated that aid to minority businesses also would help to alleviate problems of minority unemployment. 123 Cong Rec 7156 (1977). Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See Contractors Association of Eastern Pennsylvania v Secretary of Labor, 442 F2d 159, 163 (CA3), cert denied, 404 US 854, 30 L Ed 2d 95, 92 S Ct 98 (1971). Later that year, the House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overruling the Labor Department's order. 115 Cong Rec 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. Id., at 40749.

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity. See id., at 40740 (remarks on Sen. Scott); id., at 40741 (remarks of Sen. Griffith); id., at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. Id., at 40742–40743. The day following the Senate vote to recede from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." Id., at 41072.

BACKGROUND AND HISTORY OF MINORITY SETASIDE PROGRAMS

AGC of St. Louis
SKILL RESPONSIBILITY INTEGRITY

THE ASSOCIATED GENERAL CONTRACTORS OF ST. LOUIS

2301 HAMPTON AVE. • ST. LOUIS, MISSOURI 63139 • PHONE: 314/781-2356

June 16, 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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The Associated General Contractors of St. Louis is in agreement with the letter sent to you on June 1, 1987 by Hubert Beatty, Executive Vice President of the Associated General Contractors of America regarding the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

We support their position that the interim regulations: 1) not be implemented on June 1 for military construction procurement; and 2) not be implemented for military construction procurement until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

The Associated General Contractors of St. Louis represents some 400 construction-related firms in the St. Louis Metropolitan Area and in Southeast Missouri. Thank you for your consideration of our comments.

Sincerely,

ASSOCIATED GENERAL CONTRACTORS
OF ST. LOUIS

Joseph F. Shaughnessy
President

JFS:af

**Michigan Chapter ASSOCIATED GENERAL CONTRACTORS of America, Inc.**

2323 N. LARCH • BOX 27005 • LANSING, MICHIGAN 48909 • 517/371-1550

*THE FULL SERVICE CONSTRUCTION ASSOCIATION*

**President**
**RAYMOND E. JOHNSON**
*Serenus Johnson & Son Company*
*Bay City*

**Vice President**
**M. William Lang**
*Owen-Ames-Kimball Co.*
*Grand Rapids*

**Treasurer**
**JOHN C. FLOOK**
*Wagner-Flook Builders*
*Battle Creek*

*Secretary - Manager*
**BART O. CARRIGAN**

*Director*
*Employer Relations*
**JACK RAMAGE**

June 19, 1987

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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The Michigan Chapter of Associated General Contractors of America (AGC) is a full-service trade association representing commercial building contractors in Michigan. AGC supports the sentiments expressed by Hubert Beatty, AGC of America Executive Vice President, in his letter of June 1, 1987.

In that letter, Mr. Beatty voiced his opposition to the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act of Fiscal Year 1987, for these reasons:

1. The "Rule of Two" set aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to SDB firms.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to SDB firms.

3. The use of a "Rule of Two" mechanism as a criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective.

(more)

MICHIGAN CHAPTER
Associated General Contractors
of America, Inc.



The implementation of the interim regulations will be an open invitation to abuse the construction procurement process. Further, it will discourage competition in the procurement process. AGC urges that the regulations not be implemented until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely yours,

Jack W. Ramage, Director
Employer Relations

JWR:bss

CURT PETERSON
Executive Vice President

Associated General Contractors of North Dakota

422 2nd STREET, P.O. BOX 1624, BISMARCK, NORTH DAKOTA 58502, PHONE 701-223-2770

June 22, 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. Lloyd:

The Associated General Contractors of North Dakota regards the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, as a gilt-edged invitation to further abuse of the construction procurement process and opposes the interim regulations for that, and the following reasons:

1. The "Rule of Two" set-aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

3. The use of a "Rule of Two" mechanism as the criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective. A similar "Rule of Two" mechanism used in small business set-asides resulted in 80% of Defense construction contract actions being set aside in FY 1984.

Section 219.502-72(b) (1) is an invitation for abuse in that SDBs have merely to offer a bid in a highly competitive marketplace within 10% of what could reasonably be expected to be the award price. Thus, having established their "credentials!", and their non-competitiveness, the government would then sanction and encourage this non-competitiveness by setting aside subsequent construction projects. This proposal is ludicrous and the personification of abuse of the taxpaying public through the procurement process.

WHITE HOUSE
ELECTRICAL SUPPLY corporation

2619 W. HUNTING PARK AVE., PHILADELPHIA, PA 19129-1303 (215) 223-8600

June 18,1987

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.

# H. Pinckney General Contractor Inc.

6035 CHESTNUT ST. - PHILADELPHIA, PENNSYLVANIA 19139 • PHONE 471-6510


June 17, 1987

Defense Acquistion 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 it 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 businesses 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.

I urge the Defense Department to address the above issues quickly, and to move forward aggressively in pursing the 5% goal set by law.

Sincerely,

HENRY PINCKNEY
President, H. Pinckney General Contracting Inc.

HP/yw

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

JUN 23 1987

Mr. Charles Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
Room 3C841, The Pentagon
Washington D. C. 20301

Dear Mr. Lloyd:

Enclosed for Council consideration are comments, dated May 22, 1987, from Ms. Eva Poling of the Mechanical Contractors District of Columbia Association, Inc. The comments, which were provided to us by Congressman Frank Wolf, concern the Department's interim rule for contract awards to small minority business concerns (DAR Case 87-33).

Thank you for your consideration.

Sincerely,

Allan V. Burman
Deputy Administrator

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUN 24 1987

Honorable Frank R. Wolf
U.S. House of Representatives
Constituent Services Office
Suite 115
1651 Old Meadow Road
McLean, Virginia 22102

Dear Congressman Wolf:

This is in response to your recent inquiry on behalf of Ms. Eva Poling of the Mechanical Contractors District of Columbia Association, Inc. In her letter of May 22, 1987, Ms. Poling expressed concern about the interim rule recently issued by the Department of Defense on contract awards to small minority business concerns, and the economic impact of such a rule.

This interim rule is in direct implementation of Public Law 99-661, which the Congress enacted with the objective of assuring that 5 percent of Defense funds in certain categories of contracts, including construction, were awarded to small minority firms. It is not a final rule. Rather, it is an interim rule on which public comments have been solicited and will be accepted until August 3, 1987. It should also be noted that the program established by the law and implementing rule is limited to a three-year period, during which annual assessments of price, performance and economic impact will be made.

In light of the comment period that is currently underway, we have taken the liberty of forwarding a copy of your constituent's letter to the Executive Secretary of the Defense Acquisition Regulatory Council at the Pentagon. A copy of our referral letter is enclosed. We are certain that Ms. Poling's views will be carefully and thoroughly considered by the Council.

Thank you for bringing Ms. Poling's concerns to our attention. If we can be of further assistance, please contact me.

Sincerely,

Signed

Gordon Wheeler
Associate Director for
Legislative Affairs

Enclosure

Because we basically are small business and do not have the resources to twist arms and lobby, we have become a "dumping" ground for every "quick fix" designed, such as that proposed for fiscal years 1987, 1988 and 1989. It is much easier to use the 8(a) program than to carve out set asides in the mega industries that also do work with DoD.

We have no quarrel with set asides per se; however, what has been done in this instance is to close a specific market to specific contractors who have had access to it in the past.

Your help is needed in resolving this situation.

Sincerely,

Eva S. Poling

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

WASHINGTON OFFICE:
130 CANNON BUILDING
WASHINGTON, DC 20515
(202) 225-5136

CONSTITUENT SERVICES OFFICES:
[redacted]
SUITE 115
MCLEAN, VA [redacted]
(703) 734-1500

19 E. MARKET ST.
ROOM 4B
LEESBURG, VA 22075
(703) 777-4422

COMMITTEE ON APPROPRIAT

SUBCOMMITTEES:
TRANSPORTATION

TREASURY—POSTAL SERVICE—GENE GOVERNMENT

SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES

# Congress of the United States
## House of Representatives
Washington, DC 20515

87 JUN 15 AM : 46

June 9, 1987

Mr. Fred Upton
Acting Assistant Director
Office of Legislative Affairs
Office of Management and Budget
243 Old Executive Office Building
Washington, D.C. 20503

ar Mr. Upton:

I have enclosed a copy of a letter which I have received from one of my constituents regarding a matter under your department's jurisdiction.

I would appreciate it if you would review the letter and address the issues which it discusses. It would be helpful if you would address your response to me, attention, Judy McCary.

Thank you for your time and courtesy in being attentive to the concerns of my constituent.

With best regards,

Sincerely,

Frank R. Wolf
Member of Congress

FW:jsm/kmk

Enclosure

25548

mechanical contractors district of columbia association, inc.

suite 807, 5200 auth rd., suitland, md. 20746

301 899-2988

MAY 28 1987

MCA DISTRICT OF COLUMBIA

Eva S. Poling
Executive Vice-President

Lois DaCrema
Executive Secretary

May 22, 1987

Honorable Frank R. Wolf
1651 Old Meadow Road
Suite 115
McLean, Virginia 22102

Dear Congressman Wolf:

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 percent 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 percent.

The changes incurred by the interim rule are made without prior public comment and are effective June 1, 1987.

Implementation of the rule will have a drastic economic impact upon small construction contractors who have depended on the small business market for their survival. No prior study was made of this impact. The DoD is using the 8(a) program of the Small Business Administration as one method to reach the 5%. As a result, the effect on SBA's who do not fit the SDB category will be catastrophic. Worse still, at this point in time about 99% do not realize what will be happening on June 1st.

Congressman Wolf, the construction industry in this country is made up of many, many small businesses, what I refer to as a "mom and pop" industry. For every mega company, there are thousands of small companies that perform the work to keep the this country moving, including those small firms that perform construction for the DoD under the SBA program.

required corrective action(s) will be reviewed by this office in making a recommendation on the continued reliance which the Government can place on the costs generated by and charged to Government contracts under the *(CONTRACTORS SYSTEM NAMED) system.*

Please provide your written plan of action to address this matter within 30 days. Should you have any questions on this matter, please contact *(FAO REPRESENTATIVE)* at *(Telephone number)* or the undersigned.

Sincerely,

JOHN DOE, FAO Manager

Enclosure
Common MRP Deficiencies

MATERIAL REQUIREMENTS PLANNING (MRP) SYSTEMS COMMON DEFICIENCIES IDENTIFIED

- Costing to contracts based on requirements, in lieu of actual contract usage (costing of paper transactions only). Thus the Government is billed for "reserved" items which may or may not be used on the contract.
- Treating contract inventory as company-owned inventory and, therefore, costing among contracts using the company-owned inventory valuation method in lieu of actual costs incurred.
- Recurring usage of "informal"/other contract inventory to satisfy contract requirements (whole cost/no cost transfers) without proper disclosure to the Government.
- Pricing of manufactured parts using open "actual history" work orders which can have excess costs built in until the work order is closed.
- Inclusion of an allocated portion of company-owned inventory costs in public voucher/progress payment requests.
- Transferring material without the *prior* approval of the designated contracting administrative official which can result in the loss of contractually conveyed Government title to the material.
- Fabricated part transfers generated by the MRP system are not costed at the same value as the original charges.
- Pricing of proposed bills of national without adequate consideration of available inventory.
- Failure to fully disclose the impact of the MRP netting process (also sometimes referred to as dynamic rescheduling) at the time of negotiation which can result in a violation of Public Law 10 U.S.C. 2306.
- Failure adequately disclose that spare orders which are proposed based on future purchases are being completed with minimal material purchases supplemented, in whole or in part, by material transfers from an "informal"/other contract inventory with the reprocurement costs being charged to production contracts.

## DOD'S INTERIM RULES IMPLEMENTING STATUTORY 5 PERCENT MINORITY CONTRACTING GOAL

### 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, Combodia, 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 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 consideriation 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 SBD 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 252.7006, 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)

[FR Doc. 87-10099 Filed 5-1-87; 8:45 am]

INTERNATIONAL CREATIVE DATA INDUSTRIES, INC.
P.O. BOX 451 • DANBURY • CONNECTICUT 06813 • TELEPHONE (203) 797-8551 • CABLES: 'ICDI' DANBURY

May 29, 1987

The Honorable William Howard Taft, IV
Deputy Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301-1155

Dear Mr. Secretary:

I have been asked by Senator Weicker to review and comment on the contents of your memorandum pertaining to the 5% DOD goal for contract awards to Small Disadvantaged Businesses.

As president of an 8 (a) Small Disadvantaged Business for the past twelve years it has been my experience, that clearly defined and detailed procedures must be established, to insure that the spirit and intent of Public Law 99-661 is implemented and achieved. The concept of this new program as an extension of the SBA 8 (a) program is commendable but the past short-comings of the 8 (a) program have shown that a better structure must be used initially if this new program is to be successful. Therefore, I also recommend that a method of monitoring and measuring compliance with the program's objectives be set-up in order to ensure that the established target is met.

Thank you for giving me the opportunity to comment.

Sincerely,

INTERNATIONAL CREATIVE DATA INDUSTRIES, INC

J. Villodas
President

JV/mam

TRESP Associates, Inc.
Automated Data Processing • Management Services • Research and Development

June 1, 1987

REGISTERED MAIL
RETURN RECEIPT REQUESTED

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

Reference: DAR Case 87-33

Dear Mr. Lloyd:

The Department of Defense (DoD) is to be commended on its aggressive efforts to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661), entitled "Contract Goal for Minorities." We, at Tresp Associates, believe that the proposed regulations published in the Federal Register, (Volume 52, No. 85 on Monday, May 4, 1987), are certainly a step in the right direction. We support your proposed implementation regulations with few exceptions, and submit the following comments for your consideration:

ISSUE:

(1) The Rule of Two: The interim rule establishes a "rule of two (ROT)" regarding set-asides for Small Disadvantaged Business (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 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...."

RECOMMENDATION: The rule of two implementation procedures as currently presented gives the Contracting Officer complete authority in the ROT process, and fails to address the role of the Department's Small and Disadvantaged Business Specialists (SDBS). DoD has a cadre of over 700 SDBS who have done an outstanding job in the implementation of other legislation; Public Law 95-507, as an example. Therefore, we recommend that the regulations be written to mandate active participation on the part of the SDBS and

the Contracting Officer in rule of two decisions. We feel that the foregoing will result in more balanced and unbiassed ROT opinions.

ISSUE:

2. Protesting small disadvantaged business representation. Paragraph 219.302 (S-70) found at 16265, states in part, "...(1) Any offeror or an interested party, may in connection with a contract 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...." We believe that such loose wording will tend to encourage frivolous protests. In our opinion, this will become a "delay tactic" on the part of that segment of the business community, not qualified to participate in the acquisition by reasons of their non-small disadvantaged business status.

RECOMMENDATION: The regulations should be more specific with respect to who can protest. The right to protest the SDB status in acquisitions involving SDB set asides, should be limited to only effected parties (i.e., other small disadvantaged business firms.) Further, to discourage frivolous protests, penalities should be invoked in those cases where frivolity is determined. Definite time frames should also be established with each step of the protest process.

ISSUE:

(3) Subcontracting under SDB set asides. The proposed regulations do not address the degree of subcontracting to minority business concerns under Section 1207 or the Statute.

RECOMMENDATION:

In those cases where subcontracting opportunities exist, we recommend that the successful prime SDB offerors be required to award a mandatory percentage of such subcontracts to qualified minority business firms. You may wish to consider language similar to that contained in Section 211 of Public Law 95507. This will encourage networking among the Minority Business Enterprises.

Again, DoD is to be commended for its work in the various socio-economic programs, and if Tresp Associates can be of any assistance to you, please do not hesitate to contact me.

Very truly yours,

WILLIAM F. MADISON
Vice President
Corporate Affairs

cc: NEDCO Conference
716 South Sixth Street
Las Vegas, NV 89101

National Federation of 8(a) Companies
2011 Crystal Drive, Suite 813
Arlington, Virginia 22202

Mr. C. Michael Gooden
President,
Integrated Systems Analysts, Inc.
1215 Jefferson Davis Highway
Crystal Gateway III, Suite 1304
Arlington, VA 22202

Mr. Dan Gill
Office of Small & Disadvantaged Business Utilization
OSD, The Pentagon, Washington, DC 20301

87-33

SAMPLE COMMENT LETTER TO DoD

June __, 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 businesses 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.

(Add any other comments you think appropriate.)

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, Mike Pone

THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301

LEGISLATIVE
AFFAIRS

See Mr. Taft's comment

JUN 1 1987

2 MAY 1987 SEC HAS SEEN

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE

SUBJECT: Call from Senator Gramm (R-TX) Regarding Small Minority Business 5 Percent Goal - INFORMATION MEMORANDUM

Senator Gramm called this morning regarding the 5 percent goal for small minority businesses contained in Section 1207 of the 1987 Authorization Act. Senator Gramm met with Mrs. Leftwich yesterday afternoon and learned for the first time that the term "fair market cost" used in Section 1207 was a term of art defined in the FAR's and has no relationship, necessarily, to the lowest price for which DOD could obtain the product in the marketplace. The result, according to the Senator, is to authorize up to a 30 percent premium on top of an already inflated price.

Section 1207 was apparently a last minute compromise during the House-Senate Conference on the Bill and the Senator was not aware of the significance of the term proposed by the House Conferees. He is not pleased.

Senator Gramm plans to offer an amendment this year to delete "fair market cost" and substitute language referring to the lowest or reasonable price for which DOD could obtain the product in the market place. He requests that the Section 1207 implementation regulations be "slowed down" sufficiently to allow this amendment to be reflected in those regulations.

M. D. B. Carlisle

AGUCI 4427 87

Reid 1
23 MAY

# Gomez Electrical Contractors, Inc.

P.O. Box 357, Latham, New York 12110
Tel. (518) 785-3000

CAROLINE P. GOMEZ
SECRETARY TREASURER

JOSEPH A. GOMEZ
PRESIDENT

STATE OF CONNECTICUT
MASTER ELECTRICIAN
CERTIFICATE #103252

STATE OF NEW HAMPSHIRE
MASTER ELECTRICIAN
LIC. #7340

STATE OF VERMONT
MASTER ELECTRICIAN
LIC. #2272

COUNTY OF GREENE, NY
MASTER ELECTRICIAN
LIC. #2476

COUNTY OF SULLIVAN, NY
MASTER ELECTRICIAN
LIC. #228

CITY OF ALBANY, NY
MASTER ELECTRICIAN
LIC. #58

CITY OF AMSTERDAM, NY
MASTER ELECTRICIAN
LIC. #48

CITY OF SCHENECTADY, NY
MASTER ELECTRICIAN
LIC. #54

[redacted]OY, NY
M[redacted]LECTRICIAN
LIC. #96


June 15, 1987

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

Attn: Mr. Charles W. Lloyd
Executive Secretary

Re: DOD 48 CFR Parts 204, 205, 206, 219, & 252

Dear Sir:

We would like to comment on the following section A - Background. The new regulation would require:

a) that the cost will not exceed 10% of the fair market value and

b) That at least two or more firms will be bidding on the project.

Through some twenty-four (24) years in the construction industry we have seen the Engineers or Owner's budget (usually called by the agency as the fair market value) (see also 219.506) swing from very low compared to the competitive bid received and on rare occasion it swings high when then compared to the bids received.

In the cases where the government estimate is substantially low (10% or more), we have seen more than one course of action taken. We have seen the projects re-advertised for a second round of bids (usually some redesigning takes place to cut the costs). Another way is to ask the lowest responsible bidder for an extension so that the agency has some additional time in which to seek additional funding. The third avenue which is the least likely approached is cancellation of the project.

Our question to you Mr. Lloyd is simple. Government estimates are seldom within the 10% fair market value as determined by competitive bidding. How is then that DOD is going to determine what the "fair market value" is?

Why is it then, that DOD is taking a different approach from those practices used under "regular" bidding process.

# Gomez Electrical Contractors, Inc.

P.O. Box 357, Latham, New York 12110
Tel. (518) 785-3000

CAROLINE P. GOMEZ
SECRETARY TREASURER

JOSEPH A. GOMEZ
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CITY OF SCHENECTADY, NY
MASTER ELECTRICIAN
LIC. #54

[redacted] TROY, NY
[redacted] ELECTRICIAN
[redacted]96


During the course of bid offers, we have seen during regular bidding that, though in rare occasions, only one bid is received, both Federal and State Agencies have awarded such bids in the vast majority of said occasions.

Why is it again, that if the DOD's program is designed to help minorities, rules and regulations, effecting bids null and void, are enacted when a greater flexibility is granted to contracting officers during receipt of regular bids.

We hope our comments and constructive criticizm is of value to you.

Very truly yours,

Joseph A. Gomez

cc: Mr. Harvey Davies
Small Business Administration

23DoDwashington

THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-8000

ACQUISITION AND
LOGISTICS

In reply refer to:
DAR Case 87-33

Norma

MEMORANDUM FOR MS. NORMA LEFTWICH
DIRECTOR, SADBU

SUBJECT: Letter from Mr. Wilbert C. Scipio, Jr., May 1, 1987

Subject letter is referred to your office for direct reply to Mr. Scipio. I have retained a copy of his letter for consideration by the DAR Council with other comments received under DAR Case 87-33.

As you will note, Mr. Scipio mentions the 5% figure used in implementing Section 1207 of Public Law 99-661 (DAR Case 87-33) and this implementation is not effective until June 1, 1987. I have forwarded a copy of the Federal Register Notice to Mr. Scipio.

OTTO J. GUENTHER, COL, USA
Director
Defense Acquisition
Regulatory Council

Attachment
Ltr from Mr. Scipio

87-33

**DEPARTMENT OF THE AIR FORCE**
**HEADQUARTERS ELECTRONIC SYSTEMS DIVISION (AFSC)**
**HANSCOM AIR FORCE BASE, MASSACHUSETTS 01731-5000**

REPLY TO ATTN OF: JAN

SUBJECT: DAR Case 87-33, DFARS Implementation of PL 99-661, Set-Asides for Small Disadvantaged Business Concerns

TO: DARC (Attn: Mr. Charles W. Lloyd)
Executive Secretary
ODASD (P) DARS
c/o OASD (P & L) (M & RS)
Rm. 3C841, The Pentagon
Washington, D.C. 20301-3062

1. AFAC 87-16 (27 May 1987), interim rules were distributed to implement Section 1207 of PL 99-661 "Contract Goal for Minorities". Under the interim rules, Contracting Officers are required to set-aside certain acquisitions for exclusive competition among small disadvantaged business (SDB) concerns whenever it is anticipated that two or more SDB concerns will submit offers and award will be made at not more than 110% of a "fair market price".

2. Proposed DFARS 19.502-72 (a) recognizes that, in making SDB set-asides for R & D or architect-engineer acquisitions, there is a need to consider the availability of SDB scientific, technological, or architectural talent consistent with the demands of the acquisition. It is noted that in such acquisitions, the offered price/cost is not the primary consideration in selecting the successful offeror for award.

3. Proposed DFARS 19.502-72 (a) and (d) imply that the SDB set-aside rule should apply only to acquisitions to be awarded at the lowest offered price (but not to exceed 110% of fair market price) on the basis of the responsive (technically acceptable, qualified) offer made by a responsible offeror. Otherwise, under proposed DFARS 19.502-72 (d), for source-selections to be made on the basis of considerations other than only price, it would be necessary to make the source-selection decision as to the most advantageous offer and then could make award only if the price offered by the successful offeror was also within the 110% of fair market value limitation. If not, then presumably, the set-aside must be withdrawn under 19.502-72 (d) and the requirements resolicited. Such a procedure, however, would be extremely time-consuming and would cripple the ability of the agency to contract for critical requirements which do not fall within the categories of R & D or A & E services, but require that award be made on primary considerations other than price/cost. Examples of such acquisitions include management and engineering support services (where management and technical factors are more important than price) and production awards which require the successful offeror to reverse-engineer pre-existing products for which reprocurement data is unavailable and then manufacture production quantities to a performance specification. Neither of these examples would fall within the categories of R & D or A & E services so as to permit the contracting officer to exercise judgment as to whether it would be appropriate to set such acquisitions aside

for exclusive SDB participation as proposed DFARS 19.502-72 (a) is presently written. It is suggested that this situation could be resolved if the last sentence of proposed DFARS 19.502-72 (a) were deleted and the introduction to the first sentence were changed to read:

> Except for acquisitions subject to small purchases and, except for negotiated acquisitions where award will be made on the basis of factors other than only the lowest evaluated price/cost for a proposal which conforms to solicitation requirements, the entire amount of an individual acquisition shall be set-aside for.....

Roger T. McAvoy

ROGER J. MCAVOY, Chief
Contract Law Division

Cy: ESD/PK (Mr. Fowler)
ESD/TC (Mr. Kalkman)
AFSC/JAN

87-83
EXEC.SEC
7/9/87

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION

WASHINGTON, DC 20301-3061

OFFICE OF SMALL AND
DISADVANTAGED BUSINESS
UTILIZATION

30 JUN 1987

Mr. Wilbert C. Scipio
Scipio Engineering Co.
8013 Champlain
Chicago, IL 60619

Dear Mr. Scipio:

Please refer to your identical letters of June 17, 1987 to the Deputy Secretary of Defense, Department of Defense (DoD) and to me regarding your proposal to alter the DoD implementation of section 1207 of Public Law 99-661 along the lines suggested in the 1980 Supreme Court decision on minority set-asides.

Your letters are timely because the Defense Acquisition Regulation (DAR) Council is currently reviewing various public comments by those interested in the DoD proposed implementation of Public Law 99-661.

Accordingly, we have forwarded your letters to the DAR Council for their examination. We would expect careful review of your comments and those of others.

Thank you very much for your interest in the Department of Defense.

Sincerely,

Horace J. Comish

for NORMA B. LEFTWICH
Director

cc: DAR Council

1987 JUN 24 AM 9:48

OFFICE OF
THE SECRETARY OF DEFENSE

PHONE (312) 873-2456

SCIPIO ENGINEERING CO.
MECHANICAL ENGINEERING CONSULTANTS FOR
ENERGY - CONSTRUCTION - ELECTRONICS
(FROM CONCEPT TO FINISH PRODUCT)
MINORITY SMALL BUSINESS
WILBERT C. SCIPIO
8013 CHAMPLAIN
CHICAGO, IL 60619

WILLIAM TAFT
DEPUTY SECRETARY OF
DEFENSE
U.S. DEPT. OF DEFENSE
THE PENTAGON
WASHINGTON, D.C., 20301

JUNE, 17, 1987

DEAR SIR:

THIS LETTER CONCERNS YOUR MINORITY SET-ASIDE REGULATIONS PER PUBLIC LAW 99-661 SECTION 1201.

YOUR REGULATIONS DO NOT MEET THE STANDARDS SET BY UNITED STATES SUPREME COURT DECISION FULLILOVE V. KLUTZNICK. PLEASE READ ATTACHED DECISION. PLEASE READ PAGES 918, AND 933-935. READING THIS DECISION WILL HELP YOU UNDERSTAND A GOOD AND LEGAL MINORITY SETASIDE PROGRAM THROUGH REGULATION.

YOUR REGULATIONS ARE MISSING PARTS REQUIRED BY PUBLIC LAW 99-661 SECTION 1201, FOR EXAMPLES;

(1.) YOUR REGULATIONS SHOULD CONTAIN "ADMINISTRATIVE WAIVERS" IN ORDER TO EXEMPT CERTAIN CONTRACTS FROM MINORITY SETASIDE. BUT YOUR REGULATIONS DO NOT CONTAIN WAIVERS.

(2.) IT IS IMPLIED IN PUBLIC LAW 99-661 SECTION 1201 THAT 5% OF CONTRACT FUNDS SHOULD BE EXPENDED WITH MINORITY BUSINESS FOR EACH CONTRACT AS SPECIFIED IN 15 U.S.C. 637 (d) 4 & 6. 11212 87

(2) Cont'd

And that Dept. of Defense Contracting Officers are mandated to reject bids of Prime Contractors that do not meet 5% Goal of Minority Business Expenditures as being Non Responsibile. This part is not written your regulations.

Your Regulations are written in a manner that assumes Minority Business can build tanks, airplanes, and ships.

In the real world that is not true. In most cases (probably 90 percent) minority business will be subcontracting under a large white prime contractor.

Your Regulations should show that 5% of contract funds being expended to minorities primarily as subcontractors.

You may want to rewrite your regulations to that found in U.S. Supreme Court Decision.

Sincerely Yours
Willmit C. Scipio Jr.

To SEC. TAFT:
PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION
REGULATIONS ARE ON PAGES 933 TO 935.
IMPORTANT PAGES TO READ, 918, 933, 934 AND 935!!
THESE REGULATIONS ARE ON A FIRMER LEGAL FOUNDATION THAN YOURS.



[448 US 448]

H. EARL FULLILOVE et al., Petitioners,

v

PHILIP M. KLUTZNICK, Secretary of Commerce of the United States, et al.

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

[No. 78-1007]

Argued November 27, 1980. Decided July 2, 1980.

**Decision:** Minority business enterprise provision of Public Works Employment Act, requiring "10% set-aside" of federal funds for minority businesses on local public works projects, held not violative of equal protection.

SUMMARY

Associations of construction contractors and subcontractors, along with a firm engaged in heating, ventilation, and air conditioning work, brought an action in the United States District Court for the Southern District of New York against the Secretary of the United States Department of Commerce, as the administrator of federal programs for local public works projects, and against the State and City of New York, as actual and potential grantees of federally funded local public work projects, alleging that the "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116)—a provision implemented in regulations of the Secretary of Commerce and guidelines of the Commerce Department's Economic Development Administration—on its face, violated, among other things, the equal protection component of the Fifth Amendment's due process clause and various federal statutes prohibiting discrimination, including Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.) proscribing racial discrimination in any program receiving federal financial assistance, the focus of the plaintiffs' challenge to the minority business enterprise provision being the so called "ten percent set-aside requirement" of the provision whereby, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in

Briefs of Counsel, p 1324, infra.

the Public Works Employment Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Ultimately, the District Court upheld the validity of the minority business enterprise provision, denying the declaratory and injunctive relief which the plaintiffs had sought (443 F Supp 253). Thereafter, the United States Court of Appeals for the Second Circuit affirmed, expressly rejecting the contention that the ten percent set-aside requirement violated equal protection, and also rejecting, as the District Court had done, the various statutory arguments which the plaintiffs had raised (584 F2d 600).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, six members of the court nonetheless agreed that the minority business enterprise provision of the Public Works Employment Act, by virtue of its ten percent set-aside requirement, did not violate equal protection under the due process clause of the Fifth Amendment nor Title VI of the Civil Rights Act of 1964.

BURGER, Ch. J., announced the judgment of the court, and in an opinion joined by WHITE and POWELL, JJ., expressed the views that (1) in terms of Congress' objective in the minority business enterprise provision of the Public Works Employment Act—to ensure that, to the extent federal funds were granted under the Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities —such objective being within the spending power of Congress under the United States Constitution (Art I, § 8, cl 1), the provision's limited use of racial and ethnic criteria constituted a valid means of achieving the objective so as not to violate the equal protection component of the due process clause of the Fifth Amendment, and (2) the minority business enterprise provision was not inconsistent with the requirements of Title VI of the Civil Rights Act of 1964.

POWELL, J., concurring, expressed the views that the racial classification reflected in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was not violative of equal protection, being justified as a remedy serving the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress, and that since the requirement was constitutional, there was also no violation of Title VI of the Civil Rights Act of 1964.

MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., concurred in the judgment, expressing the views that (1) under the appropriate standard for determining the constitutionality of racial classifications which provide benefits to minorities so as to remedy the present effects of past racial discrimination—which standard necessitates an inquiry into whether a classification on racial grounds serves important governmental objectives and is substantially related to the achievement of those objectives—the ten percent set-aside requirement of the minority business enterprise provision

of the Public Works Employment Act was not violative of equal protection under the due process clause of the Fifth Amendment, since the racial classifications employed in the set-aside provision was substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination in the area of public contracting, and (2) the ten percent set-aside requirement also did not violate Title VI of the Civil Rights Act of 1964 in that the prohibition of Title VI against racial discrimination in any program or activity receiving federal financial assistance was coextensive with the guarantee of equal protection under the United States Constitution.

STEWART, J., joined by REHNQUIST, J., dissenting, expressed the view that the minority business enterprise provision of the Public Works Employment Act, on its face, denied equal protection of the law, barring one class of business owners from the opportunity to partake of a government benefit on the basis of the owners' racial and ethnic attributes.

STEVENS, J., dissented, expressing the view that since Congress had not demonstrated that the unique statutory preference established in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was justified by a relevant characteristic shared by members of the preferred class, Congress had failed to discharge its duty, embodied in the Fifth Amendment, to govern impartially.

# FULLILOVE v KLUTZNICK

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

## HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

**Civil Rights § 7.5 — Fifth Amendment — equal protection — Public Works Employment Act — minority business enterprise — ten percent set-aside**

1a–1e. The "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116), a provision implemented in regulations of the Secretary of the United States Department of Commerce and guidelines of the Commerce Department's Economic Development Administration, is not unconstitutional on its face as violative of the equal protection component of the Fifth Amendment's due process clause by virtue of the provision's requirement that, absent administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members", defined in the Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." [Per Burger, Ch. J., White, Powell, Marshall, Brennan, and Blackmun, JJ. Dissenting: Stewart, Rehnquist, and Stevens, JJ.]

**Civil Rights § 7.5 — race discrimination — Title VI of 1964 Act — Public Works Employment Act — minority business enterprise provision**

2a–2f. The "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116), a provision implemented in regulations of the Secretary of the United States Department of Commerce and guidelines of the Commerce Department's Economic Development Administration, is not violative of Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.), proscribing racial discrimination in any program receiving federal financial assistance, by virtue of the minority business enterprise provision's requiring that, absent administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in the Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." [Per Burger, Ch. J., White, Powell, Marshall, Brennan, and Blackmun, JJ.]

**Constitutional Law §§ 313, 513 — equal protection — Fifth and Fourteenth Amendments**

3a–3d. Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. [Per Marshall, Brennan, Blackmun, Stewart, and Rehnquist, JJ.]

## SYLLABUS BY REPORTER OF DECISIONS

The "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 (1977 Act) requires that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Under implementing regulations and guidelines, grantees and their private prime contractors are required, to the extent feasible, in fulfilling the 10% MBE requirement, to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration, or other sources for assisting MBE's in obtaining required working

capital, and to give guidance through the intricacies of the bidding process. The administrative program, which recognizes that contracts will be awarded to bona fide MBE's even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination, provides for handling grantee applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. The program also provides an administrative mechanism to ensure that only bona fide MBE's are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The District Court upheld the validity of the MBE program, and the Court of Appeals affirmed.

*Held:* The judgment is affirmed.

584 F2d 600, affirmed.

Mr. Chief Justice Burger, joined by Mr. Justice White and Mr. Justice Powell, concluded that the MBE provision of the 1977 Act, on its face, does not violate the Constitution.

(1) Viewed against the legislative and administrative background of the 1977 Act, the legislative objectives of the MBE provision, and the administrative program thereunder, were to ensure—without mandating the allocation of federal funds according to inflexible percentages solely based on race or ethnicity—that, to the extent federal funds were granted under the 1977 Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities.

(2) In considering the constitutionality of the MBE provision, it first must be determined whether the *objectives* of the legislation are within Congress' power.

(a) The 1977 Act, as primarily an exercise of Congress' spending power under Art I, § 8, cl 1, "to provide for the . . . general Welfare," conditions receipt of federal moneys upon the recipient's compliance with federal statutory and administrative directives. Since the reach of the spending power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the spending power.

(b) Insofar as the MBE program pertains to the actions of private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. The legislative history shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce.

(c) Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the equal protection guarantee of that Amendment. Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority busi-

nesses, could perpetuate the effects of prior discrimination, and that the prospective elimination of such barriers to minority-firm access to public contracting opportunities was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Cf., e.g., Katzenbach v Morgan, 384 US 641, 16 L Ed 2d 828, 86 S Ct 1717; Oregon v Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260.

(d) Thus, the *objectives* of the MBE provision are within the scope of Congress' spending power. Cf. Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786.

(3) Congress' use here of racial and ethnic criteria as a condition attached to a federal grant is a valid *means* to accomplish its constitutional objectives, and the MBE provision on its face does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

(a) In the MBE program's remedial context, there is no requirement that Congress act in a wholly "color-blind" fashion. Cf., e.g., Swann v Charlotte-Mecklenberg Board of Education, 402 US 1, 28 L Ed 2d 554, 91 S Ct 1267; McDaniel v Barresi, 402 US 39, 28 L Ed 2d 582, 91 S Ct 1287; North Carolina Board of Education v Swann, 402 US 43, 28 L Ed 2d 586, 91 S Ct 1284.

(b) The MBE program is not constitutionally defective because it may disappoint the expectations of access to a portion of government contracting opportunities of nonminority firms who may themselves be innocent of any prior discriminatory actions. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. Franks v Bowman Transportation Co., 424 US 747, 777, 47 L Ed 2d 444, 96 S Ct 1251.

(c) Nor is the MBE program invalid as being underinclusive in that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities, and there has been no showing that Congress inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program.

(d) The contention that the MBE program, on its face, is overinclusive in that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination, is also without merit. The MBE provision, with due account for its administrative program, provides a reasonable assurance that application of racial or ethnic criteria will be narrowly limited to accomplishing Congress' remedial objectives and that misapplications of the program will be promptly and adequately remedied administratively. In particular, the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBE's who are not "bona fide," or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Moreover, grantees may obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.

(4) In the continuing effort to achieve

the goal of equality of economic opportunity, Congress has latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives, especially in programs where voluntary cooperation is induced by placing conditions on federal expenditures. When a program narrowly tailored by Congress to achieve its objectives comes under judicial review, it should be upheld if the courts are satisfied that the legislative objectives and projected administration of the program give reasonable assurance that the program will function within constitutional limitations.

Mr. Justice Marshall, joined by Mr. Justice Brennan and Mr. Justice Blackmun, concurring in the judgment, concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives, University of California Regents v Bakke, 438 US 265, 359, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part), and that, judged under this standard, the 10% minority set-aside provision of the 1977 Act is plainly constitutional, the racial classifications being substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.

Burger, C. J., announced the judgment of the Court and delivered an opinion, in which White and Powell, JJ., joined. Powell, J., filed a concurring opinion. Marshall, J., filed an opinion concurring in the judgment, in which Brennan and Blackmun, JJ., joined. Stewart, J., filed a dissenting opinion, in which Rehnquist, J., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

**Robert G. Benisch** argued the cause for petitioners Fullilove et al.

**Robert J. Hickey** argued the cause for petitioner General Building Contractors of New York State, Inc.

**Drew S. Days III,** argued the cause for respondents.

Briefs of Counsel, p 1324, infra.

SEPARATE OPINIONS

[448 US 453]

Mr. Chief Justice **Burger** announced the judgment of the Court and delivered an opinion in which Mr. Justice **White** and Mr. Justice **Powell** joined.

**[1a]** We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 US 960, 60 L Ed 2d 1064, 99 S Ct 2403 (1979).

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub L 95-28, 91 Stat 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub L 94-369, 90 Stat 999, 42 USC § 6701 et seq. [42 USCS § 6701 et seq.]. The 1977 amendments authorized an addi-

TO MR LLOYD: PLEASE SUBSTITUTE CONTRACT OFFICER FOR THE WORD GRANTEE



TO DOD: IF BID OF PRIME CONTRACTOR DOES NOT EXPEND 5% OF CONTRACT FUNDS TO MINORITY BUSINESS CONTRACT OFFICER HAS AN OBLIGATION TO REJECT BID AS BEING NOT RESPONSIVE

Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[56] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they also restate the MBE requirement.[57]

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where

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feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process.[58]

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement.[59] The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's."[60] The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention.[61]

SUBSTITUT CONTRAC OFFICE FOR GRANTEE

The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process.[62] The Technical Bulletin issued by EDA discusses in greater detail the process-

56. 91 Stat 117, 42 USC § 6706 (1976 ed Supp II) [42 USCS § 6706]; 13 CFR Part 317 (1978).

57. 91 Stat 116, 42 USC § 6705(e)(1) (1976 ed Supp II) [42 USCS § 6705(e)(1)]; 13 CFR § 317.19 (1978).

58. Guidelines 2–7; App 157a–160a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 1.

59. Guidelines 2; App 157a; see 123 Cong Rec 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

60. Guidelines 8; App 161a.

61. See 123 Cong Rec 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

62. Guidelines 13–16; App 165a–167a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 2.

(1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const, Amdt 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. South Carolina v Katzenbach, 383 US 301, 15 L Ed 2d 769, 86 S Ct 8031 (1966); cf. City of Rome, supra.

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated

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the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

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(4)

There are relevant similarities between the MBE program and the federal spending program reviewed in Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786 (1974). In Lau, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. Id., at 564–566, 39 L Ed 2d 1, 94 S Ct 786. It had not been shown that this had resulted from any discrimina-

ance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious

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effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and

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eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." Supra, at 472, 65 L Ed 2d, at 920. And even as to specific contract awards,

73. The MBE provision, 42 USC § 6705(f)(2) (1976 ed Supp II) [42 USCS § 6705(f)(2)], classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 USC § 803 [45 USCS § 803], see 49 CFR § 265.5(i) (1978), on which Congress relied as precedent for the MBE provision. See 123 Cong Rec 7156 (1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." HR Rep No. 94-468, pp 20–21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination. Supra, at 469–471, 65 L Ed 2d, at 918–919. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

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Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the EDA to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See Steelworkers v Weber, 443 US 193, 200, 61 L Ed 2d 480, 99 S Ct 2721 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

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## IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity.

74. Cf. GAO, Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

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"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932)(dissenting opinion).

**[1c, 2a]** Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind

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of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as University of California Regents v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several Bakke opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.[77]

Affirmed. DEPT. OF DEFENSE (CONTACT OFFICER)

APPENDIX TO OPINION OF BURGER, C. J.

REGULATION START HERE

¶ 1. The EDA guidelines, at 2–7, provide in relevant part:

"The primary obligation for carrying out the 10% MBE participation requirement rests with EDA ~~Grantees~~. . . . The ~~Grantee~~ and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available bona fide MBE's and make every effort to use as many of them as possible on the project.

CONTRACTING OFFICERS

"An MBE is bona fide if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership

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on which the claim of minority ownership status is based. . . .

"An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . EDA will require that ~~Grantees~~ and prime contractors engage MBE's from as wide a market area as is economically feasible.

change to DOD

"An MBE is qualified if it can

77. **[2b]** Although the complaint alleged that the MBE program violated several federal statutes, n 5, supra, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Rights Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later, more specific enactment—must be deemed to control. See, e.g., Morton v Mancari, 417 US 535, 550–551, 41 L Ed 2d 290, 94 S Ct 2474 (1974); Preiser v Rodriguez, 411 US 475, 489–490, 36 L Ed 2d 439, 93 S Ct 1827 (1973); Bulova Watch Co. v United States, 365 US 753, 758, 6 L Ed 2d 72, 81 S Ct 864 (1961); United States v Borden Co. 308 US 188, 198–202, 84 L Ed 181, 60 S Ct 182 (1939).

TO MR. LLOYD: SUBSTITUTE CONTRACT OFFICER FOR GRANTEE.



DEPT. OF DEFENSE (CONTRACT OFFICER)

perform the services or supply the materials that are needed. ~~Grantees~~ and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an ~~LPW [local public works] project~~. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. ~~Grantees~~ and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

LAW SPECIFIES That You have this IN YOUR REGULATIONS BUT YOO DO NOT.

FEDERAL DEFENSE CONTRACTS

DEPT. OF DEFENSE (CONTRACTOFFICER)

DEPT. OF DEFENSE CONTRACT OFFICER

". . . [E]very ~~Grantee~~ should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. . . . Grantees should also hold prebid conferences to which they invite interested contractors and representatives of . . . MBE support organizations.

"Arrangements have been made through the Office of Minority Business Enterprise . . . to provide assistance

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~~Grantees~~ and prime contractors in fulfilling the 10% MBE requirement. . . .

DEPT. OF DEFENSE CONTRACT OFFICERS

CHANGE TO 5%

"Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration. . . .

(DEPT. OF DEFENSE CONTRACT OFFICER

". . . [T]he ~~Grantee~~ must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. . . . Grantees should administer every project tightly. . . ."

¶ 2. The EDA guidelines, at 13–15, provide in relevant part:

"Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. . . .

(DEPT. OF DEFENSE CONTRACT OFFICER

"Only the ~~Grantee~~ can request a waiver. . . . Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. . . .

DEPT. OF DEFENSE CONTRACT OFFICER

"[A] ~~Grantee~~ situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. . . ."

¶ 3. The EDA Technical Bulletin, at 1, provides the following definitions:

"a) Negro—An individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

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"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

¶ 4. The EDA Technical Bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

"If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

Mr. Justice **Powell,** concurring.

Although I would place greater emphasis than The Chief Justice on the need to articulate judicial standards of review

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in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in University of California Regents v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978) (hereinafter Bakke).

The question in this case is whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. Bakke, supra, at 299, 305, 57 L Ed 2d 750, 98 S Ct 2733; see In re Griffiths, 413 US 717, 721–722, 37 L Ed 2d 910, 93 S Ct 2851 (1973); Loving v Virginia, 388 US 1, 11, 18 L Ed 2d 1010, 87 S Ct 1817 (1967); McLaughlin v Florida, 379 US 184, 196, 13 L Ed 2d 222, 85 S Ct 283 (1964). For the reasons stated in my Bakke opin-

were to be distributed quickly,[10] any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance.[11] And Congress knew that the

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ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades.[12] The set-aside program adopted as part of this emergency

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legislation serves each of these concerns because it takes effect as soon as funds are expended under PWEA and because it provides minority contractors with experience that could enable them to compete without governmental assistance.

10. The PWEA provides that federal moneys be committed to state and local grantees by September 30, 1977. 42 USC § 6707(h)(1) (1976 ed Supp II) [42 USCS § 6707(h)(1)]. Action on applications for funds was to be taken within 60 days after receipt of the application, § 6706, and on-site work was to begin within 90 days of project approval, § 6705(d).

11. In 1972, a congressional oversight Committee addressed the "complex problem—how to achieve economic prosperity despite a long history of racial bias." See HR Rep No. 92-1615, p 3 (Select Committee on Small Business). The Committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepreneur is faced initially with the lack of capital, the most serious problem of all beginning minorities or other entrepreneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

. . . . . .

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." Id., at 3–4.

12. When Senator Brooke introduced the PWEA set-aside in the Senate, he stated that aid to minority businesses also would help to alleviate problems of minority unemployment. 123 Cong Rec 7156 (1977). Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See Contractors Association of Eastern Pennsylvania v Secretary of Labor, 442 F2d 159, 163 (CA3), cert denied, 404 US 854, 30 L Ed 2d 95, 92 S Ct 98 (1971). Later that year, the House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overruling the Labor Department's order. 115 Cong Rec 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. Id., at 40749.

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity. See id., at 40740 (remarks on Sen. Scott); id., at 40741 (remarks of Sen. Griffith); id., at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. Id., at 40742–40743. The day following the Senate vote to recede from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." Id., at 41072.

BACKGROUND AND HISTORY OF MINORITY SETASIDE PROGRAMS

PUBLIC LAW 95-507, 15 U.S.C. 637(d)4-6



(4)(A) Each solicitation of an offer for a contract to be let by a Federal agency which is to be awarded pursuant to the negotiated method of procurement and which may exceed $1,000,000, in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to contracts awarded pursuant to the negotiated method of procurement.

(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts, and

(iv) which offers subcontracting possibilities,

the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

(C) If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required by this paragraph, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

(D) No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of the contract.

(E) Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract: *Provided*, That, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

(5)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded pursuant to the formal advertising method of procurement,

(ii) is required to contain the clause stated in paragraph (3) of this subsection,

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, and

(iv) offers subcontracting possibilities,

shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan which incorporates the information prescribed in paragraph (6).

(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. Prior compliance of the bidder with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

(6) Each subcontracting plan required under paragraph (4) or (5) shall include—

(A) percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(C) a description of the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts;

(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns and small business concerns owned

FOR COMPETITIVE METHOD OF PROCUREMENT YOUR REGULATIONS CAN SPECIFY 5% ON These CONTRACTS FOR MINORITY BUSINESS IF A PRIME CONTRACTOR SUBMITS A BID of LESS Than 5% OF CONTRACT FUNDS EXPENDED WITH MINORITY FIRMS. DEPT. OF DEFENSE CONTRACT OFFICER CAN REJECT BID OF PRIME CONTRACTOR AS BEING NON RESPONSIVE

DEPT. OF DEFENSE CONTRACT OFFICER SHOULD REJECT BIDS OF PRIME CONTRACTOR NOT MEETING 5% SETASIDE GOAL AS BEING NOT RESPONSIVE

AGC of St. Louis
SKILL RESPONSIBILITY INTEGRITY

# THE ASSOCIATED GENERAL CONTRACTORS OF ST. LOUIS

2301 HAMPTON AVE. • ST. LOUIS, MISSOURI 63139 • PHONE: 314/781-2356

June 16, 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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The Associated General Contractors of St. Louis is in agreement with the letter sent to you on June 1, 1987 by Hubert Beatty, Executive Vice President of the Associated General Contractors of America regarding the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

We support their position that the interim regulations: 1) not be implemented on June 1 for military construction procurement; and 2) not be implemented for military construction procurement until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

The Associated General Contractors of St. Louis represents some 400 construction-related firms in the St. Louis Metropolitan Area and in Southeast Missouri. Thank you for your consideration of our comments.

Sincerely,

ASSOCIATED GENERAL CONTRACTORS
OF ST. LOUIS

Joseph F. Shaughnessy
President

JFS:af

**Michigan Chapter ASSOCIATED GENERAL CONTRACTORS of America, Inc.**

2323 N. LARCH • BOX 27005 • LANSING, MICHIGAN 48909 • 517/371-1550

*THE FULL SERVICE CONSTRUCTION ASSOCIATION*

**President**
**RAYMOND E. JOHNSON**
*Serenus Johnson & Son Company*
*Bay City*

**Vice President**
**M. William Lang**
*Owen-Ames-Kimball Co.*
*Grand Rapids*

**Treasurer**
**JOHN C. FLOOK**
*Wagner-Flook Builders*
*Battle Creek*

*Secretary - Manager*
**BART O. CARRIGAN**

*Director*
*Employer Relations*
**JACK RAMAGE**

June 19, 1987

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

RE: DAR Case 87-33

Dear Mr. Lloyd:

The Michigan Chapter of Associated General Contractors of America (AGC) is a full-service trade association representing commercial building contractors in Michigan. AGC supports the sentiments expressed by Hubert Beatty, AGC of America Executive Vice President, in his letter of June 1, 1987.

In that letter, Mr. Beatty voiced his opposition to the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act of Fiscal Year 1987, for these reasons:

1. The "Rule of Two" set aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to SDB firms.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to SDB firms.

3. The use of a "Rule of Two" mechanism as a criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective.

(more)

MICHIGAN CHAPTER
Associated General Contractors
of America, Inc.



The implementation of the interim regulations will be an open invitation to abuse the construction procurement process. Further, it will discourage competition in the procurement process. AGC urges that the regulations not be implemented until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely yours,

Jack W. Ramage, Director
Employer Relations

JWR:bss

CURT PETERSON
Executive Vice President

Associated General Contractors of North Dakota

422 2nd STREET, P.O. BOX 1624, BISMARCK, NORTH DAKOTA 58502, PHONE 701-223-2770

June 22, 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. Lloyd:

The Associated General Contractors of North Dakota regards the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, as a gilt-edged invitation to further abuse of the construction procurement process and opposes the interim regulations for that, and the following reasons:

1. The "Rule of Two" set-aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

2. The use in military construction procurements of the legislative authority to award contracts to SDB firms at prices that do not exceed fair market cost by more than 10 percent is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

3. The use of a "Rule of Two" mechanism as the criteria for establishing SDB set-asides will force contracting officers to set aside an inordinate number of military construction projects, far in excess of the 5 percent objective. A similar "Rule of Two" mechanism used in small business set-asides resulted in 80% of Defense construction contract actions being set aside in FY 1984.

Section 219.502-72(b) (1) is an invitation for abuse in that SDBs have merely to offer a bid in a highly competitive marketplace within 10% of what could reasonably be expected to be the award price. Thus, having established their "credentials!", and their non-competitiveness, the government would then sanction and encourage this non-competitiveness by setting aside subsequent construction projects. This proposal is ludicrous and the personification of abuse of the taxpaying public through the procurement process.

WHITE HOUSE
ELECTRICAL SUPPLY corporation

2619 W. HUNTING PARK AVE., PHILADELPHIA, PA 19129-1303 (215) 223-8600

June 18,1987

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.

# H. Pinckney General Contractor Inc.

6035 CHESTNUT ST. - PHILADELPHIA, PENNSYLVANIA 19139 • PHONE 471-6510


June 17, 1987

Defense Acquistion 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 it 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 businesses 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.

I urge the Defense Department to address the above issues quickly, and to move forward aggressively in pursing the 5% goal set by law.

Sincerely,

HENRY PINCKNEY
President, H. Pinckney General Contracting Inc.

HP/yw

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

JUN 23 1987

Mr. Charles Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
Room 3C841, The Pentagon
Washington D. C. 20301

Dear Mr. Lloyd:

Enclosed for Council consideration are comments, dated May 22, 1987, from Ms. Eva Poling of the Mechanical Contractors District of Columbia Association, Inc. The comments, which were provided to us by Congressman Frank Wolf, concern the Department's interim rule for contract awards to small minority business concerns (DAR Case 87-33).

Thank you for your consideration.

Sincerely,

Allan V. Burman
Deputy Administrator

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUN 24 1987

Honorable Frank R. Wolf
U.S. House of Representatives
Constituent Services Office
Suite 115
1651 Old Meadow Road
McLean, Virginia 22102

Dear Congressman Wolf:

This is in response to your recent inquiry on behalf of Ms. Eva Poling of the Mechanical Contractors District of Columbia Association, Inc. In her letter of May 22, 1987, Ms. Poling expressed concern about the interim rule recently issued by the Department of Defense on contract awards to small minority business concerns, and the economic impact of such a rule.

This interim rule is in direct implementation of Public Law 99-661, which the Congress enacted with the objective of assuring that 5 percent of Defense funds in certain categories of contracts, including construction, were awarded to small minority firms. It is not a final rule. Rather, it is an interim rule on which public comments have been solicited and will be accepted until August 3, 1987. It should also be noted that the program established by the law and implementing rule is limited to a three-year period, during which annual assessments of price, performance and economic impact will be made.

In light of the comment period that is currently underway, we have taken the liberty of forwarding a copy of your constituent's letter to the Executive Secretary of the Defense Acquisition Regulatory Council at the Pentagon. A copy of our referral letter is enclosed. We are certain that Ms. Poling's views will be carefully and thoroughly considered by the Council.

Thank you for bringing Ms. Poling's concerns to our attention. If we can be of further assistance, please contact me.

Sincerely,

Signed

Gordon Wheeler
Associate Director for
Legislative Affairs

Enclosure

Because we basically are small business and do not have the resources to twist arms and lobby, we have become a "dumping" ground for every "quick fix" designed, such as that proposed for fiscal years 1987, 1988 and 1989. It is much easier to use the 8(a) program than to carve out set asides in the mega industries that also do work with DoD.

We have no quarrel with set asides per se; however, what has been done in this instance is to close a specific market to specific contractors who have had access to it in the past.

Your help is needed in resolving this situation.

Sincerely,

Eva S. Poling

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

WASHINGTON OFFICE:
130 CANNON BUILDING
WASHINGTON, DC 20515
(202) 225-5136

CONSTITUENT SERVICES OFFICES:
[redacted]
SUITE 115
MCLEAN, VA [redacted]
(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 APPROPRIAT
SUBCOMMITTEES:
TRANSPORTATION
TREASURY—POSTAL SERVICE—GENE GOVERNMENT
SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES

87 JUN15 AM :46

June 9, 1987

Mr. Fred Upton
Acting Assistant Director
Office of Legislative Affairs
Office of Management and Budget
243 Old Executive Office Building
Washington, D.C. 20503

ar Mr. Upton:

I have enclosed a copy of a letter which I have received from one of my constituents regarding a matter under your department's jurisdiction.

I would appreciate it if you would review the letter and address the issues which it discusses. It would be helpful if you would address your response to me, attention, Judy McCary.

Thank you for your time and courtesy in being attentive to the concerns of my constituent.

With best regards,

Sincerely,

Frank R. Wolf
Member of Congress

FW:jsm/kmk

Enclosure

25548

mechanical contractors district of columbia association, inc.

suite 807, 5200 auth rd., suitland, md. 20746

301 899-2988

MAY 28 1987

MCA DISTRICT OF COLUMBIA

Eva S. Poling
Executive Vice-President

Lois DaCrema
Executive Secretary

May 22, 1987

Honorable Frank R. Wolf
1651 Old Meadow Road
Suite 115
McLean, Virginia 22102

Dear Congressman Wolf:

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 percent 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 percent.

The changes incurred by the interim rule are made without prior public comment and are effective June 1, 1987.

Implementation of the rule will have a drastic economic impact upon small construction contractors who have depended on the small business market for their survival. No prior study was made of this impact. The DoD is using the 8(a) program of the Small Business Administration as one method to reach the 5%. As a result, the effect on SBA's who do not fit the SDB category will be catastrophic. Worse still, at this point in time about 99% do not realize what will be happening on June 1st.

Congressman Wolf, the construction industry in this country is made up of many, many small businesses, what I refer to as a "mom and pop" industry. For every mega company, there are thousands of small companies that perform the work to keep the this country moving, including those small firms that perform construction for the DoD under the SBA program.

required corrective action(s) will be reviewed by this office in making a recommendation on the continued reliance which the Government can place on the costs generated by and charged to Government contracts under the *(CONTRACTORS SYSTEM NAMED) system.*

Please provide your written plan of action to address this matter within 30 days. Should you have any questions on this matter, please contact *(FAO REPRESENTATIVE)* at *(Telephone number)* or the undersigned.

Sincerely,

JOHN DOE, FAO Manager

Enclosure
Common MRP Deficiencies

MATERIAL REQUIREMENTS PLANNING (MRP) SYSTEMS COMMON DEFICIENCIES IDENTIFIED

- Costing to contracts based on requirements, in lieu of actual contract usage (costing of paper transactions only). Thus the Government is billed for "reserved" items which may or may not be used on the contract.
- Treating contract inventory as company-owned inventory and, therefore, costing among contracts using the company-owned inventory valuation method in lieu of actual costs incurred.
- Recurring usage of "informal"/other contract inventory to satisfy contract requirements (whole cost/no cost transfers) without proper disclosure to the Government.
- Pricing of manufactured parts using open "actual history" work orders which can have excess costs built in until the work order is closed.
- Inclusion of an allocated portion of company-owned inventory costs in public voucher/progress payment requests.
- Transferring material without the *prior* approval of the designated contracting administrative official which can result in the loss of contractually conveyed Government title to the material.
- Fabricated part transfers generated by the MRP system are not costed at the same value as the original charges.
- Pricing of proposed bills of national without adequate consideration of available inventory.
- Failure to fully disclose the impact of the MRP netting process (also sometimes referred to as dynamic rescheduling) at the time of negotiation which can result in a violation of Public Law 10 U.S.C. 2306.
- Failure adequately disclose that spare orders which are proposed based on future purchases are being completed with minimal material purchases supplemented, in whole or in part, by material transfers from an "informal"/other contract inventory with the reprocurement costs being charged to production contracts.

## DOD'S INTERIM RULES IMPLEMENTING STATUTORY 5 PERCENT MINORITY CONTRACTING GOAL

### 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, Combodia, 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 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 consideriation 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 SBD 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)

[FR Doc. 87-10099 Filed 5-1-87; 8:45 am]

INTERNATIONAL CREATIVE DATA INDUSTRIES, INC.
P.O. BOX 451 • DANBURY • CONNECTICUT 06813 • TELEPHONE (203) 797-8551 • CABLES: 'ICDI' DANBURY

May 29, 1987

The Honorable William Howard Taft, IV
Deputy Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301-1155

Dear Mr. Secretary:

I have been asked by Senator Weicker to review and comment on the contents of your memorandum pertaining to the 5% DOD goal for contract awards to Small Disadvantaged Businesses.

As president of an 8 (a) Small Disadvantaged Business for the past twelve years it has been my experience, that clearly defined and detailed procedures must be established, to insure that the spirit and intent of Public Law 99-661 is implemented and achieved. The concept of this new program as an extension of the SBA 8 (a) program is commendable but the past short-comings of the 8 (a) program have shown that a better structure must be used initially if this new program is to be successful. Therefore, I also recommend that a method of monitoring and measuring compliance with the program's objectives be set-up in order to ensure that the established target is met.

Thank you for giving me the opportunity to comment.

Sincerely,

INTERNATIONAL CREATIVE DATA INDUSTRIES, INC

J. Villodas
President

JV/mam

TRESP Associates, Inc.
Automated Data Processing • Management Services • Research and Development

June 1, 1987

REGISTERED MAIL
RETURN RECEIPT REQUESTED

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

Reference: DAR Case 87-33

Dear Mr. Lloyd:

The Department of Defense (DoD) is to be commended on its aggressive efforts to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661), entitled "Contract Goal for Minorities." We, at Tresp Associates, believe that the proposed regulations published in the Federal Register, (Volume 52, No. 85 on Monday, May 4, 1987), are certainly a step in the right direction. We support your proposed implementation regulations with few exceptions, and submit the following comments for your consideration:

ISSUE:

(1) The Rule of Two: The interim rule establishes a "rule of two (ROT)" regarding set-asides for Small Disadvantaged Business (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 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...."

RECOMMENDATION: The rule of two implementation procedures as currently presented gives the Contracting Officer complete authority in the ROT process, and fails to address the role of the Department's Small and Disadvantaged Business Specialists (SDBS). DoD has a cadre of over 700 SDBS who have done an outstanding job in the implementation of other legislation; Public Law 95-507, as an example. Therefore, we recommend that the regulations be written to mandate active participation on the part of the SDBS and

the Contracting Officer in rule of two decisions. We feel that the foregoing will result in more balanced and unbiassed ROT opinions.

ISSUE:

2. Protesting small disadvantaged business representation. Paragraph 219.302 (S-70) found at 16265, states in part, "...(1) Any offeror or an interested party, may in connection with a contract 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...." We believe that such loose wording will tend to encourage frivolous protests. In our opinion, this will become a "delay tactic" on the part of that segment of the business community, not qualified to participate in the acquisition by reasons of their non-small disadvantaged business status.

RECOMMENDATION: The regulations should be more specific with respect to who can protest. The right to protest the SDB status in acquisitions involving SDB set asides, should be limited to only effected parties (i.e., other small disadvantaged business firms.) Further, to discourage frivolous protests, penalities should be invoked in those cases where frivolity is determined. Definite time frames should also be established with each step of the protest process.

ISSUE:

(3) Subcontracting under SDB set asides. The proposed regulations do not address the degree of subcontracting to minority business concerns under Section 1207 or the Statute.

RECOMMENDATION:

In those cases where subcontracting opportunities exist, we recommend that the successful prime SDB offerors be required to award a mandatory percentage of such subcontracts to qualified minority business firms. You may wish to consider language similar to that contained in Section 211 of Public Law 95507. This will encourage networking among the Minority Business Enterprises.

Again, DoD is to be commended for its work in the various socio-economic programs, and if Tresp Associates can be of any assistance to you, please do not hesitate to contact me.

Very truly yours,

WILLIAM F. MADISON
Vice President
Corporate Affairs

cc: NEDCO Conference
716 South Sixth Street
Las Vegas, NV 89101

National Federation of 8(a) Companies
2011 Crystal Drive, Suite 813
Arlington, Virginia 22202

Mr. C. Michael Gooden
President,
Integrated Systems Analysts, Inc.
1215 Jefferson Davis Highway
Crystal Gateway III, Suite 1304
Arlington, VA 22202

Mr. Dan Gill
Office of Small & Disadvantaged Business Utilization
OSD, The Pentagon, Washington, DC 20301

87-33

SAMPLE COMMENT LETTER TO DoD

June ___, 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 businesses 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.

(Add any other comments you think appropriate.)

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, Mike Pone

THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301

LEGISLATIVE
AFFAIRS

See Mr. Taft's comment

JUN 1 1987

2 MAY 1987
DEP. SEC. HAS SEEN

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE

SUBJECT: Call from Senator Gramm (R-TX) Regarding Small Minority Business 5 Percent Goal - INFORMATION MEMORANDUM

Senator Gramm called this morning regarding the 5 percent goal for small minority businesses contained in Section 1207 of the 1987 Authorization Act. Senator Gramm met with Mrs. Leftwich yesterday afternoon and learned for the first time that the term "fair market cost" used in Section 1207 was a term of art defined in the FAR's and has no relationship, necessarily, to the lowest price for which DOD could obtain the product in the marketplace. The result, according to the Senator, is to authorize up to a 30 percent premium on top of an already inflated price.

Section 1207 was apparently a last minute compromise during the House-Senate Conference on the Bill and the Senator was not aware of the significance of the term proposed by the House Conferees. He is not pleased.

Senator Gramm plans to offer an amendment this year to delete "fair market cost" and substitute language referring to the lowest or reasonable price for which DOD could obtain the product in the market place. He requests that the Section 1207 implementation regulations be "slowed down" sufficiently to allow this amendment to be reflected in those regulations.

M. D. B. Carlisle

AGUC1487

Reid 1
28 MAY

*Gomez Electrical Contractors, Inc.*

*P.O. Box 357, Latham, New York 12110*
*Tel. (518) 785-3000*

CAROLINE P. GOMEZ
SECRETARY TREASURER

JOSEPH A. GOMEZ
PRESIDENT

STATE OF CONNECTICUT
MASTER ELECTRICIAN
CERTIFICATE #103252

STATE OF NEW HAMPSHIRE
MASTER ELECTRICIAN
LIC. #7340

STATE OF VERMONT
MASTER ELECTRICIAN
LIC. #2272

COUNTY OF GREENE, NY
MASTER ELECTRICIAN
LIC. #2476

COUNTY OF SULLIVAN, NY
MASTER ELECTRICIAN
LIC. #228

CITY OF ALBANY, NY
MASTER ELECTRICIAN
LIC. #58

CITY OF AMSTERDAM, NY
MASTER ELECTRICIAN
LIC. #48

CITY OF SCHENECTADY, NY
MASTER ELECTRICIAN
LIC. #54

[redacted]OY, NY
M[redacted]LECTRICIAN
LIC. #96

June 15, 1987

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

Attn: Mr. Charles W. Lloyd
Executive Secretary

Re: DOD 48 CFR Parts 204, 205, 206, 219, & 252

Dear Sir:

We would like to comment on the following section A - Background. The new regulation would require:

a) that the cost will not exceed 10% of the fair market value and

b) That at least two or more firms will be bidding on the project.

Through some twenty-four (24) years in the construction industry we have seen the Engineers or Owner's budget (usually called by the agency as the fair market value) (see also 219.506) swing from very low compared to the competitive bid received and on rare occasion it swings high when then compared to the bids received.

In the cases where the government estimate is substantially low (10% or more), we have seen more than one course of action taken. We have seen the projects re-advertised for a second round of bids (usually some redesigning takes place to cut the costs). Another way is to ask the lowest responsible bidder for an extension so that the agency has some additional time in which to seek additional funding. The third avenue which is the least likely approached is cancellation of the project.

Our question to you Mr. Lloyd is simple. Government estimates are seldom within the 10% fair market value as determined by competitive bidding. How is then that DOD is going to determine what the "fair market value" is?

Why is it then, that DOD is taking a different approach from those practices used under "regular" bidding process.

# Gomez Electrical Contractors, Inc.

P.O. Box 357, Latham, New York 12110
Tel. (518) 785-3000

CAROLINE P. GOMEZ
SECRETARY TREASURER

JOSEPH A. GOMEZ
PRESIDENT

STATE OF CONNECTICUT
MASTER ELECTRICIAN
CERTIFICATE #103252

STATE OF NEW HAMPSHIRE
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CITY OF SCHENECTADY, NY
MASTER ELECTRICIAN
LIC. #54

[redacted] TROY, NY
[redacted] ELECTRICIAN
[redacted]96


During the course of bid offers, we have seen during regular bidding that, though in rare occasions, only one bid is received, both Federal and State Agencies have awarded such bids in the vast majority of said occasions.

Why is it again, that if the DOD's program is designed to help minorities, rules and regulations, effecting bids null and void, are enacted when a greater flexibility is granted to contracting officers during receipt of regular bids.

We hope our comments and constructive criticizm is of value to you.

Very truly yours,

Joseph A. Gomez

cc: Mr. Harvey Davies
Small Business Administration

23DoDwashington

THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-8000

ACQUISITION AND
LOGISTICS

In reply refer to:
DAR Case 87-33

Norma

MEMORANDUM FOR MS. NORMA LEFTWICH
DIRECTOR, SADBU

SUBJECT: Letter from Mr. Wilbert C. Scipio, Jr., May 1, 1987

Subject letter is referred to your office for direct reply to Mr. Scipio. I have retained a copy of his letter for consideration by the DAR Council with other comments received under DAR Case 87-33.

As you will note, Mr. Scipio mentions the 5% figure used in implementing Section 1207 of Public Law 99-661 (DAR Case 87-33) and this implementation is not effective until June 1, 1987. I have forwarded a copy of the Federal Register Notice to Mr. Scipio.

Otto

OTTO J. GUENTHER, COL, USA
Director
Defense Acquisition
Regulatory Council

Attachment
Ltr from Mr. Scipio

87-33

**DEPARTMENT OF THE AIR FORCE**
**HEADQUARTERS ELECTRONIC SYSTEMS DIVISION (AFSC)**
**HANSCOM AIR FORCE BASE, MASSACHUSETTS 01731-5000**

REPLY TO ATTN OF: JAN

SUBJECT: DAR Case 87-33, DFARS Implementation of PL 99-661, Set-Asides for Small Disadvantaged Business Concerns

TO: DARC (Attn: Mr. Charles W. Lloyd)
Executive Secretary
ODASD (P) DARS
c/o OASD (P & L) (M & RS)
Rm. 3C841, The Pentagon
Washington, D.C. 20301-3062

1. AFAC 87-16 (27 May 1987), interim rules were distributed to implement Section 1207 of PL 99-661 "Contract Goal for Minorities". Under the interim rules, Contracting Officers are required to set-aside certain acquisitions for exclusive competition among small disadvantaged business (SDB) concerns whenever it is anticipated that two or more SDB concerns will submit offers and award will be made at not more than 110% of a "fair market price".

2. Proposed DFARS 19.502-72 (a) recognizes that, in making SDB set-asides for R & D or architect-engineer acquisitions, there is a need to consider the availability of SDB scientific, technological, or architectural talent consistent with the demands of the acquisition. It is noted that in such acquisitions, the offered price/cost is not the primary consideration in selecting the successful offeror for award.

3. Proposed DFARS 19.502-72 (a) and (d) imply that the SDB set-aside rule should apply only to acquisitions to be awarded at the lowest offered price (but not to exceed 110% of fair market price) on the basis of the responsive (technically acceptable, qualified) offer made by a responsible offeror. Otherwise, under proposed DFARS 19.502-72 (d), for source-selections to be made on the basis of considerations other than only price, it would be necessary to make the source-selection decision as to the most advantageous offer and then could make award only if the price offered by the successful offeror was also within the 110% of fair market value limitation. If not, then presumably, the set-aside must be withdrawn under 19.502-72 (d) and the requirements resolicited. Such a procedure, however, would be extremely time-consuming and would cripple the ability of the agency to contract for critical requirements which do not fall within the categories of R & D or A & E services, but require that award be made on primary considerations other than price/cost. Examples of such acquisitions include management and engineering support services (where management and technical factors are more important than price) and production awards which require the successful offeror to reverse-engineer pre-existing products for which reprocurement data is unavailable and then manufacture production quantities to a performance specification. Neither of these examples would fall within the categories of R & D or A & E services so as to permit the contracting officer to exercise judgment as to whether it would be appropriate to set such acquisitions aside

for exclusive SDB participation as proposed DFARS 19.502-72 (a) is presently written. It is suggested that this situation could be resolved if the last sentence of proposed DFARS 19.502-72 (a) were deleted and the introduction to the first sentence were changed to read:

> Except for acquisitions subject to small purchases and, except for negotiated acquisitions where award will be made on the basis of factors other than only the lowest evaluated price/cost for a proposal which conforms to solicitation requirements, the entire amount of an individual acquisition shall be set-aside for.....

Roger T. McAvoy

ROGER J. MCAVOY, Chief
Contract Law Division

Cy: ESD/PK (Mr. Fowler)
ESD/TC (Mr. Kalkman)
AFSC/JAN

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION

WASHINGTON, DC 20301-3061

OFFICE OF SMALL AND
DISADVANTAGED BUSINESS
UTILIZATION

87-53
Exec. Sec
7/9/87

30 JUN 1987

Mr. Wilbert C. Scipio
Scipio Engineering Co.
8013 Champlain
Chicago, IL 60619

Dear Mr. Scipio:

Please refer to your identical letters of June 17, 1987 to the Deputy Secretary of Defense, Department of Defense (DoD) and to me regarding your proposal to alter the DoD implementation of section 1207 of Public Law 99-661 along the lines suggested in the 1980 Supreme Court decision on minority set-asides.

Your letters are timely because the Defense Acquisition Regulation (DAR) Council is currently reviewing various public comments by those interested in the DoD proposed implementation of Public Law 99-661.

Accordingly, we have forwarded your letters to the DAR Council for their examination. We would expect careful review of your comments and those of others.

Thank you very much for your interest in the Department of Defense.

Sincerely,

Horace J. Comish

for NORMA E. LEFTWICH
Director

cc: DAR Council

1987 JUN 24 AM 9:48

OFFICE OF
THE SECRETARY OF DEFENSE

WILLIAM TAFT
DEPUTY SECRETARY OF
DEFENSE
U.S. DEPT. OF DEFENSE
THE PENTAGON
WASHINGTON, D.C., 20301

PHONE (312) 873-2456

SCIPIO ENGINEERING CO.
MECHANICAL ENGINEERING CONSULTANTS FOR
ENERGY - CONSTRUCTION - ELECTRONICS
(FROM CONCEPT TO FINISH PRODUCT)
MINORITY SMALL BUSINESS
WILBERT C. SCIPIO
8013 CHAMPLAIN
CHICAGO, IL 60619

JUNE, 17, 1987

DEAR SIR:

THIS LETTER CONCERNS YOUR MINORITY SET-ASIDE REGULATIONS PER PUBLIC LAW 99-661 SECTION 1201.

YOUR REGULATIONS DO NOT MEET THE STANDARDS SET BY UNITED STATES SUPREME COURT DECISION FULLILOVE V. KLUTZNICK. PLEASE READ ATTACHED DECISION. PLEASE READ PAGES 918, AND 933-935. READING THIS DECISION WILL HELP YOU UNDERSTAND A GOOD AND LEGAL MINORITY SETASIDE PROGRAM THROUGH REGULATION.

YOUR REGULATIONS ARE MISSING PARTS REQUIRED BY PUBLIC LAW 99-661 SECTION 1201, FOR EXAMPLES;

(1.) YOUR REGULATIONS SHOULD CONTAIN "ADMINISTRATIVE WAIVERS" IN ORDER TO EXEMPT CERTAIN CONTRACTS FROM MINORITY SETASIDE. BUT YOUR REGULATIONS DO NOT CONTAIN WAIVERS.

(2.) IT IS IMPLIED IN PUBLIC LAW 99-661 SECTION 1201 THAT 5% OF CONTRACT FUNDS SHOULD BE EXPENDED WITH MINORITY BUSINESS FOR EACH CONTRACT AS SPECIFIED IN 15 U.S.C. 637 (d) 4 & 6. 11212 87

(2) Cont'd

And that Dept. of Defense Contracting officers are mandated to reject bids of prime contractors that do not meet 5% goal of minority business expenditures as being non responsibile. This part is not written your regulations.

Your regulations are written in a manner that assumes minority business can build tanks, airplanes, and ships.

In the real world that is not true. In most cases (probably 90 percent) minority business will be subcontracting under a large white prime contractor.

Your regulations should show that 5% of contract funds being expended to minorities primarily as subcontractors.

You may want to rewrite your regulations to that found in U.S. Supreme Court Decision.

Sincerely Yours
Willmit C. Sayles Jr.

To SEC. TAFT:
PLEASE CHANGE YOUR MINORITY SETASIDE REGULATIONS TO THOSE FOUND IN THIS SUPREME COURT DECISION
REGULATIONS ARE ON PAGES 933 TO 935.
IMPORTANT PAGES TO READ, 918, 933, 934 AND 935!!
THESE REGULATIONS ARE ON A FIRMER LEGAL FOUNDATION THAN YOURS.



[448 US 448]

H. EARL FULLILOVE et al., Petitioners,

v

PHILIP M. KLUTZNICK, Secretary of Commerce of the United States, et al.

448 US 448, 65 L Ed 2d 902, 100 S Ct 2758

[No. 78–1007]

Argued November 27, 1980. Decided July 2, 1980.

**Decision:** Minority business enterprise provision of Public Works Employment Act, requiring "10% set-aside" of federal funds for minority businesses on local public works projects, held not violative of equal protection.

**SUMMARY**

Associations of construction contractors and subcontractors, along with a firm engaged in heating, ventilation, and air conditioning work, brought an action in the United States District Court for the Southern District of New York against the Secretary of the United States Department of Commerce, as the administrator of federal programs for local public works projects, and against the State and City of New York, as actual and potential grantees of federally funded local public work projects, alleging that the "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116)—a provision implemented in regulations of the Secretary of Commerce and guidelines of the Commerce Department's Economic Development Administration—on its face, violated, among other things, the equal protection component of the Fifth Amendment's due process clause and various federal statutes prohibiting discrimination, including Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.) proscribing racial discrimination in any program receiving federal financial assistance, the focus of the plaintiffs' challenge to the minority business enterprise provision being the so called "ten percent set-aside requirement" of the provision whereby, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in

Briefs of Counsel, p 1324, infra.

the Public Works Employment Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Ultimately, the District Court upheld the validity of the minority business enterprise provision, denying the declaratory and injunctive relief which the plaintiffs had sought (443 F Supp 253). Thereafter, the United States Court of Appeals for the Second Circuit affirmed, expressly rejecting the contention that the ten percent set-aside requirement violated equal protection, and also rejecting, as the District Court had done, the various statutory arguments which the plaintiffs had raised (584 F2d 600).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, six members of the court nonetheless agreed that the minority business enterprise provision of the Public Works Employment Act, by virtue of its ten percent set-aside requirement, did not violate equal protection under the due process clause of the Fifth Amendment nor Title VI of the Civil Rights Act of 1964.

BURGER, Ch. J., announced the judgment of the court, and in an opinion joined by WHITE and POWELL, JJ., expressed the views that (1) in terms of Congress' objective in the minority business enterprise provision of the Public Works Employment Act—to ensure that, to the extent federal funds were granted under the Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities —such objective being within the spending power of Congress under the United States Constitution (Art I, § 8, cl 1), the provision's limited use of racial and ethnic criteria constituted a valid means of achieving the objective so as not to violate the equal protection component of the due process clause of the Fifth Amendment, and (2) the minority business enterprise provision was not inconsistent with the requirements of Title VI of the Civil Rights Act of 1964.

POWELL, J., concurring, expressed the views that the racial classification reflected in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was not violative of equal protection, being justified as a remedy serving the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress, and that since the requirement was constitutional, there was also no violation of Title VI of the Civil Rights Act of 1964.

MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., concurred in the judgment, expressing the views that (1) under the appropriate standard for determining the constitutionality of racial classifications which provide benefits to minorities so as to remedy the present effects of past racial discrimination—which standard necessitates an inquiry into whether a classification on racial grounds serves important governmental objectives and is substantially related to the achievement of those objectives—the ten percent set-aside requirement of the minority business enterprise provision

of the Public Works Employment Act was not violative of equal protection under the due process clause of the Fifth Amendment, since the racial classifications employed in the set-aside provision was substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination in the area of public contracting, and (2) the ten percent set-aside requirement also did not violate Title VI of the Civil Rights Act of 1964 in that the prohibition of Title VI against racial discrimination in any program or activity receiving federal financial assistance was coextensive with the guarantee of equal protection under the United States Constitution.

STEWART, J., joined by REHNQUIST, J., dissenting, expressed the view that the minority business enterprise provision of the Public Works Employment Act, on its face, denied equal protection of the law, barring one class of business owners from the opportunity to partake of a government benefit on the basis of the owners' racial and ethnic attributes.

STEVENS, J., dissented, expressing the view that since Congress had not demonstrated that the unique statutory preference established in the ten percent set-aside requirement of the minority business enterprise provision of the Public Works Employment Act was justified by a relevant characteristic shared by members of the preferred class, Congress had failed to discharge its duty, embodied in the Fifth Amendment, to govern impartially.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

**Civil Rights § 7.5 — Fifth Amendment — equal protection — Public Works Employment Act — minority business enterprise — ten percent set-aside**

1a–1e. The "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116), a provision implemented in regulations of the Secretary of the United States Department of Commerce and guidelines of the Commerce Department's Economic Development Administration, is not unconstitutional on its face as violative of the equal protection component of the Fifth Amendment's due process clause by virtue of the provision's requirement that, absent administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members", defined in the Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." [Per Burger, Ch. J., White, Powell, Marshall, Brennan, and Blackmun, JJ. Dissenting: Stewart, Rehnquist, and Stevens, JJ.]

**Civil Rights § 7.5 — race discrimination — Title VI of 1964 Act — Public Works Employment Act — minority business enterprise provision**

2a–2f. The "minority business enterprise" provision (§ 103(f)(2)) of the Public Works Employment Act of 1977 (91 Stat 116), a provision implemented in regulations of the Secretary of the United States Department of Commerce and guidelines of the Commerce Department's Economic Development Administration, is not violative of Title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.), proscribing racial discrimination in any program receiving federal financial assistance, by virtue of the minority business enterprise provision's requiring that, absent administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by state and local grantees to procure services or supplies from businesses owned and controlled by "minority group members," defined in the Act as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." [Per Burger, Ch. J., White, Powell, Marshall, Brennan, and Blackmun, JJ.]

**Constitutional Law §§ 313, 513 — equal protection — Fifth and Fourteenth Amendments**

3a–3d. Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. [Per Marshall, Brennan, Blackmun, Stewart, and Rehnquist, JJ.]

SYLLABUS BY REPORTER OF DECISIONS

The "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 (1977 Act) requires that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Under implementing regulations and guidelines, grantees and their private prime contractors are required, to the extent feasible, in fulfilling the 10% MBE requirement, to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration, or other sources for assisting MBE's in obtaining required working

capital, and to give guidance through the intricacies of the bidding process. The administrative program, which recognizes that contracts will be awarded to bona fide MBE's even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination, provides for handling grantee applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. The program also provides an administrative mechanism to ensure that only bona fide MBE's are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The District Court upheld the validity of the MBE program, and the Court of Appeals affirmed.

*Held:* The judgment is affirmed.
584 F2d 600, affirmed.

Mr. Chief Justice Burger, joined by Mr. Justice White and Mr. Justice Powell, concluded that the MBE provision of the 1977 Act, on its face, does not violate the Constitution.

(1) Viewed against the legislative and administrative background of the 1977 Act, the legislative objectives of the MBE provision, and the administrative program thereunder, were to ensure—without mandating the allocation of federal funds according to inflexible percentages solely based on race or ethnicity—that, to the extent federal funds were granted under the 1977 Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities.

(2) In considering the constitutionality of the MBE provision, it first must be determined whether the *objectives* of the legislation are within Congress' power.

(a) The 1977 Act, as primarily an exercise of Congress' spending power under Art I, § 8, cl 1, "to provide for the . . . general Welfare," conditions receipt of federal moneys upon the recipient's compliance with federal statutory and administrative directives. Since the reach of the spending power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the spending power.

(b) Insofar as the MBE program pertains to the actions of private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. The legislative history shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce.

(c) Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the equal protection guarantee of that Amendment. Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority busi-

nesses, could perpetuate the effects of prior discrimination, and that the prospective elimination of such barriers to minority-firm access to public contracting opportunities was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Cf., e.g., Katzenbach v Morgan, 384 US 641, 16 L Ed 2d 828, 86 S Ct 1717; Oregon v Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260.

(d) Thus, the *objectives* of the MBE provision are within the scope of Congress' spending power. Cf. Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786.

(3) Congress' use here of racial and ethnic criteria as a condition attached to a federal grant is a valid *means* to accomplish its constitutional objectives, and the MBE provision on its face does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

(a) In the MBE program's remedial context, there is no requirement that Congress act in a wholly "color-blind" fashion. Cf., e.g., Swann v Charlotte-Mecklenberg Board of Education, 402 US 1, 28 L Ed 2d 554, 91 S Ct 1267; McDaniel v Barresi, 402 US 39, 28 L Ed 2d 582, 91 S Ct 1287; North Carolina Board of Education v Swann, 402 US 43, 28 L Ed 2d 586, 91 S Ct 1284.

(b) The MBE program is not constitutionally defective because it may disappoint the expectations of access to a portion of government contracting opportunities of nonminority firms who may themselves be innocent of any prior discriminatory actions. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. Franks v Bowman Transportation Co., 424 US 747, 777, 47 L Ed 2d 444, 96 S Ct 1251.

(c) Nor is the MBE program invalid as being underinclusive in that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities, and there has been no showing that Congress inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program.

(d) The contention that the MBE program, on its face, is overinclusive in that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination, is also without merit. The MBE provision, with due account for its administrative program, provides a reasonable assurance that application of racial or ethnic criteria will be narrowly limited to accomplishing Congress' remedial objectives and that misapplications of the program will be promptly and adequately remedied administratively. In particular, the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBE's who are not "bona fide," or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Moreover, grantees may obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.

(4) In the continuing effort to achieve

the goal of equality of economic opportunity, Congress has latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives, especially in programs where voluntary cooperation is induced by placing conditions on federal expenditures. When a program narrowly tailored by Congress to achieve its objectives comes under judicial review, it should be upheld if the courts are satisfied that the legislative objectives and projected administration of the program give reasonable assurance that the program will function within constitutional limitations.

Mr. Justice Marshall, joined by Mr. Justice Brennan and Mr. Justice Blackmun, concurring in the judgment, concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives, University of California Regents v Bakke, 438 US 265, 359, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part), and that, judged under this standard, the 10% minority set-aside provision of the 1977 Act is plainly constitutional, the racial classifications being substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.

Burger, C. J., announced the judgment of the Court and delivered an opinion, in which White and Powell, JJ., joined. Powell, J., filed a concurring opinion. Marshall, J., filed an opinion concurring in the judgment, in which Brennan and Blackmun, JJ., joined. Stewart, J., filed a dissenting opinion, in which Rehnquist, J., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

**Robert G. Benisch** argued the cause for petitioners Fullilove et al.

**Robert J. Hickey** argued the cause for petitioner General Building Contractors of New York State, Inc.

**Drew S. Days III,** argued the cause for respondents.

Briefs of Counsel, p 1324, infra.

SEPARATE OPINIONS

[448 US 453]

Mr. Chief Justice **Burger** announced the judgment of the Court and delivered an opinion in which Mr. Justice **White** and Mr. Justice **Powell** joined.

**[1a]** We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 US 960, 60 L Ed 2d 1064, 99 S Ct 2403 (1979).

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub L 95-28, 91 Stat 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub L 94-369, 90 Stat 999, 42 USC § 6701 et seq. [42 USCS § 6701 et seq.]. The 1977 amendments authorized an addi-

TO DEPT. OF DEFENSE: PLEASE SUBSTITUTE CONTRACT OFFICER FOR THE WORD GRANTEE



TO DOD IF BID OF PRIME CONTRACTOR DOES NOT EXPEND 5% OF CONTRACT FUNDS TO MINORITY BUSINESS, CONTRACT OFFICER HAS AN OBLIGATION TO REJECT BID AS BEING NOT RESPONSIVE

Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[56] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they also restate the MBE requirement.[57]

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where

[448 US 469]

feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process.[58]

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement.[59] The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's."[60] The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention.[61]

SUBSTITU. CONTRAC OFFICER FOR GRANTEE

The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process.[62] The Technical Bulletin issued by EDA discusses in greater detail the process-

56. 91 Stat 117, 42 USC § 6706 (1976 ed Supp II) [42 USCS § 6706]; 13 CFR Part 317 (1978).

57. 91 Stat 116, 42 USC § 6705(e)(1) (1976 ed Supp II) [42 USCS § 6705(e)(1)]; 13 CFR § 317.19 (1978).

58. Guidelines 2-7; App 157a-160a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 1.

59. Guidelines 2; App 157a; see 123 Cong Rec 5327-5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

60. Guidelines 8; App 161a.

61. See 123 Cong Rec 5327-5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

62. Guidelines 13-16; App 165a-167a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 2.

(1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const, Amdt 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. South Carolina v Katzenbach, 383 US 301, 15 L Ed 2d 769, 86 S Ct 8031 (1966); cf. City of Rome, supra.

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated

[448 US 478]

the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

[448 US 479]

(4)

There are relevant similarities between the MBE program and the federal spending program reviewed in Lau v Nichols, 414 US 563, 39 L Ed 2d 1, 94 S Ct 786 (1974). In Lau, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. Id., at 564–566, 39 L Ed 2d 1, 94 S Ct 786. It had not been shown that this had resulted from any discrimina-

ance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious

[448 US 487]

effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and

[448 US 488]

eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." Supra, at 472, 65 L Ed 2d, at 920. And even as to specific contract awards,

73. The MBE provision, 42 USC § 6705(f)(2) (1976 ed Supp II) [42 USCS § 6705(f)(2)], classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 USC § 803 [45 USCS § 803], see 49 CFR § 265.5(i) (1978), on which Congress relied as precedent for the MBE provision. See 123 Cong Rec 7156 (1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." HR Rep No. 94-468, pp 20–21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination. Supra, at 469–471, 65 L Ed 2d, at 918–919. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

[448 US 489]

Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the EDA to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See Steelworkers v Weber, 443 US 193, 200, 61 L Ed 2d 480, 99 S Ct 2721 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

[448 US 490]

## IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity.

74. Cf. GAO, Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

TO DEPT. OF DEFENSE: PLEASE SUBSTITUTE CONTRACT OFFICER FOR GRANTEE.



"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932)(dissenting opinion).

**[1c, 2a]** Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind

[448 US 492]

of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as University of California Regents v Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several Bakke opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.[77]

Affirmed.

REGULATIONS START HERE

DEPT. OF DEFENSE (CONTRACT OFFICER)

APPENDIX TO OPINION OF BURGER, C. J.

¶ 1. The EDA guidelines, at 2–7, provide in relevant part:

"The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees. . . . The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available bona fide MBE's and make every effort to use as many of them as possible on the project.

"An MBE is bona fide if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership

[448 US 493]

on which the claim of minority ownership status is based. . . .

"An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . EDA will require that ~~Grantees~~ and prime contractors engage MBE's from as wide a market area as is economically feasible.

"An MBE is qualified if it can

77. **[2b]** Although the complaint alleged that the MBE program violated several federal statutes, n 5, supra, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Rights Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later, more specific enactment—must be deemed to control. See, e.g., Morton v Mancari, 417 US 535, 550–551, 41 L Ed 2d 290, 94 S Ct 2474 (1974); Preiser v Rodriguez, 411 US 475, 489–490, 36 L Ed 2d 439, 93 S Ct 1827 (1973); Bulova Watch Co. v United States, 365 US 753, 758, 6 L Ed 2d 72, 81 S Ct 864 (1961); United States v Borden Co. 308 US 188, 198–202, 84 L Ed 181, 60 S Ct 182 (1939).

TO DEPT. OF DEFENSE: SUBSTITUTE CONTRACT OFFICER FOR GRANTEE.



DEPT. OF DEFENSE (CONTRACT OFFICER)

perform the services or supply the materials that are needed. ~~Grantees~~ and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. ~~Grantees~~ and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW [local public works] project. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. ~~Grantees~~ and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

LAW REQUIRES YOU TO HAVE THIS IN YOUR REGULATIONS BUT YOU DO NOT.

DEPT. OF DEFENSE CONTRACT OFFICER

DEPT. OF DEFENSE CONTRACT OFFICER

DEPT. OF DEFENSE CONTRACT OFFICER

"... [E]very ~~Grantee~~ should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. ... Grantees should also hold prebid conferences to which they invite interested contractors and representatives of ... MBE support organizations.

"Arrangements have been made through the Office of Minority Business Enterprise ... to provide assistance

[448 US 494]

DEPT. OF DEFENSE CONTRACT OFFICER

~~Grantees~~ and prime contractors in fulfilling the 10% MBE requirement. ...

DEPT. OF DEFENSE (CONTRACT OFFICER)

"~~Grantees~~ and prime contractors should also be aware of other support which is available from the Small Business Administration. ...

(CONTRACT OFFICER)

"... [T]he ~~Grantee~~ must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. ... Grantees should administer every project tightly. ..."

¶ 2. The EDA guidelines, at 13–15, provide in relevant part:

"Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. .

DEPT. OF DEF. (CONTRACT OFFICER)

"Only the ~~Grantee~~ can request a waiver. ... Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. ..

DEPT. OF DEFENSE (CONTRACT OFFICER)

"[A] ~~Grantee~~ situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. ..."

¶ 3. The EDA Technical Bulletin, at 1, provides the following definitions:

were to be distributed quickly,[10] any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance.[11] And Congress knew that the

[448 US 512]

ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades.[12] The set-aside program adopted as part of this emergency

[448 US 513]

legislation serves each of these concerns because it takes effect as soon as funds are expended under PWEA and because it provides minority contractors with experience that could enable them to compete without governmental assistance.

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10. The PWEA provides that federal moneys be committed to state and local grantees by September 30, 1977. 42 USC § 6707(h)(1) (1976 ed Supp II) [42 USCS § 6707(h)(1)]. Action on applications for funds was to be taken within 60 days after receipt of the application, § 6706, and on-site work was to begin within 90 days of project approval, § 6705(d).

11. In 1972, a congressional oversight Committee addressed the "complex problem—how to achieve economic prosperity despite a long history of racial bias." See HR Rep No. 92-1615, p 3 (Select Committee on Small Business). The Committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepreneur is faced initially with the lack of capital, the most serious problem of all beginning minorities or other entrepreneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

. . . . . .

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." Id., at 3–4.

12. When Senator Brooke introduced the PWEA set-aside in the Senate, he stated that aid to minority businesses also would help to alleviate problems of minority unemployment. 123 Cong Rec 7156 (1977). Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See Contractors Association of Eastern Pennsylvania v Secretary of Labor, 442 F2d 159, 163 (CA3), cert denied, 404 US 854, 30 L Ed 2d 95, 92 S Ct 98 (1971). Later that year, the House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overruling the Labor Department's order. 115 Cong Rec 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. Id., at 40749.

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity. See id., at 40740 (remarks on Sen. Scott); id., at 40741 (remarks of Sen. Griffith); id., at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. Id., at 40742–40743. The day following the Senate vote to recede from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." Id., at 41072.

BACKGROUND AND HISTORY OF MINORITY SETASIDE PROGRAMS

PUBLIC LAW 95-507, 15 U.S.C. 637(d) 3-6



(4)(A) Each solicitation of an offer for a contract to be let by a Federal agency which is to be awarded pursuant to the negotiated method of procurement and which may exceed $1,000,000, in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to contracts awarded pursuant to the negotiated method of procurement.

(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts, and

(iv) which offers subcontracting possibilities,

the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

(C) If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required by this paragraph, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

(D) No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of the contract.

(E) Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract: *Provided*, That, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

(5)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which—

(i) is to be awarded pursuant to the formal advertising method of procurement,

(ii) is required to contain the clause stated in paragraph (3) of this subsection,

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, and

(iv) offers subcontracting possibilities,

shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan which incorporates the information prescribed in paragraph (6).

(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. Prior compliance of the bidder with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

(6) Each subcontracting plan required under paragraph (4) or (5) shall include—

(A) percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(C) a description of the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts;

(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns and small business concerns owned

FOR COMPETITIVE METHOD OF PROCUREMENT YOUR REGULATIONS CAN SPECIFY 5% ON These CONTRACTS FOR MINORITY BUSINESS. IF A PRIME CONTRACTOR SUBMITS A BID LESS Than 5% OF CONTRACT FUNDS EXPENDED WITH MINORITY FIRMS. CONTRACT OFFICER CAN REJECT BID OF PRIME CONTRACTOR AS BEING NOT RESPONSIVE.

DEPT. OF DEFENSE CONTRACT OFFICERS SHOULD REJECT BIDS BY PRIME CONTRACTORS NOT MEETING 5% MINORITY SETASIDE GOAL AS BEING NOT RESPONSIVE

87-33

cara INC

p. o. box 5011 kingsville, texas 78364 - 5011 512 - 595 - 5795

June 24, 1987

Defense Acquisition Regulatory Council
c/o OASD (P&L)(M&RS)
Room 3C 841
The Pentagon
Washington, D.C. 20310-3062

ATTENTION: Charles W. Lloyd
Executive Secretary
USDASD (P) DARS

Dear Mr. Lloyd:

I am writing to express my opinion about the interim regulations that the Department of Defense has issued to implement the 5% minority contracting goal. There a number of issues I would like to bring to your attention. Those issues are as follows:

> The interim regulations contain no express provisions for subcontracting requirements.

> The interim regulations are unclear as to what basis will be used to provide advance payments to small disadvantaged businesses in pursuit of the 5% goal.

> The interim regulations state that partial set-asides have been specifically prohibited despite their potential ability to facilitate SDB participation.

> The interim regulations should maintain the "sole source" procurement method of the 8(a) program. The 8(a) negotiated procurement system should be complemented, not replaced, by a competitive minority set-aside program, such as the program being implemented by DOD or as proposed in the Conte bill. This complementary competitive minority set-aside program will facilitate the achievement of the DOD 5% contracting goal.

> The final regulations should institute specific procedures to ensure that the DOD SDB 5% set-aside program does not interfere with or diminish the use of the 8(a) program in meeting the DOD 5% goal.

> The final regulations should clarify that 8(a) contracts will be counted towards the DOD 5% minority contracting goal. Specifically, SBA search letters and self-marketing by 8(a) firms must be honored by DOD and should not be brushed by DOD contracting officers in favor of the SDB competitive set-aside.

> The final regulations should provide that SADBU officers, rather than contracting officers, be responsible for the determination as to whether a particular procurement will be an 8(a) set-aside or an SDB set-aside.

> The final regulations should cause DOD contracting officers' performance ratings to be tied to achievement of the 5% minority business goal and the effective utilization of the 8(a) set-aside and the SDB set-aside programs.

> The final regulations should establish objective procedures for determining fair market price, such as the proposal in the Mavroules Bill. Create a Fair Market Price Determination Panel composed of SBA and DOD pricing specialists to resolve disputes over fair market price.

> The final regulations should exempt minority firms participating in DOD procurements (either through the 8(a) program or the SDB program) from DOD's onerous profit policy rules which unfairly affect fair market pricing.

> The final regulations should exclude all non-profit organizations from participation in the SDB program.

> The final regulations should increase all the size standards of SIC Codes for SDBs or allow only SDB set-asides and 8(a) set-asides to be counted in the size standards.

Sinceramente de Usted,

Candelario F. Huerta, Jr.

Dr. Candelario F. Huerta, Jr.
President

xc: Dr. Juan F. T. Huerta, Executive Vice-president - CARA, Inc.
Honorable Solomon P. Ortiz, U.S. Congressman
Honorable Dale Bumpers, U.S. Senator
Honorable Sam Nunn, U.S. Senator
Honorable John Stennis, U.S. Senator
Honorable Silvio Conte, U.S. Congressman
Honorable John Conyers, U.S. Congressman
Honorable Henry B. Gonzalez, U.S. Congressman
Honorable Manuel Lujan, U.S. Congressman
Honorable Nicholas Mavroules, U.S. Congressman
Honorable Joe McDade, U.S. Congressman
Honorable Ed Roybal, U.S. Congressman
Honorable Esteban Torres, U.S. Congressman
Honorable Jim Wright, U.S. Congressman

87-33

Dr. William C. Young
5937 16th Street Northwest
Washington, DC 20011

June 26, 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 final regulations.

Sincerely,

William C. Young

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION

WASHINGTON, DC 20301-3061

OFFICE OF SMALL AND
DISADVANTAGED BUSINESS
UTILIZATION

2 JUL 1987

Honorable Paul S. Sarbanes
United States Senate
Washington, DC 20510

Dear Senator:

This is a reply to your letter of June 15, 1987, to the Secretary of Defense on behalf of Mr. Lloyd A. Marlowe, President of the Marlowe Heating and Air Conditioning Company.

By letter of May 23, 1987, Mr. Marlowe provided you with comments on the interim-rule revising the Defense Acquisition Regulation Supplement to implement section 1207 of Public Law 99-661. Enclosed is the full ruling of the Council for Mr. Marlowe's use. He may wish to amplify his remarks to the Council after further review of its ruling.

Mr. Marlowe's comments have been provided to the Defense Acquisition Regulation 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,

Horace J. Crouch

HORACE J. CROUCH
Deputy Director

Enclosure

cc: DAR Council

PAUL S. SARBANES
MARYLAND

1987 JUN 22 PM 4:56

OFFICE OF
THE SECRETARY OF DEFENSE

United States Senate
WASHINGTON, DC 20510

June 15, 1987

Honorable Caspar W. Weinberger
Secretary
Department of Defense
The Pentagon
Washington, D.C. 20301-1155

Dear Secretary Weinberger:

I am forwarding correspondence I have received from Lloyd A. Marlowe, President of Marlowe Heating & Air Conditioning, who is very concerned about minority small business set-aside contract procedures at the Department of Defense. Your careful review of the concerns my constituent has raised would be greatly appreciated.

With best regards,

Sincerely,

Paul Sarbanes

Paul S. Sarbanes
United States Senator

PSS/gmg
Enclosure

4010 111987

87-33

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION

WASHINGTON, DC 20301-3061

OFFICE OF SMALL AND
DISADVANTAGED BUSINESS
UTILIZATION

12 JUL 1987

Honorable Edward M. Kennedy
United States Senate
Washington, DC 20510

Dear Senator:

This is a reply to your letter of June 23, 1987, to the Director, Senate Affairs (Col. George Jacunski) on behalf of Gregg Ward, Executive Director of the National Construction Industry Council.

By letter of June 17, 1987, Mr. Ward provided you with comments on the interim-rule revising the Defense Acquisition Regulation Supplement to implement section 1207 of Public Law 99-661, copy enclosed.

Mr. Ward's comments have been provided to the Defense Acquisition Regulation 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,

Horace J. Crouch

HORACE J. CROUCH
Deputy Director

Enclosure

cc: DAR Council

87-33

# BUILDERS' ASSOCIATION OF CHICAGO, INC.

June 9, 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

Re: DAR Case 87-33

Dear Sir:

This association represents commercial and industrial building contractors in the Chicago area, some of whom bid on defense projects. We are concerned that the "rule of two" set-aside for small disadvantaged businesses works an undue hardship on those businesses not lucky enough to be classified as "disadvantaged". Experience shows that in a market where government contract users are encouraged to set aside contracts for the disadvantaged, opportunities for non-disadvantaged businesses tend to dry up and all but disappear.

Most construction companies are small, family-owned businesses. Construction is an industry typically made up of businesses which started modestly and became successful through the efforts of their owners and without the protection of government set-asides. Set-asides are not appropriate in intensely competitive industries such as construction. They do more harm than good.

Yours very truly,

Donald W. Dvorak
Executive Vice President

DWD/lr

1647 Merchandise Mart • Chicago, Illinois 60654 • (312) 644-6670

# CENTRAL NEW YORK MINORITY CONTRACTORS & VENDORS ASSOCIATION, INC.

P.O. BOX 67 SYRACUSE, NEW YORK 13205
(315) 472-0499


87-33

June 10, 1987

Defense Acquisition Regulatory Council
DAR Council
Room 3C841
The Pentagon
Washington, D.C. 20301-3062

Attention: Charles W. Lloyd
Executive Secretary

Dear Mr. Lloyd:

I wish to commend the Department of Defense for its implementation of section 207 of Public Law 99-666 set aside for small disadvantaged business concerns. Although, our organization supports a substantial part, we question section 219.501 b where it states a decision for small disadvantaged business set aside is by one officer. It is our belief that by giving the sole decision to one officer it can be detrimental to the effect and intent of congress as well as the Department of Defense. It is our belief that this requirement should be shared with the officer in charge of the facility, the small disadvantaged specialist, contracting officer and Ombudsman, representing the small disadvantaged community. We also take issue with section 252.219/7006 notice of total small and disadvantaged business set asides section c agreement where it states 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 Island, or the District of Columbia. Although, the intent is honorable because of the small number of manufacturing concerns in the continental United States it would defeat the purpose of section Public Law 99-666. This paragraph seems to discriminate and sets up barriers for participation by small disadvantaged firms in classifications such as, small distributors, wholesalers and firms that do not produce their products. I assume that this provision would nulify the intent of congress and the Department of Defense in its efforts to increase the participation of small and disadvantaged firms.

Therefore, in behalf of over fifty members in the association that I represent we strongly object to the above language in regards to the manufacturing clause and would also appreciate your reviewing the contracting officer designation and taking into consideration our recommendations in addressing these issues. It is our belief that you will eliminate any perceived discriminatory policies as well as strengthen the language of Public Law 99-666 set asides for small disadvantaged business concerns.

Sincerely,

Emanuel Henderson, Jr.
President

cc: Senator D'Amato
Senator Moynihan
Congressman Wortley

87-33

EVANBOW CONSTRUCTION CO., INC.
BUILDERS AND ENGINEERS
67 SANFORD ST.
EAST ORANGE, NEW JERSEY 07018

(201) 674-1250

June 8, 1987

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

Attention: Mr. Charles W. Lloyd
Executive Secretary ODASD (P) DARS

Reference: P.L. 99-661

Dear Mr. Lloyd:

I generally and partially support 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 businesses in all contracts where price is a primary decision factor. I believe this diffential be used for the first three contracts to a firm then be reduced to 5% as long as the firm's gross sales do not exceed $5,000,000 per year.

However, there are several important questions that have been overlooked in the published interim regulations.

First, there are no provisions for subcontracting. Since the largest dollars are to prime (majority) contractors there should be a forceful required DBE subcontracting plan required with little chance for "good faith effort" escape as is now the norm under P.L. 95-507. Defense contractors still are less than ¼ of 1% in DBE subcontracting. This is shameful. Check General Dynamics. It is important to get private enterprise used to doing business with us so that we can get off the special program need. "Privatize as our President says.

Second, there is no mention of participation of Historically Black Colleges and Universities, and other minority institutions. The National Association of Minority Contractors can help considerably to improve subcontracting as an example.

Third, it is not clear on what basis advance payments will be available to small disadvantaged contractors to pursuit of the 5% goal.

And finally, partial set-asides have been specifically prohibited despite their potential contribution to small disadvantage participation at DoD and a plan developed to permit and increase set-asides until a firm is viable in our generally exclusionary society.

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,

Hamilton V. Bowser, Sr., P.E.
President - Evanbow Construction Co., Inc.

HVB:vp

Squire, Sanders & Dempsey

Counsellors at Law
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044

Additional Offices:
Brussels, Belgium
Cleveland, Ohio
Columbus, Ohio
Miami, Florida
New York, New York
Phoenix, Arizona

Telephone (202) 626-6600
Cable Squire DC
Telex 89DDC 440003
Telecopier 1 (202) 626-6781
Telecopier 2 (202) 626-6780

Direct Dial Number
(202) 626-6632

June 2, 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

Re: DAR Case 87-33; Notice of Intent to Develop a Proposed Rule

Dear Mr. Lloyd:

These comments are submitted on behalf of Wardoco, Inc. and Tri-Continental Industries, Inc., two minority-owned fuel oil resellers currently certified to participate in SBA's Section 8(a) Program. These firms wish to comment on one proposal contained in the "Notice of Intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses." 52 Fed. Reg. 16289-90 (May 4, 1987) ("NOI"). Specifically, the NOI's second proposal establishes a 10 percent differential for Small Disadvantaged Business ("SDB") concerns in certain sealed bid competitive procurements. Since this proposal could yield significant benefits for minority fuel oil vendors, both Wardoco and Tri-Continental advocate its adoption.

Presently there are few, if any, awards by the Defense Fuel Supply Center (DFSC) to minority fuel oil vendors on either an 8(a) or non-8(a) basis. This situation results from application of the so-called "non-manufacturer rule," 13 C.F.R. § 121.5, which requires that recipients of "reserved" contracts that are not manufacturers supply the product of small manufacturers. Unfortunately, there are few, if any, small refiners (defined as less than 50,000 b/d capacity) geographically accessible to locations where minority fuel oil resellers could sell home heating oil or gasoline to DFSC Posts, Camps and Stations facilities.

While there are some small refiners who can supply certain bulk fuels to DFSC, the fact that there have been only one or two 8(a) bulk fuels contracts nationwide in the past several years speaks for itself.

SBA recognized the impossible constraints imposed on 8(a) oil firms by the non-manufacturer rule when it passed an emergency waiver from the rule for 8(a) fuel oil resellers to the Posts, Camps & Stations market of DFSC in August, 1984. With the lapsing of this emergency waiver -- and the concomitant return of the non-manufacturer rule's restrictions -- the number of awards to minority fuel oil vendors has dropped precipitously.

Through its reference to open competitive procurements, the NOI's second proposal recognizes that SDBs should not be subjected to the non-manufacturer rule. Wardoco and Tri-Continental strongly urge that this feature of the NOI remain unchanged. Additionally, DoD should require that open procurements be awarded to a Small Disadvantaged Business if its offer is within 10 percent of the lowest bid. As currently structured, the NOI puts too much discretion in the hands of the contracting offices.

Since the May 4th Federal Register notice is merely a "Notice of Intent to develop a proposed rule", we reserve the right to supplement these comments. The second proposal contained in the May 4th notice, however, should be issued in its proposed form.

Sincerely,

Leslie H. Lepow

LHL/cj

**RICHARD F. GARVIN** **3215 E. Breckenridge Lane, Birmingham, MI 48010**
**(313) 258-9120**

July 7, 1987

Mr. Charles W. Lloyd
Executive Secretary, DAR Council
DASD(P)/DARS, c/o OASD (A&L)
Room 3C841, The Pentagon
Washington DC 20310-3062

Dear Mr. Lloyd,

I just wanted to thank you for returning my telephone call on the status of the proposal for an ethics program for defense contractors.

Also, I enclose the article I said I would send. It was written to explain how impractical doctrine led many new Army leaders to walk away from severe troop discipline problems. It surveyed the development of leadership doctrine and justified the need to pay the price of ethical conduct as the only way a democracy can delegate authority. I always felt good that it explained a number of things on paper for the first time, too.

I see so much of the same cynicism and lack of structure regarding ethics in business today (particularly for defense contractors), that I am looking for work in that arena in the Detroit area. Anyway, I thought you might like to know that there are some of us out here trying to convince firms that they really ought to do things out of professional concern, and not to wait until they are forced to do them.

Again, my thanks for returning the call.

Sincerely,

Richard F. Garvin

# Troop Leaders

By Maj. Richard F. Garvin

The Army faces a tremendous credibility gap in leadership doctrine. Units are being overwhelmed with people problems. The volunteer Army has difficulty distinguishing between enlightened leadership and permissiveness. Troop riots, racial unrest and drug abuse exist to a far greater extent than reported because of command desires to minimize the problem.

The Uniform Code of Military Justice and administrative discharge procedures seem unresponsive. The recognition of more and more soldier rights imposes additional new constraints on the traditional prerogatives of the officer and NCO. In addition, the paperwork in this Army of ours has mushroomed. Each new program requires the appointment of a project officer, an SOP, monthly council meetings and periodic status reports. The personnel assignment ceilings keep a unit's troop strength at 80 percent of its authorized strength and its NCO strength at 60 percent. The administrative burden falls on the shoulders of the few supervisors on hand and a leader just plain runs out of time.

Then, training schedules become mere bulletin board decorations and motor stables assume the characteristics of a forced labor detail. Inventories of property are not made on time and it goes downhill from there. Usually, a significant amount of mission-essential equipment is still on requisition or on work order at the direct support shop, but the morning's command newspaper has a feature article on the general's claim of 92-percent material and unit readiness. The adjutant is hard at work across the hall, taking poetic license with the facts to meet the IG report suspense date.

Commanders have accepted these ethical breaches on the part of officers and NCOs in the past. One entire theater of operations has acquired the reputation of being the best kept secret in the Army because of command tolerance of all ranks' living in the village in spite of pass quotas, the ease of procurement of common-law dependents (for the duration of the tour), and for the opportunity for black market profit.

Today's leader is frequently pushed right up to his psychological overload point. Current service-school leadership instruction does not prepare him for the turbulent environment which now characterizes troop duty. None of the principles seem to apply anymore. The field manuals are filled with unrelated theories and the professional magazines offer nothing but buzzword-laden theory of dubious value.

A very significant number of these very disillusioned leaders simply quit leading and just react to the problems as they come—and thus become part of the problem.

This situation, as bleak and hopeless as it may seem, is a known and studied occurrence. Many of its elements have historical precedent. For instance, today's leader must never forget that our World War II Army had its problems. Nor had Vietnam a monopoly on acts of atrocity or troop rebellion. So why, then, is leadership and its study scorned so universally today?

This situation has developed because our leadership doctrine is faulty and its application no longer gives the right answers. The single most damaging

duction-control techniques and the field of operations research. Both use a bewildering variety of mathematics in seeking the optimum solution to a given situation. These theories are very powerful tools for the solution of managerial, equipment-oriented, efficiency-type problems from unit to Pentagon level, but they all make only the most limited assumptions in describing human behavior and offer little in the way of leadership theory. Their mathematical precision is very misleading in this respect.

The second wave of theory to hit the organizational leadership beach assumed the title of administrative management. These experts formulated a variety of management principles which they believed would produce all known benefits for their users. These people brought us the traits and principles of leadership. The fact that the application of one trait or principle usually contradicted two others was usually quite conveniently overlooked.

Most Army leaders have found that large portions of these lists of rules were just not applicable in any given situation and that this approach gave absolutely no guidance in deciding which trait or principle should be emphasized to get the particular job done. And the disillusionment does not stop there. The existence of so many exceptions who are known to be successful leaders makes an observer very cynical about adherence to the remaining traits and principles.

This whole school of doctrine is now recognized as a poor approach to leadership problem-solving and industrial and academic analysts now classify this entire method as "fuzzy thinking." Speaking against the traditional traits and principles will no doubt appear heretical to some military men of great reputation and this is a reaction we ought not treat lightly. However, the role of trait theory should be as a component of a code of military ethics, as discussed later, and not as an analytical problem-solving technique.

The existing state of the art of leadership and management theory is more realistic but still lacks the mathematics to make it a science. The procedure is to examine the characteristics of the structure of the organization, then study its methods of operation. The next step is to examine and describe the group and individual behavior within the overall organization.

After this analysis of known characteristics, current theory depends on the intuition, perception and background of the analyst to identify the factors which are most crucial to effective or efficient operation and from there to identify specific action to be taken. Sound familiar? It should—for years we've called it the estimate of the situation. The process is now known as organizational development.

The academic community usually labels it organization theory, and the Army defines its application as organizational effectiveness. The field acquired legitimacy in the academic world only about 20 years ago when organizational and other social studies were defined as forms of advanced systems which were more complex than the traditional physical (and mathematical) sciences.

The only fly in the ointment is that there is no form of mathematics yet developed which can handle the enormous number of interrelated factors or variables present in even the most elementary leadership or organizational situation. There are innovations of great promise appearing regularly, however, the latest being the Catastrophe Theory, but there still is no satisfactory form of mathematics.

The current situation is similar to the study of medicine before the discovery of germs, chemistry before the concept of atomic number or astronomy before Newtonian calculus. Without the mathematics, all organizational and leadership studies remain arts, not sciences. Current organization and leadership theories serve only as a checklist of structure and methods and are absolutely incapable of predicting the structure or procedure to use in a given situation—we must depend entirely on the intuition of the analyst.

*'Unit performance is a function of many factors, not just one or two.'*

Today's professional magazines are full of very impressive studies of the effect of only one or two variables or factors on unit performance. The real world, however, is a complex situation and unit performance is a function of many factors, not just one or two.

The application of present leadership theory is like conducting driver training by showing trainees silhouette slides of vehicles and expecting them to be able

*MAJ. RICHARD F. GARVIN, who holds a master's degree in Organization Theory from the Ohio State University, has served in Signal Corps units in Europe and Korea and in Special Forces assignments in the United States and Vietnam. He is now an inspector general at headquarters, First Army.*

example is found in our national economic-policy quandary. Experts and their computers offer conflicting advice, and confusion reigns.

This is the domain of the leader, the man who has convinced us in the past that he can organize and produce in situations of great uncertainty and so inspires in us enough confidence so we can do our job and then some, in spite of the unknown.

However, managerial constraints are always with us. Even in the most turbulent of times the leader is under pressure to conserve resources. It is a natural thing that managers minimize the role of the leader. Bureaucracy has at its very base an assumption that a very stable situation or technology exists. If this is so, bureaucracy is a very effective, acceptable and efficient form of organization. Our society establishes this organizational form as technological advances give us more control, for better or worse, over our environment.

*'The task at hand is to develop men who can both manage in peace and lead in war.'*

The managerial expertise makes the bureaucracy more and more efficient and has a very real function. Is it any wonder, then, that the manager would tend to regard a new, uncertain, turbulent environment as just a transient phenomenon? His natural response would be that all we need is a little more data. The only trouble is that if the turbulence is *not* transient, this reaction is the philosophical equivalent of the witch doctor's retreat to the interior of the jungle.

The role of the leader has never been recognized in peacetime, usually a period of relative social order and certainty. By definition alone, the need for leaders has vanished. The problem is that our society is not farsighted enough to recognize the legitimacy of leadership as a method of response to the inevitable future situations of desperate uncertainty.

Absolutely nothing about this concept is new. The role of uncertainty has been investigated by many social scientists, but not one has proposed a general theory of leadership, tying together all the variables. This academic omission has had the effect of classifying charismatic leadership as a minor theoretical exception, thus denying it the legitimacy and status that the experienced soldier has known about and respected from day number one.

The task at hand is to develop men who can both manage in peace and lead in war. We have ignored the study and the practice of the latter.

■ The third very dangerous factor contributing to the decline of our collective leadership ability is the spread of the idea that ethics are old-fashioned or irrelevant. The principal cause of this public cynicism is the fairly obvious latitude government officials take with the truth in official statements. This had its roots in the recognition of covert operations as a component of flexible-response doctrine.

The American public still does not realize the significance of the difference between clandestine and covert operations which is the fact that the government lies about its involvement when covert operations are exposed. The legitimization of this tactic has opened a Pandora's box for our country.

Governmental agencies were given the unrestricted license to lie about their activities—to one another, to superiors, to Congress and to the public. These agencies are no longer accountable to the people and government has, in some cases, become above the law. This has become the cancer of our profession and many others. This conflict will probably remain unresolved until Congress passes comprehensive legislation on information-handling which would consolidate the now independent programs for classified material, the Privacy Act and the Freedom of Information Act.

"Duty, Honor, Country." Most think this honor refers to a search for medals and personal glory when, in fact, it means adherence to a code of ethics: "I will not dishonor myself, I will not break faith with those to whom I have given my word, I will be true to my code." There are two very fundamental reasons for having a code of ethics.

Most important, ethics are a form of societal control. A code of ethics is a defined, visible form of human conscience which is adaptable to outside scrutiny by the courts and the public. Adherence to a restrictive code of ethics is the *only* justification for the delegation of authority and power in a democracy.

The physician alone has the legal authority to perform surgery, which requires the patient's willing release of control to the professional judgment of the physician. The sole element of control is the Hippocratic oath by which the medical doctor is required to act solely for the patient's welfare.

Similarly, the soldier alone has the authority to wage war. In a theater of war, society relinquishes the operation of its normal systems of law and order to the military force. In peacetime crises of internal unrest, domestic social control is delegated to the military. The analogy is exact. The essence of professionalism is the necessity for the repeated delegation of great quantities of social power to a skilled individual who is sworn to observe certain standards of conduct. Another essential characteristic is that, during the period of the exercise of this authority, the professional is independent; the only

## Just Split the Difference

On a Naval Reserve training cruise back in the early 1950s, our destroyer escort was conducting gunnery practice off Rhode Island.

Being reservists, the gunners were very rusty and consistently missed the target by wide margins. After about an hour, an increasingly frustrated skipper, who was serving a first cruise aboard his first command, ordered a cease-fire and then directed the twin 40-mm Bofors mount to fire 25 rounds.

Since my battle station on the open bridge provided a seagull's-eye view of the entire ship, I could look down on the gun-mount which was starboard midship. Clearly, the captain's order had caused some confusion.

Within a minute, a request came back for the order to be repeated. The "phone operator" repeated the order: "Twenty-five rounds, fire at will."

Again apparent confusion on the mount followed by what appeared to be a lively discussion, with all hands—striker through ensign—participating.

After several moments, the obviously annoyed skipper ordered the "phone operator" to find out what the delay was. In seconds, a very nervous "operator" reported, "Sir, the mount requests a clarification. Do you wish 25 rounds fired by each gun or the mount?"

There was dead silence on the bridge. Then in a very quiet, very controlled voice the skipper ordered, "Tell those people to fire 12½ rounds on each gun."

VINCENT J. COATES JR.

*ARMY will pay, on publication, from $5 to $25 for true first-person anecdotes.*

# SUBCOURSE M-1

## MANAGEMENT CONCEPTS

LESSON

## THE NATURE OF THE LEADER

"Battles can be lost by lack of management but they can only be won by leadership — demanding, hard driving, yet sensitive leadership."

— *General Walter T. Kerwin* [1]

**1. INTRODUCTION.** This lesson turns to the examination of the essence of successful management, the nature of the leader. It is no accident that this lesson, even more so than the first two in this subcourse, focuses upon the leadership of military organizations. The student is asked to begin shifting his thoughts from generalities of all-encompassing management thought to the specifics of the professional military. To assist in this transition, the readings draw heavily from writings concerning the military leader.

**2. SCOPE:** This lesson examines leadership from classic description of the good leader in the pre-World War II Army of the 1930's to the unit commander of today. Although heavily military flavored, it does include readings from the perspective of the civilian sector.

**3. REQUIRED READINGS.**

a. US Command and General Staff School. *Command and Staff Principles.* Fort Leavenworth: 1937. Pp. 7-12.

b. Hays, Samuel H., and Thomas, William N., eds. *Taking Command: The Art and Science of Military Leadership.* Harrisburg: Stackpole, 1967. Chap. 1: "A Usable Concept of Leadership."

c. Marshall, Samuel L.A. *The Officer as a Leader.* Harrisburg: Stackpole, 1966. Chap. 22: "Great Leaders — What Kind of Men?"

d. Collins, Arthur S. "Tactical Command." *Parameters,* Volume 8, September 1978, pp. 78-86.

e. Taylor, Maxwell D. *Military Leadership — What Is It? Can It Be Taught?* Distinguished Lecture Series, National Defense University.

f. Freeman, Douglas. "Leadership." Lecture delivered at the Naval War College, 11 May 1949. *Naval War College Review.* Volume 32, March-April 1979, pp. 3-10.

g. Kerwin, Walter T. Jr. "An Old Soldier Speaks." *Military Review.* Volume 59, March 1979, pp. 40-43.

h. Lejeune, John A. "A Legacy of Esprit and Leadership." *Marine Corps Gazette,* July 1979, pp. 31-37.

i. Leadership Workshop Conference, 1969. *Leadership in the Post-70's.* West Point: US Military Academy, 1970. Pp. 63-78: "Military Leadership in the Post 70's," by Robert R. Blake and Jane S. Mouton.

j. Skinner, Wickham, and Sasser, W. Earl. "Managers with Impact: Versatile and Inconsistent." *Harvard Business Review,* Vol. 55, November-December 1977, pp. 140-148.
(Issued Separately)

k. Zalenznik, Abraham. "Managers and Leaders: Are They Different?" *Harvard Business Review,* Vol. 55, May-June 1977, pp. 67-78.
(Issued Separately)

l. Levinson, Harry. "The Abrasive Personality." *Harvard Business Review,* Vol. 56, May-June 1978, pp. 86-94.
(Issued Separately)

m. Bruno, Jim and Lippin, Paula. "New Trend: Nice Guys Finish First." *Administrative Management.* Volume 40, June 1979, pp. 30-31, 83.

n. Turkelson, Donald R. "The Officer as a Model of Ethical Conduct." *Military Review,* Vol. 58, July 1978, pp. 56-65.

o. Acker, David D. "Contemporary Management — Professional Aspects." *Defense Systems Management Review,* Vol. 1, Spring 1977, pp. 28-33.

p. Rue, Leslie W., and Byars, Lloyd L. *Management: Theory and Application.* Homewood, Ill.: Irwin, 1977. Chap. 3: "The Manager as a Decision Maker."

q. Garvin, Richard F. "Troop Leaders Need Answers, Not Buzzwords." *Army,* Vol. 27, April 1977, pp. 24-31.

r. Sloane, Stephen B. "The Management of Time." *United States Naval Institute Proceedings,* Vol. 103, August 1978, pp. 33-40.

s. Hall, Jay; Harvey, Jerry B.; and Williams, Martha. *Styles of Management Inventory: An Analysis of Individual Behavior in Fulfilling the Functions of Management.* The Woodlands, Tex.: Teleometrics International, 1973.
(Issued Separately)

t. Hersey, Paul, and Blanchard, Kenneth H. *Leader Effectiveness & Adaptability Description.* San Diego: Center for Leadership Studies, 1973.
(Issued Separately)

**4. STUDY GUIDANCE.** In this lesson the student must complete the transition from the impersonal level of identification of good management to the personal level of final development of his philosophy of management. To accomplish this, it is recommended that the student read the required readings in the sequence listed below in a reflective mood, searching for those thoughts that flesh out his developing view of how he would like to describe his own management style at its best. After completing the readings, the student is encouraged to administer to himself the two instruments (described in paragraph 4s) designed to examine personal leadership style. Upon completing this, the

1. Extracted from General Kerwin's comments upon retirement from active duty.

US ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013

PARKS JACKSON & HOWELL, P.C.
ATTORNEYS AT LAW

BERNARD PARKS
LENWOOD A. JACKSON
GEORGE L. HOWELL

SUITE 1150
EQUITABLE BUILDING
100 PEACHTREE STREET
ATLANTA, GEORGIA 30303
404 577-5900

OF COUNSEL
CARLTON H. MORSE, JR.

July 6, 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. Lloyd:

We serve as counsel to several minority business enterprises, and have recently reviewed, with interest, the interim rule amending the Defense Federal Acquisition Regulation Supplement pertaining to set-asides for small disadvantaged business concerns ("SDB's").

One of our clients, we are informed, is presently the only minority-owned, full service, authorized dealer for a manufacturer of diesel engine products in the country. Consequently, we are concerned that it and other sole source minority suppliers have an opportunity to participate in the program. It goes without saying, that such companies can be instrumental in the attainment of a 5% contracting Goal for Minority-Owned Businesses. In addition, as a franchisee, our client is in a position to be price competitive.

We understand from the Proposed Rules (Federal Register, Monday, May 4, 1987) that two additional procedures are being considered by the DAR Council. Both offer promise for sole source, minority suppliers. We would very much appreciate receiving any additional proposed rules which have been or will be issued pertaining to non-competitive, direct awards to SDB's and to preference differentials for SDB's in competitive acquisitions.

On the matter of the proposed scheme generally, we would favor for our clients, a procedure which incorporates more objectivity and less discretion on the part of contracting officers. This would seem particularly desirable in situations where there exists a history of failure to reach established goals.

In addition, because many items and services are purchased on a recurring basis, perhaps a procedure which incorporates set-aside procurement forecasting might enhance the success of the program. Under such an approach, certain anticipated items to be acquired during a fiscal year could be designated as prospective set-aside procurements prior to the commencement of, or early in, the fiscal year, as part of a defined and planned strategy to reach the 5 percent goal.

Your assistance is appreciated, as is consideration by the Council of the concerns raised herein.

Very truly yours,

George L. Howell

GLH/rmh

OptiMetrics, Inc.
2008 Hogback Road, Suite 6
Ann Arbor, Michigan 48105-9748
Telephone: (313) 973-1177

7 July 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

Subject: DAR Case 87-33, Comments on Interim Regulation for SDB Set-Aside

Dear Mr. Lloyd:

The interim regulation published in the Federal Register 4 May 1987 that implements Section 1207 of Public Law 99-661 permits the Contracting Officer to set aside contract dollars for SDB concerns without having the SBA assess the impact of that set-aside on the existing small business contractor. This impact analysis is required under the existing 8(a) set-aside program, and would seem equally warranted in this case, as well. Without such an assessment, the interim regulation may, albeit unintentionally, put non-SDB small businesses out of business.

OptiMetrics, Inc. is a small business wholly owned by its employees. The Company was founded in 1979 to provide scientific research and development services to the federal government. OptiMetrics has grown steadily since it was founded, and now employs 100 persons in nine offices located in six states. The Company openly competes in the marketplace with other similar companies; over 99% of the Company's revenue to date resulted from competitive contract awards.

OptiMetrics was awarded a small sole-source R & D contract for $90,000 in 1979 from the U.S. Army Atmospheric Sciences Laboratory (ASL) at White Sands Missile Range, New Mexico. In 1980, the Company openly competed with other small business concerns and was awarded a three-year $3 Million R & D contract from ASL. In 1983, the Company again openly competed against other

small business concerns and was awarded the five-year follow-on contract from ASL for $10 Million. Since that time, the level-of-effort on this contract has been increased to over $24 Million.

Over 80% of OptiMetrics' revenue is provided by the current ASL contract. Though the ASL contract is scheduled to continue until December 1988, the competitive procurement process for the follow-on contract is well underway within the Government. Consideration is being given by the procurement agency to setting all of the follow-on program aside for a SDB concern using the subject interim DOD regulation as a justification. Setting aside the follow-on for an SDB concern would deny OptiMetrics the opportunity to compete for this work and would most probably put the Company out of business.

The subject interim regulation will severely penalize existing non-SDB small businesses. It is neither fair nor in the best interests of the Federal Government to bankrupt one small business concern in order to aid another. This is neither the intended nor desired effect of Public Law 99-661, yet this is precisely the effect that the interim regulation is having on OptiMetrics, Inc.

To avoid the situation I have described here, I recommend that you immediately modify the interim regulation to include a provision that requires the Contracting Officer to initiate an impact assessment of the set-aside on other non-SDB small businesses when they are incumbent contractors. If severe impact is found, for example, in accord with 13 CFR, Section 124, then the Contracting Officer should be prohibited from setting aside the procurement for an SDB.

Thank you for your prompt attention in this matter.

Very truly yours,
**OPTIMETRICS, INC.**

Robert E Meredith

Robert E. Meredith
President

SMS-8-003/cl

DATAGRAPHIC MANAGEMENT SERVICES, INC. • 2501 Oak Lawn Avenue • Suite 333 • Dallas, Texas 75219 • (214) 520-1066

June 16, 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 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,

Kenneth R. Lowe,
President/ CEO

cc: Congressman John Conyers Jr.
Attorney Parren Mitchell

KRL/dg

# Westco

Automated Systems & Sales, Inc.

1400 Spring Street • Suite #400 • Silver Spring, Maryland 20910 • (301) 495-1500


June 29, 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.

If you should have any questions, please feel free to contact our office.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

George H. Sealey, Jr.

George H. Sealey, Jr.
Senior Vice President

GHS/jdb

cc: Rep. John H. Conyers
2313 Rayburn H.O.B.
Washington, D.C. 20515

# COMPUTER SOFTWARE ANALYSTS, INC.

5217 Wadsworth Road, Dayton, Ohio 45414

INGLEWOOD OFFICE
(213) 673-8850

SAN DIEGO OFFICE
(619) 275-5070

WASHINGTON D.C. OFFICE
(703) 527-8983

DAYTON OFFICE
(513) 278-5749

FREDERICKSBURG OFFICE
(703) 752-5494

CAMARILLO OFFICE
(805) 987-3845

MOFFET FIELD OFFICE
(415) 964-5742


June 30, 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,

Frederick D. White

FREDERICK D. WHITE
Director of Business Development

cc: L. Carey
L. King
M. Marcellino

# Strawberry Mansion Citizen Participation Council

2920 W. Diamond Street
Philadelphia, Pennsylvania 19121
(215) 236-8444

June 29, 1987



Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary, ODASD (P) DARS
Room 3C841
The Pentagon
Washington, DC 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 businesses in all contracts where price is a primary decision factor.

However, I am concerned that several important questions have been overlooked in the published intermin regulations. First, there are no provisions for subcontracting. Second, there is no mention of participation by Historically Black Colleges and Universities, and other monority insitutions. 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.

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,

Vernon Marks

Vernon Marks, President

VM:rf

*"THRU UNITY, BRICK & MORTAR, PROGRESS WILL BE ACHIEVED"*

J. BENNETT JOHNSTON
LOUISIANA

87-33

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OFFICE OF
THE SECRETARY OF DEFENSE

# United States Senate

WASHINGTON, DC 20510

July 1, 1987

Respectfully referred to:

Hon. Margo D.B. Carlisle
Assistant Secretary of Defense
for Legislative Affairs
RM: 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 the return of the enclosure, will be appreciated by August 1, 1987.

J. Bennett Johnston
United States Senator

11841

J. BENNETT JOHNSTON
LOUISIANA

# United States Senate

WASHINGTON, DC 20510

July 1, 1987

Mr. Robert B. Hamm
President
BERG, Inc.
Post Office Box 8689
Shreveport, Louisiana 71148-8689

Dear Mr. Hamm:

Thank you very much for letting me hear from you concerning bids from small disadvantaged businesses.

I will certainly be pleased to look into this matter for you, and have taken the liberty of contacting the appropriate officials here in Washington to request a report. I will be back in touch with you just as soon as I have any additional information.

I appreciate your bringing this to my attention, and send every good wish.

Sincerely,

J. Bennett Johnston
United State Senator

JBJ/grb

BERG
INCORPORATED 531 WEST 61st STREET POST OFFICE BOX 8689 SHREVEPORT, LOUISIANA 71148-8689 (318) 868-888
FAX (318) 868-740

June 16, 1987

Senator J. Bennett Johnston
United States Senate
421 RSOB
Washington, D.C. 20510

Reference: Department of Defense Procurements

Dear Senator Johnston:

It is my understanding from an article in a trade publication that the Department of Defense will accept bids only from small disadvantaged businesses until the end of 1989.

I further understand that this policy is based on a Department of Defense interim rule published in the May 4th Federal Register.

As a construction contractor which has historically done a great deal of work for DOD projects, we object in the strongest terms to being effectively locked out of DOD work. It is apparent that taking only bids from small and disadvantaged business enterprises will limit competition so severely as so have an extremely adverse affect on the pricing that DOD receives on its projects. Furthermore, there are by no means enough legitimate small and disadvantaged enterprises to service to vast DOD market; this rule will result innumerable sham corporations being set-up to take advantage of DOD's contracting program.

I hope that you will do everything in your power to see that this rule is not implemented, and I would appreciate hearing from your regarding your views on this issue.

Yours very truly,

BERG, INC.

Robert B. Hamm
President

RBH/tm

87.33

Mrs. Catherine Justice
Owner, Larry's Alignment
Service
6103-05 Hazel Avenue
Philadelphia, PA. 19143

June 19, 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. 2031-3062

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, disadvantaged businesses 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.

Sincerely,
Catherine Justice

Catherine Justice
Owner, Larry's Alignment Service

# 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 SADBU 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 <u>disadvantaged businesses</u> 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 SADBU 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 unsurpation 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.

POSITION PAPER

COMMENTS ON INTERIM RULE IMPLEMENTING PUBLIC LAW 99-661

DATE: July 14, 1987

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## EXECUTIVE SUMMARY

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7) Implementation of P.L. 99-661 should include the award of portions of contracts to SDBs to increase SDB participation in Defense contracts.

Gregory E. Lawrence
1872 Ithaca St.
Chula Vista, CA.
92013

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 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 Contraction.

Sincerely,

cc: Honorable Casper Weinberger
Secretary
Department of Defense
The Pentagon, Room 3E880
Washington, D.C. 20301

Honorable James Abdnor
Administrator
Small Buisiness 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 Duncan Hunter
366 So. Pierce Street
El Cajon, Ca. 92020

Senator Alan Cranston
744 G Street, Suite 106
San Diego, Ca. 92101

Senator Pete Wilson
401 B Street, Suite 2209
San Diego, Ca. 92101

Congressman Jim Bates
3450 College Avenue, #231
San Diego, Ca. 92115

(3)

POSITION PAPER

COMMENTS ON INTERIM RULE IMPLEMENTING PUBLIC LAW 99-661

DATE: July 14, 1987

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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.

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 SADBU 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

location, more information on SDB companies and capabilities than any of the sources listed in the policy. It is specifically recommended that the SADBU 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 unsurpation 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.

87-33

**OPERATIONAL TECHNOLOGIES CORPORATION**
5825 CALLAGHAN, SUITE 225 ■ SAN ANTONIO, TEXAS 78228 ■ (512) 684-0000

July 23, 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

Dear Mr. Lloyd:

PURSUANT TO PROVISIONS of the 1987 National Defense Authorization Act (P.L. 99-661), I hereby would like to offer comments in your ability to formulate a final rule (DAR Case 87-33). The following items expresses my concerns as an 8(a) contractor.

- o SUBCONTRACTING OF MINORITY FIRMS
  The plan in implementing the five percent goal does not describe a detailed and/or support plan for reinforcing minority subcontracting opportunities. Presently, there is no active mechanism that regulates and ensures that subcontractors are given economic means to develop contracting capabilities in defense work. The DoD five percent goal should be further imposed on the major defense contractors. I would propose that Commerce Business Daily announcements should clearly indicate that large defense programs will require subcontracts with minority firms as part of contract requirements. Major defense contractors should prove in advance, their affirmation action plans in supplementing the requirements of specific contract tasks which would allow minority subcontracting abilities before contract award is finalized. Major defense contractors must be forced into implementing opportunities with minority contractors before contract award periods, rather than after when equal opportunities for minorities begins to be a lessor factor once a concurrence of award is made.

- o PUBLICIZING CONTRACT ACTIONS (Part 205.202)
  The rule which provides Commerce Business Daily notices to bidders concerning SDB set-aside reservations, as well as sources sought, should precede in the following context.

  The contracting officer should include a notice in the CBD synopsis indicating that the acquisition may be set-aside for exclusive 8(a) participation if sufficient 8(a) sources are identified prior to an issuance of SDB participation. This would allow 8(a) contractors to submit capability statements and make known to the contracting officers that a determination can be made based on 8(a) responses. This notice would allow 8(a) firms to make their interest and capabilities known prior to SDB participation announcements. The intent is to ensure that current minority firms be provided the first opportunity if they are presently certified 8(a) firms listed with the SBA. It also allows 8(a) firms in

not having to compete with more experienced and capable SDB firms who would normally have higher technological talents consistent with the demands of the acquisitions. Newly established 8(a) firms need additional opportunities in soliciting contract activities before competing with more established SDB firms. The announcements on the Commerce Business Daily should include evaluation preference for 8(a) firms and then for SDB concerns if adequate interests are not received from 8(a) firms.

o EVALUATION PREFERENCES
Contracting officer(s) should provide evaluation preferences for capable 8(a) firms over the SDB concerns. Presently, 8(a) firms are not being provided evaluation preferences in many instances and thus the SBA 8(a) program does not effectively function as intended by congress.

If additional information is needed, please do not hesitate to correspond and/or call at (512) 684-0000.

Sincerely,

Max Navarro
President

MN/mtm

Ever Ready First Aid
and Medical Supply Corp.
DUNS# 06-120-63-63
5 EAST 17th STREET • NEW YORK, N.Y. 10003
(212) 989-5004

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 responsiblity 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

(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 Pulic 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,

Eva Silverstein

# Wm. CARGILE CONTRACTOR, INC.

GENERAL CONTRACTOR • CONSTRUCTION MANAGER

July 13, 1987

Mr. Charles W. Lloyd
Defense Acquisition Regulatory Council
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:

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, partial set asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

Having analyzed the legislation, it is my opinion that the legislation poses an emminent and serious threat to the existing 8(a) program. I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

WM. CARGILE CONTRACTOR, INC.

William Cargile, III
President

WC/jh

P.O. Box 14428 • 2008 Freeman Avenue • Cincinnati, Ohio 45214 • (513) 381-2442

**Hardy Construction Company, Inc.**
GENERAL CONTRACTORS

July 22, 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, DC 20301-3062

Dear Mr. Lloyd,

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



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.

Thurston S. Fox,
Office Manager

TSF:cww

cc-AGC


# BANKS & BANKS LANDSCAPING, INC.

2541 HIGH RIDGE · ST. LOUIS, MISSOURI 63136 · (314) 388-3863


July 21, 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 of 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,

Carrie E. Banks

Carrie E. Banks, V. Pres.

CB/cw

**EL PASO COUNTY CONTRACTORS ASSOCIATION, INC.**
A COLORADO NON-PROFIT CORPORATION
P.O. BOX 7853
COLORADO SPRINGS, COLORADO 80933

July 1 1987

Defense Acquisition Regulatory Council
ATTN: Charles W. Lloyd, Exec. Secretary, ODASD(P) DARS
c/o OASD (P&L) (M&RS) Room 3c841 The Pentagon
Washington, D.C. 20301-3062

Re: Contract Goal for Minorities

Dear Mr. Lloyd:

It has come to our attention, that your office has recently written 11th hour implementation rules as a result of the Deputy Secretary of Defense reading a policy statement on March 18th. This "Interim Rule" amends the Defense Acquisition Regulation Supplement of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661) - "Contract Goal for Minorities".s

We can certainly understand and respect the initial intent of this legislation to allow up to 5% of government contracting to be made available to small disadvantaged businesses. But as we now understand, the 5% rule has been improperly amended to effect as much as 100% of Federal contracting!

With implementation of such directives, we have some difficulty understanding who the "disadvantaged" truly are. It is becoming very evident that those firms NOT complying with minority, SBA, women-owned, etc. are BECOMING the disadvantaged through unilateral directives such as this.

Our Association represents 125 affiliated commercial contracting firms and suppliers in the Pike's Peak region who feel that the appropriate public comment and impact statement periods be observed prior to such an implementation. Further, that only when all parties interested in bidding government contracts may respond in a competitive bidding market, will everyone's interest be served and not just a legislated select few.

Thank you for your attention to this issue and an immediate withdrawl of this directive.

Sincerely,
El Paso County Contractors Association, Inc.

Steven L. King
Secretary/Treasurer

cc: Rep. Joel Hefley Sen. Bill Armstrong Sen. Tim Wirth

(301) 266-5466
(301) 841-6507
(301) 261-8322

# DUNTON CONTRACTING, INC.

1825 GENERALS HIGHWAY
ANNAPOLIS, MARYLAND 21401

July 17, 1987

Defense Acquisition Regulatory Council
Attention: 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 Sir:

As President of a general contracting firm that has been in business for thirty years, and is considered a small business, I find the Defense Department interim rule allowing **only** small disadvantaged businessess to compete for Defense Contracts through fiscal 1989, to be discriminating and unfair.

If such a rule is enforced, we would be forced out of business since the majority of our contracts are with the Defense Department. If this would happen, would we then qualify as a small disadvantaged business?

Respectfully,

Carroll R. Dunton
President

COLORADO CONTRACTORS ASSOCIATION, INC.
1451 SOUTH ASH STREET, P. O. BOX 22106, DENVER, COLORADO 80222
303-756-9451

July 20, 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:

Colorado Contractors Association opposes interim regulations of Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

As we understand the interim regulations the Department of Defense must receive a solicitation for set aside if history shows that within the past 12 month period a disadvantaged firm was within 10% of an award price on previous procurement.

We believe the goal established by the Congress of awarding 5 per cent of military construction contracts to small, disadvantaged business is, in itself, sufficient. We fear that what will occur, using the proposed interim regulation, will result in 80% of these contracts being set aside as occurred under Small Business Administration in 1984. In 1985, disadvantaged businesses were awarded 9% of Department of Defense contracts. Clearly the 5 per cent rule alone is sufficient to provide the participation desired.

In Colorado the state, the largest city, the State Highway Department and the numerous federal agencies located here all have various percentage goals and objectives which turn into quotas. There is a real problem during the construction season when most qualified MBE's are busy, in locating sufficient numbers of these firms so that all can fill their quotas.

continued

The construction industry in Colorado is on a decline. Forcing a dramatic increase in the participation of small, emerging contractors as your interim rule suggests may well spell his defeat. The carrot becomes too large. The small contractor grows faster than his experience and financial ability allows. This is why, in Colorado, there is a large turnover of minority firms. One minority contractor, himself a CPA and financial expert, advised me that his firm was "busy every minute". Yet his sophisticated accounting systems told him he was "losing his shirt". This is a fact of life familiar to all contractors, but demonstrates the wisdom of slow, ordered growth.

An additional point is that our Association would like to see government open procurement to all qualified contractors when there are fewer than three disadvantaged firms with acceptable bids. This would eliminate the problems cited above and provide sufficient competition to satisfy the taxpayers.

I hope this commentary is helpful to you and that you will not make the Rule of Two a permanent rule.

Sincerely,

L. Kay Waldron

L. Kay Waldron, President
Colorado Contractors Association, Inc.

LKW:jem

**Quali-Care International Inc.**
**Medical and Pharmaceutical Supplies and Equipment**

July 17, 1987

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

Reference: DAR (ASE 87-33)

Dear Mr. Lloyd:

Quali-Care International, Inc. is a female, minority-owned wholesale dealership of medical, surgical and pharmaceutical supplies and equipment. The purpose of this letter is to commend the Department of Defense for aggressively pursuing action to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661 and to submit comments concerning the interim rule amending the Defense Federal Acquisition Regulations Supplement (DFARS). The proposed regulations, as published in the Federal Register (Volume 52, No. 85) on May 4, 1987, are most certain to contribute immensely in enabling qualified small disadvantaged business concerns to become competitive and viable in areas of government contracting previously unavailable to them. We applaud your overall action and offer the following comments:

(1) As a small disadvantaged dealer (regular), I am particularly concerned about the provision under Section 52-219-7006(b)(2)(c), entitled Agreement, which states:

> "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..."

Over a five-year span of Quali-Care's research of the medical, surgical and pharmaceutical wholesale trade industries, we have found that few, if any, small disadvantaged manufacturers of the products we represent exist, making it virtually impossible to furnish only

2801 Eighth Street, N.E. • Washington, D.C. 20017 • 202/529-2250

end items manufactured by small disadvantaged business concerns. (See attached FOIA request to Defense Personnel Support Center[DPSC], dated June 8, 1987 and DPSC response to QCI, dated July 9, 1987). We recommend, therefore, that this provision be amended 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 and/or small business concerns in the United States..."

Such amendment would provide small disadvantaged wholesale and retail dealers two sources from which to obtain end items and thus insure their participation in the program.

(2) Rule of Two. The rule of 2 should also address the rule of DOD's Small and Disadvantaged Specialists. To assure balance in this important process, the contracting officer should not have sole authority.

(3) Protests. Frivolous protests should be disallowed; protests should be limited to only affected firms with economic interest in the Bid Process. If frivolity is determined to be a factor, penalties should be invoked and time frames should be established with each step of the protest process to avoid "delay" tactics.

We look forward to your favorable consideration of our recommendations and would welcome the opportunity to assist in expediting implementation of this very important DOD contract goal for minorities.

Sincerely,

Rochelle M. Fashaw

Rochelle M. Fashaw
President

Attachments

DEFENSE LOGISTICS AGENCY
DEFENSE PERSONNEL SUPPORT CENTER
2800 SOUTH 20TH STREET
PO BOX 8419
PHILADELPHIA, PENNSYLVANIA 19101-8419

JUL 9 1987

IN REPLY REFER TO DPSC-WXA

Reference Number(s) 87-R-333

Dear Sir/Madam:

This is in response to your request, letter enclosed, for information under the Freedom of Information Act (FOIA).

Please be advised that the Act provides for collection from requestors for the cost of record search and reproduction. Please remit a check in the amount of $32.00.

The check should be forwarded to my attention at DPSC-WXA, by made payable to thee Treasurer of the United States, no later than 23 July 1987.

We appreciate your understanding in this matter. If additional information is needed, direct correspondence to Ms. Rene' L. Strickland, Administrative Management Branch, DPSC-WXA, using the above reference number(s).

Sincerely,

Rene' L. Strickland

RENE' L. STRICKLAND
Management Assistant
Office of Installation Services

Encl

DEFENSE LOGISTICS AGENCY

# Inter-Office Memorandum

JUL 06 1987

REPLY REFER TO DPSC-RPSS-PJA (J. PARSHALL/fmc/x2833)

SUBJECT: FOIA 87-R-333

TO: DPSC-WXA

Below is the information requested in subject FOIA.

| NSN | Small Mfgrs. | Small Disadvantaged Mfgrs. |
|---|---|---|
| 6515-00-242-9695<br>Catheter & Needle Unit | None | None |
| 6515-01--042-2468<br>Thermometer | None | None |
| 6545-01-120-2632<br>Survival Kit | Yes<br>Fraass Survival Systems<br>3830 Boston Rd.<br>Bronx NY 10475-1116 | None |
| 6515-01-146-4257<br>Electrodes | None | None |
| 6510-01-053-6259<br>Stockinet | Etex Company<br>720 Old Willets Path<br>Hauppauge NY 11788 | None |
| 6515-01-139-9051<br>Needle | None | None |
| 6515-01-164-2895<br>Mask | None | None |
| 6530-01-153-5365<br>Irrigation Kit | None | None |
| 6510-00-200-5000<br>Bandage, Gauze | American White Cross<br>New Rochelle, NY | None |

Jonathan Parshall

JONATHAN PARSHALL
Contracting Officer

**Quali-Care International Inc.**
Medical and Pharmaceutical Supplies and Equipment

June 8, 1987

Mr. Ellwood Johnson, DPSE-WX
Freedom of Information Officer
Denfense Personnel Support Center
2800 South 20th Street
Philadelphia, Pennsylvania 19101-8419

Dear Mr. Johnson:

Quali-Care International, Inc. is a minority, female owned wholesale dealership of medical, surgical, and pharmaceutical supplies and equipment. The QCI offices and warehouse facilities are located at 2801 Eighth Street, N.E. Washington, D.C. 20017. QCI is interested in conducting business with the Department of Defense and has a pending application for 8-A certification with the Small Business Administration.

The purpose of this letter is to request your assistance in researching the availability of small businesses (manufacturers) and/or small disadvantaged businesses (manufacturers) that provides medical, surgical supplies and equipment of the following National Stock Number (NSN) items.

| National Stock Number | Item |
|---|---|
| 6515-00-243-9695 | Catheter & Needle Unit |
| 6515-01-042-2468 | Clincical Human Thermometer |
| 6545-01-120-2632 | Survival Kit |
| 6530-01-146-4262 | Surgical Pack |
| 6530-01-042-2485 | Urinal, Male Patient |
| 6515-01-146-4257 | Electrodes, Spiral, Fetal |
| 6510-01-053-6259 | Stockinet |
| 6515-01-139-9051 | Hypodermic Needle |
| 6515-01-164-2895 | Disposable Mask |
| 6530-01-153-6365 | Irrigation Kit |
| 6510-00-200-5000 | Bandage, Gauze |

Your immediate consideration of the above request would be appreciated.

Sincerely yours,

Rochelle M. Fashaw
President

RF/sfh

Medical
87-F-333

2801 Eighth Street, N.E. • Washington, D.C. 20017 • 202/529-2250

This is representative letter from many employees of this Company

ANADAC INC.
ANALYSIS ADVICE ACTION

3 August 1987

The Honorable Robert B. Costello
Assistant Secretary of Defense
(Production & Logistics)
Washington, D. C. 20301-8000

Dear Secretary Costello:

The Federal Register, Volume 52, Number 85, May 4, 1987, 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". ANADAC has responded to that requirement and our letter to the DAR Council is enclosed for your information. Regarding this issue, I want to raise the policy question of fair and equitable treatment of minority businesses within DOD.

Section 1207 establishes a goal for DoD to award five percent of its contract dollars to small disadvantaged businesses. From discussion with your staff, it is our belief that Congress intended to put DoD on notice that its implementation of previous small disadvantaged business (SDB) legislation was unsatisfactory, in particular as pertains to PL 95-507, requiring large business to implement meaningful small and disadvantaged subcontracting plans. From discussions at lower DOD levels, we sense there is a general feeling among professionals that -- given the industrial structure that exists today -- it is not possible to meet a five-percent small disadvantaged business (SDB) goal in the research development, and acquisition of weapon systems. From our observations, it appears that the Section 1207 interim rule is encountering strong opposition and is in trouble. In fact, from the perspective of both big and small business concerns, it would appear that you are facing a major dilemma in moving ahead.

We propose that PL 95-507 be revisited to determine if it can be effectively and equitably implemented. There are some positive steps that can be considered. If SDB goals are to be successful at any level, the procurement workforce must be provided a systematic way to plan and execute the mission, attainment of objectives must be simplified, and incentives designed to motivate industry. The first thing I think that needs to be done is to tie the SDB objectives (and probably other small business programs) to the PPBS and acquisition decision-making process. Fiscal guidance under PPBS attracts the full attention of the Military Departments and must be considered in departmental planning. This could put your objectives squarely into the fiber of the DOD infrastructure. For major procurements, pass responsibility down to the Services Acquisition Executives and include goal attainment as part of the DSARC/Service reviews. Given the success of the

Crystal Square 3 Suite 300 1735 Jefferson Davis Hwy. Arlington, Virginia 22202-4177 (703) 892-9500

Competition Advocate General (CAG) program and its 6,000 advocates, consider that such CAG procedures (i.e., acquisition plan, J&A, next level review, etc.) could be extended effectively to cover contracting for overall minority goals. Competition is now easier than sole source contracting. In terms of incentives, award fee contracting methods or other fee-enhancing techniques could be applied wherein fees earned or payments are tied to how well the contractor/subcontractors plan and execute a pre-determined minority contractor program. This has always worked well when DOD institutes a major planned management change involving large contractors.

An effective 95-507 implementation program needs to be tailored to reflect the unique characteristics and circumstances of each sector. In the support service industry, the answer is clearly one of add-on. Keep FAR 19.501(g) as pertains to small business set-asides and ensure that similar guidelines continue for the 8A program. These two aspects are generally in balance and work. Expedite qualification of additional 8A service firms but ensure that those company officials who will address the intricacies of weapon systems support are themselves qualified. These are necessary criteria to reduce the number of 8A failures. Self-certification without checks and balances is questionable; it threatens the viability of 8A firms that work hard to qualify and obtain certification. Additionally, larger service contracts must be reviewed for applicability to this program. Many more of the large, omnibus service contracts are currently susceptible to breakout for all categories of small business set-asides. While there is resistance to such breakouts at the project office level, small business representatives are for the most part, sufficiently qualified to identify logical breakouts or they can be trained to do so.

In the long run, I believe the solution rests in structural changes that will develop, qualify, train, and employ high technology, medium-sized disadvantaged businesses for the 1990s and beyond. The long-term development of capable, minority-owned defense contractors is a worthwhile social program for the nation. The Office of the Secretary of Defense should seize the initiative to develop a wide range of innovative approaches to integrate disadvantaged businesses into the mainstream of DoD procurement. A major initiative in this area may require specific, carefully planned segments of an overall plan; for example: tax breaks to cover initial start-up costs; educational grants to fuel disadvantaged businesses with skilled manpower; establishing priorities to furnish government tools and equipment; or assisting dedicated minority contractors in meeting mobilization needs (e.g., making snaps and fasteners); and modified forms of Employee Stock Ownership Plans (ESOP) to help attract and motivate skilled employees. Given that many DOD needs are now being met by foreign producers, contracting to reduce this dependency is attractive. If this line of reasoning makes sense, then DoD attainment of disadvantaged business goals is more truly a policy issue than a regulatory issue as it is now being addressed by FAR.

If, in fact, you agree that implementing the small disadvantaged business goal is policy-related rather than regulatory, and that structural limitations make it extremely difficult or impossible in the short run to

rectify the situation, it seems to make little sense merely to legislate through FAR and the interim rule. Other than causing disruption, such responses will accomplish little more than the DoD actions under PL 95-507 -- which have failed as a remedy. Given the DoD history of awards to small disadvantaged businesses in the 1980s, it is clear that the brunt of the interim rule will fall in the support services industry and, more particularly, on the small business set-aside program and these small businesses that depend on these awards for survival and growth. The set-aside program is to Government-oriented small business what the 8A program is to small disadvantaged businesses. If DOD persists in implementing the interim rule as is, it will inflict grievous harm to many existing small businesses, which I suspect you recognize as not being the Congressional intent. What your staff will accomplish is the adversarial pitting of minority small businesses against non-minority small businesses in a very unproductive and distasteful competition from which resentment and an element of revenge will emerge. Furthermore, you almost surely invite Congressional hearings and further legistation that will reduce your flexibility, limit the use of project office and procurement official judgment, and increase micromanagement.

As a former Acting Assistant Secretary of Defense (Installation & Logistics) and former Assistant Secretary of the Navy (Installations & Logistics), and now as the Chief Executive Officer of a company doing extensive business with DOD, I encourage you to (a) have your staff work informally with knowledgeable Congressmen and staffers; (b) explain to Congress the constraints and restrictions which DOD operates under in weapons systems acquisition; and (c) develop and present a well thought-out, structured method to "build" small and medium-size disadvantaged businesses into the industrial mainstream now and in the future.

Respectfully yours,

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

Enclosure:
a/s

Copies to:
The Honorable N. B. Leftwich,
Dir S&DB Utilization
Mr. Duncan A. Holaday,
Dir, DAR Systems

This is representative letter from many employees of this company

AUTOMATED DATA MANAGEMENT, INC.
1920 Bladensburg Road, N.E., Washington, D.C. 20002, (202) 526 - 0440

August 3, 1987

Mr. Charles Lloyd
Sec, ODASD (P) DARS
c/o OASD (P&L) (M&RS)
RM 3C841
Pentagon
Washington, DC 20301-3082

Dear Mr. Lloyd;

As an employee 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 8(a) 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 accomblished 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 increases 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 th aparticipation 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 forminority-owned corporations, and allow the Defense department to realize its 5% goal.

Sincerely,

David Gurley

David Gurley
ADM, Inc.

This is 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 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,

Robert A. Sulit

Robert A. Sulit
13203 Portofino Drive
Del Mar, CA. 92014

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

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

Plus and 49 more received 8/5 - same as prior "Coalition" letter.

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,

Norman C. Knupp

Norman C. Knupp
2046 Whinchat Street
San Diego, CA 92123

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

Honorable Alan Cranston
880 Front Street, Suite 5S31
San Diego, CA 92188

Honorable Pete Wilson
401 "B" Street, Suite 2209
San Diego, CA 92101

Honorable Jim Bates
3450 College Avenue, Suite 231
San Diego, CA 92115

Honorable Duncan Hunter
366 So. Pierce Street
El Cajon, CA 92020

# 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 SADBU 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 <u>for direct 8(a) contracts</u>, 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 <u>disadvantaged businesses</u> 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 SADBU 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 unsurpation 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.

**EVALUATION TECHNOLOGIES INCORPORATED**

2020 N. 14th Street, Sixth floor • Arlington, Virginia 22201 • (703) 525-5818

Post Office Box 708 • Arlington, Virginia 22216

July 24, 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,

Gayle Van Horn
Director of Personnel

encl.

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 disavantaged 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,

Aurea D. Saddler

AUREA D. SADDLER
5011 12th Street, N.E.
Washington, D.C. 20017

cc: Honorable Walter Fauntroy
U.S. House of Representatives
Washington, D.C. 20515

Honorable Caspar Weinberger
Secretary
U.S. Department of Defense
The Pentagon 3E880
Washington, D.C. 20301

Honorable James Abdnor
Administrator
Small Business Adminstration
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

July 26, 1987

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

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,

James Brown

James Brown
726 Cordova Street
San Diego, Ca. 92107

TIPCO

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:

I am a disadvantaged person and an executive of a disadvantaged business. I am very concerned with the Interim Rule implementing Public Law 99-661.

I wish to inform you and all concerned that I strongly support the attached recommended changes of the Coalition to Improve DoD Minority Contracting.

Sincerely,
TIPCO, INC.

Paul F. Williams

PAUL F. WILLIAMS
President

cc: Honorable Walter Fauntroy
U.S. House of Representatives
Room 2135 Rayburn House Office Building
Washington, D.C. 20515-5101

Honorable Caspar Weinberger
Secretary
U.S. Department of Defense
The Pentagon 3E880
Washington, D.C. 20301

Honorable James Abdnor
Administrator
Small Business Adminstration
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

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TELEX 4971 640

# United States Senate

WASHINGTON, D.C. 20510

June 18, 1987

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
The Pentagon
Room 3C641
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

We have received the enclosed letter from Mr. Calvin G. Tyler, President of Tylane, Inc., regarding Public Law 99-661. We would appreciate your review and written response to this letter.

Should you have questions or concerns regarding this correspondence, please feel free to contact us at Room 447, 46 East Ohio Street, Indianapolis, Indiana 46204, attention Mr. Lane Ralph, (317)269-5555 or FTS 331-5555. Your assistance is appreciated.

Sincerely,

Richard G. Lugar
United States Senator
224-4814

Sincerely,

Dan Quayle
United States Senator
224-5623

Enclosure

Tylane Products Company
Division of Tylane, Inc.
8241 Indy Lane
Indianapolis, Indiana 46224
(317) 271-6001

1988 MAY 32 AM 11:36

JUN 15 1987

DEFENSE ACQUISITION REGULATORY COUNCIL
ATTN: Mr. Charles W. Lloyd, Executive Secretary
ODASD (P) DARS, C/O OASD (P&L) (M&RS)
ROOM 3C641
THE PENTAGON, WASHINGTON, DC 20301-3062

May 26, 1987

Dear Mr. Lloyd;

This letter is written to provide comment regarding Public Law 99-661, Set-Asides for Small Disadvantaged business Concerns; Department of Defense Interim Rule and request for comment, as requested in Federal Register/vol 52., No 85/ May 4, 1987.

As regards The Defense Acquisition Regulatory (DAR) Council's action to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 entitled "Contract Goal for Minorities" the 5 % set-aside proposed and implemented on a temporary basis should be increased to a percentage that is in line with the minority racial make-up of this society, or as an alternative, a minimum 12-15 % goal should be established. This 12-15 % goal is suggested in view of the Supreme Court's recent decision upholding Civil Rights and Affirmative Action Laws for all persons of minority groups such as Blacks, Hispanics, Arabs, Italians, Polish, and others who clearly decended from groups considered minorities upon their arrival in this country.

Public Law 99-661 is designed to use government purchasing power as a lever to strengthen minority and small business entreprenurship and capital formation. In addition to the suggested increase in the quota percentage suggested above, procedures should be incorporated into Public Law 99-661 that would prevent Contracting Officers and other government officials from nullifying the intent and results of this law or failure to enforce the spirit or letter of the law.

The suggested procedures would be:

a. Clear indication in Commerce Business Daily that subject solicitation is subject to this 12 or 15% Small Disadvantaged Business Concern Set-aside with sales between 0 and 5 million dollars for this class.

b. Make set-aside applicable to each category of DOD Procurement such as-Research & Development, Test & Evaluation, Construction Contracts, Janitorial Contracts, Maintenance & Operations Contracts, and all Sub-contracts to be awarded in each category, rather than an aggregate percentage as stipulated in the interim rule.

c. SDB set-asides can not substitute for procurements designated as 8(a) set-asides since these sub-contracts with the SBA are somewhat different from the long-standing criteria normally used to determine set-asides for small business as a class. Competition under Public Law 99-661 will not be diminished as long as offerings are publicized adequately within the small business sector and should work well to facilitate the attainment of DOD and Congressional Goals.

Continuation-Public Law 99-661 Comments:

d. Failure on the part of DOD Contracting Officers to set aside the applicable percentage of procurements as set forth under Public Law 99-661 should result in some sort of action against the Contracting Officer for failure to comply with the law in spirit or letter, whichever is applicable. Action taken could be as mild as a written reprimand entered into his/her personnel file or as severe as re-assignment or dismissal in instances where clear and convincing evidence of failure to meet DOD and Congressional Goals, without legitimate reasons, is found.

e. Establish a simplified complaint procedure or mechanism for the Small Business person to file greivances. Remedies are already available to the Contracting Officer in cases of complaints and/or non-performance.

f. Require Contracting Officers to consult with U.S. Small Business Administration Local Offices regarding availability of Small Business concerns qualified for the applicable procurement. Local SBA Offices are generally aware of numerous small businesses offering a great variety of products and services.

g. In solicitations and IFB's, require that small business concern be screened by the local Small Business Administration Office for certification as a small disadvantaged business concern. This procedure would serve to eliminate majority-owned fronts as well as provide one-point certification for SDBs for all procuring agencies under SBA's PASS Program. Make false/misleading certifications punishable by stiff fines and /or jail terms for individuals commiting such violations.

Sincerely yours,

CALVIN G. TYLER, President
TYLANE, INC.

Copies to:

Chief Counsel for Advocacy
U.S. Small Business Administration
Washington, D.C. 20301

U.S. Small Business Admin.
Attn: Mr. Huerta Tribble
575 N Pennsylvania St.
Indianapolis, IN 46204

The Honorable Senator Dan Quayle
Senate Executive Office Building
Washington, D.C. 20301

Congressional Black Caucas
C/O Rep. John Conyers
U. S. House of Representatives
Washington, D.C. 20301

The Honorable Senator Richard Lugar
Senate Executive Office Building
Washington, D.C. 20301

1987 JUL 15 AM 9:26

OFFICE OF
THE SECRETARY OF DEFENSE

ANIEL P. MOYNIHAN
NEW YORK

UNITED STATES SENATE

Date: July 9, 1987

Respectfully referred to:

Department of Defense

for such consideration as the enclosed may warrant. Please send me your written response in duplicate along with the letter from my constituent.

Sincerely,

D. P. Moynihan

United States Senate

Mark to the attention of: L.B.

AQ012552 87

# CENTRAL NEW YORK MINORITY CONTRACTORS & VENDORS ASSOCIATION, INC.

P.O. BOX 67 SYRACUSE, NEW YORK 13205
(315) 472-0499


B

June 10, 1987

Defense Acquisition Regulatory Council
DAR Council
Room 3C841
The Pentagon
Washington, D.C. 20301-3062

Attention: Charles W. Lloyd
Executive Secretary

Dear Mr. Lloyd:

I wish to commend the Department of Defense for its implementation of section 207 of Public Law 99-666 set aside for small disadvantaged business concerns. Though, our organization supports a substantial part, we question section [illegible]501 b where it states a decision for small disadvantaged business set aside is by one officer. It is our belief that by giving the sole decision to one officer it can be detrimental to the effect and intent of congress as well as the Department of Defense. It is our belief that this requirement should be shared with the officer in charge of the facility, the small disadvantaged specialist, contracting officer and Ombudsman, representing the small disadvantaged community. We also take issue with section 252.219/7006 notice of total small and disadvantaged business set asides section c agreement where it states 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 Island, or the District of Columbia. Although, the intent is honorable because of the small number of manufacturing concerns in the continental United States it would defeat the purpose of section Public Law 99-666. This paragraph seems to discriminate and sets up barriers for participation by small disadvantaged firms in classifications such as, small distributors, wholesalers and firms that do not produce their products. I assume that this provision would nulify the intent of congress and the Department of Defense in its efforts to increase the participation of small and disadvantaged firms.

Therefore, in behalf of over fifty members in the association that I represent we strongly object to the above language in regards to the manufacturing clause and would also appreciate your reviewing the contracting officer designation and taking into consideration our recommendations in addressing these issues. It is our belief that you will eliminate any perceived discriminatory policies as well as strengthen the language of Public Law 99-666 set asides for small disadvantaged business concerns.

Sincerely,

Emanuel Henderson, Jr.
President

cc: Senator D'Amato
Senator Moynihan
Congressman Wortley

CHILES
ORIDA

# United States Senate

COMMITTEES:
APPROPRIATIONS
BUDGET
GOVERNMENTAL AFFAIRS
SPECIAL COMMITTEE ON AGING
DEMOCRATIC STEERING COMMITTEE

July 9, 1987

Mr. M. D. B. Carlisle
Asst. to Sec'y. Defense, Legis.
Department of Defense
Room 3E822, The Pentagon
Washington, D.C. 20301

Dear Mr. Carlisle:

I have recently received the enclosed correspondence regarding a matter involving your agency, and because of my desire to be responsive to all inquiries, I would appreciate having your comments and views.

Your early consideration of this matter will be appreciated. If convenient, I would like to have your reply in duplicate and to have the enclosure returned.

Please refer to SF, 50-2 in your reply.

With kindest regards, I am

Most sincerely,

Lawton Chiles

LAWTON CHILES

LC/ma
Enclosure

12443

REPLY TO: FEDERAL BUILDING, LAKELAND, FLORIDA 33801

NATIONAL CONSTRUCTION INDUSTRY COUNCIL

1919 Pennsylvania Avenue, N.W. • Suite 850 • Washington, D.C. 20006 • (202) 887-1494

June 17, 1987

The Honorable Lawton Chiles
United States Senate
Washington, D.C. 20510

Dear Senator Chiles:

As you may know, the Department of Defense recently issued a regulation which dramatically changes the way in which DOD contracts will be let in the future. The new regulation was published on an "interim basis" in the May 4, 1987 Federal Register and is entitled "Department of Defense Federal Acquisition Regulation."

We are writing to convey our strong objection to the proposal. 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 bidding DOD-related projects for the next three fiscal years. Simply stated, that prospect is unacceptable. We cannot believe that effect was intended by Congress.

The new rule will in most cases foreclose 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.

Contracting officers around the country are now telling engineer and contractors, some of whom have built DOD facilities for decades, that they need not apply for the next three years. Accordingly, NCIC believes that hundreds of such firms will either go out of business or establish false disadvantaged fronts in order to qualify.

We have attached a series of questions to this letter which have yet to be answered. We encourage you to convey these concerns to the Defense Department and ask them to formally respond. Additionally, we have attached a recent editorial in the Engineering News-Record on the subject.

In the final analysis, this issue involves simple fairness. A "rule of two" should not become a rule of 100 per cent. And yet that is the effect of the interim rule. Telling small businesses around the country to "go away" for three years, particularly in an industry which is in compliance with all Congressionally mandated utilization goals, cannot be sound public policy.

If you have any questions regarding NCIC or our views on this policy, please call us at 887-1494. We would be pleased to meet with you at your convenience to discuss our position.

Sincerely,

Gregg Ward

Gregg Ward
Executive Director

GW:ldt

Enclosures (2)

cc: American Consulting Engineers Council
American Rental Association
American Society of Civil Engineers
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors of America
Associated Landscape Contractors of America
Association of the Wall & Ceiling Industries - International
Mechanical Contractors Association of America
National Association of Surety Bond Producers
National Association of Women in Construction
National Constructors Association
National Electrical Contractors Association
National Society of Professional Engineers
Prestressed Concrete Institute
Sheet Metal and Air Conditioning Contractors
National Association
The Surety Association of America

## Catch up on computers—or else

Architects, engineers and contractors entering their respective disciplines in the early 1950s were probably more concerned with their slide rules than the promise of a seemingly complicated tool that could automate repetitive and tedious calculations. If they started families within the first five years of their careers, they could be grandparents by now. But in those same years, the first commercial computer has become a great-grandparent to the new machines on the market. Such sharply accelerated life cycles increase greatly the responsibility of those in construction to understand and manage these powerful tools.

Computer users in other industries are way ahead of the game. They've developed computer planning strategies that direct their computer purchases, they've joined computer standards organizations, and they belong to user groups that carry a lot of clout with powerful computer suppliers.

Construction industry users are playing catch-up (see p. 34). That requires a corporate commitment to the expensive computer equipment acquired and a responsibility to monitor the trends that could render it obsolete. This cannot be achieved unless construction industry users attempt to master computer technology as it applies to their business. Some users will respond that their primary business is construction, not computer technology. But with the rate technology is changing, almost all phases of construction now have some computer input, and users who are slow to follow will surely be left behind.

## Trashing the Rule of Two

There comes a point when special emphasis programs in federal construction procurement become more like the tail wagging the dog. The ever expanding use of the so-called Rule of Two concept in the Dept. of Defense is a good example (see p. 74). This rule started out as a way to channel more of the $8 billion a year in defense construction work to small businesses. But now it is also being used to set aside work for small disadvantaged businesses (SDBs).

There is a place in federal contracting for programs that allow small businesses and those owned by minorities and women to compete with the giants of industry. The federal government has a social responsibility in addition to its function as a procurer of goods and services. But the social responsibility that calls for fairness also demands that special interests be cut off at a certain point. It is ludicrous that all disadvantaged and minority-owned firms be given first look at the cream of a multibillion-dollar construction budget, while experienced and efficient mainstream producers sit on their hands.

By definition, SDBs lack opportunity, experience, financing and skills. Programs to remedy that must be tailored carefully to address those problems. Projects should be selected accordingly, with an eye toward maximizing contracting experience while limiting the potential impact that a business's failure to perform will have on national defense. We suggest that the Defense Dept. go back to the drawing board when it crafts its final rule. The Rule of Two concept is simply an administrative expedient to meet arbitrary goals and it has an unnecessarily severe impact on the competitive bidding process.

## Emphasizing technology

The creation of a National Institute of Technology, proposed in a Senate bill, could help put technology transfer in the U.S. on the front burner, where it belongs. As proposed by the influential chairman of the Senate Commerce, Science and Transportation Committee, Ernest F. Hollings, the bill would move the National Bureau of Standards (with its building and fire technology centers) into NIT (ENR 6/4 p. 7). And there's much more than a name change.

Money authorized by the bill would stimulate technology transfer through creation of regional federal-state centers around the country. For the current work of NBS there might be little additional money, but results of that work could be more effectively made available to industry for commercial application. It is a good idea.

## The landfill as art

The nation's abundance of garbage, piling up in unsightly "Mount Trashmores" from coast to coast, is a source of pride to nobody. But there is new hope.

Within a few years, a dump in New Jersey could give new meaning to the disparaging term "junk art." Following a design by artist Nancy Holt, the Hackensack Meadowlands Development Commission (HMDC) is planning to transform a 57-acre landfill into a piece of landscape art. It will be visible to millions of commuters and tourists who travel to and from New York City via the New Jersey Turnpike, Amtrak or Newark Airport (see p. 28).

The landfill will be closed and sculpted into mounds, with a covering of grass and other plants. Sky Mound, as it will be called, will provide carefully arranged vistas of the rising and setting sun and moon through mounds and steel structures. Its design is meant to provide an interesting appearance to those who pass by, as well as to those who stop at the site.

While landfills elsewhere have been turned to recreational use such as parks, HMDC says this would be the first used to create public art. To the extent that the public's trash cannot be recycled for the public good, here's another way to find something positive in a growing national problem.

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. Is the construction industry -- the very industry currently in compliance -- the only industry impacted 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 was 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?

ARBANES
LAND

87 JUL 23 PM 2:52

OFFICE OF
THE SECRETARY OF DEFENSE

# United States Senate

WASHINGTON, DC 20510

July 21, 1987

Margot Carlisle, Assistant Secretary
of Defense, Legislative Affairs
Department of Defense
Room 3E966, The Pentagon
Washington, DC 20301

Dear Ms. Carlisle:

I am enclosing correspondence recently received from Dr. K. R. Shah regarding DAR Case 87-33 for Architectural and Engineering Services. I would appreciate your review of this matter and any information you can provide me.

With best regards,

Sincerely,

Paul S. Sarbanes
United States Senator

PSS/bk

Enclosure

AQ101308287

SHAH & ASSOCIATES
ENGINEERS
CONSULTANTS
4 PROFESSIONAL DRIVE • SUITE 136 • GAITHERSBURG, MARYLAND 20879 • (301) 926-2797

July 17, 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 Sir:

Subject: Comments on DAR Case 87-33 for Architectural and Engineering Services

This letter is in response to your invitation advertised in the Federal Register, Vol. 52, No. 85, dated May 4, 1987, concerning the set asides for small disadvantaged business (SDB) concerns.

Shah & Associates, Inc. (SHAH), is a small disadvantaged Architectural and Engineering (A&E) firm involved primarily in the design, testing, and investigation of electrical engineering projects throughout the United States, South and Central America and Thailand. SHAH received an 8(a) certification in A&E disciplines from the Small Business Administration in 1984. Since 1984, we have received only two A&E contracts under the 8(a) Program, while we have received nine A&E contracts in open competition with large, established A&E firms! None of the contracts that we received were set aside for small businesses.

The purpose of the 8(a) Program and the Small Business Program is to increase participation of the small business and small disadvantaged business firms in the DOD procurements. However, at this time, review of the past two years' Commerce Business Daily announcements reveal that DOD does not set aside procurements for even small businesses in the Architectural and Engineering areas. A copy of a letter dated June 29, 1987, received from Mr. Chiasson, Director of Management Analysis at the Naval Facilities Engineering Command, Chesapeake Division, Department of the Navy, also confirms this. The same Naval Facilities Engineering Command has not, to date, awarded a single A&E contract to an 8(a) firm!

This background of non-compliance by the Chesapeake Division of the Department of the Navy and DOD, in general, and the total disregard for the laws of the United States is important to note in formulating future laws and safeguards against non-compliance by the Department of Defense, whose civil and military offices have been trusted with the greatest duty of following the laws in the defense of our country.

In order to make this law (Public Law L.99-661) work, provide the intended results for the small disadvantaged businesses and increase participation of SDB concerns in A&E areas, we strongly recommend that the Implementation Section of this law include the following:

1. The Implementation Section Must Specify A Specific Rule for Setting Aside A&E Procurements

   The Brooks Bill, a haven for large A&E firm and DOD Contracting Officers, Engineering Directors and Base Commanders in not setting aside 8(a) projects, states under Section 40, U.S.C. 543, "no less than three of the firms deemed to be the most highly qualified to provide the services required." The "Rule of Two" is in conflict with the Brooks Bill, 40, U.S.C. 543.

   We recommend that you add either a separate section or in Section 219.502-72 add the following:

   > "For A&E contracts, a "Rule of Three" is required for setting aside procurements for SDB concerns under this bill."

   If this statement is not included, then Contracting Officers, Engineering Directors and Base Commanders are not going to set aside any contracts for SDB firms because they have an excuse that is in conflict with the Brooks Bill.

2. The Implementation Section Must Specify Protesting Procedures for Non-compliance by the Contracting Officers for Immediate Resolution

   The Implementation Section 219.302 includes protesting a small business representation but does not include protesting by SDB concerns when the Contracting Officers refuse to set aside procurements under this law, even though SDB firms meet all the requirements.

   Failure to include this provision will force SDB firms to spend their meager resources in following up "through the chain of command" and consume all their resources. As a result, they will be frustrated and will not pursue the matter further. The Contracting Officers will then

say, "We do not have enough SDB concerns." This is what they are saying now. In short, inclusion of specific procedures will enable increased participation of SDB concerns in meeting the 5% contracting goal of DOD.

3. The Implementation Section Must Include the Goal of 5% Contract Dollars for A&E Procurements

At present, DOD hires minority firms for menial jobs such as window washing, garbage collection, etc. to meet their procurement requirements. Very few A&E procurements (none for the Naval Facilities Engineering Command, Chesapeake Division) are set aside for minority firms because A&E is considered "Elite" and minority firms should not be trusted for this sophisticated procurement even though minorities are trusted in the battlefield to shed blood in the defense of our country. This disparity must stop if a meaningful execution of this Law PL 99-661 is to be carried out to increase participation of minorities. It must be noted that 5% of the contract dollars in the A&E areas is far less than the 15.3% minority population comprising black Americans, Hispanic Americans, Asian Pacific Americans, Asian Indian Americans and Native Indians. We strongly recommend that the Implementation Section must include the following, in the "Contract Goal for Minorities":

> Five (5) percent of the contract dollars must be set aside for A&E areas for SDB firms.

Failure to include this provision will result in Contracting Officers meeting their goals by hiring minorities for menial jobs such as garbage collection, window washing and painting. The real benefits of this program is to increase participation of minorities in the state-of-the-art and advanced technical procurements. Failure to include this provision will fail in accomplishing this objective.

4. The Implementation Section Must Include Provisions and Procedures to Make Contracting Officers "Accountable"

The Contracting Officers, when contacted to set aside contracts, tell us to contact the Engineering Project Officers and the Engineering Project Officers tell us to go to the Contracting Officers. This "run-around" does not produce any results for the minorities in the A&E areas. There are three main reasons for not setting aside A&E contracts in the dod Contracting Offices:

(1) Lack of an accountability requirement by DOD.

(2) Lack of technical knowledge.

(3) Subjective interpretation of the laws.

However, the bottom-line reason is the "lack of accountability requirement" by the DOD. If the Contracting Officers are to be accountable for their actions or lack thereof, then they will be forced to pursue the contracting goals established by DOD.

In summarization, we strongly recommend that you include the above four items in the Implementation Section of Public Law PL 99-661. Failure to do so will result in a program entitled "Mission Unaccomplished" and in the waste of our tax dollars.

Thank you for the opportunity to submit our comments. I would be glad to testify or to provide any additional information you might need in support of this law.

Sincerely,

K. R. Shah

Dr. K. R. Shah, P. E.

KRS:cc

DEPARTMENT OF THE NAVY
CHESAPEAKE DIVISION
NAVAL FACILITIES ENGINEERING COMMAND
BUILDING 212, WASHINGTON NAVY YARD
WASHINGTON, D.C. 20374-2121

IN REPLY REFER TO
012/EB
29 JUN 1987

Dr. K. R. Shah
Shah and Associates
4 Professional Drive
Suite 136
Gaithersberg, Maryland 20879

Dear Dr. Shah:

We have received your Freedom of Information Act request of 11 June 1987. You requested the following documents: 1.) Advance planning document for fiscal year 1986-87; 2.) List of engineering contracts set-asides specially for small businesses; 3.) List of engineering design and service contracts awarded by the Chesapeake Division to 8(a) small business and disadvantaged businesses.

There are no engineering contracts set-asides for small business. The only FY 87 engineering design and service contract under 8(a) is contract #87-C-0054, Miscellaneous Repairs on various building, Headquarters, Marine Corps, Henderson Hall. This contract has not been awarded to date.

Any planning document containing engineering design and investigative service for FY 1986-87 would not be an advance document as FY 86 terminated September 30, 1986 and FY 87 terminates September 30, 1987. All projects for FY 86-87 have already been designed and most are under construction.

Based on this information you may want to redefine your request.

Sincerely,

R. F. Chiasson

R. F. CHIASSON
Director of Management Analysis
By direction of the
Commanding Officer

JUL 20 PM 1:54

OFFICE OF
THE SECRETARY OF DEFENSE

*From the desk of*
Senator Strom Thurmond
7-16-87

RE: Attached

TO: Legislative Affairs
Office of the Secretary of Defense
Department of Defense
Washington, DC 20301

Sir:

The attached is respectfully referred to you for such consideration as it may warrant and for a report thereon in duplicate, if possible.

Your assistance in enabling me to provide a prompt response to my constituent is greatly appreciated. PLEASE RETURN THIS CORRESPONDENCE WITH YOUR REPLY.

Very truly,

Strom Thurmond

Strom Thurmond
U. S. Senator

ST/J

AQUO1282287

**Mechanical Contractors Association of America, Inc.**

1987 JUL 15 AM 9:37

Suite 120, 5410 Grosvenor Lane, Bethesda, MD 20814-2122
Telephone (301) 897-0770 TWX: 710-825-0423

July 3, 1987

The Honorable Strom Thurmond
United States
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to you on behalf of the members of the Mechanical Contractors Association of America, Inc. (MCAA) to voice our opposition to the "Department of Defense Federal Acquisition Regulation."

Recently, the Department of Defense issued a regulation that will allow DOD contracting officers to set aside solicitations to allow only small disadvantaged businesses (SDBs) to compete in the bidding process during fiscal years 1987, 1988 and 1989. The regulation, which went into effect on June 1, 1987, was designed to meet goals set by Congress to set aside five percent of contracts and subcontracts for SDBs.

According to the ruling listed in the May 4, 1987 Federal Register, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns ("rule of two"), and can expect that the awarded price will not exceed the fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among SDB firms.

The Federal Register report referenced above serves as public notice of this DOD ruling. "Compelling reasons" existed to issue this ruling without prior public comment.

MCAA stands in firm opposition to this ruling for the following reasons:

- o This is going to have a devastating effect on those construction concerns which have traditionally done work for the DOD.
- o DOD is implementing an interim regulation before it has received public comment.
- o DOD has not conducted an economic impact statement prior to issuing these rules even through the impact will be considerable.

MCAA is a construction trade association of approximately 1,300 firms employing approximately 125,000 persons. The work of a mechanical contractor is used to move fluids -- both liquids and gas. This includes the fabrication and installation of heating, ventilating, air conditioning and process piping systems , and further encompasses service, maintenance and the testing, adjusting and balancing of these systems. Our work effects multi-residential, commercial, public and industrial facilities. According to our 1987 Membership Profile, A large percentage of our members perform work on Federal projects.

MCAA has no objection to set asides for small, qualified, disadvantaged businesses as long as the bidding process is fair and open to all parties. In fact, MCAA has long supported the growth of SDBs and has had its own EEO Committee for 16 years. In this instance, however, it appears that participation by all other companies is forclosed.

Sincerely,

Charles H. Carlson
MCAA President

cc: Committee on Armed Services
U.S. Senate

Committee on Small Business
U.S. Senate

Committee on Governmental Affairs
U.S. Senate

Committee on Armed Services
U.S. House of Representatives

Committee on Small Business
U.S. House of Representatives

Committee on Government Operations
U.S. House of Representatives

81-33

JAIME B. FUSTER
PUERTO RICO

WASHINGTON OFFICE:
427 CANNON BUILDING
WASHINGTON, DC 20515
(202) 225-2615

DISTRICT OFFICE:
P.O. BOX 4751
OLD SAN JUAN, PR 00902
(809) 723-6333

COMMITTEES:
FOREIGN AFFAIRS

SUBCOMMITTEES:
WESTERN HEMISPHERE
HUMAN RIGHTS AND
INTERNATIONAL ORGANIZATIONS

INTERIOR AND INSULAR AFFAIRS

SUBCOMMITTEES:
INSULAR AND INTERNATIONAL AFFAIRS
ENERGY AND ENVIRONMENT

# Congress of the United States
## House of Representatives
## Washington, DC 20515

July 17, 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 percent minority contracting goal. In general, I believe that they represent a step forward. I particularly support proposals that would establish a 10 percent preference differential for small disadvantaged businesses 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, although subcontracting is allowed, no clearly defined strategy has been developed to ensure that prime contractors make good faith efforts to increase subcontracting opportunities for small disadvantaged businesses. Second, there are no regulations to clearly define DOD's obligation to utilize Historically Black Colleges and other minority institutions in the early stages of research and development of our military systems.

I urge the Defense Department to address these issues quickly and to move forward aggressively in pursuing the 5 percent goal established by law.

Sincerely,

Jaime B. Fuster

Jaime B. Fuster
Member of Congress

ViaTech
Systems, Inc.

July 29, 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,

Victor W. Kan
President

cc: Honorable Caspar Weinberger
Secretary
Department of Defense

Honorable James Abdnor
Administrator
Small Business Administration

Honorable Gus Savage
US House of Representatives

Honorable John Warner

Honorable Paul S. Trible, Jr.

Honorable Stan Parris

Honorable Frank Wolf

Coalition to Improve DoD Minority Contracting

DISC Decision Information Systems Corporation

August 3, 1987

Mr. Charles W. Lloyd
Secretary
OASD (P) DARS
c/o OASD (P&L) (M&RS)
Room 3C841 The Pentagon
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As Chairman and Chief Executive Officer of a small 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,

Donald L. Campbell
Chairman, Chief Executive Officer

Enclosure

cc: Honorable Casper Weinberger
Secretary
Department of Defense
The Pentagon, 3E880
Washington, D.C. 20301

Honorable James Abdnor
Administrator
Small Business Administation
1441 L Street, N.W.
Washington, D.C. 20416

1425 K Street, N.W., Suite 1000, Washington, D.C. 20005
(202) 898-1234

COMPUTER BASED SYSTEMS, INC.
8550 Lee Highway, Fairfax VA 22031 • 703/849-8080

August 3, 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,

COMPUTER BASED SYSTEMS, INC.

Mohan Kapani
President

cc: Honorable Caspar Weinberger
Secretary
Department of Defense
The Pentagon, Rm. 3E880
Washington, DC 20301

Honorable James Abdnor
Administrator
Small Business Administration
1441 L Street, NW
Washington, DC 20416

Honorable Gus Savage
U.S. House of Representatives
Room 1121, Longworth Building
Washington, DC 20515

Congressman Frank Wolfe
130 Cannon House Office Building
Washington, DC 20515-4610

Coalition to Improve DOD Minority Contracting

ABSS
of Washington D.C.
"The Systems Integrator"

**Automated Business Systems & Services, Inc.**

CORPORATE
6715 Kenilworth Avenue
P.O. Box 838
Riverdale, Maryland 20737

Telephone: (301) 454-8200
Toll Free: (800) 638-0885
TWX: (710) 826-0465

Theodore Howard
Rt. 7 Box 62F Havensbrook Dr.
Waldorf, MD 20601

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 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,

Theodore Howard

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

BRANCHES

4915 Prospectus Drive, Suite G
Durham, North Carolina 27713
(919) 361-5798

One Herald Square
579 E. Xenia Drive
Fairborn, Ohio 45324
(513) 878-0033

17200 Ten Mile Road, Suite 200
East Detroit, Michigan 48021-3386
(313) 774-8877

**THE SNOWDEN COMPANY**
**P.O. Box 18886**
**Seattle, Washington 98118**
**(206) 722-4731**

July 30, 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/woman 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.

Small businesses are a crucial part of America's economic future and we must have all businesses represented in that future. Minority businesses are also vital to the economic growth of America, and we must have a chance to be a part of earning some of those defense dollars.

I urge the Defense Department to make subcontracting an integral part of the awards and procurement process.

Sincerely

Constance Herring

Constance Herring
Owner

CH:as

cc: John Conyers, Jr.
Member of Congress

E·R·MITCHELL

**E.R. Mitchell Construction Company, Inc.**
2875 Bankhead Highway NW • Atlanta • Georgia • 30318 • 404/799-1111

July 28, 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:

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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 American's defense needs.

I am also deeply concerned about the difficulty minority firms are having obtaining bonding in the standard market. There seems to be a conspiracy on the part of the bonding companies that needs to be addressed.

I urge the Defense Department to make subcontracting as integral part of the awards and procurement process.

Sincerely,

E.R. Mitchell, Jr.
President

**CYNEX Manufacturing Corporation**
28 SAGER PLACE. HILLSIDE. N.J. 07205
(201) 399-3334
800-631-7854 TWX 710-995-4730 CYNEX HISE

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.

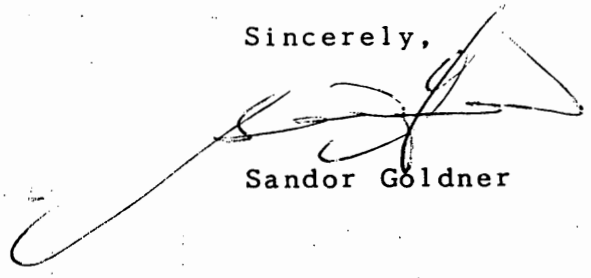
Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. Part 1400.1 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsiblity 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

(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 Pulic 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,



Sandor Goldner

focus CAMERA, INC.
&
1-HOUR COLOR LAB
4419-21 13th Avenue
Brooklyn, N.Y. 11219

Tel. For Orders Only 1-800-221-0828
Customer Service (718) 871-7608
Information (718) 436-6262

July 13, 1987

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Att: Mr. Charles W. Lloyd
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Sincerely,

Abe Berkowitz

Adar Venetian Blind & Shade Co. Inc.
Manufacturers of Windows & Window Covering

168 Williamsburg St. East
Brooklyn N.Y. 11211
(718) 384-4008-9

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,

Sam Goldberger

TELEPHONE NO. (718) 387-0390

**MUTUAL BEDSPREAD CORP.**

MANUFACTURERS OF
BED SPREADS & DRAPES

395 BEDFORD AVENUE
BROOKLYN, N.Y. 11211

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,

Paul Zelcer

ROH
INCORPORATED

3456 Camino Del Rio North
Suite 201
San Diego, CA 92108
(619) 280-8100

July 28, 1987

Defense Acquistion Regulatory Council
ATTN: Mr. Charles Lloyd, Executive Secretary
ODASD (P) DARS
c/o OASD (P&L) (M&RS)
RM 3C841, THE PENTAGON
WASHINGTON, DC 20301-2062

Dear Mr. Lloyd:

The purpose of this letter is to provide ROH's comments on the interim rule amending the DFAR supplement which implemented Section 1207 of the 1987 DOD Authorization Act (Public Law 99-661). Comments were solicited in the Federal Register of 4 May 1987.

By way of background, ROH is a small business founded over 15 years ago which provides engineering, logistic and computer services to government and commercial clients. The majority of our business is with the Naval Sea Systems Command (NAVSEA) and its field activities. In the NAVSEA marketplace, there can be little question about the devastating effect on non-disadvantaged small businesses such as ROH if the interim rule is allowed to stand as written. In Fiscal Year 1986 NAVSEA fell short of their $300M goal for contracting to small disadvantaged business (including 8(a) firms). In Fiscal Year 1987 their goal has been raised to $510M. This goal cannot be met even if virtually all NAVSEA small business set-asides are reclassified to SDB set-asides. In fact, following promulgation of the interim rule, NAVSEA immediately began reclassifying solicitations and the small business advocate in NAVSEA has been verified that he expects this to continue.

The first solicitation to be reclassified in NAVSEA was N00024-87-R-2168(Q), Project Management and Program Planning Support for CV Service Life Extension Program. The predecessor contract was competed as a Small Business Set-Aside and awarded to ROH in Sept 1984. The estimated contract value was approximately $1.1M annually, which equates to over 20 man years per year of effort. In the past three years, ROH has developed an outstanding project team with specialized aircraft carrier programmatic, financial, engineering, logistics and information systems expertise. The current procurement was synopsized in the

CBD of 11 March 1987 as a Small Business Set-Aside to be issued on or about 3 April 1987. ROH began serious pre-RFP proposal effort when the announcement appeared in the CBD, well before there was any indication of a new SDB program. We had absolutely no idea that there was any consideration being given to re-classifying this procurement, and no one in NAVSEA gave any indication to us.

The RFP, received on 15 June 1987 as a SDB set-aside, was a complete shock to ROH. The solicitation precluded ROH, the incumbent contractor from even competing as prime contractor on a contract we not hold. This is contrary to Part 19 of the FAR which requires that products and services previously acquired successfully on the basis of a small business set-aside shall be acquired on the basis of a repetitive set-aside. If this solicitation stands as issued, the best ROH can realize, assuming we are a subcontractor to the successful SDB, is a reduction in revenues and personnel of nearly 10%. Under the interim rule, we foresee this same scenario being played out many times, resulting ultimately in the demise of most non-disadvantaged businesses supporting NAVSEA.

We are positive that Congress did not intend to destroy the Small-Business Set-Aside programs, which it spawned and nurtured for many years, in order to place increased pressure on DOD to increase its SDB contracting. We have followed the FY 1988 Authorization Act closely and are aware that the Congress is moving to clarify its intent in the 1988 Bill. We believe that the SDB program should be supported, even if it does adversely impact the non-disadvantaged small businesses. But we believe that the impact should be shared proportionally between large and small business, and under the present interim rule, small business would absorb nearly all of the impact. We believe that much greater emphasis must be placed on SDB subcontracting plans in large procurements and in breaking out work for SDBs from large procurements. These areas offer the best opportunity for new SDB work, not just reclassification from one part of a small business program to another.

We believe that the interim rule invites abuse because of the allowability of self-certification. In all probability, unless the successful offeror has been certified under the SBA 8(a) program, there will likely be a protest. We foresee that resolution of these protests will be difficult and time consuming, with adverse impact upon DOD programs because of delay and disruption. A more formalized, prior-to-bid certification process is strongly recommended.

The two other SDB proposed rules contained in the 4 May Federal Register but not a part of the interim rule, pose even greater threat to small business. Sole sourcing to an SDB when the interim rule of two fails and only one disadvantaged contractor is identified would further limit the small business's chance to survive.

PORTERHOUSE CLEANING AND MAINTENANCE SERVICE COMPANY, INC.
General Office 6 Moyse Place Edison, New Jersey 08820
(201) 769-0997

July 27, 1987

Defense Acquisition Regulatory Council
Executive Secretary, OD ASD (P) DARS
c/o OASD (P&L) (M&RS)
The Pentagon
Washington, D.C. 20301-3062

Attn: Mr. Charles W. Lloyd

Dear Mr. Lloyd:

I would like to express my concern over the interim regulations that the Department of Defense has developed to implement the 5% minority 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 of minority institutions. Third, it is unclear on what basis advance payments will be made 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,

Geoffrey L. Griffin
Executive Vice President

cc: Bill Bradley, U.S. Senate
Frank Lautenburg, U.S. Senate
Bernie Dwyer, U.S. House of Representatives

AMC
Est. 1963

**ASSOCIATION OF MINORITY CONTRACTORS**

376 E. GRAND BLVD. • DETROIT, MI 48207 • (313) 571-8310

July 30, 1987

Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary, ODASD (P) DARS
c/o OASD (&L) (M&RS)
Room 3C 841
The Pentagon
Washington, D.C. 20301-3062

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First, the regulations contain no express provisions for subcontracting. Second, the regulations do not provide for 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.

My members would be greatly benefited if the final regulations were changed to reflect the suggestions above. I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

Leon Jackson Jr

Leon Jackson, Jr.
Executive Director

LJ/dk

GEORGE G. SHARP, INC.

WASHINGTON OFFICE

MARINE SYSTEMS - ANALYSIS & DESIGN

2121 Crystal Drive • Suite 714 • Arlington, Va. 22202 • Tel. (703) 892-4000

July 31, 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

Re: Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Publ. L. 99-661; Set Aside for Small Disadvantaged Business Concerns.

Dear Mr. Lloyd:

The referenced interim rule was published in the Federal Register of May 4, 1987 and comments were invited by 3 August 1987.

George G. Sharp, Inc. (Sharp) is a small business firm and a considerable portion of its business is obtained by competing for small business set asides. Further, Sharp is supportive of the objective of establishing a five percent goal for DoD contract dollar awards to Small Disadvantaged Businesses. However, the interim rule and in particular its implementation by the Navy and the Naval Sea Systems Command, is imposing a very serious impact on existing Small Business concerns.

Procurements being set aside for Small Disadvantaged Business are those that were formerly set aside for Small Business. Thus Small Business is bearing the brunt of the implementation of this rule. An example of this is a NAVSEA set aside procurement (PMS 312) which has been in the set aside program since 1984. This was synopsized in the Commerce Business Daily of March 11, 1987 as a small business set aside but when the request for proposal was issued in late June 1987 the procurement had been changed to a set aside for Small Disadvantaged Business. Thus other small businesses, including the incumbent, cannot compete for this procurement.

This action and other actions similar are in violation of FAR 19.501(g) which requires that small business set aside procurement 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 rule therefore, is aiding Small Disadvantaged Business to the detriment of Small Business which is clearly contrary to the intent of Congress as is shown by the language in Section 846 of the Proposed National Defense Authorization Act for Fiscal Year 1988 as passed by the House of Representatives.

> Section 846(b)(7)
>
> "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"

To properly implement the intent of Congress, DoD should revise the interim rule to:

1. Preserve Small Business Set Asides - suspend all reclassification of work previously performed by small businesses to the Small Disadvantaged set aside program

2. Enforce FAR 19.701 - Impose a five percent disadvantaged business goal through contract clauses on all large business awards. Enforce it vigorously and require review by the Competitive Advocate General of awards to large businesses without five percent of the contract dollars subcontracted to small disadvantage business. This approach will address the issue of providing training to the Small Disadvantaged Business by permitting large business to guide the efforts until they are self sustaining.

3. Preserve Small Business goals and its share of small business awards to encourage the social and economic goal.

4. Make all Commerce Business Daily small business set aside classification of solicitations final to prevent a waste of bid preparations costs.

The present DoD approach to the Small Disadvantage Business Program should not be at the expense and to the detriment of which, if permitted to continue as presently formulated, is the undesirable outcome of the Interim Rule

Yours very truly,

GEORGE G. SHARP, INC.

John J. Ryan, Jr.
Senior Vice President

JJR:idd

# EBONY
# GLASS & MIRROR COMPANY

**Watkins Center / 6050 McDonough Dr., N.W., Suite "N"**
**Norcross, Georgia 30093 / Phone: 449-9745**


**Part 205 - Publishing Contract Actions**

Comment

I agree that you should restrict competition to Small Disadvantaged Business's only in the CBD.

**Part 206 - Competition Requirements**

Comment

Contracting officers should justify selection of contracts for competition by SBD's.

**Part 219 - Small Business and Small Disadvantaged Business Concerns**

Comment

I agree that historically Black Colleges and Universities and minority institution eligibles should have their own guidelines.

**- 219.301 Representation by the Offeror**

Comment

I agree that at the time of award no significant change in ownership should occur.

**219.302 - Protesting a small business representation**

Comment

"Interested party" should be limited to all SBD's who were not awarded the contract, not just to the second in line or second ranked.

Within 5 - 10 days of notification of successful offeror, a protest might be made.

Protests should be forwarded to the office that is most expeditious in its findings. If a protest is eventually forwarded to the District Office, there is no need for the protest to be forwarded to the Regional

# EBONY
# GLASS & MIRROR COMPANY

**Watkins Center / 6050 McDonough Dr., N.W., Suite "N"**
**Norcross, Georgia 30093 / Phone: 449-9745**


July 31, 1987

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd
Executive Secretary
C/O OASD (P&L) (M&RS)
Room 3C841,
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

As a minority business owner I am very interested in DAR Case 87-33 specifically Section 1207 of Public Law 99-661 concerning the 5 percent minority set aside goal. I have reviewed this section very thoroughly and have enclosed my comments in the following pages.

Thank you for your time.

Sincerely,

Arthur Queen
President

AQ:tc
Enclosure

CC: file

# EBONY
# GLASS & MIRROR COMPANY

**Watkins Center / 6050 McDonough Dr., N.W., Suite "N"**
**Norcross, Georgia 30093 / Phone: 449-9745**




Office. I agree that the procedure is unclear.

Standards for awards should be the same for all types of SBD's.

**- 219.304 Solicitation Provisions**

Comment

Agree. There should be another check off box added.

**- 219.501 General**
**- 219.501-7 Small Disadvantaged Set-Asides**
**- 219.502-72 Small Disadvantaged Set-Asides**
**- 252,219-7006 Notice of Total Small Disadvantaged Business Set Aside**

Comment

Agree, but it is somewhat confusing as far as wording.

**- 219.502.3 Partial set-asides**

Comment

Partial set-asides might cause more confusion, red tape and loss of quality performance.

**- 219.502-4 Methods of Conducting Set-Asides**
**- 219.504 Set-Asides Program Order of Precedence**

Comment

Clarity of SBD's in the order of priority awards program.

**- 219.503 Setting Aside a class of Acquisitions.**

Comment

Agree. Protection for other small or 8(a) businesses.

**- 219.506 Withdrawing or Modifying Set-Asides**

Comment

Agree.

# EBONY
# GLASS & MIRROR COMPANY

**Watkins Center / 6050 McDonough Dr., N.W., Suite "N"**
**Norcross, Georgia 30093 / Phone: 449-9745**




- **219.507 Automatic Dissolution of a Set Aside**

Comment

Agree.

- **219.508 Solicitation Provisions and Contract Clauses**
- **252.219-7006 Notice of Total Small Disadvantaged Business Set-Aside.**

Comment

Agree.

- **219.803 Selecting Acquisitions for the 8(a) program**

Comment

Safeguards should be implemented to insure stability of SBA program.

Need to define "follow-on requirement".

# REGION VI
# CONTRACTORS ASSOCIATION



July 30, 1987

Congressman Albert G. Bustamante
Federal Building Room 146-B
727 East Durango Street
San Antonio, Texas 78206

Honorable Congressman Bustmante:

As President of the Region VI Contractors Association, I am writing to express our views of our membership and it's concern with the Interim regulations developed by the Department of Defense to implement the 5% minority contracting goal. These rules are a step in the right direction, however they leave much to be desired.

The "Rule of two", will give the contracting officers full authority to determine its satisfied requirement. Contracting Officers, we feel, do not have the tools to certify or qualify those firms which claim to be small disadvantaged businesses. We feel this rule will greatly impact and almost eliminate the one and only program in the government process that provides "Set-asides" for those businesses that are certified as small disadvantaged business by the U S Small Business Administration through the 8(a) program.

The 8(a) program has time and time again proven to be an effective tool that provides contracting opportunities for many small disadvantaged businesses. It has not been without problem, however transfering the burden to self certification of small disadvantaged businesses and contracting officers will only compound matters while there are other areas of concern, such as the issue of subcontracting, our main concern is the U S Small Business Administration 8(a) program.

Congressman Bustmante, may we take this opportunity to express our appreciation for your concern and support on these very important issues. Please let us know if our Association can be of any assistance in the future.

Sincerely,

Antonio P. Macias,President
REGION VI CONTRACTORS ASSOCIATION

Copy to: Charles W. Lloyd
Executive Secretary

# NATIONAL CONFERENCE OF BLACK MAYORS, INC.

July 27, 1987



Mr. Charles Lloyd
Executive Secretary
ODASD(P) DARS
c/o OASD P&L M&RS
Rm 3C841
The Pentagon
Washington, D. C. 20301-30620

Dear Mr. Lloyd:

This letter is written pursuant to an invitation by the Defense Acquisition Revelation Supplement (OFARS) to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Public Law 99-661 entitled: Contract Goal for Minorities."

The National Conference of Black Mayors supports the general intent of the proposed rules to implement Section 1207 of Public Law 99-661. However, we strongly recommend adjustments to include specific and detail methods of outreach to guarantee an agressive implementation process and the removal of certain culturally biased language from the proposed rules.

I. Specifically, Section 219.201 General Policy indicate "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(9) Program, and through creation of a total SDB 'set-aside'." It is the recommendation of the National Conference of Black Mayors that a detailed Section be included which specifies that "The National Conference of Black Mayors Network of 294 municipalities be utilized for public awareness, outreach and technical assistance." This inclusion guarantees an agressive identification of eligible SDBS and their successful participation in the program.

II. The Conference recommends extension of time through 1991 to account for the delay in initiating the program.

III. The Conference strongly recommends the utilization of minority firms and institutions to implement the terms of the program.

IV. It is strongly recommended that under subpart 219.3 Determination of Status As a Small Business Concern, Distributorships be specifically stated as an eligible concern when they meet the definitions of small business concerns and/or small disadvanaged business.

V. It is strongly recommended that small business concerns and/or small disadvantaged businesses which are selected for contract awards have bonding requirements waived or underwritten by DOD as a component of the award.

VI. It is strongly recommended that business sharecropping and minority front business be vigorously prosecuted.

VII. It is strongly recommended that under Subpart 219.502-72(a) the following statement be removed:

"in making SDB set-asides for R & U 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 demand of the acquisition."

The aboved statement projects the assumption and advances the suspicion and doubt that small business concerns and/or small disadvantaged businesses are cheaters, subjecting such concerns to program-initiated racial or ethnic prejudice and diminished opportunity. In addition, the open-ended and arbitrary nature of this Rule

tend toward encouraging attitudinal barriers on the part of the Contract Officer, toward Ethnic and Racial group members.

The above points are submitted for acceptance and to improve the probability of the success of the Program.

Respectfully Submitted,

P R E S I D E N T

JHS.ph

# INFINITE CREATIONS, INC.

P. O. Box 158 and Corner of Calhoun & Elm
Bamberg, South Carolina 29003 • (803) 245-5126

**Willie Cam Nimmons, President**


July 29, 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

RE: DAR Case 87-33

Dear Mr. Lloyd:

After reviewing the interim-rule concerning contract goals for minorities, I felt that I should definitely act on the opportunity to respond. Our company, Infinite Creations, Inc., is a Black American, Woman-Owned manufacturer of sewn goods. We have been very actively involved in the SBA 8(a) program as a certified contractor since 1980. As we anticipate our graduation from 8(a) in 1989 we have already begun to solidify our company in the competitive open market. We have tried to use the opportunities provided by the 8(a) program as a stepping stone and not as a sole means of ensuring work. In spite of our success in the open market and 8(a) program, Infinite Creations, Inc remains a socially and economically disadvantaged company relative to the vast majorities of our competitor for DOD contracts. The interim-rule on set-asides for small disadvantaged business concerns is exactly the type of program needed to encourage disadvantaged business like ourselves, to participate in DOD procurement and to equalize ourselves with the companies that are not faced with the social and economic disadvantages that we are.

Infinite Creations, Inc is in full support of this ruling and we look forward to participating in it and continuing our valuable relationship with DOD.

With warm regards,

William Nimmons Jr.
Plant Engineer

ABSS
of Washington D.C.
"The Systems Integrator"

**Automated Business Systems & Services, Inc.**

CORPORATE
6715 Kenilworth Avenue
P.O. Box 838
Riverdale, Maryland 20737

Telephone: (301) 454-8200
Toll Free: (800) 638-0885
TWX: (710) 826-0465

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:

We appreciate the opportunity to submit the attached 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 (P.L. 99-661).

As presently written, we are extremely concerned that the rule will not benefit minority business enterprises as intended by section 1207. Also, it appears likely that DOD will experience great difficulty in achieving the 5% contracting goal unless SBA Standard Industrial Code (SIC) thresholds are modified to enable more minority firms to qualify as "small".

We would welcome the opportunity to provide further input, if desirable, as you move toward the final version of the amendment.

Sincerely,

AUTOMATED BUSINESS SYSTEMS & SERVICES, INC.

Theodore Howard
President

TH/zdj
Enclosures

BRANCHES

4915 Prospectus Drive, Suite G
Durham, North Carolina 27713
(919) 361-5798

One Herald Square
579 E. Xenia Drive
Fairborn, Ohio 45324
(513) 878-0033

17200 Ten Mile Road, Suite 200
East Detroit, Michigan 48021-3386
(313) 774-8877

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

COMMENTS ON THE DOD INTERIM RULE
IMPLEMENTING THE 5% SDB GOAL
(Section 1207, PL 99-661)

1. Although the DOD interim rule suffers from precise definition in some instances, it appears to implement section 1207 of PL 99-661 (National Defense Authorization Act of 1987) in accordance with the Act. If DOD contracting officers vigorously execute the policy contained in the interim rule, with modifications that will be explained later, small disadvantaged businesses will indeed have a better opportunity to compete for DOD business. However DOD will likely have problems meeting the five percent goal due to the relatively small size of the contracts normally awarded small disadvantaged firms. Since service businesses whose average receipts exceed the SIC code thresholds are no longer classified as "small", many capable minority firms that are neither "small" nor "large" will be excluded. Consequently, the goal will not be easily achieved. A firm must first be small, then minority to count toward the goal, according to the Act and the interim rule.

2. The intent of the Act and the interim rule is of great importance to minority business. However the problem that it leaves yet unsolved is the plight of the minority business that continues to have difficulty competing for DOD contracts when it has been successful enough to achieve revenues that classify it just beyond the "small business" definition, but whose receipts are not enough to be considered large. For example, a minority owned information services business with three year average receipts in excess of 12.5 million dollars can no longer meet the Small Business Act definition of small business. Yet it is still not large enough to compete with the "Fortune 1000" companies that have traditionally provided information management services to DOD. The minority firm also has difficulty competing with majority firms of the same size due to a variety of well documented sociological factors including racial discrimination.

3. We believe it unfortunate that the Act and the rule did not address themselves to "Socially Disadvantaged Business" rather than "Small Disadvantaged Business" and further tie the "small business" definition to the Small Business Act. "Socially Disadvantaged Business" better describes the business interests that Congressional leaders speak to when they talk of assisting the segment of our population that has heretofore been deprived of a competitive position in the Defense procurement process. Society has kept the socially disadvantaged "small" for a long time...it is now time to allow this segment to grow and compete with the more favored industrial giants.

4. The near term remedy to the two part problem of achieving the 5% goal and helping minority firms no longer considered "small", is to persuade the Small Business Administration (SBA) to raise the monetary thresholds for relevant SIC codes. As a minimum, the definition of small business must be based upon revenue from contracts which were not obtained through the 8(a) program. The only true measure of self sufficiency is the value of contracts obtained through open competition rather than from the protected SBA environment. It may be that the SBA has the authority to do so without congressional action. Of course, controls would have to be established to insure that the smaller minority firms get their share of contracts, but other minority firms that are neither "large" nor "small" would also be able to benefit from DOD contracts while helping to achieve the 5% goal.

5. The long term solution is to amend the Act to eliminate reference to "Small Disadvantaged Business" and the supporting Small Business Act definitions, and substitute in its place, "Socially Disadvantaged Business." Again, controls to protect the smaller minority firms would have to be put in place. This would de-couple the DOD program from the SBA programs and thereby promote the growth and economic empowerment of minority firms toward which the 5% goal is designed to contribute.

6. With respect to the interim rule as presently written, there are some areas where modifications are suggested.

- The interim rule is silent on subcontracting as a means of achieving the goal. It is unlikely that minority firms can successfully compete for the sizeable contracts coming from DOD; nevertheless, they could do very well with selected portions of these requirements. We are concerned that no clearly defined mechanism exists which will secure minority participation. This can be easily corrected by requiring Contracting Officers to award a certain portion or percentage to minority firm(s).

- The Contracting Officer appears to have broad discretionary authority in the award of SDB contracts. It is suggested that contracting officers be provided more specific guidelines to prevent widely varying standards in program execution.

- The issue of sole source contracting should be specifically addressed. Sole sourcing should be allowed if only one source can be located, or for purposes to attain the 5% goal.

- There is potential for "gamesmanship" with self-certification. For example, it is possible that a firm could be properly certified at the time it submits a proposal but may have changed its minority ownership or size status prior to contract performance.

- We are concerned that the source of SDB contracts may be the Small Business Set Aside program to include the 8(a) program. If that is the case, there will be no real increase in the proportion of DOD contract dollars that go to small and disadvantaged firms. The thrust of the program should be to increase the proportion provided socially disadvantaged firms at the expense of the industry giants that presently receive the vast majority of DOD contracting dollars, not have dollars flow from other set-asides into the SDB program.

M. Bacoate
129 Roberts Street
P. O. Box 4295 Disposables, Inc.
Asheville, N.C. 28802

July 23, 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:

Pursuant to the interim regulations that the Department of Defence has designed to initiate and implement the 5% minority contracting goals. The 5% goals program is needed badly, and can do much to assist in developing Small Disadvantaged Businesses (SDB)s, bringing them into the economic main stream of our country's economy. However, there are several areas that I am concerned about.

One: In Section 252.219-7006, Part (c), Page 16267, in the May 4th Federal Register, 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. This element of the goals program would preclude a very large percentage of Small Disadvantaged Businesses from eligibility, and thus developing, because of the few SDB's in the manufacture or production of end items. While there must be checks and balances, I feel that by incorporating the Small Business set-asides criteria for small business would offer the goals program integrity.

Two: There seems to be unclear bases for advance payments to support SDB's in performance of DOD contracts under the goals program. The advance payment need is such that if SDB's are precluded from the Financial Assistance, its intended value to SDB's, as well as DOD, will be greatly sacrificed. Temporary financing is a must.

The goals program is designed to stengthen and not weaken or prohibit Small Disadvantaged Business participation in DOD contracts. The value of partial set-asides is an element which should definitely be a part of this program. I am encouraging the Department of Defense to take special action in addressing these issues.

Sincerely,

Matthew Bacoate, Jr.

cc: Senator, Terry Sanford
Congressman, James McClure Clarke
Congressman, Charlie Rose
Congressman, John Conyers

**COMPUTER AIDED ENGINEERING,
DESIGN & DOCUMENTATION
SERVICES**

3045 ROSECRANS STREET
SUITE 115
SAN DIEGO, CA 92110
619 224 8791

29 July 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:

As owner of a small, minority owned business, I am writing this letter to fully support full implementation of P.L. 99-661, relative to 5% set asides for Small Disadvantaged Business Concerns.

I urge the strengthening of your interim regulations published in May 1987. With that in mind, I also strongly support H.R. 1663, the Prompt Payment Act and H.R. 1607, the Rule of Two.

Relative to the 8(a) Program, I am in complete favor of H.R. 1807 on 8(a) reform. I have always felt that the Fixed Program Participation was a counterproductive method for graduating 8(a) companies and contributed significantly to the high failure rate.

I feel the Department of Defense needs to pay closer attention to subcontracting to minority and disadvantaged companies in the areas of high technology and other nontraditional areas. Minority owned companies are often excluded from participation in significant DOD projects. DOD should require Prime Contractors to fully use the subcontracting process as a vehicle for Minority and Disadvantaged Business development.

Sincerely,

Edward Howard
President

NATIONAL
CAPITOL SYSTEMS
INCORPORATED

5205 LEESBURG PIKE
SUITE 400
FALLS CHURCH, VIRGINIA 22041-3898
703/671-3360

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, D.C. 20301-3062

Dear Mr. Lloyd:

Reference is made to DAR Case 87-33, the attached copy of Section 846 of the Proposed National Defense Authorization Act, and in particular to paragraph b(7).

National Capitol Systems, Inc. is a small and disadvantaged business currently participating in the SBA 8(a) program. We are due to graduate from the program in approximately 15 months.

We are hopeful that we will qualify for contracts under the small business set aside program established under section 15(a) of the Small Business Act subsequent to our graduation. In fact, it is quite possible that the survival of our business may depend on it.

We urge you to do your part to ensure that the final rule contains the wording in paragraph b(7) of the attached. It is our belief that the Department of Defense should accept its social responsibility to support both small and small and disadvantaged businesses.

Thank you for your interest and concern.

Sincerely,

Jack R. Flikeid
Executive Vice President

## APPENDIX E: SECTION 846 OF THE PROPOSED NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1988

Sec P 68

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

**SEC. 846. REQUIREMENT FOR SUBSTANTIAL PROGRESS ON MINORITY AND SMALL BUSINESS CONTRACT AWARDS.**

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

(b) REGULATIONS.—The Secretary shall carry out the requirement of subsection (a) through the issuance of regulations which do the following:

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

(2) Establish procedures or guidance for contracting officers to—

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

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

(B) provide incentives for such prime contractors to increase subcontractor awards to section 1207(a) entities.

(3) Require contracting officers to emphasize awards to section 1207(a) entities in all industry categories, including those categories in which section 1207(a) entities have not traditionally dominated.

(4) Provide 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).

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

(C) The small business set-aside program established under section 15(a) of the Small Business Act (15 U.S.C. 644(a)).

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

(6) With respect to a Department of Defense procurement for which there is a 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.

(7) 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.

(8) Implement section 1207 of the Department of Defense Authorization Act, 1987, in a manner which shall not alter the procurement process under the program established under section 8(a) of the Small Business Act.

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

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

1) Provide for partial set-asides for section 120 entities.

2) Establish a procedure for awarding a contract to ection 1207(a) entity, without providing for full an pen competitive procedures, in circumstances v a market survey and Commerce Business Daily s sought notice resulted in the identification of ne responsible section 1207(a) entity.

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

14) Require that a concern may not be awarded tract under section 1207 of the Department of se Authorization Act, 1987, unless the concern s to comply with the requirements of section (1) of the Small Business Act.

EFINITION OF SECTION 1207(a) ENTITIES.—For of this section, the term "section 1207(a) entities" e small business concerns, historically Black col- universities, and minority institutions described in 207(a) of the Department of Defense Authorization 7 (Public Law 99–661; 100 Stat. 3973).

# A. Judd Company, Inc.

Electrical Construction

8000 Ft. Hunt Road
Alexandria, Virginia 22308
Telephone (703) 768-3100


July 30, 1987

Defense Acquisition Regulatory Council
OASD (P&L)(M&RS), Room 3C841
The Pentagon
Washington, D.C. 20301-3062

Attention: Mr. Charles W. Lloyd, Executive Secretary

Subject: Implementation of Section 1207 of Pub. L. 99-661; Set Asides for Small Disadvantaged Business Concerns

Gentlemen:

While we are not against "Minority Set Aside", we oppose the implementation of this rule as it far exceeds the intended preferential treatment and results in a grossly unfair and potentially economically devastating situation for non-disadvantaged small businesses.

Yours truly,

A. JUDD COMPANY, INC.

Alfred Judd
President

AJ/jh

July 24, 1987

DELORES EARL
4819 JEFFERSON ST
LANHAM, MD 20801

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,

Delores Earl

DARTNELL ENTERPRISES
INCORPORATED

349 WEST COMMERCIAL ST. • SUITE 2190 • EAST ROCHESTER, N.Y. 14445 • (716) 248-9400

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, DC 20301-3062

Re: DAR Case 87-33

Dear Mr. Lloyd:

Dartnell Enterprises, Inc. is very much in favor of the implementation of Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), entitled "Contract Goal for Minorities". Section 1207, Pub. L. 99-661 will provide small disadvantaged business (SDB) concerns, historically Black colleges and universities and minority institutions the opportunity to become a government contractor.

Dartnell Enterprises, Inc. is a small, minority owned information and imaging systems firm. The U. S. Government is one of our target markets. We have found it difficult, though, to compete with large industries due to the fact that we are a new business and our volume is not substantial enough to provide the same pricing large businesses can support.

To reiterate our position, Dartnell Enterprises, Inc. supports PL 99-661, Section 1207.

Sincerely,

Elsa M. Steo

Elsa M. Steo, Manager
Contracts and Administration

EMS:mjf

ROBERT T. BOYLER
1320 ELDORADO DR
FLINT, MI 48504
(313) 767-4466

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:

This letter is to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. I believe the regulations are on time, however, it appears that some important issues have been overlooked.

1) The regulations contain no express provisions for subcontracting.

2) The regulations do not provide for the participation of black colleges and universities or minority institutions.

3) It is unclear on what basis advance payments will be available to black-owned 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 urge the Department of Defense to address these issues quickly and throughly in the final regulations.

Sincerely,

Robert T. Boyler

Robert T. Boyler

F ... TWO PAGES

PHYSIO CONTROL

**Corporate Headquarters**
11811 Willows Road Northeast
Post Office Box 97006
Redmond, WA 98073-9706 USA

Telephone: 206/881-4000
Telex: 276051 ELI LILLY IND A
Telefax: 206/881-2405

OUT - FAX

July 30, 1987

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

SUBJECT: DAR Case 87-33 - Five Per Cent of Contract Dollars
To Small Disadvantaged Businesses

Ladies and Gentlemen of the Council:

As longtime providers of emergency and acute cardiac monitoring and defibrillation equipment to the federal government, we strongly subscribe to the support of SBA programs.

For the majority of our thirty-three years, we were a small business, but as our technology progressed and our reputation grew, we surpassed the established SBA employment thresholds. Through the years we have established positions and systems to fully support the spirit and letter of the plethora of regulations and agencies that administrate the health industry.

We feel justified in our pride of achieving 59% SBA subcontracts, with 2.2% Small Disadvantage subcontracts. We have worked diligently to locate and groom these suppliers that can provide quality products with consistency, and at a price that allows us to provide best value bids for government service. These supplies must also meet stringent requirements set forth by the Food and Drug Administration (F.D.A.) among others, necessitated by the critical nature of these instruments - they can literally be your last hope for life! Just last year one of our main suppliers was purchased, ending their SBA status. We also have an aggressive EEO program to reach minorities outside our immediate physical radius for employment with us. In addition, we are separately working with more than 20 developmentally disadvantaged employees, in an enclave program that has trained them to become full team members with all benefits. While these programs are part of good corporate citizenship, we of course cannot count these separate efforts in our disadvantaged SBA tallies.

It is our professional and experienced opinion that more than doubling the small disadvantaged target is unwise, as it is unachievable without a major nationwide SBA program of funding and training additional new qualifying firms - a program that realistically would take three (3) years or more to bear significant fruit. While we would make every

**Marketing Center**

P.O. Box 76
Hines IL 60141

**Veterans Administration**

May 7, 1987

In Reply Refer To: 904F/FSS

Mr. L. Murray Lorance
Senior Contract Administration Supervisor
Physio Control
11811 Willows Road Northeast
Post Office Box 97006
Redmond, WA 98073-9706

Dear Mr. Lorance:

Enclosed is an approved copy of your Small and Small Disadvantaged Business Subcontracting Plan dated January 9, 1987, as amended by revision of April 29, 1987.

The Plan is incorporated and made part of Contract V797P-3102h and is effective January 1, 1987 to December 31, 1987. A Subcontracting Plan for your next fiscal year should be submitted no later than sixty days prior to the expiration of this Plan.

The enclosed Summary Subcontracting Report (SF 295) forms are to be used to fulfill reporting requirements. An annual report covering the period October 1, 1986 through September 30, 1987 is due October 25, 1987. The original report is to be directed to Deputy Director, Office of Small and Disadvantaged Business Utilization (005C), VA Central Office, 810 Vermont Avenue, N.W. Washington, DC 20420, with an information copy to the VA Marketing Center (904F), P. O. Box 76, Hines, IL 60141.

Sincerely,

Marilyn A. Heinrichs

MARILYN A. HEINRICHS
Contracting Officer
Marketing Division for
Medical Equipment

Enclosures

# SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PLAN

DATE: January 9, 1987

CONTRACTOR: PHYSIO CONTROL CORPORATION

ADDRESS: 11811 Willows Road NE, P.O. Box 97006, Redmond, WA 98073-9706

SOLICITATION OR CONTRACT NUMBER: V797P-3102H

ITEM/SERVICE: Medical Equipment, Supplies and Replacement Parts

The following, together with any attachments, is hereby submitted as a Subcontracting Plan to satisfy the applicable requirements of Public Law 95-507 as implemented by OFPP Policy Letter 80-2.

1. (a) The total estimated dollar value of all planned subcontracting (to all types of business concerns) under this contract is $ 25,000,000 .

(b) The following percentage goals (expressed in terms of a percentage of total planned subcontracting dollars) are applicable to the contract cited above or to the contract awarded under the solicitation cited.

(i) Small disadvantaged business concerns: 58 % of total planned subcontracting dollars under this contract will go to subcontractors who are small business concerns.

(ii) Small disadvantaged business concerns: 2 % of total planned subcontracting dollars under this contract will go to subcontractors who are small business concerns owned and controlled by socially and economically disadvantaged individuals.

(c) The following dollar values correspond to the percentage goals shown in (b) above.

(i) Total dollars planned to be subcontracted to small business concern: $ 14,500,000 .

(ii) Total dollars planned to be subcontracted to small disadvantaged business concerns: $ 500,000 .

(d) The following principal products and/or services will be subcontracted under this contract, and the distribution among small, small disadvantaged and large business concerns is as follows:

| SMALL BUSINESS | SMALL DISADVANTAGED BUSINESS | LARGE BUSINESS |
|---|---|---|
| See attached addendum | | |
| | | |
| | | |

(e) The following method was used in developing subcontract goals (i.e., Statement explaining how the product and service areas to be subcontracted were established, how the areas to be subcontracted to small and small disadvantaged business concerns were determined, and how small and small disadvantaged business concern"s capabilities were determined, to include identification of source lists utilized in making those determinations.)

Last year this company purchased 59% of its products and services from small businesses and 2.2% from small disadvantaged businesses. This year's goals are 58% and 2% respectively. The new goals were based on actual attained dollars spent last year.(continued on page 6)

(f) Indirect and overhead costs (check one below(:

_____have been  __x__have not been

included in the goals specified in 1(a) and 1(b)

(g) If "have been" is checked, explain the method used in determining the proportionate share of indirect and overhead cost to be allocated as subcontracts to small business concerns and small disadvantaged business concerns.

2. The following individual will adminster the subcontracting program:

NAME: Kenneth M. Brebner

ADDRESS AND TELEPHONE: 11811 Willows Rd. NE, P.O. Box 97006, Redmond, WA 98073-9706

TITLE: Director of Materiel (206) 881-4000

This individual's specific duties, as they relate to the firm's subcontracting program are as follows:

General overall responsibility for this company's small business program, the development, preparation and execution of individual subcontracting plans and for monitoring performance relative to contractual subcontracting requirements contained in this plan, including, but not limited to:

(a) Developing and maintaining bidders lists of small and small disadvantaged business concerns from all possible sources.

(b) Ensuring that procurement packages are structured to permit small and small disadvantaged business concerns to participate to the maximum extent possible.

(c) Assuring inclusion of small and small disadvantaged business concerns in all solicitations for products or services which they are capable of providing.

(d) Reviewing solicitations to remove statements, clauses, etc., which may tend to restrict or prohibit small and small disadvantaged business concerns participation.

(e) Ensuring periodic rotation of potential subcontractors by bidders lists.

(f) Ensuring that the bid proposal review board documents its reasons for not selecting low bids submitted by small and small disadvantaged business concerns.

(g) Ensuring the establishment and maintenance of records of solicitations and subcontract award activity.

(h) Attending or arranging for attendance of company counselors at Business Opportunity Workshops, Minority Business Enterprise Seminars, Trade Fairs, etc.

(i) Conducting or arranging for conduct of motivational training for purchasing personnel pursuant to the intent of Public Law 95-507.

(j) Monitoring attainment of proposed goals.

(k) Preparing and submitting periodic subcontracting reports required.

(l) Coordinating contractor's activities during the conduct of compliance reviews by Federal agencies.

(m) Coordinating the conduct of contractor's activities involving its small and small disadvantaged business subcontracting program.

(n) Additions to (or deletions from) the duties specified above are as follows:

N/A

3. The following efforts will be taken to assure that small and small disadvantaged business concerns will have an equitable opportunity to compete for subcontract:

(a) Outreach efforts will be made as follows:

(i) Contacts with minority and small business trade associations

(ii) Contacts with business development organizations

(iii) Attendance at small and minority business procurement conferences and trade fairs

(iv) Sources will be requested from SBA's PASS system

(b) The following internal efforts will be made to guide and encourage buyers:

(i) Workshops, seminars and training programs will be conducted.

(ii) Activities will be monitored to evaluate compliance with this subcontracting plan.

(c) Small and small disadvantaged business concern source lists, guides, and other data identifying small and small disadvantaged business concerns will be maintained and utilized by buyers in soliciting subcontracts.

(d) Additions to (or deletions from) the above listed efforts are as follows:

N/A

4. The bidder (contractor) agrees that the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals will be included in all subcontracts which offer further subcontracting opportunities, and all subcontractors except small business concerns who receive subcontracts in excess of $500,000, will be required to adopt and comply with a subcontracting plan similar to this one. Such plans will be reviewed by comparing them with the provisions of Public Law 95-507, and assuring that all minimum requirements of an acceptable subcontracting plan have been satisfied. The acceptability of percentage goals shall be determined on a case-by-case basis depending on the supplies/services involved, the availability of potential small and small disadvantaged subcontractors, and prior experience. Once approved and implemented, plans will be monitored through the submission of periodic reports, and/or, as time and availability of funds permit, periodic visits to subcontractor's facilities to review applicable records and subcontracting program progress.

5. The bidder (contractor) agrees to submit such periodic reports and cooperate in any studies or surveys as may be required by the contracting agency or the Small Business Administration in order to determine the extent of compliance by the bidder with the subcontracting plan and with the clause entitled Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals, contained in the contract.

6. The bidder (contractor) agrees that he will maintain at least the following types of records to document compliance with this subcontracting plan:

   (a) Small and small disadvantaged business concern source lists, guides, and other data identifying small and small disadvantaged business concerns vendors.

   (b) Organizations contacted for small and small disadvantaged business sources.

   (c) On a contract-by-contract basis, records of all subcontract solicitations over $100,000, indicating on each solicitation (1) whether small business concerns were solicited, and if not, why not; (2) whether small disadvantaged business concerns were solicited, and if not, why not; and (3) reasons for the failure of solicited small and small disadvantaged business concerns to receive the subcontract award.

   (d) Records to support other outreach efforts: Contacts with Minority and Small Business Trade Associations, etc. Attendance at small and minority business procurement conferences and trade fairs.

   (e) Records to support internal activities to guide and encourage buyers: Workshops, Seminars, Training Programs, etc. Monitoring activities to evaluate compliance.

   (f) On a contract-by-contract basis, records to support subcontract award data to include name and address of subcontractor.

   (g) Records to be maintained in addition to the above are as follows:

   N/A

Signed: Kenneth M Brebner

Typed Name: Kenneth M. Brebner

Title: Director of Materiel

Date: January 9, 1987

Plan Accepted By: Marilyn A. Hennicks
Contracting Officer

Date: 5/7/87

EFFECTIVE DATE FOR SUBCONTRACTING PLAN: Bidder or offeror to indicate their company's Fiscal Year period Jan. 1 1987 (Month, Day, Year) to Dec. 31 1987 (Month, Day, Year).

In the event your company's fiscal year is for a period other than the proposed contract period of this solicitation, you will be required to submit a new subcontracting plan for approval sixty (60) days prior to expiration of the existing subcontracting plan. In the event an acceptable plan cannot be negotiated prior to expiration of the existing subcontracting plan, your contract may be terminated.

NOTE TO CONTRACTING OFFICER: Upon incorporation of the plan into a contract, indicate the estimated dollar value to the contract. $_____

(ATTACHMENT MAY BE USED IF ADDITIONAL SPACE IS REQUIRED)

| | PRIOR YEAR/ CONTRACT GOALS | PRIOR YEAR/ CONTRACT ACHIEVEMENTS |
|---|---|---|
| Total Subcontract dollars | 22,000,000 | 24,026,742 |
| Small Business dollars | 13,640,000 | 14,226,872 |
| Small Business percent | 62% | 59.2% |
| Small Disadvantaged dollars | 352,000 | 530,159 |
| Small Disadvantaged percent | 1.6% | 2.2% |

GOALS PROJECTED FOR CURRENT YEAR/CONTRACT

| | |
|---|---|
| Total Subcontracting dollars | 25,000,000 |
| Small Business dollars | 14,500,000 |
| Small Business percent | 58% |
| Small Disadvantaged dollars | 500,000 |
| Small Disadvantaged percent | 2% |

ADDENDUM (revised 4/29/87)

Small and Small Disadvantaged
Subcontracting Plan
Buyer Commodity List
Solicitation No. V797P-3102H

*SMALL BUSINESS

Capacitors, general
Yokes
Semi Conductors (Diodes and Transistors)
Integrated Circuits
Switches
Connectors (Circular)
Sheet Metal Fabrication
Patient Cables
Coil Cords
Wire and Cable
Lugs
Tie Wraps
Tubing (Heat Shrink)
Engraving
Plating
Painting
Silkscreen
Knobs
Screw Machine Parts
Seals & O-Rings
Heat Sinks
Meters
Membrane Switches
Relays & Solenoids
Conditioned Components
PCB Connectors (Amp & Molex)
Resistors
Pots & Trimmers
Nameplates & Labels
Recorders, Stylus
Emergency Carts
CMS 6000 Units & Accessories
Fasteners and Standoffs
Out of House Assemblies
Shielding
Shipping Supplies
Tools
Accessory Bags
Shipping Containers
Flex Circuits

**SMALL DISADVANTAGED BUSINESS

Transformers
Machining
Molded Parts
I.C. Sockets
Lamps & LED's
Circuit Boards
Strain Reliefs
Manuals

LARGE

Fuses & Fuseholders
ECG Paper
Batteries
Plastic Resins
Chemicals
Electrodes
CMS 8000 Units & Accessories
Micro Computers
CRT's
High Energy Capacitors

# SUMMARY SUBCONTRACT REPORT

*(Report to be submitted quarterly. See Instructions on reverse) (Type or Print)*

FORM APPROVED OMB NO. 3090-0053

| 1. CONTRACTING AGENCY | | 2. ADMINISTERING AGENCY | |
|---|---|---|---|
| 3. DATE OF LAST GOVERNMENT REVIEW | 4. REVIEWING AGENCY | 5. DUNS NO. | 6. REPORT SUBMITTED AS: ☐ PRIME CONTRACTOR ☐ SUBCONTRACTOR ☐ SC |
| 7. CORPORATION, COMPANY, OR SUBDIVISION COVERED *(Name, Address, ZIP Code)* | | 8. MAJOR PRODUCTS OR SERVICE LINES: a. b. c. | |

## CUMULATIVE COMMITMENTS

Subcontract and Purchase Commitments for the Period October 1, 19 ____ through _____ , 19 ____

| COMMITMENTS | CURRENT FISCAL YEAR *(To date)* | | SAME PERIOD LAST YEAR | |
|---|---|---|---|---|
| | DOLLARS | PERCENT | DOLLARS | PERCI |
| 9. TOTAL *(Sum of a and b)* | | 100 | | 10 |
| a. SMALL BUSINESS CONCERNS | | | | |
| b. LARGE BUSINESS CONCERNS | | | | |
| 10. SMALL DISADVANTAGED BUSINESS CONCERNS *(8 & % of 9)* | | | | |
| 11. LABOR SURPLUS AREA CONCERNS *(8 & % of 9)* | | | | |

## SUBCONTRACT GOAL ACHIEVEMENT

| GOALS | NO. OF CONTRACTS | $ VALUE OF SUBCONTRACTS (000) | $ VALUE OF SUBCONTRACT GOALS | ACTUAL GOAL ACHIEVEMENT |
|---|---|---|---|---|
| | | | | DOLLARS |
| 12. CONTRACTS WITH SMALL BUSINESS SUBCONTRACT GOALS | | | | |
| a. ACTIVE CONTRACTS | | | | |
| b. CONTRACTS COMPLETED THIS QUARTER WHICH MET GOALS | | | | |
| c. CONTRACTS COMPLETED THIS QUARTER NOT MEETING GOALS | | | | |
| 13. CONTRACTS WITH SMALL DISADVANT. BUS. SUBCONTRACT GOALS | | | | |
| a. ACTIVE CONTRACTS | | | | |
| b. CONTRACTS COMPLETED THIS QUARTER WHICH MET GOALS | | | | |
| c. CONTRACTS COMPLETED THIS QUARTER NOT MEETING GOALS | | | | |

14. REMARKS *(Enter a short narrative explanation if: (a) Zero is entered in Blocks 9a or 10 for current fiscal year, (b) the percent entry in Block 9a for current fiscal year is more than 5 percentage points below the percent reported for same period last year, or (c) the percent entry in Block 1 current fiscal year is lower than the percent reported for same period last year.)*

| 15. NAME AND TITLE OF LIAISON OFFICER | SIGNATURE | DATE | TELEPHONE (incl Area Cod |
|---|---|---|---|
| 16. NAME AND TITLE OF APPROVING OFFICIAL | SIGNATURE | DATE | |

# SUMMARY SUBCONTRACT REPORT

*(Report to be submitted quarterly. See Instructions on reverse) (Type or Print)*

FORM APPROVED OMB NO. 3080-0053

| 1. CONTRACTING AGENCY | 2. ADMINISTERING AGENCY | | |
|---|---|---|---|
| 3. DATE OF LAST GOVERNMENT REVIEW | 4. REVIEWING AGENCY | 5. DUNS NO. | 6. REPORT SUBMITTED AS: ☐ PRIME CONTRACTOR ☐ SUBCONTRACTOR ☐ BO |
| 7. CORPORATION, COMPANY, OR SUBDIVISION COVERED *(Name, Address, ZIP Code)* | 8. MAJOR PRODUCTS OR SERVICE LINES: a. b. c. | | |

## CUMULATIVE COMMITMENTS

Subcontract and Purchase Commitments for the Period October 1, 19 ____ through _____, 19 ____

| COMMITMENTS | CURRENT FISCAL YEAR *(To date)* | | SAME PERIOD LAST YEAR | |
|---|---|---|---|---|
| | DOLLARS | PERCENT | DOLLARS | PERCI |
| 9. TOTAL *(Sum of a and b)* | | 100 | | 10 |
| a. SMALL BUSINESS CONCERNS | | | | |
| b. LARGE BUSINESS CONCERNS | | | | |
| 10. SMALL DISADVANTAGED BUSINESS CONCERNS *(8 a % of 9)* | | | | |
| 11. LABOR SURPLUS AREA CONCERNS *(8 a % of 9)* | | | | |

## SUBCONTRACT GOAL ACHIEVEMENT

| GOALS | NO. OF CONTRACTS | $ VALUE OF SUBCONTRACTS (000) | $ VALUE OF SUBCONTRACT GOALS | ACTUAL GOAL ACHIEVEMENT |
|---|---|---|---|---|
| | | | | DOLLARS |
| 12. CONTRACTS WITH SMALL BUSINESS SUBCONTRACT GOALS | | | | |
| a. ACTIVE CONTRACTS | | | | |
| b. CONTRACTS COMPLETED THIS QUARTER WHICH MET GOALS | | | | |
| c. CONTRACTS COMPLETED THIS QUARTER NOT MEETING GOALS | | | | |
| 13. CONTRACTS WITH SMALL DISADVANT. BUS. SUBCONTRACT GOALS | | | | |
| a. ACTIVE CONTRACTS | | | | |
| b. CONTRACTS COMPLETED THIS QUARTER WHICH MET GOALS | | | | |
| c. CONTRACTS COMPLETED THIS QUARTER NOT MEETING GOALS | | | | |

14. REMARKS *(Enter a short narrative explanation if: (a) Zero is entered in Blocks 9a or 10 for current fiscal year, (b) the percent entry in Block 9a for rent fiscal year is more than 5 percentage points below the percent reported for same period last year, or (c) the percent entry in Block 1 current fiscal year is lower than the percent reported for same period last year.)*

| 15. NAME AND TITLE OF LIAISON OFFICER | SIGNATURE | DATE | TELEPHONE (and Area Cod |
|---|---|---|---|
| 16. NAME AND TITLE OF APPROVING OFFICIAL | SIGNATURE | DATE | |

**DEFENSE LOGISTICS AGENCY**

1 May 87

MEMO FOR Ken

Here is the new Public Law 99-661. When this becomes effective for the federal sector I'll let you know. It would be after that time when it is given to you as a requirement, possibly.

Regards,
Alice Toms

DLA FORM OCT 74 104a

Murray - info

When this bill passes, I don't know how we're going to comply. We have trouble making 2%. A mandatory 5% might disqualify us as a source for gov't. business.

Pls. show Tom. Any ideas?

Ken

PUBLIC LAW 99-661

# Ninety-ninth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday, the twenty-first day of January, one thousand nine hundred and eighty-six*

## An Act

To authorize appropriations for fiscal year 1987 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, to improve the defense acquisition process, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE

This Act may be cited as the "National Defense Authorization Act for Fiscal Year 1987".

SEC. 2. ORGANIZATION

This Act is divided into four divisions as follows:

(1) Division A—Department of Defense Authorizations.
(2) Division B—Military Construction Authorizations.
(3) Division C—Other National Defense Authorizations.
(4) Division D—Child Nutrition Programs.

# DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

SEC. 100. SHORT TITLE; TABLE OF CONTENTS

(a) SHORT TITLE.—This division may be cited as the "Department of Defense Authorization Act, 1987".

(b) TABLE OF CONTENTS OF DIVISION.—The table of contents of this division is as follows:

(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.

(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 this subsection 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:

"(4) The term 'manpower estimate' means, with respect to a major defense acquisition program, an estimate of—

"(A) the total number of personnel (including military, civilian, and contractor personnel), expressed both in total personnel and man-years, that will be required to operate, maintain, and support the program upon full operational deployment and to train personnel to operate, maintain, and support the program upon full operational deployment;

"(B) the increases in military and civilian personnel end strengths that will be required for full operational deployment of the program above the end strengths authorized in the fiscal year in which such an estimate is submitted and the fiscal year or years in which such increases will be required; and

"(C) the manner in which such a program would be operationally deployed if no increases in military and civilian end strengths were authorized above the strengths authorized for the fiscal year in which such estimate is submitted.".

(c) CLERICAL AMENDMENTS.—(1) The heading of such section is amended to read as follows:

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1231 for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

Federal Communications Commission.

**Mark N. Lipp,**

*Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 87-14925 Filed 6-30-87; 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; Set-Asides for Small Disadvantaged Business Concerns**

**AGENCY:** Department of Defense.

**ACTION:** Notice of Intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses; Notice of extension of comment period.

**SUMMARY:** The Defense Acquisition Regulatory Council published on May 4, 1987 (52 FR 16289), a notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses, with a 30-day comment period to end June 3, 1987. The purpose of this document is to extend the comment period for an additional 60 days.

**DATE:** Comments on this subject should be submitted in writing to the Executive Secretary, DAR Council, at the address shown below, on or before August 3, 1987, to be considered in the DAR Council's deliberations. Please cite DAR Case 87-33 in all correspondence related to this issue.

**ADDRESS:** Interested parties should submit written comments to: 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.

Note.—If commenters choose to hand-carry comments to the DAR Council Office at 1211 South Fern Street, Arlington, VA, arrangements for hand-carried comments must be made with the DAR Council Staff Members. Security Guards at this location are not permitted to accept or sign for hand-delivered comments of any kind.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, telephone (202)697-7266.

**SUPPLEMENTARY INFORMATION:** The DAR Council issued a notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses. Comments were to be submitted within 30 days, ending June 3, 1987. The DAR Council has determined that, due to the nature of the issue involved, the comment period should be extended for an additional 60 days, ending August 3, 1987.

**Charles W. Lloyd,**

*Executive Secretary, Defense Acquisition Regulatory Council.*

[FR Doc. 87-14888 Filed 6-30-87; 8:45 am]

BILLING CODE 3810-01-M

## DEPARTMENT OF THE INTERIOR

**Fish and Wildlife Service**

**50 CFR Part 17**

**Endangered and Threatened Wildlife and Plants; Notice of Findings on Petitions and Initiation of Status Review**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition findings and status review.

**SUMMARY:** The Service announces two 90-day petition findings and seven 12-month findings for petitions to amend the Lists of Endangered and Threatened Wildlife and Plants. A status review is initiated for the white-necked crow, *Corvus leucognaphalus*, historically distributed in Hispaniola and Puerto Rico.

**DATES:** The findings announced in this notice were made during the period from September 14, 1986, to March 10, 1987. Comments and information may be submitted until further notice.

**ADDRESSES:** Information, comments, or questions should be submitted to the Assistant Director—Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, Washington, DC 20240. The petitions, findings, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 North Glebe Road, Arlington, Virginia. Additional information, comments regarding unlisted populations of the desert tortoise should be addressed to Mr. Wayne White, Endangered Species Specialist, U.S. Fish and Wildlife Service, Lloyd 700 Building, Suite 550, 700 NE. Multnomah Street, Portland, Oregon 97232.

**FOR FURTHER INFORMATION CONTACT:** William Knapp, Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235-2771 or FTS 235-2771).

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended in 1982 (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the Federal Register. If the finding is positive, the Service is also required to promptly commence a review of the status of the involved species.

Section 4(b)(3)(B) of the Act, as amended, requires that, for any petition to revise the Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information, a finding be made within 12 months of the date of receipt of the petition on whether the petitioned action is (a) not warranted, (b) warranted, or (c) warranted, but precluded from immediate proposal by other pending proposals. Section 4(b)(3)(C) requires that petitions for which the action requested is found to be warranted but precluded should be treated as though resubmitted on the date of such finding, i.e. requiring a subsequent finding to be made within 12 months. Such 12-month findings are to be published promptly in the Federal Register. The most recent announcement of miscellaneous petition findings was published on June 30, 1987, and included all findings made by October 31, 1986, except for the desert tortoise finding. That finding, made September 25, 1986, and others made subsequent to November 1, 1986, are announced below.

In recent months the Service has received and made 90-day findings on the following two petitions:

Ken,

In view of the change to 5% rule on disadvantaged small business, perhaps someone should attend.

Note: I'll be out (SFO) that day

Wpmay

cc Len/Gene
Tom

SMALL BUSINESS CONFERENCE

***YOU CAN***

SELL TO GOVERNMENT

Government, through its agencies, institutions, facilities, and its many sub-contractors at Federal, State, county, city and local levels are the biggest buyers of virtually every product and/or service produced by our economic system.

This conference is designed to acquaint you, the attendee, with some of the products/services that will be purchased from local economy and to provide you an opportunity to meet face to face with representatives of major Northwest government buying agencies.

You will have an opportunity to learn the techniques and procedures for selling to government. You will be provided a notebook of required documentation, of names and addresses of major buying agencies in the Pacific Northwest.

Learn about the millions of dollars in government purchases that are "Set-asides" for small business.

## SCORE ACE Volunteers?

SCORE and SBA have a continuing interest in recruiting qualified volunteers to serve in SCORE/ACE.

If you are experienced in business, especially small business, and are willing to share your knowledge and experience to help others, please contact:

Leroy H. Peterson
SCORE/ACE Coordinator
915 2nd Ave.
Seattle, WA 98174-1089
(206) 442-0141

The Service Corps of Retired Executives

VOLUNTEER their business knowledge and experience to assist small businesses.

THEIR COUNSELING IS FREE & CONFIDENTIAL
If interested Seattle (206) 442-4518

3rd Class Bulk Mail
Postage & Fees Paid
S.B.A.
Permit No. G-82

U.S. Small Business Administration
Room 1792 Federal Building
915 Second Avenue
Seattle, Washington 98174

Official Business
Penalty for Private Use $300

AN EQUAL OPPORTUNITY EMPLOYER
ICAPPED FACILITIES AVAILABLE

**SMALL BUSINESS**


# *YOU CAN SELL TO* GOVERNMENT

## ALL DAY

**ONE DAY CONFERENCE**

**JULY 29 REGISTER 8:00 AM**
**BELLEVUE • HOLIDAY INN**
11211 Main Street
Bellevue, WA 98004
I-405 Exit #12
(info) 442-4518 or 442-5534

Presented by
Service Corps of Retired Executives
The Small Business Administration
Local Chamber of Comm

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1231 for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

Federal Communications Commission.

Mark N. Lipp,

*Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 87-14925 Filed 6-30-87; 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; Set-Asides for Small Disadvantaged Business Concerns

**AGENCY:** Department of Defense.

**ACTION:** Notice of Intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses; Notice of extension of comment period.

**SUMMARY:** The Defense Acquisition Regulatory Council published on May 4, 1987 (52 FR 16289), a notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses, with a 30-day comment period to end June 3, 1987. The purpose of this document is to extend the comment period for an additional 60 days.

**DATE:** Comments on this subject should be submitted in writing to the Executive Secretary, DAR Council, at the address shown below, on or before August 3, 1987, to be considered in the DAR Council's deliberations. Please cite DAR Case 87-33 in all correspondence related to this issue.

**ADDRESS:** Interested parties should submit written comments to: 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.

Note.—If commenters choose to hand-carry comments to the DAR Council Office at 1211 South Fern Street, Arlington, VA, arrangements for hand-carried comments must be made with the DAR Council Staff Members. Security Guards at this location are not permitted to accept or sign for hand-delivered comments of any kind.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, telephone (202)697-7266.

**SUPPLEMENTARY INFORMATION:** The DAR Council issued a notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses. Comments were to be submitted within 30 days, ending June 3, 1987. The DAR Council has determined that, due to the nature of the issue involved, the comment period should be extended for an additional 60 days, ending August 3, 1987.

Charles W. Lloyd,

*Executive Secretary, Defense Acquisition Regulatory Council.*

[FR Doc. 87-14888 Filed 6-30-87; 8:45 am]

BILLING CODE 3810-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**50 CFR Part 17**

### Endangered and Threatened Wildlife and Plants; Notice of Findings on Petitions and Initiation of Status Review

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition findings and status review.

**SUMMARY:** The Service announces two 90-day petition findings and seven 12-month findings for petitions to amend the Lists of Endangered and Threatened Wildlife and Plants. A status review is initiated for the white-necked crow, *Corvus leucognaphalus*, historically distributed in Hispaniola and Puerto Rico.

**DATES:** The findings announced in this notice were made during the period from September 14, 1986, to March 10, 1987. Comments and information may be submitted until further notice.

**ADDRESSES:** Information, comments, or questions should be submitted to the Assistant Director—Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, Washington, DC 20240. The petitions, findings, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 North Glebe Road, [illegible] Virginia. Additional infor[illegible] comments regarding unliste[illegible] populations of the desert tort[illegible] be addressed to Mr. Wayne Wh[illegible] Endangered Species Specialist, U[illegible]ish and Wildlife Service, Lloyd 700 Building, Suite 550, 700 NE. Multnomah Street, Portland, Oregon 97232.

**FOR FURTHER INFORMATION CONTACT:** William Knapp, Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235-2771 or FTS 235-2771).

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended in 1982 (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the Federal Register. If the finding is positive, the Service is also required to promptly commence a review of the status of the involved species.

Section 4(b)(3)(B) of the Act, as amended, requires that, for any petition to revise the Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information, a finding be made within 12 months of the date of receipt of the petition on whether the petitioned action is (a) not warranted, (b) warranted, or (c) warranted, but precluded from immediate proposal by other pending proposals. Section 4(b)(3)(C) requires that petitions for which the action requested is found to be warranted but precluded should be treated as though resubmitted on the date of such finding, i.e. requiring a subsequent finding to be made within 12 months. Such 12-month findings are to be published promptly in the Federal Register. The most recent announcement of miscellaneous petition findings was published on June 30, 1987, and included all findings made by October 31, 1986, except for the desert tortoise finding. That finding, made September 25, 1986, and others made subsequent to November 1, 1986, are announced below.

In recent months the Service has received and made 90-day findings on the following two petitions:

July 23, 1987

MEMO TO: Tom Wright

FROM: Ken Brebner

SUBJECT: Defense Acquisition Regulatory Council (DAR) 5% Rule

The DAR is considering proposing a rule to help achieve a goal of awarding 5% of contract dollars to small disadvantaged businesses. We have been working with SDB's for over 5 years under the current provision of public law 95-507 and have slowly worked our percentage up to 2.2 actual in 1986.

Due to the technical nature of our product, it is extremely difficult to find SDB's with whom to subcontract our material requirements. I feel that it would be impossible for Physio (or any other medical electronics company) to meet the 5% rule. It would essentially eliminate us from providing anything to DOD.

I notice that we have until August 3rd to respond to this proposed rule change. Your department is our contact with government agencies and I think you should express our concerns.

KB:cg

cc: Murray Lorrance
Bill Godejohn

Attachment

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1231 for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Mark N. Lipp,

*Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 87-14925 Filed 6-30-87; 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; Set-Asides for Small Disadvantaged Business Concerns

**AGENCY:** Department of Defense.

**ACTION:** Notice of Intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses; Notice of extension of comment period.

**SUMMARY:** The Defense Acquisition Regulatory Council published on May 4, 1987 (52 FR 16289), a notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses, with a 30-day comment period to end June 3, 1987. The purpose of this document is to extend the comment period for an additional 60 days.

**DATE:** Comments on this subject should be submitted in writing to the Executive Secretary, DAR Council, at the address shown below, on or before August 3, 1987, to be considered in the DAR Council's deliberations. Please cite DAR Case 87-33 in all correspondence related to this issue.

**ADDRESS:** Interested parties should submit written comments to: 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.

Note.—If commenters choose to hand-carry comments to the DAR Council Office at 1211 South Fern Street, Arlington, VA, arrangements for hand-carried comments must be made with the DAR Council Staff Members. Security Guards at this location are not permitted to accept or sign for hand-delivered comments of any kind.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles W. Lloyd, Executive Secretary, DAR Council, telephone (202)697-7266.

**SUPPLEMENTARY INFORMATION:** The DAR Council issued a notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses. Comments were to be submitted within 30 days, ending June 3, 1987. The DAR Council has determined that, due to the nature of the issue involved, the comment period should be extended for an additional 60 days, ending August 3, 1987.

Charles W. Lloyd,

*Executive Secretary, Defense Acquisition Regulatory Council.*

[FR Doc. 87-14888 Filed 6-30-87; 8:45 am]

BILLING CODE 3810-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

### Endangered and Threatened Wildlife and Plants; Notice of Findings on Petitions and Initiation of Status Review

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition findings and status review.

**SUMMARY:** The Service announces two 90-day petition findings and seven 12-month findings for petitions to amend the Lists of Endangered and Threatened Wildlife and Plants. A status review is initiated for the white-necked crow, *Corvus leucognaphalus*, historically distributed in Hispaniola and Puerto Rico.

**DATES:** The findings announced in this notice were made during the period from September 14, 1986, to March 10, 1987. Comments and information may be submitted until further notice.

**ADDRESSES:** Information, comments, or questions should be submitted to the Assistant Director—Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, Washington, DC 20240. The petitions, findings, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 North Glebe Road, [illegible] Virginia. Additional infor[illegible] comments regarding unliste[illegible] populations of the desert tort[illegible] be addressed to Mr. Wayne Wh[illegible] Endangered Species Specialist, U[illegible]ish and Wildlife Service, Lloyd 700 Building, Suite 550, 700 NE. Multnomah Street, Portland, Oregon 97232.

**FOR FURTHER INFORMATION CONTACT:** William Knapp, Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235-2771 or FTS 235-2771).

**SUPPLEMENTARY INFORMATION:**

Background

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Section 4(b)(3)(B) of the Act, as amended, requires that, for any petition to revise the Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information, a finding be made within 12 months of the date of receipt of the petition on whether the petitioned action is (a) not warranted, (b) warranted, or (c) warranted, but precluded from immediate proposal by other pending proposals. Section 4(b)(3)(C) requires that petitions for which the action requested is found to be warranted but precluded should be treated as though resubmitted on the date of such finding, i.e. requiring a subsequent finding to be made within 12 months. Such 12-month findings are to be published promptly in the Federal Register. The most recent announcement of miscellaneous petition findings was published on June 30, 1987, and included all findings made by October 31, 1986, except for the desert tortoise finding. That finding, made September 25, 1986, and others made subsequent to November 1, 1986, are announced below.

In recent months the Service has received and made 90-day findings on the following two petitions:

E. J. A., Inc.
Consulting Engineers & Surveyors

ELMER JONES, P.E.
President

(504) 275-1762

August 3, 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

RE: DAR Case 87-33
(Pub. L-99-661)

Dear Mr. Lloyd:

My concern for the 5% ruling is simply that agencies will use it with the intention of eliminating 8(a) set-asides which, in all reality, is defeating our purpose.

I have personally spoken with a number of Federal agencies (DOD primarily) who interpret the law to mean that they have to comply with 5% minority participation in their contracts as a rule. It was explained to me that the 5% was above and beyond the present 8(a) support and would, in no way, affect our opportunities to do work with the government but would enhance and increase our contracting efforts with the government agencies.

I encourage you to be sure that all of the necessary clauses are added to this law to make sure that the Federal agencies are aware of the interpretation to mean additional enforcement for additional work for the small and disadvantaged businesses, not a decrease in work as is being assumed.

Sincerely,

Elmer Jones, P.E.
President

EJ:mlg

11920 Richcroft Avenue, Baton Rouge, Louisiana 70814

NORTHWEST PIPING, INC.

*Established in 1970*
*100% Indian Owned*

**General and Mechanical Contractor**

Home Office & Mechanical Division:
1817 1st Avenue North
Grand Forks, North Dakota 58201
701-746-1058

Highway Heavy:
3407 Maple Street
Fargo, North Dakota 58102
701-280-0141

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 3C841
The Pentagon
Washington D.C. 20301-3062

Re: DAR Case 87-33

Dear Sir:

We are respectfully submitting our comments concerning the above referenced interim rule for consideration in formulating a final rule. We are in full agreement that an aggressive approach should be taken to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987(Pub.L. 99-661), entitled "Contract Goal for Minorities." We, however, disagree on a few points in the interim rule.

The first point on which we differ is the language used to descibe a small disadvataged business concern. Section 219.001 entitled definitions states that a "small disadvantaged business concern" 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,etc. We strongly oppose this language. The possibility of "sham" and "front" companies would increase with the potential of edging out competition from legitimately owned and controlled minority companies. The effort to reduce this risk by policing the companies responding to bid invitations would be very time consuming and expensive. These two hardships most likely would preclude any efforts to police the activities of all companies claiming a 51 percent minority ownership and control. We are a 100 percent owned and controlled Indian business and have had experience with this type of problem.

The second point we disagree with in the interim rule is the lack of distinction between a small disadvataged business concern and a business obtaining contracts pursuant to the Small Business Administrations' 8(a) program. We belive it would be far more equitable if the 5 percent set-aside for "small disadvantaged business concerns" did not include businesses in the Small Business Administrations' 8(a) program. We believe any contracts negotiated with 8(a) businesses should

not be included within the 5 percent award goal of the interim rule. Any awards to 8(a) business enterprises should be over and above the 5 percent goal which seeks to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987.

The reason we feel strongly about these points is because we are a 100 percent Indian owned and controlled business enterprise obtaining most of our contracts pursuant to the "Buy Indian Act" and have had difficulty competing with companies bidding on projects claiming they are 51 percent minority owned and controlled. In a few cases the question of the companies legitimate status as a minority business enterprise was raised and not answered satisfactorily. We anticipate the same problems with the interim rule if the 51 percent language remains.

If you have any questions regarding these comments please write me at 1817 1st Avenue North, Grand Forks, North Dakota 58201 or call me at 701-746-1058. Thank you for your attention in this matter.

Sincerely,

William E. deMontigny
President

GRAVES & Associates, Inc.
Third Generation of Road Builders
3104 Catalpa, Suite #8
P. O. Box 1549
PINE BLUFF, ARKANSAS 71613-1549
Telephone: 535-4123

JUL 2 0 1987

29

July 16, 1987

Honorable John Paul Hammerschmidt
U.S. Representative
2207 Rayburn Building
Washington, D.C. 20515

RE: DAR Case 87-33

Dear Representative Hammerschmidt:

Graves and Associates, Inc. strongly opposes the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

The Rule of Two set-aside for small disadvantaged businesses (SDB) is not necessary, nor authorized by Congress, to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses.

The ten percent allowance is nothing more than add-on cost. Fair market prices are exclusively the product of competition for the lowest possible costs. The Rule of Two is an invitation to abuse taxpayer dollars and favors certain segments of the population, a form of reverse discrimination.

I urge that the interim regulations not be implemented until such time as the Department of Defense conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980. Thank you.

Sincerely,

Don C. Graves

Don C. Graves, President

DCG/kk

JOHN PAUL HAMMERSCHMIDT
THIRD DISTRICT, ARKANSAS

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

COMMITTEES:
PUBLIC WORKS AND TRANSPORTATION
SUBCOMMITTEES:
AVIATION—RANKING MEMBER
WATER RESOURCES
SURFACE TRANSPORTATION
VETERANS' AFFAIRS—RANKING MEMBER
SUBCOMMITTEES:
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 24, 1987

Mr. Don C. Graves
President
Graves and Associates, Inc.
3104 Catalpa, Suite 8
P.O. Box 1549
Pine Bluff, Arkansas 7163-1549

Dear Mr. Graves:

Thank you for your recent letter in which you expressed your opposition to the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

Mr. Graves, I share your basic position on this issue. Defense Department officials are currently accepting comments on this interim rule, and all comments they receive will be considered in formulating a final rule. You can be sure that I will make your view known to the proper officials at the Department of Defense.

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: Charles W. Lloyd (re: DAR Case 87-33) ✓
Enclosure

**COLUMBIA CONSULTING SERVICES**
**consultant to managers**

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, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing in regards to the Small Business Set-Aside Base and implemtation by the DOD of section 1207 of the 1987 DOD Authorization Act (PL 99-661).

As president of a small business, I urge you to adapt a final rule in line with the intent of Congress. The rule should establish policies and procedures which will ensure that there shall be no reduction in the number or dollar value of contracts awarded under the SBA, sections 8(a) and 15(a), in order to meet the goal of section 1207 of the DOD Authorization Act, 1987.

Sincerely,

Kenneth H. Columbia
President

cc: file

**945 North Quantico Street, Arlington, Virginia 22205**

NATIONAL SECURITY INDUSTRIAL ASSOCIATION
National Headquarters
1015 15th Street, N.W.
Suite 901
Washington, D.C. 20005
Telephone: (202) 393-3620



AUG 0 5 1987

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

Dear Mr. Lloyd:

The National Security Industrial Association (NSIA) is pleased to comment on the notice of intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses. (DAR CASE 87-33). This interim rule would amend the Defense Federal Acquisition Regulatory Supplement (DFARS) to implement Section 1207 of the National Defense Authorization Act for the Fiscal Year 1987 (PL 99-661) entitled "Contract Goal for Minorities".

There is a concern especially among "small businesses" that under the proposed rule, the new percentage goals will infringe on the business opportunities of "small business" section not identified as "small disadvantaged businesses" (SDB). The same concern has been expressed by women-owned businesses, both of which are now competing against large businesses.

Many large businesses (some of who are NSIA member companies) that are active in Defense Contracts through earnest outreach programs are now spending 1.9% of their subcontracting dollars with small disadvantaged businesses. They would be hard tasked to increase their purchases approximately 150% with Small Disadvantaged Businesses (SDB).

This is extremely difficult in high-technology/manufacturing industries where the capacity for SDB to produce has not yet been demonstrated.

Some NSIA smaller company members are further concerned that using less than full and open competitive procedures and making awards for prices that may exceed fair market costs by up to 10 percent would definitely impact the strides they have made in being truly competitive with big business.

A further concern of both large and small companies is that the emphasis on percentage and the potential of receiving 10 percent above fair market value without meeting competitive requirements could encourage a surge of business individuals to place a small disadvantaged person at the head of their firm representing 51% ownership, thereby creating "false fronts" to more easily reap the benefits of Defense business.

Also of concern is the reporting by code for each "Ethnic Group " such as Asian-Indian Americans, Asian-Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Other minority groups. The potential for comparisons among ethnic groups, and potentially later requests, to "even-out" individual ethnic groups because of one or more ethnic groups not getting their share appears to be administratively perilous. In addition, if this requirement were passed on to large business the administrative costs for systems and reporting would be sizeable. This would appear to impact also on the information collection requirements found in the "Paperwork Reduction Act".

Finally, the National Security Industrial Association encourages the proposed "enhanced use" of technical assistance programs by DoD to SDB since this would help increase the vendor base, increase potential for SDB, and eventually help efforts to provide the available products at the lowest life cycle cost to the Federal Government.

We would be pleased to meet with you to further discuss this issue. Point of contact is Colonel E.H. Schiff of my staff.

Sincerely,

Wallace H. Robinson, Jr.
President

WHR: ff

charles s. davis associates, inc. consulting engineers
220 Bagley Avenue, Suite 700 • Detroit, Michigan 48226 • (313) 963-7565

July 29, 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 regulation which the Department of Defense has developed to reach its 5% minority contracting goal. In general, I view these rules as a disproportionately low representation which minority firms have in the defense business. However, I do maintain certain specific reservation to which I feel I should call your attention during this commentary period.

My reservation 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 Business. 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 State 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 the execution of sole-source contracts to minority firms are totally unsatisfactory and require strengthening. And fifth--neither a ambiguity nor an ommission--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 quickly, and to move forward aggressively in pursuing the five percent goal as established by the Defense Authorization Act of 1987.

Sincerely,

CHARLES S. DAVIS & ASSOCIATES, INC.

Charles S. Davis, PH.D, P.E.
President

CSD/alt

**Atlantic Petroleum Corporation**

401 Farragut Street, N.E.
Washington, D.C. 20011

Executive Offices

(202) 526-6784

August 3, 1987

Hand Delivered

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

Re: DAR Case 87-33, Comments

Dear Mr. Lloyd:

Set forth below are comments relating to the Interim Rules to achieve a goal of awarding 5 percent of contract dollars to Small Disadvantaged Businesses (SDB), 52 FR 85, p. 16265.

In enacting the Interim Rules, it is axiomatic that the agency must not prescribe rules that tend to defeat the legistative right established by Congress. On the contrary, the Interim Rules should be designed and intended "to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses, and of maximizing the number of such concerns particpating in Defense prime contracts...". ibid.

The provision of section 252.219-7006 (c) Agreement is wholly in derogation to the National Defense Authorization Act for Fiscal Year 1987 (Pub. L.99-661), "Contract Goals for Minorities". The Agrement as published, creates an undue encumberance, to wit, "to furnish, in performing the contract, only end items manufactufred or produced by small disadvantaged business concerns...", ibid at 16267. Said provision will work a baseless penalty on most of the SDB concerns, that would otherwise be eligible to participate in the proposed set-asides.

The availability of small disadvantaged manufacturers are sorely inadequate to service other small disadvantaged business concerns. Additionally, there are no such small disadvantaged manufacturer in many industries. As a result, many small disadvantaged regular dealers will be excluded from participating in the blanket contract goal, as mandated by Congress without restrictions.

A flagrant example of the wrongful exclusion not intended by Congress, is the oil industry. There are no, and have not been any refineries in the United States that were owned and operated by small disadvantaged concerns. Conversely, there are numerous small disadvantaged regular, dealer oil concerns nationwide, to which class this firm is a member. Our firm, in additon to many other disadvantaged oil companies would like an opportunity to participate in the contract goal, on a fair basis.

The inclusion of such a provision that bars our participation as a class, may not pass constitutuional muster, particularly where compliance is known at the outset, to be impossible. Basic principles of Contract Law, including but not limited to, fustration of purpose, and impossibility of performance would seem to dictate that the provision, as written, be deleted from the Interim Rules.

In formulating the Final Rules, we strongly urge the substitution of "...agrees to use its' Best Efforts...to furnish end items manufactured or produced by a small disadvantaged business, as supplemented by appropriate Certifications of SDB non-availability, prior to contact award". In said manner, the Final Rules will be consistent with both the intent and the letter of the law, while concurrently affording a greater opportunity to maximize SDB participation, without injury to members of the same SDB class.

I trust the foregoing will be utilized in formulating the Final Rules.

Regards,

R. S. Hill

Ms. R. S. Hill,
Chief Executive Officer


401 Farragut Street, N.E.
Washington, D.C. 20011
Executive Offices
(202) 526-6784

June 2, 1987

Hand Delivered

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

Re: DAR Case 87-33, Comments

Dear Mr. Lloyd:

Set forth below are comments relating to the supplemental proposals to develop proposed rules to achieve a goal of awarding 5 percent of contract dollars to Small Disadvantaged Businesses (SDB), 52 FR 85, p.16290.

The first proposal in which only one responsible SDB concern could be identified to fulfill DOD's requirements should be developed in accordance with the set asides procedures established in the Interim Rules.

Exception is taken to the second proposal for "establishing a 10 percent preference differential for SDB concerns in certain sealed bid competitive acquisitions when...necessry to attain the 5 percent goal".

At a minimum the perference should be stated as a 10 percent price differental as it relates to the Fair Market Price (FMP), and not as it relates to the low offeror's bid price. In acquisitions in which price is the primary consideration, the FMP is the most accurate indicator as to the price for which a commodity could reasonaly be obtained. Establishing a price differential above the low bid price, will encourage abuses, and may not objectively reflect actual market conditions. Arising from economies of scale, a large business can oftentimes bid below the fair market price, at which a Small Disadvantgaed Business , could otherwise acquire the commodity. In so doing, the preference differential would be defeated. A subjective artificial price as established by a large business bidder is meaningless, in that it bears no rational relationship to the marketplace. As a result thereof, the large business concerns will continue to receive most of the contract awards, while the SDB concerns for whose benefit the law was enacted, receive nothing.

Moreover, the preference proposal should not be established in lieu of the set asides provisions, which reserves contract opportunities for exclusive competition by SDB concerns. The preference proposal should only be utilized as a last resort, if at all, and not as an alternative, or discretionary elective to the set aside

procedures. To do otherwise, is to effectively nullify the intent and the letter of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), "Contract Goal for Minorities".

I trust that the foregoing will be considered in developing the proposed rules.

Cordially,

R.S. Hill

Ms. R.S. Hill,
Chief Executive Officer

Linda A. Hallum
P.O. Box 736
Marina, CA 93933

July 31, 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

Gentlemen:

This letter is to provide comments and voice concerns about the Interim Rule to Implement Section 1207, P.L. 99-661, Set-Asides for Small Disadvantaged Business Concerns (published Federal Register/Vol. 52, No. 85/Monday, May 4, 1987).

I am a contracting officer at Fort Ord, California, but the opinions expressed in this letter are my own opinions, and do not necessarily reflect the opinions of anyone within my chain of command.

My primary concerns about the interim rule are the mandatory nature of the application, the effect that the rule will have upon installation level contracting support, and the effect upon other small businesses. My letter will try to identify the issues and provide analyses, summary, and recommendations.

The contracting officer is directed to reserve an acquisition for exclusive competition among SDB firms if the "rule of two" can be met and award price will not exceed fair price by more than 10 percent.

Implementation of the interim ruling places an additional burden upon installation level contracting to bring the total Army obligations up to a 5 percent level. In and of itself, that concept is not necessarily bad. However, if an installation is presently meeting or exceeding SDB goals established by its major command, the contracting officer cannot exercise discretionary judgment. As of May 31st, Fort Ord was at 117% of its small disadvantaged business goals; however, it was only at approximately 60% of its goal for women-owned businesses. There is no leeway for a contracting officer not to set a procurement aside for SDB if the procurement meets criteria.

I envision the following detrimental effects on installation level contracting efforts.

a. The ruling imposes significant additional paperwork to an arena already choked with documentation requirements. Pre-solicitation documentation is increased in order to determine whether the solicitation should be reserved exclusively for SDB concerns. Additional clauses will be required in the solicitation. Additional certifications are required from bidders, and a supplementary report is required at contract award.

b. A contract specialist will experience difficulty in obtaining market prices in order to determine whether a price is fair and does not exceed the market price by 10 percent. As time goes by, those vendors excluded from bidding on government contracts because they are not a SDB concern will be increasingly reluctant to assist contract specialists. This phenomenon will be particularly true for service and construction contracts, where more effort is required in order to state a price for requested services.

c. Both evaluation and award processes and contract administration will become more difficult with increased numbers of bidders who are deficient in English. California has a high number of oriental contractors with exceedingly limited English. A higher proportion of errors are contained in solicitation documents, and a contract specialist must resolve whether they are material mistakes or minor discrepancies. Dialogue between the contractor, the contract administrator, and the contract inspector can be exceedingly difficult. Fort Ord has had to include local requirements for at least one person to be able to translate for the contractor. A contract administrator cannot be completely sure that the contractor truly understands what is expected of him, and tremendous amounts of time are spent in the translation process.

d. The process increases contracting leadtime from 30 to 60 days. Increased time is particularly wasted time when a solicitation reserved for SDB "busts," and no bids are received. The contract specialist in essence must start all over again. Increased regulatory leadtime reduces an installation's flexibility in planning and meeting emergency or short-fuse requirements. (Certainly, even more paperwork and documentation is then required.) One must not lose sight of the fact that the ruling is likely to cost an installation more money than a regular small business set-aside. The SDB would get the award if the amount is within the 10% difference over market price. The real losers are the installation activities and the soldiers who must wait another one to two months to receive the

I can be reached by mail at Post Office Box 736, Marina, California 93933, or by telephone at (408) 384-4813 (home) or (408) 242-3103 (work) or AUTOVON 929-3103/6914, should the Council desire any clarification/discussion of the contents of this letter.

Sincerely,

Linda A. Hallum

Linda A. Hallum
P. O. Box 736
Marina, CA 93933

**ASSOCIATED SPECIALTY CONTRACTORS, INC.**

Daniel G. Walter, *President*
7315 Wisconsin Avenue
Bethesda, MD 20814-3299
Telephone: (301) 657-3110

DAR Case 87-33

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

Dear Mr. Lloyd:

I am submitting these comments to you on behalf of the members of the Associated Specialty Contractors (ASC), voicing our opposition to the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987: Contract Goal for Minorities.

Recently, the Department of Defense issued a regulation that will allow DOD contracting officers to set aside solicitations to allow only small disadvantaged businesses (SDBs) to compete in the bidding process during fiscal years 1987, 1988 and 1989. The regulation, which went into effect on June 1, 1987, was designed to meet goals set by Congress to set aside five percent of contracts and subcontracts for SDBs.

According to the ruling listed in the May 4, 1987 Federal Register, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns ("rule of two"), and can expect that the awarded price will not exceed the fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among SDB firms.

The Federal Register report referenced above serves as public notice of this DOD ruling. "Compelling reasons" existed to issue this ruling without prior public comment.

**Mechanical Contractors Association of America, Inc.**

Suite 120, 5410 Grosvenor Lane, Bethesda, MD 20814-2122
Telephone (301) 897-0770 TWX: 710-825-0423

DAR Case 87-33

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

Dear Mr. Lloyd:

I am submitting these comments to you on behalf of the members of the Mechanical Contractors Association of America, Inc. (MCAA), voicing our opposition to the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987: Contract Goal for Minorities.

Recently, the Department of Defense issued a regulation that will allow DOD contracting officers to set aside solicitations to allow only small disadvantaged businesses (SDBs) to compete in the bidding process during fiscal years 1987, 1988 and 1989. The regulation, which went into effect on June 1, 1987, was designed to meet goals set by Congress to set aside five percent of contracts and subcontracts for SDBs.

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The Federal Register report referenced above serves as public notice of this DOD ruling. "Compelling reasons" existed to issue this ruling without prior public comment.

MCAA stands in firm opposition to this ruling for the following reasons:

- This is going to have a devastating effect on those construction concerns which have traditionally done work for the DOD.

- o DOD is implementing an interim regulation before it has received public comment.

- o DOD has not conducted an economic impact statement prior to issuing these rules even through the impact will be considerable.

MCAA is a construction trade association of approximately 1,300 firms employing approximately 125,000 persons. The work of a mechanical contractor is used to move fluids -- both liquids and gas. This includes the fabrication and installation of heating, ventilating, air conditioning and process piping systems, and further encompasses service, maintenance and the testing, adjusting and balancing of these systems. Our work effects multi-residential, commercial, public and industrial facilities. According to our 1987 Membership Profile, A large percentage of our members perform work on Federal projects.

These regulations are already having a profound effect on MCAA members who perform the majority of their work for the Department of Defense. For all practical purposes, they have been told to forget about bidding DOD jobs during the three years that this rule will be in effect. Yes, the U.S. government needs to encourage more minority participation in all areas of the Federal budget; but if you were to check Federal government figures on compliance with the five percent goal, you would find that there are only two out of a total of 36 industries that meet and surpass that goal. As you may have guessed, one of those is the construction industry.

MCAA has no objection to set asides for small, qualified, disadvantaged businesses as long as the bidding process is fair and open to all parties. MCAA has long supported the growth of SDBs and has had its own EEO Committee for 16 years. In this instance, however, it appears that participation by all other companies is foreclosed.

We urge that our comments concerning this interim ruling be given serious consideration.

Sincerely,

Charles H. Carlson
MCAA President

cc: The President of the United States
The Honorable Caspar W. Weinberger, Secretary of Defense
Mr. James C. Miller, III, Director, Office of Management and Budget

CONDON & FORSYTH

1100 FIFTEENTH STREET, N. W.

WASHINGTON, D. C. 20005

1251 AVENUE OF THE AMERICAS
NEW YORK, N. Y. 10020
(212) 757-6870

1900 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067
(213) 557-2030

TELEPHONE: (202) 289-0500
TELEX: CAFW 440354

August 3, 1987

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P) (M&RS)
C/o OADS (P&L) (M&RS)
Room 3C841 The Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 87-33; Implementation of Section 1207 of P.L. 99-661; Set asides for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

Comments are submitted on behalf of MGG Pipe & Supply Company, Inc. ("MGG"), New Orleans, Louisiana, an hispanic female owned steel and pipe dealer currently certified to participate in SBA's Section 8(a) Program. MGG wishes to focus its comments primarily on the proposed amendment to Section 252.219-7006(c).

The proposed amendment reads:

> (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.

The proposed amendment to 252.219-7006(c) is faulty in several respects. First, it is contrary to Congressional content. Public Law 99-661 was passed by Congress with the intent of creating procurement opportunities for small disadvantaged businesses ("SDB") with the Department of Defense ("DOD"). Congress did not intend the law to diminish opportunities for

SDBs. The net effect of this proposed amendment will do precisely that - diminish opportunities for dealers. Restricting SDB dealers to furnish only end items manufactured or produced by another SDB in the U.S. limits the SDB dealers ability to be competitive.

Second, the number of SDBs that manufacture steel and pipe in the United States is virtually nonexistent. MGG is unaware of SDBs that could provide end items of steel and pipe in such quantities to allow MGG or others similarly situated to fulfill contractual obligations. The amendment as proposed is a sure guarantee that companies, such as MGG, would never be selected by the DOD in the procurement process -- not because MGG could not perform on its own merits but because DOD through this rule would prevent MGG from securing its products from sources other than SDB manufacturers. Surely, Congress did not intend to restrict SDB dealers, such as MGG, to buying exclusively from SDB manufacturers.

Third, the amendment goes beyond the present SBA's so-called "non-manufacturer rule". The extension of the so-called "non-manufacturer rule" would unfairly exclude some SDB dealers from the program, especially in those areas where the number of SDB manufacturers is either very limited or non-existent.

The restriction will eliminate otherwise qualified SDBs from participating in a program in which Congress intended <u>inclusion</u> rather than exclusion of SDBs.

In sum the proposed amendment to Section 252.219-7006(c) is contrary to the Congressional intent of Section 1207, Public Law 99-661. Rather than creating an opportunity for an SDB dealer, such as MGG, the amendment makes opportunity illusory. There is no surer way of closing the door of opportunity to SDBs than by restricting them to purchasing only end items manufactured in the United States from other SDBs - SDBs which may not exist or who cannot furnish products in adequate amounts required for the set aside. Such a restriction makes a mockery of Congressional intent.

MGG strongly recommends that the proposed amendment be modified. At a minimum the amendment should conform to the current SBA "non-manufacturer rule." Even though that SBA rule restricts businesses, such as MGG, it will, at least, provide more of an opportunity than this proposed amendment. Section 252.219-

7006(c) should be modified to insure that SDBs will have every opportunity to participate in DOD procurements as was intended when Congress passed Public Law 99-661.

Sincerely,

Jim J. Marquez
CONDON & FORSYTH

JJM:em

July 31, 1987

Comments by Robert H. Golden, Esq.
Brooks Towers, Penthouse South
1020 Fifteenth Street
Denver, Colorado 80202

Respectfully submitted to the:

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

Re: DAR Case 87-33

## INTRODUCTION

On May 4, 1987, the Defense Acquisition Regulatory Council ("DAR") published an interim rule to implement Section 1207 of the National Defense Authorization Act, Public Law 99-661 ("Section 1207"). Section 1207 requires the Department of Defense to seek to obtain a certain level of contracting with small disadvantaged business concerns, including mass media (owned and controlled by socially and economically disadvantaged individuals the majority of the earnings of which directly accrue to such individuals) historically Black colleges and universities, and other minority institutions, in each of fiscal years 1987, 1988 and 1989. The required level of contracting which is set at 5% applies to the combined total of funds obligated for contracts for Department of Defense procurement in research, development, test and evaluation; military construction; and operations, and maintenance.

Section 1207 requires the Secretary of Defense to "exercise his utmost authority, resourcefulness, and diligence" in order to reach the desired objective. Section 1207 bolsters the authority, of the Secretary of State by providing that "[t]o the extent practical and when necessary to facilitate achievement of the 5% goal described in sub-section (a) the Secretary of Defense may enter into contracts using less than full and open competitive measures . . . , but shall pay a price not exceeding fair market cost by more that 10% in payment per contract to contractors or sub-contractors described in sub-section (a)."

The DAR interim rule requires that a contracting officer set aside acquisitions for exclusive competition among small disadvantaged business ("SDB") concerns whenever the contracting

officer determines that offers can be anticipated from two or more SDB concerns and that the contracting award price will not exceed fair market price by more than 10%. This commentary takes exception to the rule of 2 established in the interim rule and maintains that in order to facilitate meeting the stated objective, and what this commentator believes to be the underlying purpose of Section 1207, the Section 1207 implementing rule should utilize sole source awards.

## Discussion

The legislative history of Section 1207 is sparse. The house version of the Defense Authorization Bill contained a provision (Section 1032) that would provide for not less than 10% of each of the amounts appropriated for the Department of Defense's procurement in research, development, test and evaluations; 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. The Senate Bill did not contain a similar provision. However, in conference the Senate receded to the House Provision with amendments that replaced the mandated 10% set-aside with a goal of 5% of the total combined amount of contracts and sub-contracts for the next three fiscal years, 1987, 1988, 1989.

### A. The Underlying Purpose of Section 1207

In the late 1960's, the Commission on Civil Disorders ("the Kerner Commission") found that disadvantaged individuals played only a minor role in America's free enterprise system. In order to remedy this problem, the Kerner Commission reported that the federal government would have to take steps to increase the level of business ownership by minorities. Up until that time, in the words of the Honorable Parrin J. Mitchell "the federal government [had been] an active participant in practices which virtually excluded minority businesses from participating in a multi-billion dollar procurement system. While the legislative history of Section 1207 is sparse the history of the federal government's efforts to aid the development and growth of SDB's is not.

As a result of the Kerner Report, over the next ten years the federal government began taking small steps towards remedying the problems of disadvantaged individuals participating in the free enterprise system. The small business administrations' 8(a) program evolved through a series of executive orders issued by Presidents Johnson and Nixon. The Small Business Administration was altered in order to allow it to participate in solving the problems identified by the Kerner Report. The Office of Minority Business Enterprise was created within the Department of Commerce, by executive order, exclusively for minority busi-

1982 and 1983 prime government contracts and government sub-contracts to minority owned firms increased by 10%. Between 1983 and 1984 the total value of 8(a) sub-contracts increased from $2 billion in fiscal 1983 to $2.7 billion in fiscal 1984. However, with all the progress that has been made since 1978, The Minority Business Today, in January 1986, reported that Minority Americans had made only "modest gains in business in recent years". Surely, these modest gains do not approach economic parity, but simply another step in the right direction. The gains discussed herein will be dissipated if the Federal Government does not continue to strengthen old programs and create new and inventive programs. It is to this end that this commentator believes that sole-source contracting should be allowed in implementing Public Law 99-661.

In particular, sole-source contracting would have the advantages of: (a) allowing technical, professional, and high-tech manufacturing concerns which may not be eligible under the interim "rule of 2" to participate in the program; and (b) creating an atmosphere in which the most qualified and motivated SDBs would actively self-market their services and participate in the program, allowing new concerns to enter industries presently unoccupied by SDBs. These advantages are consistent with the federal government's objective to foster business ownership and promote the viability of SDBs. Moreover, the fair market provision in section 1207 would operate to insure that sole-source awards did not create unreasonable costs for services.

## C. Section 1207 Gives the DAR the Authority to Use Sole-Source Awards.

The Department of defense is clearly restricted by the competitive requirements in the Competition in Contracting Act. 10 U.S.C. 2303 (a) states that "[t]his chapter applies to the procurement by any of the following agencies for its use or otherwise, of all property (other than land) and all services for which payment is to be made from appropriated funds: (1) Department of Defense . . . . " Notwithstanding the absolute preference for competition created by the Competition in Contracting Act, the Act itself contemplates circumstances under which competition is not necessary. One of those circumstances is when there is a legislative mandate to the contrary. 10. U.S.C. 2304 (c) (5) provides that "the head of an agency may use procedures other than competitive procedures only when . . . (5) a statute expressly authorizes or requires that the procurement by made through another agency or from a specified source . . . ."

Section 1207 specifically authorizes the use of less than full and open competitive measures to achieve the goal of 5%. Further, as indicated above, sole-source awards are consistent with the promotion of SDBs. Therefore, this commentator

would suggest the use of sole-source awards to acheive the goal of 5% where contracting officers are aware or made aware of SDBs that can complete a contract within the fair market requirements.

Respectfully submitted this 31st day of July, 1987.

Robert H. Golden

Robert H. Golden, Esq.

# American Consulting Engineers Council

1015 Fifteenth Street, N.W., Washington, D.C. 20005 202-347-7474

**HOWARD M. MESSNER**
Executive Vice President


August 3, 1987

Mr. Charles W. 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:

On behalf of the American Consulting Engineers Council (ACEC), I want to take this opportunity to voice our strong opposition to the mechanism described in the interim rule to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (P.L. 99-661). 52 Fed. Reg. 16263 (May 4, 1987).

ACEC is an association representing some 4,600 private practice consulting engineer firms with approximately 130,000 employees. Many of these firms actively pursue contracts with all branches of the military services and view such work as an important part of their client mix. The vast majority of these firms are small business enterprises as defined by the Small Business Administration. In fact, 90% of our members have fewer than 50 employees; 50%, fewer than 7 employees.

The proposed "SDB Rule of Two" mechanism for meeting section 1207's goal of 5 percent of contract dollars to small disadvantaged business (SDB) concerns during FY 1987, 1988 and 1989, will seriously impact thousands of other small business firms. As such, the interim rule represents an unacceptable approach to accomplishing Congress' goal.

It is well documented that SDB professional design firms enjoy nearly twice the amount of contract opportunities in supplying architectural, engineering and surveying (A/E/S) services than even the ambitious 5 percent goal enacted by Congress. The Department of Defense's own data show that in FY 1986 SDB firms received 9.4 percent of the actions and 7.6 percent of the contract dollars for A/E services. (See Attached DoD data).

It is important to note that SDB participation represented 11.8 percent of all contracts and 11.5 percent of all contract dollars going to small A/E business firms (whether by set-aside or in the open market) in FY 1986. Therefore, if SDB set-asides increase in the A/E industry, that increase will most likely come at the expense of

other small business firms. This fact is recognized by DoD when it states in the May 4, 1987 notice of the interim rule making that:

> *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 . . . This approach should tend to reduce impact upon non-SDB small businesses.*

Since most small A/E firms are not selected for DoD contracts through "small purchases," this alleged safeguard is of little value. In fact, the interim rule will have a very great impact on non-SDB small firms, notwithstanding the rule's attempt to mitigate against such an impact.

It has been the consulting engineers' experience that federal contracting officers have used the so-called "Rule of Two" to set-aside A/E/S service contracts at levels approaching total set-asides. The justification for such high set-aside levels has been the argument that the A/E industry contains a great number of qualified small business firms - certainly enough to meet the required "two". While this is true, it is also true these firms have shown that they can compete outside of the set-aside market (see Attached DoD data); yet, whenever the "Rule of Two" method is applied near total set-asides occur.

For the interim rule to introduce a "SDB Rule of Two" preference for all contracts raises the potential of large numbers of A/E/S contracts being set-aside for exclusive SDB participation at the expense of other A/E small business firms. Even though the A/E industry is well above the 5 percent goal -- the interim rule's approach will almost certainly result in greater SDB set-asides, based on our previous experience with the general "Rule of Two." The very fact the A/E industry has had higher SDB participation than the 5 percent goal will actually be the reason contracting officers will argue there is "a reasonable expectation" that at least two SDB firms exist that can handle a given contract under the interim rule's approach.

The interim rule assures only that industries that have SDB participation will receive more participation. The rule does nothing to spread that participation among industry groups. Therefore, the interim rule should be changed so as to apply a "goaling" method for each major industry contracting group. When an industry group meets or exceeds its goal the work should be subject only to general small business participation or left in the open market.

It is clear the A/E industry far exceeds the statute's goal. Under P.L. 92-582, A/E firms vigorously compete for projects based on competence, experience, prior performance, and technical qualifications. This method has proven very effective in providing small and small disadvantaged firms the opportunity to win contracts. Their fees are based on the negotiation of scope of work and "fair and reasonable" compensation. No 10 percent price preference is given since selection is based on qualifications. The interim rule as proposed does injustice to this system.

For the foregoing reasons, ACEC respectfully requests that the Defense Acquisition Regulatory (DAR) Council change the proposed "SDB Rule of Two" method to a "goaling" method in order to meet section 1207's 5 percent SDB participation goal.

ACEC appreciates your consideration of our comments on this important matter.

Sincerely,

Howard M. Messner

Enclosure

MAC W-II.6

ARCHITECT AND ENGINEERING AWARDS FOR CONSTRUCTION 1/
(EXCLUDING NAVAL A&E)
(AMOUNTS IN THOUSANDS)

| | TOTAL A & E | | LARGE AND SMALL BUSINESS | | | | | | SET-ASIDES | | | | SMALL DISADVANTAGED | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | LARGE | | SMALL | | PCT OF SMALL | | SET-ASIDES | | PCT OF TOTAL | | NON-8A | | 8A | | TOTAL SM-DIS | | PCT-TOTAL | |
| | ACTNS | $(000) | ACTNS | $(000) | ACTNS | $(000) | ACTN | AMT | ACTNS | $(000) | ACTN | AMT | ACNS | $(000) | ACNS | $(000) | ACNS | $(000) | ACTN | AMT |
| ARMY (Excluding Civil Functions) | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 1,551 | 82,133 | 340 | 27,577 | 1,211 | 54,556 | 78.1 | 66.4 | 42 | 4,382 | 2.7 | 5.3 | 119 | 5,649 | 4 | 130 | 123 | 5,779 | 7.9 | 7.0 |
| FY 80 | 1,275 | 76,769 | 284 | 32,735 | 991 | 44,034 | 77.7 | 57.4 | 92 | 5,016 | 7.2 | 6.5 | 94 | 3,962 | 8 | 209 | 102 | 4,171 | 8.0 | 5.4 |
| FY 81 | 1,716 | 96,517 | 254 | 25,630 | 1,462 | 70,887 | 85.2 | 73.4 | 663 | 33,252 | 38.6 | 34.5 | 174 | 7,162 | 17 | 625 | 191 | 7,787 | 11.1 | 8.1 |
| FY 82 | 2,216 | 137,984 | 230 | 36,716 | 1,986 | 101,268 | 89.6 | 73.4 | 1410 | 69,872 | 63.6 | 50.6 | 203 | 8,839 | 24 | 474 | 227 | 9,313 | 10.2 | 6.7 |
| FY 83 | 1,722 | 194,451 | 235 | 69,832 | 1,487 | 124,619 | 86.4 | 64.1 | 1,306 | 104,753 | 75.8 | 53.9 | 201 | 14,280 | 7 | 1,800 | 208 | 16,080 | 12.1 | 8.3 |
| FY 84 | 2,123 | 205,200 | 303 | 58,886 | 1,820 | 146,314 | 85.7 | 71.3 | 1,392 | 106,977 | 65.6 | 52.1 | 228 | 16,076 | 11 | 908 | 239 | 16,984 | 11.3 | 8.3 |
| FY 85 | 2,275 | 243,257 | 468 | 100,796 | 1,807 | 142,461 | 79.4 | 58.5 | 587 | 41,138 | 25.8 | 16.9 | 213 | 16,515 | 8 | 464 | 221 | 16,979 | 9.7 | 7.0 |
| FY 86 | 1,594 | 157,578 | 420 | 71,070 | 1,174 | 86,508 | 73.6 | 54.8 | 180 | 12,932 | 11.3 | 8.2 | 83 | 5,493 | 4 | 167 | 87 | 5,660 | 5.4 | 3.6 |
| CIVIL FUNCTIONS | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 476 | 47,072 | 108 | 29,833 | 368 | 17,239 | 77.3 | 36.6 | 7 | 592 | 1.5 | 1.3 | 25 | 1,036 | - | - | 25 | 1,036 | 5.3 | 2.2 |
| FY 80 | 383 | 23,260 | 98 | 9,671 | 285 | 13,589 | 74.4 | 58.4 | 16 | 1,312 | 4.2 | 5.6 | 32 | 1,060 | 4 | 600 | 36 | 1,660 | 9.4 | 7.1 |
| FY 81 | 488 | 26,982 | 114 | 12,106 | 374 | 14,876 | 76.6 | 55.1 | 79 | 3,266 | 16.2 | 12.1 | 38 | 1,002 | 7 | 252 | 45 | 1,254 | 9.2 | 4.6 |
| FY 82 | 319 | 15,295 | 99 | 7,348 | 220 | 7,947 | 69.0 | 52.0 | 109 | 3,564 | 34.2 | 23.3 | 47 | 1,088 | - | - | 47 | 1,088 | 14.7 | 7.1 |
| FY 83 | 141 | 12,675 | 29 | 3,725 | 112 | 8,950 | 79.4 | 70.6 | 83 | 5,824 | 58.9 | 45.9 | 15 | 662 | 7 | 309 | 22 | 971 | 15.6 | 7.7 |
| FY 84 | 154 | 10,022 | 18 | 1,314 | 136 | 8,708 | 88.3 | 86.9 | 117 | 6,888 | 76.0 | 68.7 | 10 | 444 | 4 | 600 | 14 | 1,044 | 9.1 | 10.4 |
| FY 85 | 183 | 14,789 | 25 | 4,477 | 158 | 10,312 | 86.3 | 69.7 | 97 | 6,673 | 53.0 | 45.1 | 6 | 280 | 1 | 100 | 7 | 380 | 3.8 | 2.6 |
| FY 86 | 137 | 14,202 | 22 | 5,456 | 115 | 8,746 | 83.9 | 61.5 | 71 | 5,118 | 51.8 | 36.0 | 6 | 501 | - | - | 6 | 501 | 4.4 | 3.5 |
| NAVY | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 1,248 | 61,736 | 107 | 7,665 | 1,141 | 54,071 | 91.4 | 87.6 | 125 | 5,258 | 10.0 | 8.5 | 73 | 2,529 | - | - | 73 | 2,529 | 5.8 | 4.1 |
| FY 80 | 1,342 | 80,123 | 95 | 8,563 | 1,247 | 71,560 | 92.9 | 89.3 | 575 | 31,921 | 42.8 | 39.8 | 140 | 6,420 | 2 | 849 | 142 | 7,269 | 10.6 | 9.1 |
| FY 81 | 1,664 | 99,249 | 143 | 17,497 | 1,521 | 81,752 | 91.4 | 82.4 | 1,229 | 67,055 | 73.9 | 67.6 | 188 | 8,720 | 2 | 105 | 190 | 8,825 | 11.4 | 8.9 |
| FY 82 | 2,234 | 139,772 | 148 | 25,811 | 2,086 | 113,961 | 93.4 | 81.5 | 1,903 | 95,091 | 85.2 | 68.0 | 282 | 12,051 | - | - | 282 | 12,051 | 12.6 | 8.6 |
| FY 83 | 1,884 | 206,834 | 241 | 64,733 | 1,643 | 142,101 | 87.2 | 68.7 | 1,472 | 122,402 | 78.1 | 59.2 | 225 | 16,446 | 3 | 189 | 228 | 16,635 | 12.1 | 8.0 |
| FY 84 | 1,816 | 179,142 | 203 | 44,676 | 1,613 | 134,466 | 88.8 | 75.1 | 1,242 | 99,015 | 68.4 | 55.3 | 214 | 16,716 | 1 | 160 | 215 | 16,876 | 11.8 | 9.4 |
| FY 85 | 1,994 | 168,360 | 306 | 36,509 | 1,688 | 131,851 | 84.6 | 78.3 | 740 | 51,529 | 37.1 | 30.6 | 297 | 19,808 | 2 | 265 | 299 | 20,073 | 15.0 | 11.9 |
| FY 86 | 1,931 | 184,016 | 368 | 49,954 | 1,563 | 134,062 | 80.9 | 72.8 | 424 | 28,169 | 22.0 | 15.3 | 243 | 19,909 | 3 | 113 | 246 | 20,022 | 12.7 | 10.9 |
| AIR FORCE | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 130 | 9,725 | 19 | 3,098 | 111 | 6,627 | 85.4 | 68.1 | 31 | 1,634 | 23.8 | 16.8 | 6 | 136 | 1 | 12 | 7 | 148 | 5.4 | 1.5 |
| FY 80 | 148 | 14,052 | 13 | 5,639 | 135 | 8,413 | 91.2 | 59.9 | 46 | 2,166 | 31.1 | 15.4 | 16 | 915 | 4 | 266 | 20 | 1,181 | 13.5 | 8.4 |
| FY 81 | 222 | 11,557 | 22 | 2,305 | 200 | 9,252 | 90.1 | 80.1 | 158 | 6,464 | 71.2 | 55.9 | 29 | 1,309 | 2 | 43 | 31 | 1,352 | 14.0 | 11.7 |
| FY 82 | 519 | 19,950 | 24 | 1,855 | 495 | 18,095 | 95.4 | 90.7 | 380 | 13,597 | 73.2 | 68.2 | 77 | 3,057 | 10 | 215 | 87 | 3,272 | 16.8 | 16.4 |
| FY 83 | 247 | 17,513 | 13 | 1,529 | 234 | 15,984 | 94.7 | 91.3 | 189 | 12,770 | 76.5 | 72.9 | 36 | 2,328 | 4 | 265 | 40 | 2,593 | 16.2 | 14.8 |
| FY 84 | 234 | 18,783 | 18 | 2,033 | 216 | 16,750 | 92.3 | 89.2 | 148 | 10,757 | 63.2 | 57.3 | 37 | 2,366 | - | - | 37 | 2,366 | 15.8 | 12.6 |
| FY 85 | 358 | 30,126 | 78 | 10,440 | 280 | 19,686 | 78.2 | 65.3 | 75 | 4,032 | 20.9 | 13.4 | 54 | 4,288 | 1 | 48 | 55 | 4,336 | 16.4 | 14.4 |
| FY 86 | 379 | 28,447 | 81 | 9,777 | 298 | 18,670 | 78.6 | 65.6 | 58 | 3,089 | 15.3 | 10.8 | 40 | 2,603 | 3 | 243 | 43 | 2,646 | 11.3 | 9.3 |
| DLA | | | | | | | | | | | | | | | | | | | | |
| FY 79 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 80 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 81 | 1 | 13 | - | - | 1 | 13 | 100.0 | 100.0 | 1 | 13 | 100.0 | 100.0 | - | - | - | - | - | - | - | - |
| FY 82 | 11 | 184 | - | - | 11 | 184 | 100.0 | 100.0 | 10 | 167 | 90.9 | 90.8 | - | - | - | - | - | - | - | - |
| FY 83 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 84 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 85 | 1 | 28 | - | - | 1 | 28 | 100.0 | 100.0 | - | - | - | - | - | - | - | - | - | - | - | - |
| FY 86 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |

ARCHITECT AND ENGINEERING AWARDS FOR CONSTRUCTION 1/
(EXCLUDING NAVAL A&E)
(AMOUNTS IN THOUSANDS)

| | TOTAL A & E | | LARGE AND SMALL BUSINESS | | | | | | SET-ASIDES | | | | SMALL DISADVANTAGED | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | LARGE | | SMALL | | PCT OF SMALL | | SET-ASIDES | | PCT OF TOTAL | | NON-8A | | 8A | | TOTAL SM-DIS | | PCT-TOTAL | |
| | ACTNS | $(000) | ACTNS | $(000) | ACTNS | $(000) | ACTN | AMT | ACTNS | $(000) | ACTN | AMT | ACNS | $(000) | ACNS | $(000) | ACNS | $(000) | ACTN | AMT |
| TOTAL DOD | | | | | | | | | | | | | | | | | | | | |
| FY 79 | 3,405 | 200,666 | 574 | 68,173 | 2,831 | 132,493 | 83.1 | 66.0 | 205 | 11,866 | 6.0 | 5.9 | 223 | 9,350 | 5 | 142 | 228 | 9,492 | 6.7 | 4.7 |
| FY 80 | 3,148 | 194,204 | 490 | 56,608 | 2,658 | 137,596 | 84.4 | 70.9 | 729 | 40,415 | 23.2 | 20.8 | 282 | 12,357 | 18 | 1,924 | 300 | 14,281 | 9.5 | 7.4 |
| FY 81 | 4,091 | 234,318 | 533 | 57,538 | 3,558 | 176,780 | 87.0 | 75.4 | 2,130 | 110,050 | 52.1 | 47.0 | 429 | 18,193 | 28 | 1,025 | 457 | 19,218 | 11.2 | 8.2 |
| FY 82 | 5,299 | 313,815 | 501 | 71,730 | 4,798 | 241,455 | 90.5 | 77.1 | 3,812 | 182,291 | 71.9 | 58.1 | 609 | 25,035 | 34 | 689 | 643 | 25,724 | 12.1 | 8.2 |
| FY 83 | 3,994 | 431,473 | 518 | 139,819 | 3,476 | 291,654 | 87.0 | 67.6 | 3,050 | 245,749 | 76.4 | 57.0 | 477 | 33,716 | 21 | 2,563 | 498 | 36,279 | 12.5 | 8.4 |
| FY 84 | 4,327 | 413,147 | 542 | 106,909 | 3,785 | 306,238 | 87.5 | 74.1 | 2,899 | 223,637 | 67.0 | 54.1 | 489 | 35,602 | 16 | 1,668 | 505 | 37,270 | 11.7 | 9.0 |
| FY 85 | 4,811 | 456,560 | 877 | 152,222 | 3,934 | 304,338 | 81.7 | 66.6 | 1,499 | 103,372 | 31.1 | 22.6 | 570 | 40,891 | 12 | 677 | 582 | 41,568 | 12.1 | 9.1 |
| FY 86 | 4,041 | 384,243 | 891 | 136,257 | 3,150 | 247,986 | 77.9 | 64.5 | 733 | 49,308 | 18.1 | 12.8 | 372 | 28,506 | 10 | 523 | 382 | 29,029 | 9.4 | 7.6 |

1/ This table presents all A&E actions (minus R216 marine A&E) that are for construction (C2 in Item 10C) for work performed in the U.S. and its possessions.

PROFESSIONAL
SERVICES
COUNCIL

Representing companies
that are creating the
future through innovation,
technology and ideas

John C. Rennie
*President*

Virginia Littlejohn
*Executive Director*

August 3, 1987

Defense Acquisition Regulatory Council
The Pentagon
Room 3C841
Washington, D.C. 20301-3062

Attention: Mr. Charles W. Lloyd, Executive Secretary
OSASD (P) DARS, c/o OASD (P&L) (M&RS)

Re: Development 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:

We are submitting these comments on the above interim rule on behalf of the Professional Services Council (PSC), an association representing the interests of the professional and technical services industry.

PSC represents eighty firms and six trade associations of companies that serve the federal government's needs for a wide variety of technology-based professional and technical services. The professional and technical services industry is reinvigorating our industrial base and providing major new competitive strengths and opportunities in international trade. The industry encompasses research and development firms, computer software development houses, independent laboratories and test facilities, systems engineering, integration and support companies, and program analysis and evaluation organizations, to name a few. The personnel in these companies are highly skilled engineers, scientists in all disciplines, mathematicians, statisticians, accountants,

World Center, 918 16th Street, N.W., Suite 406, Washington, D.C. 20006, Phone: 202/296-2030, Fax: 202/296-2035

program analysts, artificial intelligence specialists, computer scientists and programmers, social scientists and specialists in many other fields.

We note that this is an interim rule with a request for comments. We note additionally that comments must be submitted by August 3, 1987, to be considered in formulating a final rule. The text accompanying the interim rule recites the DOD's determination that the interim rule may have a "significant economic impact on a substantial number of small businesses." Consequently, an Initial Regulatory Flexibility Analysis (IRFA) is required under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et. seq., (RFA).

We are informed by the DOD that the analysis is currently unavailable, and that a notice of proposed rulemaking on another rule "affecting the same topic" will be issued shortly. The interim rule states that the IRFA will be filed with that rule.

These comments are submitted to insure that PSC's views are considered in formulation of the final rule. However, we consider it unrealistic for DOD to request definitive comments on either this interim rule or the final rule prior to the publication and general availability of the IRFA, and Final Regulatory Flexibility Analysis (FRFA).

Accordingly, we suggest that the IRFA be completed and published. Further comments on the proposed final rule should be allowed in the future, based on information and analysis set forth in the IRFA. Subsequently, a FRFA, summarizing the comments received, should be filed with the final rule. Such a procedure is important to avoid "short-circuiting" the administrative process as required by the RFA.

Summary of PSC's Concerns

More information is required on the potential impact of the setaside in terms of dollars. In the event the IRFA yet to be filed shows that a large dollar amount is needed to meet the goal, PSC contends that technical and professional services requirements should not be a disproportionate source of those dollars. Another source of concern is the degree to which actions taken to fulfill the setaside will be subject to abuse. Some protections as to eligibility

determination and subcontracting limitations, equivalent to those in effect in the 8(a) program, may be required.

Our comments below state PSC's request for inclusion of various information and analysis in the IRFA. We also comment on various substantive aspects of the interim rule of concern, and which we believe should be addressed in the IRFA. PSC additionally provides broader perspectives on the small business setaside program within the procurement process.

We would hope to expand on these perspectives in our later submission, as part of our comments on information and analysis contained in the IRFA.

Information and Analyses Required in the IRFA

The interim rule proposes to implement Section 1207 of the National Defense Authorization Act for FY 1987 (Pub. L. 99-661). That section and the interim rule require a new category of setasides for a class of small firms identified in the interim rule as Small Disadvantaged Businesses (SDBs).

To properly evaluate the rule, and provide rational comments on its possible effects on the procurement process, the services industry, and PSC members, which include government contractors of all sizes, more information and analysis is required than is set forth in the interim rule. We therefore request that the information requested below be included in the IRFA:

- The total number of procurement dollars currently received by the combined class of SDBs covered by the five percent setaside required by Section 1207, broken down by:
  - -- prime contract dollars;
  - -- subcontract dollars; and
  - -- each of these should be broken down further by small business concerns owned and controlled by socially and economically disadvantaged individuals,

historically black colleges and universities, and minority institutions.

The above information is requested to help determine how many DOD procurement dollars have been allocated to those groups in recent years, allowing interested parties to the rule to determine the extent of the impact in dollars of the five percent setaside requirement.

- We request a further definition of SDBs, to include:

  -- the number of firms such a class will contain;

  -- the industry categories in which such SDBs are currently doing business, broken down by services (SIC group 87), and non-services;

  -- the impact of the rule as proposed on 8(a) (versus SDB) firms, by industry category; and

  -- the impact of the rule on small, 8(a) technical and professional services firms.

  The above information is requested to help determine the impact of the rule in existing 8(a) firms, and particularly those doing business in technical and professional services.

- We request information on the impact on non-SDB firms, as follows:

  -- the number of small firms in the services industry categories not qualifying for SDB status;

  -- industry categories in which the setaside will have a significant impact, and the procurement dollar volume

estimated to be set aside for each category;

-- a discussion of the impact on technical and professional services requirements now substantially filled by non-SDB firms, which would be set aside;

-- the relationship of the proposed implementation of the rule to other sections of Pub. L. 99-661, particularly Section 921 (a)-(h);

-- in particular, an analysis and explanation of how proportionality by industry category, as required in Section 921 of Pub. L. 99-661, will be maintained by the "Rule of Two" implementation approach for Section 1207, as set forth in the interim rule;

-- an analysis of the impact of the rule on non-small business firms recently graduating from small business status and no longer eligible for setasides, particularly those in the technical and professional services industry; and

-- the impact of the rule on complexity of the procurement process, and on the publication-to-award-time-frame for procurements.

The above information is required to analyze and comment intelligently and rationally on the displacement impact of the rule and the five percent setaside on non-8(a) and non-SDB firms.

Comments on Effects of the Interim Rule

The following brief comments are made regarding substantive aspects of the interim rule.

o Proportional Impact

As a matter of good public and procurement policy, DOD should insure that implementation of both the interim and final rule exerts an equitable and proportional impact across all of the various industry categories contributing to the defense effort. In both drafting the final rule, and in implementing the five percent setaside, DOD should avoid the dysfunctions which would occur if the five percent goal were fulfilled from too few industry categories.

o Program Integrity

The interim rule provides for a system of self-certification as to the status as a small disadvantaged business concern. This process will be vulnerable to abuse and is difficult to monitor by competitors and other interested parties. The qualification factors, percentage of ownership, actual control, and accrual of profits, are considerably more difficult to monitor than the factors used for size determination where self-certification is also permitted. A preferred system, requiring additional oversight by the federal government, is a system that operates much like the current 8(a) program, where concerns must provide the information necessary to make an accurate determination as to eligibility.

Additional consideration should be given to the question of limitations on subcontracting levels by SDBs. The 8(a) program imposes limits on subcontracting, to prevent "flow-through" situations, in which the qualified disadvantaged firm is used to obtain work for non-disadvantaged subcontractors. Protections against the possibility of such abuses have not been set forth in the interim rule.

o "Fair Market Cost" versus "Fair Market Price"

The statute permits award to an SDB as long as the price does not exceed fair market cost by ten percent. The interim regulations, however, provide that award may be made if made at a price not exceeding fair market price by more than ten percent. The difference between cost and price is the amount of profit. As the interim regulations now read, the final acceptable price of an SDB offer may be higher than permitted by statute because ten percent of cost will presumably always be lower than ten percent of the sum of cost and profit.

o Subcontracts

Although the statutory goal of five percent is to be met through the award of contracts and subcontracts, the interim regulations do not require any collection of data on the total dollar value of subcontracts awarded to SDBs. Failure to collect that data could result in increased pressures to award additional contracts to SDBs even though the five percent goal has actually been met.

As stated above, we propose to submit more detailed comments on PSC's views on the substantive effects of the rule when DOD's IRFA has been published.

Perspectives of PSC on the Impact of Further Setasides on the Procurement Process

PSC is currently reviewing the existing small business setaside approach as a fundamental part of the procurement system. While this review is in process, PSC believes there is opportunity for improving the manner in which small business can rationally and efficiently receive a fair and equitable proportion of procurements. One aspect of a program for constructive improvement should include a biannual planning and programming approach to identifying and allocating the areas across all federal government procurement where small business setasides will be affected. The targeted dollar volume of setaside procurements would include both direct prime contracts with small businesses and subcontract participation by small businesses.

The goals of the planning process are (1) to ensure that setaside programs are applied evenly to all procurement areas, (2) to ensure that the government marketplace is more stable and predictable for the government's contracting resource base (small, disadvantaged, midsize, and large businesses), and (3) to provide organizations interested in government procurement the needed information to develop marketing strategies for the public sector. This, most importantly, will provide visibility to both eligible small businesses, as well as place non-small businesses on notice as to what areas will not be accessible through unrestricted competitive procurement. This planning and programming vehicle will culminate with a submission to Congress that lays out all areas selected for small business setasides. It will be submitted in comprehensive form every two years and modified as necessary in the intervening year.

PSC reserves the right to supplement its comments on the IRFA to the rule with additional perspectives on how the government's overall approach to small business participation in the procurement process can be improved.

We appreciate the opportunity to submit these comments, and look forward to the opportunity to submit further comments on the rule in the future.

Sincerely,

Virginia Littlejohn
Executive Director

cc: Frank Swain, Chief Counsel for Advocacy,
Small Business Administration

ROPES & GRAY
1001 TWENTY-SECOND STREET, N.W.
WASHINGTON, D.C. 20037
(202) 429-1600

CABLE ADDRESS "ROPGRALOR"
TELEX NUMBER 940519
TELECOPY (202) 429-1629

IN BOSTON:
225 FRANKLIN STREET
BOSTON, MASSACHUSETTS 02110
(617) 423-6100

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 requirments 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 captial 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 thses 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 <u>voting</u> stock owned by one ore 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

(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.

(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.



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-

## The Section 8(a) and 7(j) pro-
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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)(i), 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 souree;

(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

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"Regular dealer" means a person owns, operates, or maintains a warehouse, or other establish- in which materials, supplies, ar- or equipment of the general cter described in the business are bought for the account of person, kept in stock and sold to ublic in the usual course of busi- In order to qualify as a regular r, the concern must be able to

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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 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 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 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

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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 a 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

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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 comparision 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

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 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

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during the period of debarrment, 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 Participating 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

achieve competitiveness. In order to maximize limited program resources, SBA will emphasize program participation for those concerns closer to achieving competitiveness.

(ii) 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 Participation 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 §§ 124.112 124.110(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, 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)(9) of the Small Business Act (15 U.S.C. 637(a)(9)), or any of SBA's implementing rules and regulations.

(k) *Program completion.* (1) When a 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;

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(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-

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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 supension 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

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.

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**§ 124.205 Forms and documents required.**

Each 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 Classification Codes through other Government procurement procedures. As 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.

(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 financial resources or the ability to obtain such resources as required.

(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 inthe 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 indentified 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 evalution 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 Quotation (RFQ). Providence of a general intent to set aside, such as Pro-

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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 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 indentified 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.

(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 maintained 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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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

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(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 convenants 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 dissemi-

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 individuals, 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

ls, and with small businesses eli- to receive contracts pursuant to n 8(a) of this Act. SBA may pro- ncentives and assistance to such esses that will aid in the training pgrading of potential subcontrac- or other small business concerns le for assistance under sections 11), 7(j), and 8(a) of the Small ess Act, and

Coordinate and cooperate with leads of other Federal depart- and agencies, to insure that acts, subcontracts, and deposits by the Federal Government or programs aided with Federal are placed in such a way as to er the purposes of sections 1), 7(j), and 8(a) of the Small ess Act.

*Eligibility.* (1) Eligibility for the ance enumerated under (b) above shall include, but ted to:

nesses which qualify as small the meaning of size standards ibed in 13 CFR Part 121, and are located in urban or rural with a high proportion of unem- d or low-income individuals, or are owned by such low-income duals; and

Businesses eligible to receive con- pursuant to section 8(a) of the Business Act.

*Delivery of services.* (1) The fi- al assistance authorized for ts under paragraph (b) of this n includes assistance advanced ant, cooperative agreement, or act.

To the extent feasible, services ble under paragraph (b) of this n shall be provided in a location is easily accessible to the indi- s and small business concerns l.

*Coordination and cooperation other government agencies.* (1) A/MSB-COD may utilize the re- es of other agencies and depart- whenever practicable which can ly or indirectly support or aug- the purposes of sections 7(a)(11), nd 8(a) of the Small Business

The AA/MSB-COD shall enter ments with Federal agencies rtments to further effective



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 shall 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 asssistance;

(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 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. 3245-0205]; § 124.112(a)(17) [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]

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