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June 8, 1987

Defense Acquisition Regulatory Council
OASD (P&L) DASD (P) DARS
c/o Room 3D 139
Pentagon
Washington, D.C. 20301

Attn: Charles W. Lloyd, Executive Director

Re: Comments On Interim Rule
DAR Case 87-33
Implementation of Section 1207 of Pub.L. 99-661
Set Asides for Small Disadvantaged Business Concerns

Gentlemen:

The proposed regulation aimed at fostering the economic growth of small socially and economically disadvantaged business (SDB) concerns by means of SDB set asides fails to take into account Executive Order No. 12138 (May 18, 1979, Fed. Reg. 29637), which recognizes the "many obstacles facing women entrepreneurs" and "the need to aid and stimulate women's business enterprise." The Order directs each department and agency of the Executive branch to "take appropriate action to facilitate, preserve and strengthen women's business enterprise and to ensure full participation by women in the free enterprise system."

FAR §19.901 implemented the Executive Order by requiring the inclusion of clause 52.219-13 "Utilization of Women-Owned Small Businesses" in all contracts expected to exceed the small purchase dollar limitation. It requires the contractor

> to use its best efforts to give women-owned small businesses the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with the efficient performance of its contract.

In view of the strong interest demonstrated by the administration in assisting and promoting the use of women-owned businesses, we believe that the DAR Council should consider adding women business enterprises as a group eligible for award under this Regulation.

Very truly yours,

Francis J. Pelland

FJP:djk
cc: Washington Area Contracting Center, Andrews AFB

87-33

Tylane Products Company
Division of Tylane, Inc.
8241 Indy Lane
Indianapolis, Indiana 46224
(317) 271-6001

May 26, 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

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

NATIONAL CONSTRUCTION INDUSTRY COUNCIL

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

June 3, 1987

Mr. Wayne Arney
Associate Director
Office of Management and Budget
Washington, D.C. 20503

Dear Wayne:

Re: DOD Federal Acquisition Regulation
Volume 52, No. 84; Federal Register

Thank you for taking the time to meet with our delegation from the National Construction Industry Council (NCIC). As you can tell, we are very concerned over the practical impact of DOD's new interim acquisition regulation on the construction industry. If our interpretation of the proposal is correct, the 90 per cent of construction companies in the U.S. which are by definition considered small businesses, will be precluded from even bidding DOD-related projects for the next three fiscal years. Simply stated, that prospect is unacceptable.

We understand and appreciate the pressure the Department of Defense is responding to. Nonetheless, we believe the Department has misconstrued the legislative history related to 99-661 in this regard, and as a consequence, has produced a flawed proposal.

While the respective views of NCIC's members differ on the issue of small, disadvantaged set-aside percentages and less than free and open market competition, there is unanimity within the Council in opposition to the interim rule. We plan to make that position very clear in the ensuing weeks.

We do not discount that DOD had the best intentions in advancing the proposal. The contracting office was clearly responding to what it believes was both a congressional mandate and a directive from the Under Secretary's office. But the fact remains that the new procedures will literally put hundreds of small businessmen out of business in the near term.

The Council believes the following concerns/questions need to be addressed:

1. **Is DOD aware that this "rule of two" will effectively foreclose all bidding opportunities from firms which are not disadvantaged?**

2. **Does not the "rule of two" in the construction industry become an exclusionary 100 per cent rule for disadvantaged firms over the next three fiscal years?**

3. **Has not the construction industry exceeded the 5 per cent threshold, cited in the regulation as the goal to be achieved, for years?**

4. Why is the construction industry -- the very industry currently in compliance -- the only industry covered by the interim rule? Is aerospace affected? Research and development? High technology contractors? If not, why not?

5. Was an economic impact statement conducted? If not, why not? If one was compiled, what is the projected impact on small business organizations in the construction industry?

6. Why were no public comments received prior to the implementation of the interim rule? Why an interim rule in the first instance? Has the Administrative Procedures Act been violated?

7. Did the DOD acquisition regulation get OMB clearance? If not, why not? Has Director Miller been briefed on the subject at all? In short, has anyone in this Administration other than DOD personnel reviewed the proposal?

In short, NCIC believes this regulation has been very poorly conceived, that normal administrative procedures have been clearly circumvented, and that other defense industries are receiving preferential treatment at the expense of the construction industry. We intend to raise these concerns immediately with the appropriate Members and staff of the Armed Services, Small Business and Government Operations Committees, other high-ranking officials within the Administration, the trade and general press, and well as with DOD officials directly.

We genuinely believe, Wayne, that this is a fundamentally flawed rule which will have (intended or otherwise) a devastating affect. We hope OMB is in a position to, at least, convey the nature of our concern to the proper persons and, where possible, lend substantive support.

Thanks once again for your time and consideration.

Sincerely,

Gregg Ward

Gregg Ward
Executive Director

GW:bs

cc: Joe Hughes
Jack Curtin
Dave Johnston
Jim Noble

NAMC NATIONAL ASSOCIATION OF MINORITY CONTRACTORS
NEW JERSEY CHAPTER, P.O. Box 1604 Union, New Jersey 07083

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,
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

Hamilton V. Bowser, Sr.
Legislature Comm. of NJC, NAMC

HVB:vp

July 7, 1987

The Honorable Caspar W. Weinberger
Secretary of Defense
The Pentagon
Room 3E880
Washington, DC 20301

Re: 48 CFR Parts 204,205,206,219 and 252 Set-Asides for Small Disadvantaged Business Concerns

Dear Mr. Secretary:

On behalf of the 20,000 general contractors, subcontractors, suppliers and related firms of Associated Builders and Contractors, I would like to register the Association's strong opposition to the interim regulation cited above as published in the Federal Register of May 4, 1987.

Although ABC will submit formal regulatory comments on this proposed rule, the sweeping impact of this interim regulation on the nation's construction industry dictates that the Association make known its opposition early in the regulatory process.

Associated Builders and Contractors has long held the position that a contract should be awarded to the lowest responsible bidder. As a practical matter, combining the "rule of two" and the small disadvantaged business (SDB) set-aside practices creates a preferential procurement program so restrictive that it will exclude the vast majority of American construction firms from bidding on Department of Defense contracts.

It is important to understand the real-world context in which this badly flawed proposal will be implemented if its full impact is to be recognized. Construction is a large industry -- contributing 9.4% of America's Gross National Product -- composed of relatively small firms. Most of ABC's membership fall under the Small Business Administration's size standard for a "small" general contractor ($17 million in annual receipts). Moreover, the vast majority of ABC members -- general contractors included -- fall under the SBA's size standard for a "small" specialty contractor ($7 million in annual receipts). The proposed interim rule will, if promulgated in final form, preclude many companies in these size ranges from bidding on Department of Defense contracts and curtail, if not eliminate, aggressive competition for work which benefits the Department and, in turn, the American taxpayer.

AQUO 12181 87

729 15th Street, NW • Washington, DC 20005 • (202) 637-8800

Technically, ABC is concerned that the interim regulation has been published prior to public comment and does not appear to have been cleared by the Office of Management and Budget. These two actions alone would have alerted the Defense Acquisition Regulatory Council to the massive impact the interim rule will have.

In summary, the interim rule will severely reduce competition in bidding Defense Department contracts and cause higher costs to the taxpayer. ABC already has learned of situations where non-SDBs that submitted bids as much as 20% lower than their competitors lost contracts to SDBs whose bid prices were some 6% above the fair market price.

ABC strongly believes that this badly formulated regulation will have unforeseen devastating effects on America's construction industry, and we ask that you use your authority to order its immediate withdrawal.

Sincerely,

Charles E. Hawkins, III, CAE
Vice President, Government Affairs

87-33

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TELEX 279 354 AGC WSH

DANA HUESTIS, *President* JAMES W. SUPICA, *Senior Vice President* PAUL EMERICK, *Vice President*

F. THOMAS WESTCOTT, *Treasurer* HUBERT BEATTY, *Executive Vice President*

June 1, 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 America 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.

Implementation of SDB Set-Aside Regulations Is Not Necessary Nor Authorized for Military Construction

Section 1207(e)(3) of the National Defense Authorization Act for Fiscal Year 1987 provides the Secretary of Defense with authority to enter into contracts using less than full and open competitive procedures and to award such contracts to SDB firms at a price in excess of fair market price by no more than 10 percent only "when necessary to facilitate achievement of the 5 percent goal." The legislative intent is clear that only when existing resources are inadequate to achieve the 5 percent objective should the Secretary of Defense consider using less than full and open competitive procedures such as set-asides.

While such restrictive procurement procedures may be necessary to achieve the 5 percent objective in certain classifications of Department of Defense procurements, such procedures are clearly not necessary in military construction. In fiscal year 1985 disadvantaged businesses were awarded 9 percent of Department of Defense construction contracts ($709 million out of $7.9 billion). Clearly the 5 percent objective has already been achieved and exceeded through the full and open competitive procurement process for military construction contracts.

Applying the "Rule of Two" SDB set-aside procedures to military construction procurements is not only not necessary, but clearly not authorized by the legislation since such set-asides are not "necessary to facilitate achievement of the 5 percent goal."

Contract Award to SDB Firms at Prices That Do Not Exceed 10 Percent of Fair Market Cost Is Not Necessary Nor Authorized for Military Construction

Application of the legislative authority to award contracts to SDB firms at a price not exceeding fair market cost by more than 10 percent to military construction procurements is also not authorized by the legislation since the same condition is placed on that provision as is placed on the provision allowing the use of procurement procedures utilizing less than full and open competition; that is, the 10 percent price differential is to be utilized only "when necessary to facilitate achievement of the 5 percent goal."

The routine and arbitrary use of the 10 percent price differential provision in military construction procurements will only serve to increase the cost of construction to the taxpaying public and yet bear no relationship to achieving the 5 percent objective.

The ten percent allowance is nothing more than an add-on cost, to the detriment of taxpayers, particularly since the definition of fair market cost contained in the interim regulations is based on reasonable costs under normal competitive conditions and not on the lowest possible costs. This definition ignores the market realities of how prices are derived. Fair market prices are exclusively the

product of competition. Competition forces business firms to seek the lowest possible cost methods of producing or providing service. The fair market price 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 conditions 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 restricted 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(a), that in making SDB set-asides for research and development or architect-engineer acquisitions, 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) of the interim regulations provides that the contracting officer must, in implementation of the Rule of Two, reserve a solicitation for SDB set-aside procedures if 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. This requirement effectively transforms the anti-competitive "Rule of Two" into an even more anti-competitive "Rule of One." For example, a contract awarded under full and open competition at $1 million, might have 5 competitive bidders within 3% of the award price. Yet, the existence of a non-competitive bid by an SDB firm, 10% over the award price, would require the contracting officer to set aside similar subsequent solicitations.

Section 219.502-72(b)(1) is a 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,

Hubert Beatty
Executive Vice President

cc: The President of the United States
Caspar W. Weinberger, Secretary of Defense
James C. Miller, III, Director of Office of Management and Budget

Aerospace Industries Association of America, Inc.

Office of the Vice President

July 2, 1987

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

Dear Mr. Lloyd:

The Aerospace Industries Association (AIA) appreciates the opportunity to comment on the interim rule to add a new Subpart 217.75, Undefinitized Contract Actions, to the DFARS.

On behalf of our member companies, we offer the following comments for your consideration:

1. 217.7501 Definitions

a) The proposed DoD rule is inconsistent with the scope of the Defense Acquisition Improvement Act of 1986. The statute defines an undefinitized contract action as a "new procurement action" entered into by the head of the agency for which the contractual terms, specifications or price are not agreed upon before performance is begun under the action. The regulation defines the undefinitized contract action as any "contract action" for which the contract terms, specifications or price are not agreed upon before performance is begun under the action, including contract modifications for additional supplies and services. This broadening of the requirement goes beyond the apparent intent of Congress.

b) Amend the second paragraph by adding the word "written" before "agreement." There is no definitive contract until the parties have signed. "Definitization" would take place upon execution of the contract document by both parties. This date is important in the computation of the time frames cited in 217.7503(b)(3)(i)&(ii).

2. 217.7503(b)(3)(i) Definitization Schedule

The definitization schedule in this subpart is more restrictive than that required by the statute which states the action must provide for definitization by the earlier of 180 days from submission of a qualifying proposal or the date when funds are

equal to more than 50%. The regulation requires agreement by the earlier of 180 days from the date of issuance of the action or the date when funds are equal to more than 50%. Even though extensions are permissible, this appears to be an unwarranted restriction.

3. 217.7503(b)(4) Limitation on Obligations and Expenditures

a) There may be an error at 217.7503(b)(4) in the second sentence wherein it says the UCA must be definitized before 50% of the maximum NTE price is expended "...by the government, ..". It seems more logical that this should read "...by the Contractor, ..." inasmuch as the Contractor is doing the expending. We assume these new requirements would be used in conjunction with other standard clauses in incrementally funded contracts; e.g. Limitation of Government Liability, Contract Definitization, and Limitation of Government Obligation. To avoid any possible misunderstanding or conflict, these new requirements should be reviewed to ensure they are compatible with these standard clauses.

b) Limitation of expenditure may cause additional cost tracking which will be difficult and contrary to the Paperwork Reduction Act. It is not clear from the implementing instructions but it is assumed these provisions are prospective. This should be clarified.

4. 217.7504(b) Contract Clauses

There is no mention of how to establish provisional shipment billing prices when deliveries are made prior to receipt of a definitized contract document. It is assumed that if a UCA is not definitized but deliveries are required that interim billing prices can be established. This point should be clarified.

We would be pleased to meet at your convenience to discuss these comments.

LeRoy J. Haugh
Vice President
Procurement and Finance

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, DC 20301-3062

Re: DAR Case 87-33, Set-Asides for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

Associated Builders and Contractors (ABC) appreciates the opportunity to submit comments on the above-mentioned interim regulation.

ABC requests that the Department of Defense withdraw this badly flawed proposal to allow consideration of more appropriate alternatives, such as those proposed in these comments, for fulfilling its mandate in Section 1207 of The National Defense Authorization Act for Fiscal Year 1987 (P.L. 99-661).

ABC represents 20,000 general contractors, subcontractors, material suppliers and related firms that employ more then one million workers in the open shop segment of the construction industry which now performs 70% of all work across the nation. The Association promotes the Merit Shop concept of construction, which means that a contract should be awarded to the lowest most responsible bidder under fair and open competition.

One of ABC's most fundamental tenets is that government procurement should be conducted with totally open and fair competition. The Association is committed to the belief that it is the responsibility of government to obtain the lowest possible price through unrestricted competition, as utilized in the free enterprise system, in the government procurement process.

However, ABC recognizes that Congress, in Section 1207(e) of the FY '87 Defense Authorization Act, permitted the Secretary of Defense to enter into contracts using "less than full and open competitive procedures when practical and necessary to facilitate achievement of a goal of awarding 5% of contract dollars to small disadvantaged business concerns during FY 1987, 1988 and 1989, providing the contract price does not exceed fair market cost by more than 10%."

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The Association objects to the Department's decision to utilize the "Rule of Two" to implement this provision of Public Law 99-661. ABC proposes the publication of a revised proposed regulation that implements Section 1207 by 1) emphasizing greater DOD assistance and outreach efforts, as mandated by Congress in Section 1207(c), to help increase the percentage of contract awards to Small Disadvantaged Businesses (SDBs); and 2) replacing the Rule of Two with a "sufficient number" standard.

Use of the Rule of Two Is Not Mandated By The Law and Is Inappropriate For The Construction Industry

Section 1207 of The FY '87 Defense Authorization Act is silent on the issue of which guidelines the Secretary of Defense may use in entering into contracts with SDBs under "less than full and open competitive procedures." Therefore, DOD is given wide latitude in selecting an appropriate mechanism for preferential procurement.

By proposing to use the Rule of Two, the Department is contemplating a set-asides system based on the most onerous and restrictive of procurement rules. Under this rule, a DOD contracting officer would be required to severely limit competition by setting aside a contract whenever he/she thinks that two SDBs might have an interest in doing the specified work. The rule functions as an automatic trigger mechanism and achieves what is practically sole-source procurement -- only two bidders.

The special characteristics of the construction industry and the practical facts of construction contracting clearly demonstrate that the Rule of Two is not appropriate for implementing Section 1207.

The industry is composed of a large number of small firms which by their nature are highly competitive. The longstanding competitive bid process exemplified by the construction industry assures that firms compete on an equal basis in the free enterprise system. This process works well and promotes competitiveness and, in turn, cost-effective construction. Small construction firms usually compete with their equals because it would not be economical for large firms to bid on work more efficiently handled by the small firms. To do so would drain financial and personnel resources large firms need to bid on contracts more suited to their greater capabilities and requirements.

As the Department is aware, small companies in general are awarded a significant share -- up to 90% in some areas -- of federal set-aside contracts. Congress has reviewed this situation and has directed the SBA, in Public Law 99-661, to review small business size standards with the goal of limiting small business procurement levels to approximately 30% of dollar volume.

Additionally, entry into the construction industry is relatively easy and requires little start-up capital. Since there are relatively few barriers to entering this business, new small firms are constantly emerging, which assures competition. Construction firms compete for contracts on the basis of price and ability to perform work.

Since offers are generally received from 10 to 12 firms in federal construction procurement at all times, this means that exclusive small business set-asides frequently occur on a repetitive basis with the Rule of Two. Utilizing this rule will not necessarily result in more contract awards to SDBs -- it will only cause more contracts to be set aside for restricted bidding. The true result could be an exclusionary 100% set-aside for SDBs.

The Association is alarmed that the Rule of Two, as proposed in this interim regulation, will unfairly burden the construction industry. Currently, 64% of all non-residential federal construction (SIC Code 1542) is performed through small business set-asides and SBA 8(a) contract awards. In construction specialty trades, construction set-asides can reach as high as 91.7% in the carpentry trade (SIC Code 1751).

Section 1207(b) mandates a 5% SDB set-aside goal for the "total combined amounts" of four DOD acquisition activities -- procurement; research development, test and evaluation; military construction; and operations and maintenance. Under this provision, it is not necessary to achieve the 5% SDB set-aside goal in any one of the four activities -- only in the total value of the four areas.

ABC is extremely concerned that DOD contracting officers will attempt to meet the overall 5% goal by setting aside an unreasonably high number of construction contracts for exclusive bidding by SDBs simply because federal construction is characterized by a high level of set-asides. The Association believes it would be unfair to achieve the 5% goal by compensate for lower SDB set-aside levels in the other acquisition activities.

The Rule of Two Is Inconsistent With The Requirements of The Competition Contracting Act

The Competition In Contracting Act of 1984 (CICA) requires "full and open competition in the procurement of property and services ... by establishing policies, procedures, and practices that assure that the executive agency receives a 'sufficient number' of responses. This would be carried out by requiring contracting officers to demonstrate that a sufficient number of small business concerns will respond ... taking into account the size, character, and complexity of each contract and the pool of prospective firms."

In passing CICA, Congress clearly intended to maximize full and open competition to meet the government's procurement needs. The "Rule of Two" unreasonably restricts the contracting officer's discretion to consider the factors specified in CICA. In actual practice, the Rule of Two goes far beyond the "less than full and open competitive procedures" standard of Section 1207. Requiring a contracting officer to create an SDB set-aside based on the expectation that only two such firms may have an interest in bidding on the contract effectively prevents the development of evidence to justify what is virtually sole-source procurement.

The Rule of Two Will Result in Higher Procurement Costs and Will Not Increase The Level of SDB Contracting

Additionally, the highly restrictive nature of the Rule of Two invites higher procurement costs above and beyond the 10% premium allowed by the Act. Specifically, the Department will face increased costs -- as well as contract delays -- due to the defaults that will occur due to unqualified SDBs being awarded contracts beyond their capabilities solely because of their SDB status. ABC has been provided with a study of the mechanical (plumbing, heating, cooling) subcontracting field which shows that 18% -- or almost one in five -- of the MBE (minority business enterprise) firms defaulted on government contracts awarded through set-aside programs. In cases such as this, the government agency must absorb the financial loss, face delays in completing the project, and reissue the contract -- all of which create higher procurement costs.

From FY 1981 through FY 1986 -- the period of the administration's massive defense build-up, when overall contract awards to business increased by 57% -- the percentage of awards to SDBs varied by 0.3%. Further, the dollar volume of DOD contracts to all small businesses never varied by more than 2%. Clearly, if the opportunities created by the recent increases in defense spending have not, by their sheer size, resulted in more contract awards to small businesses and SDBs, the Department may be close to maximizing the SDB procurement capability available.

Moreover, using the Rule of Two to fulfill the requirements of Section 1207 may actually reduce the overall level of minority contracting by the Department. By relying on the Rule of Two, the proposed regulation gives DOD contracting officers a simple, expedient option for setting aside contracts for exclusive SDB participation. The availability of this procedure can be expected to reduce minority set-asides under the SBA 8(a) program, which is considerably more complex and requires more effort on the part of contracting officers to set aside contracts and certify contractors as eligible to participate in the 8(a) program. The simplicity and expediency afforded by the proposed DOD regulation -- coupled with the existing availability of known minority contractors in the Department's 8(a) program -- will encourage contracting officers to redirect contracts and contractors from the 8(a) program to meet the requirements of Section 1207 (and, in turn, the proposed regulation).

Congress already recognizes the potential for this redirecting of minority contracts by including in FY 1988 authorization legislation provisions to prevent this situation. Section 846 (b) (5), (6), (7) and (8) of H.R. 1748 requires the Secretary of Defense to issue regulations (emphasis added) that:

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

Clearly, Congress realizes how easy it will be for DOD contracting officers to use the pool of existing 8(a) contractors for the purpose of fulfilling the requirements of Section 1207. Moreover, these provisions in the FY 1988 Defense Authorization bill are directed at closing this regulatory loophole and safeguarding the 8(a) set-aside program.

Alternatives to the Rule of Two

ABC believes that Section 1207(c) clearly directs the Secretary of Defense to pursue a balanced regulatory approach for the purpose of meeting the requirements of Public Law 99-661. Specifically, paragraph (c) mandates the Secretary to:

> "... 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."

This language is significantly more proscriptive than Section 1207(e) (3), which states:

> "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... (emphasis added)"

Associated Builders and Contractors understands and appreciates the need to facilitate the establishment of SDBs in the construction industry and assist these firms in obtaining the experience necessary to compete in the private sector. ABC is concerned, however that the 5% SDB goal -- and DOD's proposal to utilize the Rule of Two to achieve it -- do not take into consideration that a sufficient number of qualified SDBs may not be available. The Association further believes that increased participation in the construction marketplace by SDBs can best be achieved on a long-term basis by upgrading the job skills of these workers and the management abilities of owners and supervisors. Accordingly, ABC offers the following recommendations:

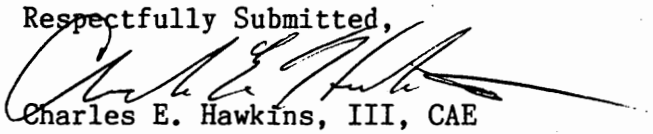
> 1) The Secretary of Defense should make the fullest possible use of his mandate in Section 1207(c) to provide the assistance necessary to help qualified SDBs compete for DOD contracts. This effort would concentrate on identifying potentially capable SDBs as well as providing ongoing training and management development over the terms of their contracts to help SDBs increase their capabilities to perform.

2) As part of this outreach and assistance program, SDBs should be qualified by contracting officers as to their capability to successfully perform the particular projects on which they are bidding. Criteria should include, but not be limited to: on-site visits, personal interviews, license examination, analysis of bonding capacity, listing of work completed, resume of principal owners, and financial capacity and type of work preferred. Section 1207 does not prohibit the Secretary of Defense from establishing qualification criteria, and such standards would help assure the Department of more efficient and cost-effective procurement using SDBs. Further, a set of uniform qualification standards promotes the original intent of Section 1207 -- to develop the business abilities of SDBs in the DOD procurement arena.

3) The Rule of Two should be replaced with a "sufficient number" standard that allows contracting officers more discretion in determining whether to set aside a contract for exclusive SDB participation under Section 1207. As previously mentioned, the sufficient number standard allows contracting officers to demonstrate that a sufficient number small business concerns will respond to a request for bids, with consideration given to the size, character and complexity of individual contracts as well as the pool of available firms. This standard returns discretion to the contracting officer in choosing to restrict competition. Under the Rule of Two, the contracting officer is allowed almost no discretion, even to the point of not permitting even an examination of the SDB's ability to perform a particular contract. In the alternative ABC, suggests that the Department examine DBE programs in civilian federal agencies as potential models for its Section 1207 program.

ABC urges the Department of Defense to adopt these recommendations in the interest of promoting equity and efficiency in SDB procurement. The Association's staff will be pleased to assist the Department in any way in refining the proposed regulation to achieve these goals.

Respectfully Submitted,



Charles E. Hawkins, III, CAE
Vice President, Government Affairs

Bill

I "SYNOPSIZED"
YOUR COMMENTS
& WILL FAX THEM
TO MR LLOYD
WED AM

YOU WRITE WELL
BILL.

HAVE A GOOD
DAY MARSHALL

(3) Subcontracts. Where subcontract opportunities exist we recommend that successful SDB offerors be required to award a mandatory percentage of such subcontracts to qualified minority business firms.

We look forward to your favorable response to our comments and stand ready to assist you in your speedy implementation of this important legislation.

Very truly yours,

Marshal D. Joseph
President/BPRA

cc:
NEDCO
National Federation
of 8(a) Companies
Norma Leftwich

KETRON, INC.

Corporate Office
Suite 1710, Rosslyn Center
1700 N. Moore Street
Arlington, VA 22209
(703) 558-8700
Telex: 710-955-0219

May 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 is in the response to the Federal Register of May 4, 1987. I cite DAR Case 87-33. It has to do with set-asides for disadvantaged business concerns.

A key element of the proposed regulation appears to be "specifically, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns, and that there is a reasonable expectation that the award price will not exceed fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among such SDB firms."

For whatever acquisitions to which the above policy would pertain, I suggest the following alternative. For any disadvantaged firm that responds to this proposal request, its cost proposal will be discounted by 10 percent. Once this discount has been applied, the contract award will be made on the basis of otherwise normal selection criteria. For such contracts, all proposers, both disadvantaged and non-disadvantaged, will be notified of this handicap.

Let me outline the basis for this suggestion. First of all, the provisions of the original statement are extremely hazardous, if not actually ridiculous -- particularly the requirement that the contracting officer determine that the award price is unlikely to succeed the fair market price by more than 10 percent. Given the difficulty of pricing government defense contracts, this determination is inherently impossible for any contracting officer to make. For almost any category of defense procurement, actual bids typically vary by at least 30 percent. It is not unusual for them to vary by over 100 percent, and this includes good faith bids by technically competent contractors. This means that, based on actual current DOD acquisition experience, these determinations by the contracting officer will be totally and demonstrably arbitrary. It may be

helpful to phrase the problem in two other ways: first, if the competition was structured according to my suggested alternative, and a contracting officer had already lined up at least two disadvantaged firms to bid, what do you think he could say about the probability that a disadvantaged firm would win; second, suppose (contrary to the normal process) the contracting officer were to announce ahead of time what he considered the fair market price to be. What is the likelihood that a non-disadvantaged firm would bid more than 10 percent below that price?

Clearly, either one of these provisions will produce a real strain on the "non-disadvantaged" firms. In the one case, they will be arbitrarily precluded from bidding; in the second case, they will be discouraged from bidding because of the risk of being underbid by an actual higher bid. This strain will, in turn, interfere with DOD being able to procure the best available support for its projects. I do not argue with the apparent DOD decision that some interference of this sort is an appropriate price to pay for the positive social consequences of improving the lot of disadvantaged individuals. I do say that the alternative I suggest will enable DOD to help the disadvantaged with much less interference with effective procurement than must be anticipated by the original wording.

Sincerely,

John D. Kettelle
Chairman, Board of Directors

JDK:dlm

OLD TIME ENTERPRISES, INC.

POST OFFICE BOX 51507
NEW ORLEANS, LOUISIANA 70151

2700 NORTH PETERS STREET
NEW ORLEANS, LOUISIANA 70117
(504) 948-3171

May 30, 1987

Defense Acquisition Regulatory Council

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

Dear Mr. Lloyd:

Ref. DAR Case 87-33. Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Public Law 99-661; Set-Asides for Small Disadvantaged Business Concerns. (Interim Rule and Request for Comment.)

We are Coffee Roasters and Processors. (Primary Business Activity SIC Code: 2095; Related Secondary SIC Code: 2099.)

In the entire coffee industry we are the only SDB concern capable of delivering to the Department of Defense coffee products processed, packaged, boxed, palletized and shipped in accordance with standard contractual requirements. To the best of our knowledge no other SDB bids for this business. The list of coffee roasters/processors bidding for coffee is usually very small.

In our case the "rule of two" (See A Background. and Section 219.502-72.) may have the effect of keeping us from competing for Set-Asides for SDB Concerns. We trust a solution can be found.

Thanking you for your kind consideration, we remain

Sincerely yours,

Jack Bolanos
President

87-33

Tylane Products Company
Division of Tylane, Inc.
8241 Indy Lane
Indianapolis, Indiana 46224
(317) 271-6001

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

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

DELTA TECHNOLOGY SYSTEMS

a subsidiary of LME

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

Dear Mr. Lloyd:

The recommended change to Small Business set-aside contracts as cited in the DAR Case 87-33 will have an adverse effect on our company. It may ultimately result in the termination of this company.

We strongly urge that you cancel this recommended interim ruling in order that our company can remain competitive in the business environment.

Thank you for your consideration.

Very truly yours,

M. Schulman, President
Delta Technology Systems, Inc.
605 Louis Drive, Suite 503B
Warminster, PA 18974

MS/dg

arcata
associates, inc.
System Manufacturing Division

June 2, 1987

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

Attention: Mr. Charles Lloyd, Executive Secretary

Subject: DODs Interim Rules Implementing A Statutory 5 Percent Minority Contracting Goal (DAR Case 87-33)

Gentlemen:

Subsequent to our review of your proposed interim rules, the following areas seem to require edification.

Under the 'Other DAR Council Considerations' there were thoughts regarding the approach of allowing a 10 percent preferential factor application to the Small Disadvantaged Business (SDB) price in competitive negotiations, when selection is based primarily on price. This approach, in effect, eliminates Cost type contracts. We suggest a revision of this approach be included to allow the application of the 10 percent preferential factor to the costs proposed by the SDB in the competition of Cost type contracts.

In further support of the intent of Public Law (PL) 99-661 we suggest the degree of subcontracting by the prime SDB contractors also include goals to encourage the networking and support of smaller SDBs.

In an effort not to damage one Government program for the benefit of another we recommend that the 5 percent minority contracting goal be against the eligible dollars (exclusive of those allocated for 8(a) goals and women-owned goals).

When determining the number of qualified SDBs, we request that all revenues as a result of 8(a) participation be excluded as the size of many SDBs are unrealistically inflated through subcontracts with the Small Business Administration.

The protest process requires more guidance and policy. The issue of exactly who is qualified to challenge the process remains unclear. An 'interested party' requires definition. Our suggestion is that only qualified SDB offerors have the right to challenge. Timeframes must be defined to prevent or discourage the use of the PL 99-661 program.

3200 POLARIS, UNIT #9, 45 • LAS VEGAS, NEVADA 89102 • (702) 367-1300

Request the establishment of a supportive policy outlining an aggressive program in determining the availability of SDBs to perform on DOD contracts (in consonance with the rule of two).

The intent of PL 99-661 is well accepted by our Company. We look forward to your consideration and implementation of the comments we've provided above.

Sincerely,

Buck W. Wong
President

CHARLIE ROSE
7TH DISTRICT, NORTH CAROLINA

[redacted]URN HOUSE OFFICE BUILDING
[redacted]HINGTON, D.C. 20515
[redacted]REA CODE 202, 225-2731

DISTRICT OFFICES:
208 POST OFFICE BUILDING
WILMINGTON, NC 28401
PHONE: AREA CODE 919, 343-4959

218 FEDERAL BUILDING
FAYETTEVILLE, NC 28301
PHONE: AREA CODE 919, 323-0260

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

COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEES:
CHAIRMAN, OFFICE SYSTEMS
ELECTIONS

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

August 11, 1987

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

Dear Mr. Lloyd:

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

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

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

Sincerely,

Charlie Rose

Charlie Rose

CR:cam

ZACHRY

H. B. ZACHRY COMPANY
General Contractors

D. R. Schad
Vice President

June 11, 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:

With regard to the above referenced case, please be advised that H. B. Zachry Company is in complete agreement with the letter written to you by the Associated General Contractors of America on June 1, 1987. We, along with the AGC, urge that the interim regulations not be implemented on June 1 for military construction procurement; and 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.

Should you wish to discuss this matter further, please feel free to contact us at any time.

Sincerely,

D. R. Schad

lk

ASSOCIATED GENERAL CONTRACTORS of New Jersey

Richard L. Forman, Executive Director

June 15, 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:

For the same reasons cited by Mr. Hubert Beatty, Executive Vice President of the Associated General Contractors of America, in his June 1, 1987 letter to you, the AGC of New Jersey also objects to the proposed "Rule of Two" set aside provision for Small Disadvantaged Businesses.

While there is no question about the government's intent in providing set asides for genuinely disadvantaged small businesses, it is neither necessary nor authorized by Congress to achieve the 5 per cent goal of total dollars awarded.

Further, experience has proven (witness FY 1984), that the mcehanism used in small business set asides results in an inordinate number of defense construction contracts being set aside under this program.

We strongly urge that the interim regulations not be implemented for military construction procurement until such time as the Defense Department conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely,

Richard L. Forman

Richard L. Forman,
Executive Director

Mail: 7 Centre Drive, Suite 8, Jamesburg, NJ 08831, (609) 655-2997

NATIONAL CONGRESS
FOR COMMUNITY
ECONOMIC DEVELOPMENT
1612 K Street, N.W., Suite 510, Washington, D.C. 20006 202/659-8411

June 15, 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

Dear Mr. Lloyd:

I would like to receive a copy of the proposed Department of Defense Federal Acquisition Regulation Supplement, Implementation of Section 1207 of Public Law 99-661 - "Set-aside for Small Disadvantaged Business Concerns" (DAR Case 87-33). Please send a copy of these regulations to my attention at the address below:

NCCED
1612 K St., N.W.
Suite 510
Washington, D.C. 20006

Thank you for your time and assistance.

Very truly yours,

Kevin P. McQueen
Program Director

KPM/vqa

THE ASSOCIATED GENERAL CONTRACTORS OF ILLINOIS
3219 EXECUTIVE PARK DRIVE ■ P.O. BOX 2579 ■ SPRINGFIELD, ILL. 62708 ■ TELEPHONE (217) 789-2650

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 Mr. Lloyd:

Please be advised that the Associated General Contractors of Illinois, a Statewide Highway/Heavy and Utility Contractors Association representing 259 members, endorses the letter dated June 1, 1987 to you from Hubert Beatty, AGC of America.

Sincerely,

John P. Harrelson
Executive Vice President

JPH/jw

The Kansas Contractors Association, Inc.

316 WEST 33rd STREET P.O. BOX 5061
Topeka, Kansas 66605-0061
Phone 913-266-4152

GLENN R. COULTER, Manager
DANIEL W. RAMLOW, Assistant Manager
CRIS MILLARD, Office Manager
CARRIE KRUSOR, Bulletin Editor

June 8, 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:

It is our understanding that the Department of Defense has established a 5% Set-Aside for Small Disadvantaged Businesses and that the interim rule establishes a "Rule of Two" regarding set-asides.

The Kansas Contractors Association believes that the "Rule of Two" was not authorized by Congress and is a waste of tax payers money in America. If this rule is allowed to remain, contracting officers will be forced to set-aside many more projects than the proposed 5%.

The letter to you from Mr. Hubert Beatty, Executive Vice-President of the Associated General Contractors of America dated June 1, 1987 spells out in an excellent manner why the set-aside is not needed, why the set-aside will waste millions of dollars and why the rule will penalize hundreds of thousands of contractors in America who only ask for the opportunity to submit competitive sealed bids for Department of Defense projects.

We ask that you follow the provisions of the bill as dictated by congress. Thank you for your consideration.

Most sincerely,

Glenn R. Coulter
Manager

GRC:clm

SKILL · RESPONSIBILITY · INTEGRITY
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

ASSOCIATED GENERAL CONTRACTORS OF MAINE, INC.

June 8, 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 Maine is very much concerned with the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

The SBA and 8(a) set-aside programs have placed serious constraints on the construction industry in Maine for the past several years. The programs have resulted in additional costs to the American Taxpayer, while eliminating, for all practical purposes, the competitive bidding process and inviting contractors from outside of Maine to complete work which should remain with local firms. With large defense contracts being awarded to majority-owned firms, the SBA set-aside program have been applied to the great majority of smaller defense projects in Maine.

The interim DOD 5% "Rule of Two" Set-Aside for SDBs just adds more fuel to an already well-fueled fire and results in an unwarranted and unnecessary taxpayer expense, particularly since the program has not been authorized by Congress.

AGC of Maine respectfully urges that the interim regulations not be implemented for military construction procurement.

Very truly yours,

JGH:s

Jerry G. Haynes
Executive Director

WHITTEN ROAD, P.O. BOX N, AUGUSTA, MAINE 04330 207/622-4741

Arizona Chapter

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

P.O. BOX 6878 / 1825 W. ADAMS
PHOENIX, ARIZONA 85005
PHONE (602) 252-3926

June 12, 1987

Mr. Charels W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(PA)DARS
%OSAD(P&C)(M&MRS)
Room 3C841
The Pentagon
Washington, D.C. 20301-3062

RE: Case #DAR87-33

Dear Mr. Lloyd:

Our Chapter would like to echo the sentiments voiced in the June 11, 1987 letter from Hurbert Beatty, Executive Vice-President of the Associated General Contractors.

It is our feeling that set-aside programs of any configuration violate the basic tenets of the competive bidding process and create excess costs for the taxpayers.

The purpose of defense spending is to insure a prepared America in the event armed force is necessary. To this extent we see no value or purpose other than social engineering to create a favored bidding climate for a select few.

We would urge you to view Mr. Beatty's letter in a positive light and implement his requested course of action.

Sincerely,

James R. McDonald
Executive Secretary

JRMcD:ncm

cc: Senator Dennis DeConcini
Senator McCain
Congressman John J. Rhodes III
Congressman Morris K. Udall
Congressman Bob Stump
Congressman John Kyl
Congressman Jim Kolbe

AGC
MASSACHUSETTS

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 Mr. Lloyd:

The Associated General Contractors of Massachusetts opposes the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for FY 1987.

AGC of Massachusetts is a trade association of general contractors, of whom over 90 percent qualify as small businesses. AGC of Massachusetts has a total membership of 256 member firms, of whom 135 are general contractors. AGC is in its 52nd year of existence in Massachusetts.

Our opposition to the interim regulations is based on the following:

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

2) The Act authorizes the Secretary to use less than full and open competitive procedures only "when necessary to facilitate achievement of the 5 percent goal." Since disadvantaged businesses were awarded 9 percent of DOD construction contracts in FY 85 -- and that happened through the full and open competitive bidding process -- special measures are neither necessary nor authorized in the present case.

3) The same is true of "exceeding the fair market price by a ten percent differential." In the case of construction, it is not necessary, and so is not authorized.

4) There is in the interim regulations a strange proposal: If the acquisition history shows within the past 12 months a

> responsive bid from at least one small disadvantaged business within the 10 percent differential ... then the contracting officer must reserve the solicitation for small disadvantaged business set-aside procedures. Such a proposal in regulations borders on the weird. It seems to say: Of 30 projects bid in Region I in the past year by approximately 200 small businesses, if one small disadvantaged business came within 10 percent of the low price on one of the 30 projects, then -- for the 30 such projects coming up this year in Region I --all must be under the set-aside procedures for small disadvantaged businesses.

AGC of Massachusetts urges more reflection and care be given to the regulations for construction in the regulations implementing military procurement in the coming year. The interim regulations should be withdrawn and redrafted.

Respectfully submitted,

William D Kane

WILLIAM D. KANE
Director of Government Relations

wdk/dml

Copy to The Honorable Silvio O. Conte

ASSOCIATED GENERAL CONTRACTORS OF TENNESSEE

BUILDING - MUNICIPAL UTILITIES - HEAVY INDUSTRIAL CONTRACTORS

2924 FOSTER CREIGHTON DRIVE • NASHVILLE, TENNESSEE 37204 • PHONE 615/244-4555

June 8, 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 -- Department of Defense 5% Set-Aside for Small Disadvantaged Businesses

Dear Mr. Lloyd:

The Associated General Contractors of Tennessee fully endorse the entire letter regarding the above subject, as written by the Associated General Contractors of America, dated June 1, 1987.

We urge you and your associates to not implement these regulations 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,

Donald D. Powelson

Donald D. Powelson
Executive Vice President
AGC of Tennessee

DDP/dp

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

855-8237

May 23, 1987

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

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

Dear Mr. Lloyd

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
President

718-237-1300

Deluxe Furniture Co.

Decorative Custom Furniture

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Brooklyn, N.Y. 11211

- *Bookcases*
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- קינדער מעבעל
- שוהל אייניריכטונגען
- טישן בענקלעך

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,

Sam Nojovits

TEL. (212) 387-8660

S n W

ELECTRONICS AND APPLIANCES LTD.

187 ROSS STREET

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 Penfagon
Washington, D.C. 20301-3062

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Sincerely,

Israel Wertzberger

V.I.P. FOODS INC.
79 LORIMER STREET
BROOKLYN, N.Y. 11206
(212) 388-7001

MANUFACTURERS OF QUALITY FOODS FOR THE V.I.P. CONSUMER

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,

Edward Freund

Reliable Poly Packaging Co., Inc.
62 Hope Street, Brooklyn, N.Y. 11211 (212) 387-3434

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,

Mark Rosenfeld

LUCKY Polyethylene Mfg. Co., Inc.

Designers and Converters of All Types of
POLYETHYLENE BAGS/PRINTED AND PLAIN

5-17 LORIMER STREET • BROOKLYN, N. Y. 11221 • TEL.: (212) 388-1192

July 15, 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,

Jeno Friedman

CROWN PURSE INC.

Manufacturers of Ladies Handbags & Accessories

65 HOPE STREET • BROOKLYN, N. Y. 11211

TEL. (212) 384-5558 - 384-5998

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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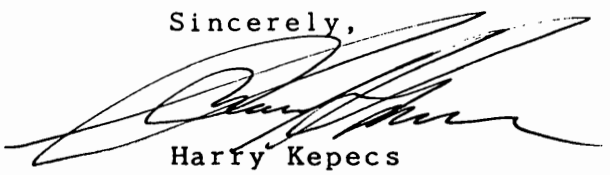

Harry Kepecs

(212) 384-1428

(212) 782-4286

TOV TRADING CORPORATION

171 DIVISION AVENUE • BROOKLYN, N.Y. 11211

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,

Mordechai Gluck

Mochan Painting Supplies of Brooklyn, Inc.

Moore PAINTS

Manufacturers - Distributors of Paints & Wallpaper
Wholesale & Retail

47 LEE AVENUE
BROOKLYN, N. Y. 11211
EV 7-4108 — EV 7-4858

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,

Chaim Silverstein

M & G PRODUCTS INC.

284 SEIGEL STREET, BROOKLYN, N.Y. 11206 (718) 497-7316

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.

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Sincerely,

Leib Reichman

Metters Industries, Inc.
SYSTEMS RESEARCH AND DEVELOPMENT ®

July 7, 1987

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:

We here at Metters Industries wish to commend the Department of Defense for its sense of urgency in implementing Section 1207 of PL99-661 "Intermin Rule", the National Defense Authorization Act for fiscal year 1987. We feel that the proposed regulations stipulated in the May 4, 1987 Federal Register will certainly enhance the minority community's pursuits of defense contracts.

However, we would like to register two major concerns about the impending legislature. Our first concern has to do with the size standards which will determine whether "Small" or "Big" minority business can participate in the DOD Small and Disadvantaged Business (SDB) Program. Our second concern is that there appears to be no proposed legislative guidelines, which will insure commonality or consistency within DOD contracting agencies in the determining the criteria that will be used in deciding when and under what conditions with a DOD SDB, firm will be allowed to compete an the SBA 8(a) firm.

We would like to offer our assessment of the impact on the minority small business community if provisions for the two issues are not adequately addressed in the final legislative.

With respect to the first issue, i.e. size standards, we urge you to keep the criterion for participating in the DOD SDB program small, whether the Small Business Administration (SBA) Act 15 V.S.C. 637(d), 13 CFR 121.1(a), 13 CFR 121.1(b), 13 CFR 121.4(g)(1) or some other measure established by DOD is used as a guideline. For example, should the size standard in employees or dollar value in sales be increased to include "Big" minority business, it would undermine the integrity of SBA's 8(a) program. In fact, it would eventually destroy the 8(a) program, because it would be virtually impossible, for example, a very small 8(a) minority business of 4 to 5 people with FY sales $250,000 to compete successfully with a Big 8(a) minority business of 400 - 600 employees with sales of $65M to $150M.

VIRGINIA OFFICE: CRYSTAL SQUARE II □ SUITE 1200C □ 1725 JEFFERSON DAVIS HIGHWAY □ ARLINGTON, VIRGINIA 22202 □ PHONE (703) 892-5200
TELECOPIER: (703) 979-2535 □ TELEX: 248909 WASCI-UR
MARYLAND OFFICE: FOREST GLEN OFFICE BUILDING □ 10 POST OFFICE ROAD □ SILVER SPRING, MARYLAND 20910 □ PHONE (301) 588-0058
CALIFORNIA OFFICE: 36509 SPRUCE STREET □ NEWARK, CALIFORNIA 94560 □ PHONE (415) 791-0185

The possibility of such occurring is ironic, in that it was the congressional sanctioned 8(a) program in the first place that made "small" minority firms "big" minority firms. Again, we urge you to keep eligibility for participation in the DOD Small and Disadvantage Business (SDB) set-aside for small business as the name and concept implies.

With respect to the second issue, i.e. common guidelines, under the propose legislature each DOD Contracting Agency will be allowed to establish its own guidelines which will inevitably vary from agency to agency, as to when and under what conditions an SDB will be allowed to compete with a SBA with an 8(a) firm. Please let me suggest the following: In cases where SBA submits a FAR letter in behalf of an 8(a) firm, the FAR letter will be processed under current procedures. Only when a "declination" is provided and an SBA appeal is denied will that be considered for an SDB set-aside.

We hope that you and your staff will seriously consider the above comments before the proposed regulation becomes law.

Please acknowledge receipt of this letter. We would also appreciate any other comment you wish to provide us.

7/21/87

Respectfully,
Metters Industries, Inc.

Samuel Metters
President

SM/sh

M & G PRODUCTS INC.

284 SEIGEL STREET, BROOKLYN, N.Y. 11206 (718) 497-7316

July 13, 1987

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

Dear Mr. Lloyd:

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Sincerely,

Leib Reichman

Bond
Kinman
Limited, Inc.

1000 SCHOOL DRIVE
JACKSONVILLE, ARKANSAS 72076
501-982-5256

July 10, 1987

Mr. Charles W. Loyd
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. Loyd:

We have just been made aware of the recent (June 1, 1987) interim rule issued by the DARC requiring the set aside for SDB's.

We have contacted the Little Rock Air Force Base Contracting Office and they advise that the rules recently issued to them require that 100% be set aside for SDB's for all contruction projects over $25,000. I am baffled by a goal of 5% of the DOD budget being interpretted by someone to be 100% of the local construction contracts.

We do not feel that this will serve in the best interest of anyone, even the SDB's in our area. At best, it can only cost the Little Rock Air Force Base additional construction money. It is our understanding that the contracting officer is allowed to exceed fair market valve for SDB contracts by 10%. I can understand the concern for minority businessess, but it does not seem reasonable that 100% of the contracts be set aside and that the contracting officer would be allowed to pay a 10% premium.

Please include my strongest possible objection to this rule.

Sincerely yours,

T. R. Bond
President

E. WHINNEN CONSTRUCTION
4620 Edison, Suite H Colorado Springs, Colorado 80915 (303) 591-9394

July 15, 1987

Charles W. Lloyd
Executive Secretary
ODASD (P) DARS
% OASD (P & L) (M & RS)
Room 3C841
The Pentagon
Washington, D. C. 20301-3062

RE: INTERIM RULE FOR SMALL DISADVANTAGED BUSINESS

Dear Mr. Lloyd:

In response to the above referenced interim rule I urge you to consider the impact this will have on all construction firms contracting with the Department of Defense.

I believe that set asides for small disadvantaged businesses is a proper program provided the bidding is competitive and the firms involved are qualified.

This interim ruling has been implemented in the Colorado Springs area and the result has been that several projects have been withdrawn from competitive bidding. I do not believe that restraining or limiting competition is now or will ever be in the best interests of government contracting.

There are many small business contractors performing work for the Department of Defense and we all work in one of the most competitive industries in the country. This interim rule will serve to eliminate the foundation of our industry with severe economic impact.

Very truly yours,

E. WHINNEN CONSTRUCTION

Eugene Whinnen
President

EW/mjw

Communiplex SERVICES
35 E. Seventh Street
Executive Bldg. Suite 404
Cincinnati, Ohio 45202 (513) 621-2812
STEVEN REECE, PRESIDENT

July 16, 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 propsed 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 disadvantage contractors in pursit of the 5% goal. And finally, partial set-asides have been specifically prohibited despite their potential contribution to small disadvantage participation oat 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,

Steven Reece
President

SR/dh

cc: William H. Gray III

We Get Results

GRAVES & Associates, Inc.

Third Generation of Road Builders

3104 Catalpa, Suite #8
P. O. Box 1549
PINE BLUFF, ARKANSAS 71613-1549
Telephone: 535-4123

July 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:

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

W. M. Z. MANUFACTURING CO., INC.

359 BURNHAM STREET
EAST HARTFORD, CONN. 06108
TEL: (203) 528-7194
TELEX: 643-774

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 the final regulations.

Sincerely,

Magno Palacios

Magno Palacios
President

July 15, 1987

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

Dear Mr. Lloyd:

I have had the opportunity to review copies of information forwarded to your offices from Mr. C. Michael Gooden, President of Integrated Systems Analysts, Inc., which sets forth recommendations to increase the probability of the successful implementation of Section 1207 of PL99-661. I heartily support his recommendations and encourage the consideration of his observations and the incorporation of his astute ideas.

We are concerned, here in the Small Business Community, about efforts to assist with the implementation of this important legislation. Now that the 5% set aside has been established by law, we want to be sure that there are mechanisms in place by which Small Disadvantaged Businesses (SDB) can comply and can, in fact, realize the goals of this legislation. We do not want to leave the SDB without adequate and vigorous support, and without a concrete system which provides for total and successful participation in the entire process.

We commend past contributions to the developments in this area of procurement. It is with your active involvement and receptivity that the goals will be realized.

Sincerely,

Rose H. Elder
Executive Director

RHE.JC.f

Rose Elder & Associates, Inc. · 1725 K Street, N.W. · Suite 1112 · Washington, D.C. 20006 · (202) 857-0745

NATIONAL
Paper & Packaging Inc.
Division of Nationwide Corrugated Box Co. Inc.
260 BROADWAY BROOKLYN, N.Y. 11211

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
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Sincerely,

Martin Schlesinger

SDi
SUPREME DIECUTTING, INC.
div. of All-Star Diecutting Co.
27 SKILLMAN STREET
BROOKLYN, NY 11205
(718) 802-9300

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
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Sincerely,

Oscar Wercberger

itac label co., inc.

PRINTERS • DESIGNERS • CONVERTERS

784 Wythe Avenue Brooklyn, N.Y. 11211 (718) 625-2148

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
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Sincerely,

Salomon Lowy

WHOLESALE
SPORTSWEAR
HOSIERY
UNDERWEAR

Telephone: 1-718-388-7979

Young's

184 KENT AVE., BROOKLYN, NY 11211

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,

Julius Young

Linen Star inc.
250 MOORE STREET
P.O. BOX 28
BROOKLYN, NY 11206
(718) 456-7455
TLX: 299089 GAMA UR

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,

M. Mendelovich

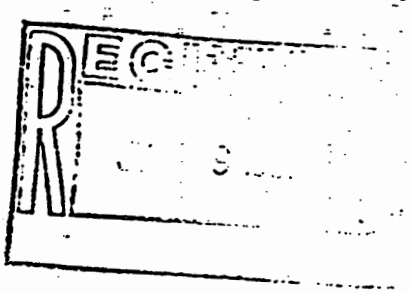
OLD TIME ENTERPRISES, INC.

POST OFFICE BOX 51507
NEW ORLEANS, LOUISIANA 70151

2700 NORTH PETERS STREET
NEW ORLEANS, LOUISIANA 70117
(504) 948-3171

June 23, 1987

Honorable Robert L. Livingston
Member of Congress
1st District, Louisiana
Room 2412
Rayburn House Office Building
Washington, D. C. 20515



Dear Congressman Livingston:

Thank you very much for your letter dated June 15, 1987, and for the Small Business Administration seminar on government procurement opportunities for minority small business.

I have studied the excerpt from the Federal Register concerning the DoD Interim Rule and Request for Comments for implementation of the 5% goal you enclosed with your letter.

The "Rule of Two", as I understand it, may keep us from competing for Small Disadvantaged Business Set-Asides. We are coffee processors. The Department of Defense, The Army and Air Force Exchange Service, and the Veterans Administration are our best customers. We are SBA 8(a) certified. Most of our contracts have been won in open bidding. We are the only company, to the best of my knowledge, competing for coffee contracts, qualified as a SDB.

Perhaps a formula can be found, fair to all parties concerned, for industries where there is only one SDB competing. We trust a solution can be found.

Thanking you for your kind consideration, we remain

Sincerely yours,

Jack Bolanos
President

JUN 25

Encl. 1. Ltr to Mr. Charles W. Lloyd dtd 5-30-87.
2. Ltr to Congressman Conyers dtd 5-31-87
3. Ltr to LAMA dtd 5-31-87.

OLD TIME ENTERPRISES, INC.

POST OFFICE BOX 51507
NEW ORLEANS, LOUISIANA 70151

2700 NORTH PETERS STREET
NEW ORLEANS, LOUISIANA 70117
(504) 948-3171

May 30, 1987

Defense Acquisition Regulatory Council

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

Dear Mr. Lloyd:

Ref. DAR Case 87-33. Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Public Law 99-661; Set-Asides for Small Disadvantaged Business Concerns. (Interim Rule and Request for Comment.)

We are Coffee Roasters and Processors. (Primary Business Activity SIC Code: 2095; Related Secondary SIC Code: 2099.)

In the entire coffee industry we are the only SDB concern capable of delivering to the Department of Defense coffee products processed, packaged, boxed, palletized and shipped in accordance with standard contractual requirements. To the best of our knowledge no other SDB bids for this business. The list of coffee roasters/processors bidding for coffee is usually very small.

In our case the "rule of two" (See A Background. and Section 219.502-72.) may have the effect of keeping us from competing for Set-Asides for SDB Concerns. We trust a solution can be found.

Thanking you for your kind consideration, we remain

Sincerely yours,

Jack Bolanos
President

V. H. PATEL ASSOCIATES P.A.

5500 EXECUTIVE CENTER DR., SUITE 106 CHARLOTTE, N.C. 28212 704/536-7600

July 17, 1987

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

RE: DOD Federal Acquisition Regulation Supplement
Implementation of Sec. 1207 of PL99-661

Dear Mr. Lloyd

We are in support to the proposed regulation and suggest that they be made a permanent part of DOD acquisition policy with some modifications.

1. A 5% set aside for SDB is only lip service considering the percentage of population eligible for the benefit of the program which is close to 25%. We suggest that Secretary Weinberger should direct the procurement personnel to increase this goal to 10%.

2. The biggest draw back of DOD policy toward SDB is that the department requires self-certification of a person or firm. There may be many on DOD's SDB list that are not SDB's, not even fronts and are obtaining federal funds under false pretenses. I have personal knowledge of such firms and when they were brought to the attention of procurement officers, their response was, "We are not in the law enforcement business".

   All SDB's must be required to be certified, similar to SBA 8(a) certification, with perhaps less paper work and expeditious process. To our knowledge all state, local and Federal agencies, with the exception of DOD, require certification.

3. All DOD prime contractors must be required to follow the same SDB policy.

4. The policy should apply to Architect/Engineer Service Contract as much as it applies to manufacturers and suppliers of goods.

Sincerely,

V. H. Patel

V. H. Patel, President
V. H. Patel Associates

cc: Sen. Terry Sanford
Cong. Alex McMillan
Cong. John Conyers
Cong. Mervyn Dymally

Dash Metal Products Co. Inc.

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PLANT:
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BROOKLYN, N. Y. 11211
(212) 384-2000

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,

Eugene Schwartz

BEDROCK ENTERPRISES, INCORPORATION
Minority Small Business
Fayetteville, North Carolina 28303

Hospital Aseptic Housekeeping
Food Preparation
Operational Service
Military Building Repair
Maintenance Service

Waddell J. Timpson
President
857 Bedrock Drive
Fayetteville, N.C. 28303
Phone: (919) 867-9443

July 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, DC 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 either been overlooked or need revision in order to maximize the effectiveness of the goals program.

First, in section 252.219-7006 part (c), on page 16267 in the May 4th Federal Register, a manufacturer or regular dealer is restricted to other SDB's only, in the purchase of its end items that are needed to perform a contract let under these regulations. This would totally eliminate otherwise qualified SDB'S from participation in this program due to the limited number of end items SDB manufactures in certin product and service areas. I understand the reason for some sort of restriction, but I feel that program integrity can be maintained without jeopardizing effectiveness, by limiting end item purchases to small business concerns only as it is currently handled in the small business set-asides.

Second, the regulations contain no express provisions for subcontracting goals for DOD's prime contractors. This would be an extremely significant inclusion, since the subcontracting dollars that are available in some states, either equal or surpass the direct DOD contract dollars that are regionally available. Also, the prime contractors are not usually as strict in their qualification procedures, as it relates to such things as financial responsibility, and therefore can add to the growth of a wide range of SDB's that might have difficulty qualifying for direct contracts initially,

Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of DOD contracts under this goals program. It is of utmost importance that these procedures be clarified and that the availability of advance payments be maximized because the number of SDB firms seeking to help DOD fufill its goal will be in direct proportion to the ability of those firms to obtain interim financing for contract compliance.

Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation. This would be a disasterous mistake for the program. Afterall, the goals program, as I understand it, is designed to maximize, not prohibit Small Disadvantaged Business participation in DOD contracting.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

W. J. Timpson

Waddell J. Timpson
President

WJT/bb

cc: Senator Terry Sanford
Senator Jesse Helms
Congressman Charlie Rose

S&A 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

COX & PALMER CONSTRUCTION CORP.

4485 N.E. 6th TERRACE, FT. LAUDERDALE, FLA. 33334
GENERAL CONTRACTORS LICENSE #CGC019371

(305) 771-0452 (305) 771-0453

July 20, 1987

Defense Acquisition Regulatory Council
Room 3C841, Pentagon Building
Washington D.C., 20301-3062

Attn: Mr. Charles Lloyd, Executive Secretary

Dear Sir:

Please be advised that our company has been performing construction services on an exclusive basis for several of the DOD and DOT service agencies since 1981.

The recent promulgation of Public Law #99-661 (set aside for small disadvantaged business concerns), is creating a reverse discrimination situation in the south Florida area, whereby there are hundreds of small minority business firms (mostly of Latin origin), that bid on Government contracts and to the best of my knowledge, have never been discriminated against.

It seems preposterous that the Federal Government could even conceive implementing such a law which has effectively excluded thousands of non-minority firms which are the backbone of this nation and contribute the majority of the nations taxes.

Any ruling and/or law that sets aside 100% of public services for the exclusive enjoyment of minority factions at the expense of the majority of the American public leaves me to conclude that this legislation has been proposed by Fidel Castro and legislated by the misguided liberals that serve in our House of Representatives.

It should be noted that most of the construction contracts that are defaulted and/or run into trouble are those of certain minority factions which have problems with understanding the American way of doing business.

We have never advocated in the past, and/or will we in the future, that minorities not be given the opportunity of participating in Government contracting, but strongly resent that non-minority firms are receiving selective elimination from performing work for the U.S. Government, especially since we have to pay the bill.

I trust this communique expresses our frustration and concerns, and hope someone within our Government comes to realize that there was no reason to implement this legislation, as no discrimination has ever existed relative to minority firms securing a fair share of the Government contracting market.

Very truly yours,

Edward A. Cox
President

EAC/ld

cc: Mr. E. Clay Shaw
Mr. Dante Fascell

BARCO of Virginia Inc.
2224 Commerce Parkway Virginia Beach, Va 23454 (804) 486-0481

July 21, 1987

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

Dear Mr. Lloyd:

Reference DAR Case 87-33, Implementation of Section 1207(a) of Public Law 99-661; Set-Asides for Small Disadvantaged Business (SDB) concerns.

Americans in general empathize with small minority businessmen who strive for a portion of Government commercial contracts. However, competing contracts among SDB concerns at higher than fair market prices is a waste of the American taxpayers dollars, and just does not make good business sense.

The interim rule should not be implemented for the following reasons:

(1) Non-SDB small business concerns competing primarily for services-type contracts will bear the brunt of this rule because most of the services-type contracts do not qualify for exclusion under the small purchases exemption of FAR Part 13.

(2) If the rule is designed to assist the "economically disadvantaged individuals" . . . "whose ability for competition in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit . . .", then assist them in obtaining capital and credit, but don't take the contracts out of the truly competitive system among the entire small business community.

(3) After competitive award, the Small Business Administration (SBA) should assist in training and financing SDB firms through either SBA guaranteed loans or perhaps grants in extreme cases. This would serve a twofold purpose: (a) maintain the integrity of the competitive, free enterprise system; and (b) aid the SDB concern in getting started in a competitive "real" world.

We implore the DAR Council to initiate immediate action to reverse this practice which will severely penalize the non-SDB small businesses in the United States.

Sincerely,

Ray C. Barber
President

Paul D. Rasmussen
Executive Vice President

cc: Senator John Warner
Senator Paul Trible
Congressman Owen B. Pickett

MONROE WIRE AND CABLE CORP.

Manufacturers of specialty wire and cable

MID-ORANGE INDUSTRIAL PARK • 14 COMMERCIAL AVENUE
MIDDLETOWN, N.Y. 10940 • Telephone: (914) 692-2800

July 13, 1987

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

Dear Mr. Lloyd:

This letter responds to the Notice in the Federal Register of May 4, 1987 (52 fed. Reg. 16263), and provides comments on proposed parts 48 C.F.R. 219.001 and 219.3. As explained below, I respectfully object to the exclusion of Hasidic Jews from the designated list of socially disadvantaged groups and to the procedural handicaps that the Hasidim will suffer if the proposed regulations are adopted.

Hasidic Jews have been recognized as a disadvantaged group by the Secretary of Commerce pursuant to his authority to define this status as provided for in applicable Executive Orders. See 15 C.F.R. part 1400.0 (c). Under the provisions of Public Law 99-661, Section 1207 (a) (1), the Defense Department has the responsibility to make a similar determination. The controlling statutory test for the Defense Department is indistinguishable from the determination that the Secretary of Commerce has already made; namely, whether the group consists of individuals "who have been subjected to racial or ethnic prejudice or cultural bias." 15 U.S.C. #637 (a) (5). Thus, in addition to the groups that are identified in Part 219.001 of the proposed regulations, the Defense Department should accept the findings of the Secretary of Commerce (most recently confirmed on October 24, 1984) that Hasidic Jews constitute a socially disadvantaged group individuals.

In the absence of express recognition of Hasidic elegibility in Part 219.001, I must respectfully object to the protest procedures set forth in proposed Part 219.302,

. .

MONROE WIRE AND CABLE CORP.

Manufacturers of specialty wire and cable

MID-ORANGE INDUSTRIAL PARK • 14 COMMERCIAL AVENUE
MIDDLETOWN, N.Y. 10940 • Telephone: (914) 692-2800

These procedures are an open invitation to obstructionist opposition to contracting opportunities by disadvantaged individuals who are not members of a designated group. Under the proposed procedures, designated group members are entitled to a presumption of eligibility but other individuals are not. Under these circumstances, individuals who are not members of designated groups are likely to be the most frequent targets of the protest procedures under Part 219.302.

Moreover, there is no statutory basis for the proposed abdication of responsibility to the Small Business Administration to determine disadvantaged status. In the past, SBA has been unjustifiably (and unconstitutionally) inhospitable to requests by Hasidic Jews for designation as socially disadvantaged. Although Public Law 99-661 requires the Defense Department to apply the eligibility determinations be made by the Defense Department and not the SBA. Accordingly, I oppose the referral procedure set forth in proposed Part 219.302.

Sincerely,

Mr. Abraham Wieder
President
Monroe Wire & Cable Corp.

AW/vw

G & H BUILDING MAINTENANCE CO.

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July 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, DC 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 either been overlooked or need revision in order to maximize the effectiveness of the goals program.

First, in section 252.219-7006 part (c), on page 16267 in the May 4th Federal Register, a manufacturer or regular dealer is restricted to other SDB's only, in the purchase of its end items that are needed to perform a contract let under these regulations. This would totally eliminate otherwise qualified SDB'S from participation in this program due to the limited number of end items SDB manufactures in certin product and service areas. I understand the reason for some sort of restriction, but I feel that program integrity can be maintained without jeopardizing effectiveness, by limiting end item purchases to small business concerns only as it is currently handled in the small business set-asides.

Second, the regulations contain no express provisions for subcontracting goals for DOD's prime contractors. This would be an extremely significant inclusion, since the subcontracting dollars that are available in some states, either equal or surpass the direct DOD contract dollars that are regionally available. Also, the prime contractors are not usually as strict in their qualification procedures, as it relates to such things as financial responsibility, and therefore can add to the growth of a wide range of SDB's that might have difficulty qualifying for direct contracts initially.

Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of DOD contracts under this goals program. It is of utmost importance that these procedures be clarified and that the availability of advance payments be maximized because the number of SDB firms seeking to help DOD fufill its goal will be in direct proportion to the ability of those firms to obtain interim financing for contract compliance.

Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation. This would be a disasterous mistake for the program. Afterall, the goals program, as I understand it, is designed to maximize, not prohibit Small Disadvantaged Business participation in DOD contracting.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

Willie J. Gould,
President

WJG/bb

cc: Senator Terry Sanford
Senator Jesse Helms
Congressman Charlie Rose

NELLO L. TEER COMPANY
A Subsidiary of Koppers Company, Inc.
P. O. BOX 1131 DURHAM, N. C. U. S. A.
OFFICE TEL: (919) 682-6191 • TELEX: 57-0446

7/10/87

Department of Defense
Mr. Charles W. Lloyd
Executive Secretary, ODASD (DARS)
c/o OASB (PNL) (M&RS), Room 3C841
Pentagon
Washington, DC 30201-3062

Dear Mr. Lloyd:

RE: DOD Federal Acquisition Regulation
Volume 52, No. 84; Federal Register

I would like to reiterate the concern expressed by Mr. Gregg Ward of the National Construction Industry Council (NCIC) concerning the new DODefence Federal Acquisition Regulation.

I, too, understand the pressures that government offices come under relating to small, disadvantaged business (SDB) support; however, I cannot support the acceptance of this regulation as it stands.

The construction industry as a whole, and this company in particular have made many efforts to support, encourage, tutor and assist SDB's. In my career, I have seen these efforts be rewarded and I have seen the impact of the failure of a DBE on our jobs. I also know that support is available through the Associated General Contractors of which this company is a member and through the National Association of Women in Construction of which I am Durham Chapter President. The industry does have a good track record of compliance with guidelines and I encourage your office to insure that a careful assessment is made of the impact of this interim rule and any final regulations that may be written Please convey my feelings on the matter to whomever else you feel may be able to have an impact on review and final decisions.

Attached is a copy of the NCIC letter to OMB outlining several concerns and questions. I encourage you to review these in making your assessment.

Respectfully yours,

Jo Moore
Scheduling/Cost Engineer

NATIONAL CONSTRUCTION INDUSTRY COUNCIL

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

SPECIAL NOTICE

TO: All Delegates

FROM: Gregg Ward GW

RE: New DODefense Acquisition Regulation

DATE: June 4, 1987

On June 1, 1987 the Department of Defense inaugurated new procedures relating to the solicitation of construction bids for the next three fiscal years. The new rule (being implemented on an interim basis) will in many cases have the effect of foreclosing bid submissions from firms which are not defined as being small, disadvantaged businesses. In general, if DOD is aware of two such firms in the area (known as the rule of two), DOD contracting officers are directed to set-aside the entire project for the small, disadvantaged business community (SDB's). Only bids from SDB firms will then be solicited.

Please review the attached NCIC letter recently sent to the Office of Management and Budget for more specific information. The regulation is on page 16263 of the May 4, 1987 Federal Register. We encourage you to read it and convey your feelings about it to the Department of Defense, OMB, the White House and your Congressional delegation as soon as possible.

Pub Cmt.

87-33

W & R ASSOCIATES

29 JUL 1987

P.O. BOX 604
NORWICH, CT 06360
TELEPHONE (203) 889-5950

P.O. BOX 6637
HARTFORD, CT. 06106

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 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.

As a consultant that represents a number of 8(a) and minority business concerns, I have found that contract splits have been an essential tool in assisting MBE's in the mainstreaming effort. In instances where contracts are either large in volume, highly critical and/or time critical buys - the contract splits have afforded MBE's a greater resource of follow-on contracts and has enhanced the pool of available contracts. Many of the contracts that emanate from the aforementioned source are on prime contractor's "keep list".

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

Ronald V. Williams
Principal

MARLOWE

Heating/Air Conditioning — Commercial Refrigeration

871 Warner Dr.
Huntingtown, Md. 20679

855-8237

May 23, 1987

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

Attn: Mr. Charles W. Lloyd, Executive Secretary

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

Dear Mr. Lloyd,

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

ASSOCIATION OF OKLAHOMA GENERAL CONTRACTORS
P. O. BOX 53385 / 301 N. E. EXPRESSWAY
OKLAHOMA CITY, OKLAHOMA 73152 / PHONE 405 843-5661

June 5, 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 Association of Oklahoma General Contractors considers the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, to be a continuing abuse of the construction procurement process; and we strongly urge that the interim regulations not be implemented for military construction procurement. It is our sincere opinion that these regulations are not required to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses. Additionally, we believe these regulations to be discriminatory in nature to those small businesses that cannot qualify as SDB firms.

Here in Oklahoma, we have observed the disastrous discriminatory effect of the Small Business Administration's 8A Program. We have seen SDB firms participate in this "giveaway program" receive negotiated contracts. Frequently, these contracts exceeded the competitive bid price by more than 40 percent. We have then observed these SDB firms subcontract 85 percent of the dollars to a non-SDB firm, and do nothing more than observe the work of the non-SDB Contractor to receive their 15 percent of the contract price. Such abuses were repeated over and over by the SBA and the same SDB firm. While this "giveaway program" was going on, many small non-SDB firms faltered and failed because they had no opportunity to submit competitive bids. Such rash discrimination by the Federal Government

is inexcusable and a total waste of taxpayer dollars. To our knowledge, not one SDB firm that participated in the SBA 8A program developed into a firm that was capable of bidding in a competitive bid market. Implementation of the Section 1207 interim regulations invites this type of abuse to even a greater extent than the 8A program.

We are in complete agreement with The Associated General Contractors of America letter to you dated June 1, 1987; which outlines in detail abuses that will be created by the implementation of the Section 1207 interim regulations. We urge you carefully consider the devastating economic impact that these regulations will have on the construction industry; and withdraw the interim regulations immediately.

Sincerely,

BILL SKEITH
Executive Director

General Contractors

P.O. Box 559
509 Cooper Street
Camden, N.J. 08101-0559
609-541-4100

87-33

June 4, 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,

Larry Evans

LE/drf

LEV
Enterprises, Inc.

87.33

SAXON
CAPERS
A·I·A
ARCHITECTS/PLANNERS
1530 SPRUCE STREET
PHILADELPHIA, PA 19102
215/735-3035

ROBERT S. SAXON, AIA
THEODORE R. CAPERS, AIA
CORPORATE MEMBERS
AMERICAN INSTITUTE
OF ARCHITECTS

June 10, 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

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 provision for subcontracting. Second, there is not 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 agressively in pursuing the 5% goal set by law.

Sincerely,
SAXON/CAPERS, AIA

Robert S. Saxon, AIA

Theodore R. Capers, AIA

RSS/TRC:sg

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

TRACTELL, Inc.
Consulting, Research and Engineering
4490 NEEDMORE ROAD · DAYTON, OHIO 45424
(513) 233-6550

26 May 1987

Mr. Charles W. Lloyd
Executive Secretary
ODASD (P) DARS
c/o OASD (P&L) (M&RS)
Room 3c-841, The Pentagon
Washington, DC 20302-3062

Dear Mr. Lloyd:

This letter responds to your request for public comment concerning the development of procurement methods to be used to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (P.L. 99-661).

1. As a reference, the Federal Register, Thursday, July 21, 1983, Part II, contains comments on the "Participation by Minority Business Enterprises in Department of Transportation Programs". In reading P. L. 99-661, exactly the same problems are re-emerging for DoD as were handled by DoT in 1983.

2. Reference the Interim DAR rule including the statement: " competition among SDB concerns whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns, and that the contract award price will not exceed fair market price by more than 10 percent... "

The practical implementation of such a procedure requires much more information than the average contracting officer ordinarily possesses. It also seems that this rule is either impossible to implement, or if it is implemented, it becomes a prime candidate for abuse. To "anticipate" that two or more SDBs will respond to an offer appears to imply knowing "which" firms might respond; knowing the price range they will offer requires even more specific knowledge of such potential respondees. This is easy to write as policy, but almost impossible for humans to do (witness the IRS W-4 form!).

We recommend the "pre-established" criteria for SDB set-aside under P.L. 99-661 be more practically based on the estimated dollar value for the award (typically done by requirement-side personnel anyway), and the generic capabilities of SDBs that might respond to such solicitations.

We also recommend that certain "larger dollar" solicitations become "on-the-spot" set-aside candidates, based on the determined capabilities of the SDB actually responding, rather than those expected to respond. This would encourage capable SDBs into gradual competition with higher expectations of success, which should be the ultimate goal of P.L. 99-661, but not penalize any responding vendor.

2. Another concern is the proposal of "exception five" whereby a direct award could be made to an SDB without competition when sources sought identified only one responsible SDB to fulfill requirements,... where set-aside criteria are not met ... ". The latter statement (underlined) is meaningless, unless further defined. What is the scope of responsibility within DoD for which a specific set-aside criteria is met, or not met? Is this criteria to be DoD wide? for a single agency, such the Air Force; for a specific contracting agency? a geographic region. This needs a lot more clarification.

3. A second proposal establishes a 10 percent preference differential for SDB concerns for the objective to attain a specific goal. Again, the scope of responsibility within DoD for the application for a specific goal is not clear. Also, this proposal appears to be a set-aside after-the-fact of a sealed bid process, wherein both non-SDBs and SDBs are being solicited. This could be a source of major confusion if not pre-specified in a formal solicitation, or other anouncement, requesting bids.

4. The formal definition of "SDB" is reasonably clear. Notably, Part 204, Federal Register/ Vol 52/ 4 May 1987 regarding increased categorizations of SDBs. In practice within DoD, "SDB" is systematically interpreted to mean a firm with SBA 8(a) certification, especially for the meaningful, larger dollar value efforts.

There will be a definite conflict with the existing SBA 8(a) program, as administered, if indeed P. L. 99-661 intends to increase participation of minorities in DoD contracting. As a rule, certification in the SBA 8(a) program is a extremely tedious, often endless process, constrained by the personnel and locations of SBA certifying offices.

In effect, this current SBA 8(a) certification process is a major constriction. Some other type of "pre-certification" should be devised to apply to all SDB firms in the broader definition. Otherwise, the presence of firms with 8(a) certifications may be used to screen out SDBs without certification, since both are covered by P.L. 99-661; indeed this would be counter-productive.

To attain maximum exposure to capable non-SBA(8a) firms, we recommend DoD make maximum use of State-supported certification of SBEs/SBDs and MBEs, regardless of their current SBA 8(a) status.

4. We recommend a specific category of contracting within the scope of P. L. 99-661 be devised for SDBs interacting, or seeking to interact, directly with Historically Black Colleges and Universities in contracted efforts that mutually enhance each, and dually respond to DoD needs. We also recommend a specific category of set-aside expediency in contracting when such efforts are consumated involving Historically Black Colleges, much like the "Short Form Research Contract".

We strongly recommend policies be developed at the DoD level that accent the need for increased attention to the systemic inadequacies of HBCUs in dealing with the intricacies of DoD contracting. Significantly more emphasis and latitude should be included in those contracts with HBCUs that seek to "establish an increased capacity" to compete more effectively in the DoD mainstream. For example, costs of inclusion of specific support to an institution from an SDB should be accented as a capability enhancement for the HBCU, since this synergy covers TWO objectives related to P. L. 99-661.

Also, when set-aside criteria CANNOT be met for either SDBs and/or HBCUs, the capacity to use non-SDB firms in joint efforts with SDBs, and/or HBCUs should be considered BEFORE the set-aside category is withdrawn.

5. Finally, we recommend a strong evaluation process be superimposed on the implementation of P. L. 99-661 to assure that the subsequently designed policies do what they suppose to do, or possess a mechanism for change if they do not. This should include before and after analyses, and pre-set targets for both the number of SDBs involved in DoD contracting, and the dollar

87-33

AGC
VERMONT

Associated
General
Contractors
of Vermont

47 Court Street
P.O. BOX 750
MONTPELIER
VT 05602
(802) 223-2374

June 6, 1987

Charles W Lloyd, Exec Secy
Defense Acquis Reg Council
Room 3C841, The Pentagon
Washington, D C 20301-3062

Dear Mr Lloyd,

There is no need of repeating the discussion in the AGC of America letter to your office, dated June 1, 1987. This Chapter of 160 supports the arguments in that letter.

This being a small state, would have many problems in trying to carry out the provisions of the "Rule of Two."

It is our hope that you will discard your proposal.

Sincerely,

William J Keogh

WILLIAM J KEOGH
Executive Vice President

87-33

arcata
associates, inc.
System Manufacturing Division

June 2, 1987

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

Attention: Mr. Charles Lloyd, Executive Secretary

Subject: DODs Interim Rules Implementing A Statutory 5 Percent Minority Contracting Goal (DAR Case 87-33)

Gentlemen:

Subsequent to our review of your proposed interim rules, the following areas seem to require edification.

Under the 'Other DAR Council Considerations' there were thoughts regarding the approach of allowing a 10 percent preferential factor application to the Small Disadvantaged Business (SDB) price in competitive negotiations, when selection is based primarily on price. This approach, in effect, eliminates Cost type contracts. We suggest a revision of this approach be included to allow the application of the 10 percent preferential factor to the costs proposed by the SDB in the competition of Cost type contracts.

In further support of the intent of Public Law (PL) 99-661 we suggest the degree of subcontracting by the prime SDB contractors also include goals to encourage the networking and support of smaller SDBs.

In an effort not to damage one Government program for the benefit of another we recommend that the 5 percent minority contracting goal be against the eligible dollars (exclusive of those allocated for 8(a) goals and women-owned goals).

When determining the number of qualified SDBs, we request that all revenues as a result of 8(a) participation be excluded as the size of many SDBs are unrealistically inflated through subcontracts with the Small Business Administration.

The protest process requires more guidance and policy. The issue of exactly who is qualified to challenge the process remains unclear. An 'interested party' requires definition. Our suggestion is that only qualified SDB offerors have the right to challenge. Timeframes must be defined to prevent or discourage the use of the PL 99-661 program.

Request the establishment of a supportive policy outlining an aggressive program in determining the availability of SDBs to perform on DOD contracts (in consonance with the rule of two).

The intent of PL 99-661 is well accepted by our Company. We look forward to your consideration and implementation of the comments we've provided above.

Sincerely,

Buck W. Wong
President

Office of the
General Manager

2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlanta, Georgia 30365-4301

May 29, 1987

Mr. Charles Lloyd
Executive Secretary
OSAD(P)/DARS
c/o OSAD (A&L) M&RS
Room 3C841
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

I would appreciate it very much if you would provide me with a copy of the Department of Defense's proposed procedures for achieveing the 5% minority contracting goal (reference: DAR Case 87-33)

This information should be sent to:

Mr. John S. Schadl
Assistant to the General Manager
for Equal Employment Opportunity
Metropolitan Atlanta Rapid Transit
Authority
2200 Peachtree Summit
401 W. Peachtree Street, N.E.
Atlanta, Georgia 30365-4301

Thank you for your assistance.

Sincerely,

John S. Schadl
Assistant to the General Manager
for Equal Employment Opportunity

dkh

con-real support group, inc.

May 28, 1987

Mr. Charles W. Lloyd
Executive Secretary
ODASD (P) DARS
c/o OASD Room 3C841
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I have reviewed your proposed document regulation of the DAR Council to achieve the 5% goal of federal procurement.

Upon careful review of the limited information provided, I am encouraged in the competition in the contracting act whereby direct awards could be made to a Small Disadvantaged Business lien without providing for full and open competition.

This proposal would ensure that Small Disadvantaged Businesses would be allowed to compete against other businesses or provide the agency with a fair and reasonable price when other SDB's are not available to compete.

Please furnish me with additional information on this proposal.

Sincerely,

CON-REAL SUPPORT GROUP, INC.

Gerald B. Alley
President

GBA:plg

ft. worth/dallas • austin

297 n.w. 25th street • grand prairie, texas 75050 • 214-641-0044 metro 988-9444

Highland Corporation

300 Murray Road • Cincinnati, Ohio 45217 • (513) 641-1111

Emile Godfrey
Chairman and CEO

May 27, 1987

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd, Executive Secretary
ODASD(P) DARS, c/o OASD
(P&L) (MARS), Room 3C841
The Pentagon
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

DFARS Implementation of Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L 99-661) - "Contract Goals for Minorities".

The Statute, on examination, appears to be a fair and equitable law for assisting minorities in gaining access to Department of Defense procurement. However, since the Supreme Court's recent ruling on who can claim minority status, those minorities who for decades have been suffering from economic parity, must further contend with groups who have been suffering from culture acceptance.

To cause racial (Black) minorities to compete against culture minorities for contracting opportunities with DOD, even using the "rule of two", racial minorities cannot compete against a culture-designated minority because of the long tradition of economic sophistication enjoyed by the latter.

Because of the recent Court ruling, defining minority status, all that the Statute intended should be reviewed for its effect on the "target groups." Especially in implementing the Interim Rule under (FAR) Part 13, for exclusive "competition" among SDB concerns.

With the minorities "and their homeland identity, it can be forseen that with the "rule of two," foreign made products that can be obtained and are "acceptable substitutes" or "specified" by the Bid conditions, will be made available at prices the other minorities will not be privilege to. How much of the volume of DOD's commitment to minority procurement of the 5 percent goal this will amount to, there is no immediate answer. It might be determined with some degree of accuracy by examining DOD's procurement under P.L. 95-507!!

There is intended no negative meaning by the above statement, but it opens up the possibilities that if DOD had more procurement activity with small and disadvantage business firms under P.L. 95-507 then it did under the 8(a) program, with the "new minorities" now as a resource the opportunities for the historical minority is negatively impacted.

It is seen by this writer that unless the "rule of two" is implemented using "apples with apples" and not "apples" with "watermelons" a disparate effect" will be the result of a well-intended Statute.

It is my belief that DOD has higher responsibility in determining SDB other than self certification as outlined in subpart 219.3. "Determination of Status as a Small Business concern". It would appear to this writer that if SBA will be called in only to determine the status of a SDB under protest, why not contract with SBA and determine their status during the certification process. More money, time and effort could be saved with this process and a major effort could then be given SDB who have been certified by SBA. The outlined process under this sub section opens the door for too much cheating and there is no need for another "60 minute" expose of a beneficientual law.

Subpart 19.8 - Contracting with the Small Business Administration (the 8(a) Program) should be a mandatory requirement and not an option. 8(a) contractors are firms that have been properly screened and identified for the capabilities to perform in the areas of their qualifications. Every governmental body should be required to use these companies unquestionably by the standards met through the SBA 8(a) certification process. Every congress person who has supported an 8(a) company should insist that this be the rule.

The contents of this letter are meant to be critical of efforts by governmental units when they do not foresee the wisdom of their actions, although well intended. There is evidence this Statute resulted from DOD's inability to implement P.L. 95-507, and this effort is a modification of the Economic Development 10 percent mandate for MBE's of an earlier time. The efforts are to be applauded, but they should be reviewed very carefully as to the impact on the intended audience.

Sincerely,

Norman Macon
Chief Executive Officer

cc: Congressman Tom Luken
Congressman Bill Gradison
Senator Metzabaum
Senator Glenn
Hertha J. Williams, SBA

PENNZOIL PRODUCTS COMPANY
PENNZOIL PLACE • P.O. BOX 2967 • HOUSTON, TEXAS 77252-2967 • (713) 546-4000

CARROLL C. COOK
Vice President,
Fuels Marketing

May 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

Re: DAR Case 87-33

Comments of Pennzoil Company and
Pennzoil Products Company

For over 20 years, Pennzoil Company has been awarded fuel supply contracts, on a competitive bid basis, to supply the Department of Defense (DOD) with jet fuel and other petroleum products. During that time, we have established a reputation for product quality and reliability of supply at a fair price. Consequently, while we recognize the department's desire to promote the ability of small disadvantaged businesses (SDBs) to compete for fuels contracts, we must vigorously oppose adoption of the department's most recent proposals regarding SDB contracts on the grounds that they unduly disadvantage historical, larger business suppliers and concurrently violate the administration's commitment to fiscal austerity.

As both a crude oil producer and a refiner/marketer of gasoline and other petroleum products, Pennzoil appreciates the opportunity to comment on the DOD's proposed rule to develop procurement methods to be used to implement Section 1207 of the National Defense Authorization Act of Fiscal Year 1987 (P.L. 99-661). The proposed methods are intended to achieve a goal of awarding 5 percent of contract dollars to SDBs. While the goal itself is laudable, the mechanisms proposed attempt to achieve that goal at the expense of fair and open competition and in spite of proven track records of reliable supply and lower cost alternatives.

1-0008/1

Pennzoil has serious concerns regarding both procurement methods that have been proposed. The first proposal being considered would allow a direct award to an SDB firm, without providing for full and open competition in order to achieve the 5 percent goal. Pennzoil believes that removing competition in an attempt to achieve that goal arbitrarily confers an enormous and unfair competitive advantage to SDB concerns and will ultimately cost U.S. taxpayers millions of dollars in overpayments. Moreover, this lack of competition could lead to an abuse of the disadvantaged minorities by promoters, brokers and others, which could result in an increase in uneconomical and non viable business investments. Thus, national security could be endangered by forcing the Defense Fuels Supply Center (DFSC) to rely on marginal operating units not capable of performing their contractual commitments.

The second procurement proposal under consideration would establish a 10 percent preference differential for SDB concerns, also when the preference is determined necessary to attain the 5 percent goal. In other words, an award could be given to an SDB concern whose bid is up to 10 percent higher than the lowest bid offered. Pennzoil believes that this proposal is ludicrous, especially when applied to fuel sales. As you know, companies such as Pennzoil compete on very small margins. Allowing SDB concerns to successfully bid up to 10 percent above other bids again provides an outrageous, unfair advantage to those concerns. Those SDB concerns would certainly not be disadvantaged with the huge profit margins that they could reap from this type of bidding system.

In the current economic climate and faced with a spiraling federal deficit, this administration should be particularly vigilant about how federal revenues are managed and spent. It makes absolutely no economic sense for the government to consciously lose revenues by overpaying (by up to 10 percent) for any products when competitively priced alternatives of comparable or better quality are available. Even in the haste to attempt to reach a magical 5 percent goal, there is no justification for this proposed rule, especially when the government would likely lose revenues.

Further, placing such a politicized administrative burden on DFSC would effectively breakdown their "fair and impartial" status with current legitimate suppliers, thereby inviting more requests for favored treatment.

Pennzoil has always been a company that believes strongly in fair competition. We also believe that all companies must work to remain healthy, viable and flexible, particularly during tough economic times. However, companies - large or small - should not be as heavily subsidized, while at the same time not subject to competition, as this proposed rule would assuredly allow.

We appreciate this opportunity to share our concerns.

Sincerely,

Carroll C. Cook
Vice President
Fuels Marketing

CCC/mad
1-0008/2

Product Research
Incorporated

- *Computer Applications*
- *Operations Research*
- *Services and Equipment*

1033 Mill Creek Drive
Feasterville, PA 19047
Telephone: (215) 322-2600

May 30, 1987

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

Subj: Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of PL 99-661; Set Asides for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

As a SDB we are in support of the spirit of PL 99-661 and wish to include the following comments in its implementation:

If an SBD needs to subcontract work to flesh out the particular area of expertese then he should be allowed to do it by subcontracting to other SBDs rather than with non-SBD help.

The protest procedures should be tightened to preclude the dilution of the effectiveness of the law by its enemies, i.e., frivolous protests, delaying tactics. On the other hand "fronts" and their users should summarily be prosecuted to the highest extent of the law.

Where contracting activities are at the 5% goal with current programs, make the new goal an additional goal. In many cases the 5% goal currently reached is done via maintenance and menial service contracts rather than engineering and scientific work.

Make more of the work available to non-Washington SBD's.

You have a very difficult task, please call me if you need any clarification in our comments.

Sincerely,

Delis Negron, Jr.
President

EQUITY ASSOCIATES, INC.
Post Office Box 296
Knoxville, Tennessee 37901

EQUITY ASSOCIATES
CONSULTING FIRM

(615) 688-0999

Marcia Riley-Elliott, Ph.D.
President

William R. Brown
Secretary

May 18, 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, DC 20301-3062

SUBJ: DAR Case 87-33

Dear Mr. Lloyd:

As noted in the May 4, 1987 issue of the Federal Register, this letter is being submitted in response to the invitation for public comment concerning the National Defense Authorization Act for 1987 (P.L. 99-661), Section 1207(a).

Even though the five percent DoD contract goal for minorities represents a major breakthrough for SDBs like ours, I feel that the definition of "combined DoD obligations..." should also include training and supportive services procurement opportunities.

Over the past five years, our firm has executed a number of contracts that focused on SDB procurement activities within Region IV. The SIC codes and business descriptions of participating firms have indicated that there are a significant number of SDBs that provide training-related services as well as support services. A clear inclusion of these services would not only broaden the base of SDBs eligible to participate in the five percent set-aside program, but would also ensure that service firms are not excluded.

The five percent goal is indeed a commendable one, and the above suggestion is being submitted only as an additional means of strengthening the successful attainment of that goal.

Thank you for providing the public an opportunity to comment. Your time and consideration are appreciated!!

Sincerely,

Marcia Riley-Elliott

Marcia Riley-Elliott, Ph.D.
President

MRE/jjt

Enclosure

cc: Mrs. Margaret Pittman, SBA/Atlanta Office
Ms. Mary Gipson, SBA/Nashville Office

1000 SCHOOL DRIVE
JACKSONVILLE, ARKANSAS 72076
501-982-5256

July 10, 1987

Mr. Charles W. Loyd
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. Loyd:

We have just been made aware of the recent (June 1, 1987) interim rule issued by the DARC requiring the set aside for SDB's.

We have contacted the Little Rock Air Force Base Contracting Office and they advise that the rules recently issued to them require that 100% be set aside for SDB's for all contruction projects over $25,000. I am baffled by a goal of 5% of the DOD budget being interpretted by someone to be 100% of the local construction contracts.

We do not feel that this will serve in the best interest of anyone, even the SDB's in our area. At best, it can only cost the Little Rock Air Force Base additional construction money. It is our understanding that the contracting officer is allowed to exceed fair market valve for SDB contracts by 10%. I can understand the concern for minority businessess, but it does not seem reasonable that 100% of the contracts be set aside and that the contracting officer would be allowed to pay a 10% premium.

Please include my strongest possible objection to this rule.

Sincerely yours,

T. R. Bond
President

E. WHINNEN CONSTRUCTION

4620 Edison, Suite H Colorado Springs, Colorado 80915 (303) 591-9394

July 15, 1987

Charles W. Lloyd
Executive Secretary
ODASD (P) DARS
% OASD (P & L) (M & RS)
Room 3C841
The Pentagon
Washington, D. C. 20301-3062

RE: INTERIM RULE FOR SMALL DISADVANTAGED BUSINESS

Dear Mr. Lloyd:

In response to the above referenced interim rule I urge you to consider the impact this will have on all construction firms contracting with the Department of Defense.

I believe that set asides for small disadvantaged businesses is a proper program provided the bidding is competitive and the firms involved are qualified.

This interim ruling has been implemented in the Colorado Springs area and the result has been that several projects have been withdrawn from competitive bidding. I do not believe that restraining or limiting competition is now or will ever be in the best interests of government contracting.

There are many small business contractors performing work for the Department of Defense and we all work in one of the most competitive industries in the country. This interim rule will serve to eliminate the foundation of our industry with severe economic impact.

Very truly yours,

E. WHINNEN CONSTRUCTION

Eugene Whinnen
President

EW/mjw

Communiplex SERVICES
35 E. Seventh Street
Executive Bldg. Suite 404
Cincinnati, Ohio 45202 (513) 621-2812
STEVEN REECE, PRESIDENT

July 16, 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 propsed 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 disadvantage contractors in pursit of the 5% goal. And finally, partial set-asides have been specifically prohibited despite their potential contribution to small disadvantage participation oat 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,

Steven Reece
President

SR/dh

We Get Results

cc: William H. Gray III

GRAVES & Associates, Inc.

Third Generation of Road Builders

3104 Catalpa, Suite #8
P. O. Box 1549
PINE BLUFF, ARKANSAS 71613-1549
Telephone: 535-4123

July 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:

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

W. M. Z. MANUFACTURING CO., INC.

359 BURNHAM STREET
EAST HARTFORD, CONN. 06108
TEL: (203) 528-7194
TELEX: 643-774

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 the final regulations.

Sincerely,

Magno Palacios
President

July 15, 1987

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

Dear Mr. Lloyd:

I have had the opportunity to review copies of information forwarded to your offices from Mr. C. Michael Gooden, President of Integrated Systems Analysts, Inc., which sets forth recommendations to increase the probability of the successful implementation of Section 1207 of PL99-661. I heartily support his recommendations and encourage the consideration of his observations and the incorporation of his astute ideas.

We are concerned, here in the Small Business Community, about efforts to assist with the implementation of this important legislation. Now that the 5% set aside has been established by law, we want to be sure that there are mechanisms in place by which Small Disadvantaged Businesses (SDB) can comply and can, in fact, realize the goals of this legislation. We do not want to leave the SDB without adequate and vigorous support, and without a concrete system which provides for total and successful participation in the entire process.

We commend past contributions to the developments in this area of procurement. It is with your active involvement and receptivity that the goals will be realized.

Sincerely,

Rose H. Elder

Rose H. Elder
Executive Director

RHE.JC.f

W & R ASSOCIATES

P.O. BOX 604
NORWICH, CT 06360
TELEPHONE (203) 889-5950

P.O. BOX 6637
HARTFORD, CT. 06106

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 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.

As a consultant that represents a number of 8(a) and minority business concerns, I have found that contract splits have been an essential tool in assisting MBE's in the mainstreaming effort. In instances where contracts are either large in volume, highly critical and/or time critical buys - the contract splits have afforded MBE's a greater resource of follow-on contracts and has enhanced the pool of available contracts. Many of the contracts that emanate from the aforementioned source are on prime contractor's "keep list".

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

Ronald V. Williams
Principal

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?

World Wide
Moving & Storage

12727 Saticoy Street North Hollywood, California 91605
(818) 983-2299 (818) 764-8031

July 7, 1987

Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary, ODASD (P) DARS
c/o OASD (P&L) (M&RS)
Room 3C 8 41
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

I am indeed 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 evident that a number of important issues have been overlooked.

First, the regulations contain no expressed provisions for subcontracting. I am a subcontractor. I am a small black moving and storage company who at this time is having the most difficult time acquiring business from Department of Defense prime contractors, due to the fact that they expect me to compete with the largest companies in the trucking industry - to offer the largest discount to get business from them.

When I am outbid and can no longer compete, they deny me business. No preference is given to me because I am a small struggling company. It's just like my opening a quick-stop store next to a 7-Eleven or a Grace's Computer Company next to an IBM Center - I am no competition to them, they get the business and I go out of business. This is what is happening to me now - it is a reality with all small minority companies: inability to compete.

Second, the regulations contain no express provisions for the participation of either historically black colleges and universities or minority institutions. My daughter will be a senior this year, with plans for attending a black college. What provisions are you implementing to make it possible for my daughter and other minorities who have the 3.8 and 4.0 aptitudes, but cannot afford the ever-rising expense of the ever-growing cost of our fine colleges and universities? They should have

that choice and, Yes! the budget should and can allow these provisions. Third, it is unclear on what basis advance payment 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. Why?

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

If the Department can spend BILLIONS of dollars on aircraft parts that are worth hundreds; if the Department can spend BILLIONS on equipment that isn't even proven to be operative for that cause for which it is purchased; if the Department can spend **BILLIONS** of dollars on what I've heard to be mistakes in spending, then why, I ask, can't the Department of Defense be more effective in what is attributed to the future success of our great country and that is:

1. Black small businesses, and

2. Black historical colleges, universities and minority institutions.

These are necessary, mandatory, and would give the Department's budget a face-lift. More credibility would be due you, Mr. Lloyd, for implementation of these provisions, that have for so long been neglected items, and inadequacies on the part of your spending power.

Sincerely yours,

Ms. Grace Bryan, President
Golden State Transfer

GB:ewt

cc: SBA - Los Angeles
SBA - San Francisco
Hon. Parren J. Mitchell - MBELDEF
BBA - Los Angeles

Alabama Branch

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, Inc.

Mail - P. O. Box 10204

Office - 822 University Blvd.

BIRMINGHAM, ALABAMA 35202

Telephone 252-8021

July 1, 1987

Mr. Charles E. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD (P) DARS
c/o OASD (PNL) (MNRS) ROMM 3C841
Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

You recently received a letter dated June 1, 1987 from Mr. Hubert Beatty, Executive Vice-President of the Associated General Contractors of America, with regard to DAR Case 87-33. Mr. Beatty's comments on the interim rule implementing the goal of awarding 5% of DoD contract dollars to small business concerns, owned and controlled by socially and economically disadvantaged individuals (SDB's) and the establishment of a "rule of two" regarding these set-asides.

Please be advised that the Alabama Branch of the Associated General Contractors of America whole heartedly agrees with Mr. Beatty's remarks. We would like to urge you in the strongest sense to resend this interim rule, furthermore, we feel that it is in the best interest of all taxpayers that there be a national policy to award government projects to the lowest responsible bidder without regard to race or size. We, who are in the trenches on a day-to-day basis, are exposed to excessive government spending where the taxpayer's dollars are not utilized to the fullest. To continue to come out with additional programs, where we are not getting the most for each of these construction dollars, is just a bit too much.

Thank you for you consideration in this important matter.

Sincerely,

Henry T. Hagood, Jr.
Executive Director
Alabama Branch AGC

engineers
architects
surveyors

LEE WAN & ASSOCIATES, INC.

[illegible]

July 10, 1987

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

RE: DAR Case 87-33
PL 99-661

Dear Mr. Lloyd:

I am writing to express my endorsement of the above-referenced Regulation. Lee Wan & Associates, Inc. is a Disadvantaged Business graduated from the 8(a) program in October, 1986. The newly enacted Regulation would enable an 8(a) graduate, such as ours, to provide an orderly transition from an otherwise sudden graduation syndrome to a semi-protected arena which offers opportunities in between full competition and no competition.

We are looking forward to taking advantage of the intent of the Regulation to the fullest, and we are confident that a very useful purpose can be served through this effort.

Yours very truly,

Lee Wan, Ph.D., P.E.
President

LW:bf

CHILES
RIDA

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

product of competition. Competition forces business firms to seek the lowest possible cost methods of producing or providing service. The fair market price 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 conditions 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 restricted 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

Medley Tool & Model Co.

1950 W. Rockland Street
P. O. Box 20918
Philadelphia, Penna. 19141

"Your Special Needs are our Specialties"

CONTRACT MANUFACTURING FROM DESIGN TO FINISHED PRODUCT

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 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.

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,

Elijah R. Medley
PRESIDENT
MEDLEY TOOL & MODEL COMPANY

C.E. WYLIE CONSTRUCTION CO.

General Building and Engineering Contractors

8282 BUCKHORN STREET • SAN DIEGO, CALIFORNIA 92111 • PHONE (619) 565-0912

Reply to: 1178e
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

Re: DAR Case 87-33

OPPOSE

C. E. Wylie Construction Co. of San Diego, California enforces the decision of the Associated General Contractors of America to OPPOSE the interim regulations "implementing Section 1207 of Public Law 99-661", the National Defense Authorization Act for Fiscal Year 1987. We feel that the regulations cannot feasibly achieve their goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses (SDB).

The interim regulations are not necessary nor authorized by Congress for military construction. Furthermore, the contract award to SDB firms at prices not exceeding 10 percent of fair market cost is neither necessary nor authorized. Finally, the existing small business Rule of Two has proven the "Rule of Two" procedure to bear indiscriminate results of 80 percent of contract actions to be set-aside rather than the 5 percent goal. For these reasons we OPPOSE the "Rule of Two" set-aside for SDB.

Sincerely,

C. E. Wylie, President

CEW/ccb

PB Laminations Inc

PERVIS D. BROWN
PRESIDENT

2940 MARY AVENUE
BRENTWOOD, MO. 63144
314/968-2569

July 9, 1987

Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary, ODASD (P) DARS
c/o OASD (P&L) (M&RS)
Room 3C 841
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

I am writing to express my concern about the interim regulations that the Department of Defense has developed to implement the 5% minority contracting goal. Although the regulations are a step in the right direction, it appears that a number of important issues that have been overlooked.

First, the regulations contain no express provisions for sub-contracting. Second, the regulations do not provide for the participating of either historically Black colleges and universities or 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.

As a minority business owner, I feel these are important issues that should be addressed in order that we may survive. The programs originated under 8(a) provide a much needed assistance program for all businesses, and I therefore urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Very truly yours,

Pervis D. Brown

PERVIS D. BROWN
President

JUNE 15, 1987

Contractor Magazine

A CAHNERS PUBLICATION

TWICE-MONTHLY News of Mechanical Contracting: AIR CONDITIONING • HEATING • PIPING • PLUMBING

Egan-Ryan signs first union pact

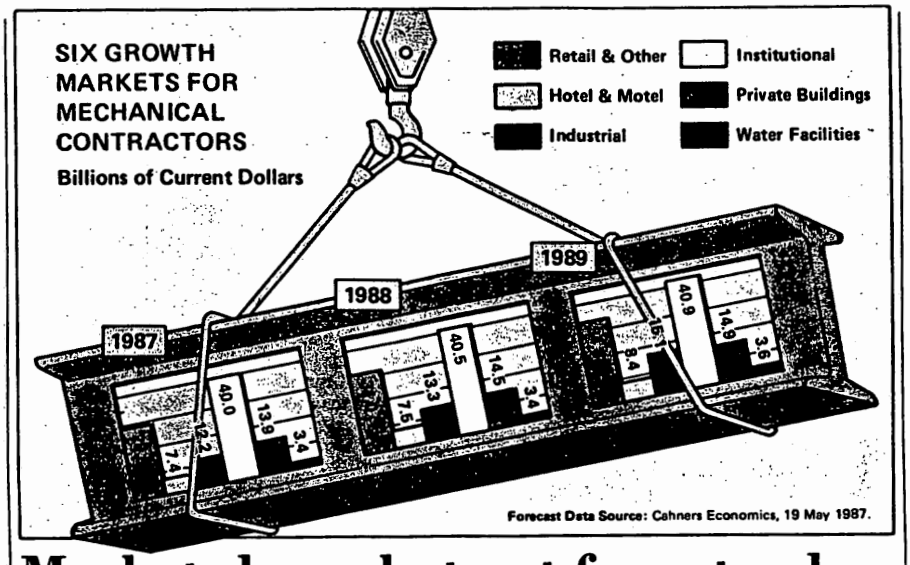
SMW ends another Limbach contract

BY DIANA GRANITTO
Of CONTRACTOR's *staff*

PHOENIX, ARIZ. — Egan-Ryan Mechanical Co. here, an open shop since it was established five years ago, has signed a labor agreement with the Sheet Metal Workers following a dispute in which the union accused the company of being the alter ego of a unionized Minnesota contractor.

Egan-Ryan chose to enter

(Turn to Egan, page 19)



Market slows, but not from tax law

Market forces should cause 1987 construction spending to slide 3%

BY ROBERT P. MADER
Of CONTRACTOR's *staff*

DESPITE PESSIMISTIC predictions last fall about the effects of tax reform on the construction industry, market forces, not tax law, will be the cause of a mixed and sluggish construction market for the next three years.

"The reality is not as bad as forecast," said Kermit Baker, director of economics, Cahners Economics, Newton, Mass.

Still 'serious problems'

"The pessimism that was pervading the industry has not been realized. Still there are real serious problems with the construction industry," he said.

Most of the construction economy peaked in 1985 and started to slide in '86, Baker said. Tax reform just made the impact of the decrease more substantial.

On most points, George A. Christie, vice-president and chief economist, F.W. Dodge, New York, agreed with Baker. Overbuilding and the 20% commercial building vacancy rate — 30% in the southwest — will have more impact than tax reform.

Offices already weak

"The office building market turned a year before tax reform," Christie said.

For this year, total new construction is forecast to increase

(Turn to Retail, page 22)

New rule: minorities get *all* bids

BY DIANA L. AMREIN
Of CONTRACTOR's *staff*

WASHINGTON — Contractors were shocked last month to learn that *only* bids from small disadvantaged businesses will be accepted for Department of Defense projects until the end of 1989.

Cited as a reason for this action was a Department of Defense interim rule published in the May 4 *Federal Register.*

Interim rule protects minorities

This rule amends the Defense Federal Acquisition Regulation Supplement of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661) called "Contract Goal for Minorities."

Originally the statute, which was enacted in late 1986, per-

(Turn to Minorities, page 23)

Tapping specialty markets

- Kitchen fabrication proves a lucrative market niche for Oklahoma sheet metal contractor — page 32.
- Look at where new customers come from for the key to developing a promotional program. See page 36.
- Tell banks and bonding companies what they need to know — page 38.
- Directory of energy management system manufacturers begins on page 44.

1987 NATIONAL SUPER VALUE ★★DAYS★★
MAY - JUNE, 1987

Subcontracts clarified

New A-401 gives subs more rights

Special to CONTRACTOR

WASHINGTON — Newly revised "Standard Form of Agreement Between Contractor and Subcontractor—1987 Edition" (AIA document A-401), just released by the American Institute of Architects, clarifies the rights of subs in regard to payments, retainage and a number of other issues.

Thomas J. Barfield, chairman of the American Subcontractor Ass'n's AIA Liaison Committee, told CONTRACTOR that A-401 has been written to parallel AIA's newly released "General Conditions of Construction Contract," commonly referred

(Turn to A-401, page 28)

Guide spells out scope of work

BY DIANA GRANITTO
Of CONTRACTOR's *staff*

DENVER — Comprehensive guidelines for defining the subcontractor's scope of work according to local practices have been published by an industry group here.

Called *Subcontract Scopes*, the document aims to clarify bid packages for both bidders and those receiving bids. It also clarifies work categories for architects, engineers and specifiers.

Use is voluntary

It is hoped that the voluntary bid descriptions will help "bring order to the sometimes chaotic

(Turn to Scopes, page 21)

Proposals would revise downsizing in CABO code

BY DIANA GRANITTO
Of CONTRACTOR's *staff*

LAS VEGAS — Intent on defeating downsized piping and venting provisions in the 1986 CABO One and Two Family Dwelling Code, some industry groups are working within the code-change process.

In a recent public hearing here on 1987 code amendments, the Texas State Ass'n of Plumbing Inspectors proposed tables that would reverse some of the reduced pipe sizes called for in the plumbing provisions.

BOCA supports changes

Support for the changes came from a source that might surprise some observers: Building Officials & Code Administra-

(Turn to Code, page 23)

Job Log

EPA tank regs offer promise

BY JOHN A. SCHWEIZER

OUT OF SIGHT but keep it in mind: Contamination of the water table by toxic manmade chemicals is a steadily percolating crisis throughout the world. The poisoning of our precious groundwater and aquifers jeopardizes the public's health. It's nothing less than an awful crime against nature itself.

So, like it or not, the federal Environmental Protection Agency is proposing rigorous regulations designed to prevent leaks from the estimated 1.4 million (some say it's 10 million) underground tanks in the U.S. that hold gasoline, diesel fuel and Lord knows what other chemicals.

Does your shop yard have an underground tank for gasoline or oil? Do you know if it's leaking?

With about 84% of tanks lacking anticorrosive coatings, EPA estimates that somewhere between 5% and 20% are leaking to some degree. Most tanks have useful life of 20 to 30 years, but too many

(Turn to Job Log, page 30)

Minorities favored in DOD bidding rule

(Continued from page 1)

itted DOD to enter into con-acts using less than full and pen competitive procedures so iat the agency could award 5% f its contract dollars to small isad[illegible]d businesses.

Und[illegible]e interim rule, con-acting officers may allow only nall disadvantaged business oncerns to compete for fiscal ears 1987, 1988 and 1989.

"I can't quarrel with the go-ernment's 5%, but the govern-ient's 100% is impossible," Joe lughes, J.R. Hughes, Washing-on, told CONTRACTOR.

"On the surface it is disturb-ig. Possibly [the interim rule] is misinterpretation," Hughes iid. One hundred percent of lughes' business is government ork.

But Gregg Ward, executive irector of the National Con-ruction Industry Council, a ederation of associations with-1 the construction industry, oesn't believe this is true.

He said he has talked to sev-ral people at the Office of lanagement & Budget and one of them admits a mistake as been made.

Ward said NCIC's concern is fourfold:

1. This is going to have a devastating effect on those construction concerns which have traditionally done work for DOD.

2. DOD is implementing an interim regulation before it has received public comment.

"And we don't think it's a good way of doing business and may be in violation of the Administrative Procedures Act."

Normally, he explained, a rule is changed through a three-step process which involves: an advanced notice of proposed rule making during which time comments are invited, a proposed rule period of 60 to 90 days for additional comments, and issuance of the final rule.

3. DOD has not conducted an economic impact statement prior to issuing these rules even though the impact will be considerable. Ward explained that the Regulatory Flexibility Act of 1980 requires an impact study prior to the issuance of a proposed rule.

4. NCIC has no objection to set asides for small, qualified, disadvantaged businesses as long as the bidding process is fair and open to all parties, but in this instance it appears that participation by all other companies is foreclosed, said Ward.

Has scheduled meeting

NCIC has scheduled a meeting with OMB to clarify procedural matters and to have Hughes explain the impact of the interim rule on the construction industry. Hughes is a board member of the Mechanical Contractors Ass'n of America and MCAA's representative to NCIC as well as a member of the executive committee of NCIC.

And after the meeting with the OMB, NCIC may get a meeting at the White House, added Ward.

In the *Federal Register* report, the contact person listed was Charles W. Lloyd, executive secretary of the Defense Acqui-

(Turn to Minorities, page 27)

Code

(Continued from page 1)

ors. BOCA is a member of the ouncil of American Building fficials.

BOCA representatives en-orse[illegible]posals, said Julius alla[illegible]A staff liaison.

Fina[illegible]ng on this year's roposed changes will take lace next fall.

Local fights

Meanwhile, plumbing con-actors, inspectors, unions and ther groups are battling to eep the code out of their juris-ictions.

The reduced vent and pipe zes are being actively promot-d on a state-by-state basis by ie National Ass'n of Home uilders, original proponent of ie plumbing provisions (CON-RACTOR, *May 1, p. 1*).

When building officials who se the BOCA National Plumbing ode have asked for assistance, OCA has advised them to adopt ie CABO One and Two Family welling Code without its con-oversial plumbing provisions, t least temporarily, Ballanco ld CONTRACTOR.

Rather than "bog down" the ode adoption process with ngthy, emotional debate, the rovisions can be considered eparately for possible inclusion ter, he said.

Further evaluation of the ABO code is expected over the ext three years as BOCA takes ver July 1 as its secretariat.

BOCA [illegible]ates every three ears [illegible]ernational Con-rence [illegible]ilding Officials, irrent secretariat, and South-n Building Code Congress In-rnational. The three groups mprise CABO.

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

June 17, 1987

The Honorable Alan J. Dixon
United States Senate
Washington, D.C. 20510

Dear Senator Dixon:

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.

HEMPHILL
Contracting Company Inc.

1730 Laclede Station Road
St. Louis, Missouri 63117
(314) 644-3993

July 9, 1987

Defense Acquistion Regulatory Council
Attn: Mr. Charles W. Lloyd
Executive Secretary, ODASD (P) DARS
% OASD (P&L) (M&RS)
Room 3C 841
The Pentagon
Washington, DC 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,

John Hemphill, President
Hemphill Contracting Company, Incorporated

JH/ct

SILTRONIX

DEFENSE ACQUISITION REGULATORY COUNCIL
ATT: MR. CHARLES W. LLOYD
EXECUTIVE SECRETARY
ODASD (P) DARS
(P&L) (M&RS) ROOM 3C841
THE PENTAGON, WASHINGTON,D.C. 20301-3062

ATTENTION: MR. CHARLES W. LLOYD

SUBJECT: DAR CASE 87-33

Dear Mr. Lloyd:

I am a woman, and the owner of a small, software company. We are 9 years old and experienced in software for the military. Our reputation is one of excellence technically, and our costs are usually the lowest for the work we bid on. In spite of this, our growth has been very slow, because minority and 8A businesses can apply for the same work we do and receive contracts with little or no competition, in spite of higher costs and less expertise.

Since there are only so many dollars contracted competitively by the Government, the amount that goes to 8A and minority businesses, reduces considerably, the amount left to other small companies. Therefore, I ask that this interim rule, DAR CASE 87-33 be recinded so that my small business, SILTRONIX, may have an equal opportunity to compete in the area of Government contracting.

Thank you for your attention and efforts.

Sincerely,

SILTRONIX,

Hasmig Sillano

Hasmig B. Sillano

July 9, 1987

cc SENATOR, ALAN CRANSTON
SENATOR, PETE WILSON
CONGRESSMAN, JIM BATES
CONGRESSMAN, DUNCAN HUNTER
CONGRESSMAN, BILL LOWERY

P.O. Box 82544 San Diego, California 92138 Telephone: (619) ~~224-8207~~ 541-2502

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President: Ryland L. Holmes, Jr.
Secretary: James P. Green, Jr, JD
Treasurer: James P. Green, MD

July 6, 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 either been overlooked or need revision in order to maximize the effectiveness of the goals program.

First, in section 252.219-7006 part (c), on page 16267 in the May 4th Federal Register, a manufacturer or regular dealer is restricted to other SDB's only, in the puchase of its end items that are needed to perform a contract let under these regulations. This would totally eliminate otherwise qualified SDB's from participation in this program due to the limited number of end item SDB manufacturers in certain product and service areas. I understand the reason for some sort of restriction, but I feel that program integrity can be maintained without jeopardizing effectiveness, by limiting end item purchases to small business concerns only as it is currently handled in the small business set-asides.

Second, the regulations contain no express provisions for subcontracting goals for DOD's prime contractors. This would be an extremely significant inclusion, since the subcontracting dollars that are available in some states, either equal or surpass the direct DOD contract dollars that are regionally available. Also, the prime contractors are not usually as strict in their qualification procedures, as it relates to such things as financial responsibility, and therefore can add to the growth of a wide range of SDB's that might have difficulty qualifying for direct contracts initially.

Third, it is unclear on what basis advance payments will be available to minority businesses in pursuit of DOD contracts under this goals program. It is of utmost importance that these procedures be clarified and that the availability of advance payments be maximized because the number of SDB firms seeking to help DOD fufill its goal will be in direct proportion to the ability of those firms to obtain interim financing for contract compliance.

Finally, partial set-asides have been specifically prohibited despite their potential ability to facilitate minority business participation. This would be a disasterous mistake for the program. Afterall, the goals program, as I understand it, is designed to maximize, not prohibit Small Disadvantaged Business participation in DOD contracting.

I urge the Department of Defense to address these issues quickly and thoroughly in the final regulations.

Sincerely,

Ryland L. Holmes, Jr.

Ryland L. Holmes, Jr.
President

/lm

cc Senator Terry Sanford
Congressman David Price
Congressman Martin Lancaster
Congressman John Conyers

Office of

CONGRESSMAN JOHN CONYERS, JR.

First District, Michiga

For Immediate Release
Thursday, June 18, 1987

Contact: Glenn Ivey
(202) 225-5126

MINORITY SET-ASIDE REGULATIONS: THE BATTLE CONTINUES

WASHINGTON, D.C.-- Congressman John Conyers, Jr. (D-Mich.), a senior member of the House Judiciary and Government Operations Committees and a member of the House Small Business Committee, has been appointed chair of the Congressional Black Caucus working group on set-asides for minority businesses which met with Defense Secretary Casper W. Weinberger. He also chaired a day long Washington Brain Trust meeting hosted by the Minority Business Enterprise Legal Defense and Education Fund. Congressman Conyers then issued the following statement:

"Congressional Black Caucus chairman Mervyn Dymally has appointed me to chair the CBC working group on minority set-asides. Pursuant to that I have undertaken a series of initiatives on the Defense Department minority set-aside regulations, set aside regulations for other federal departments and agencies, and oversight in hearings of proposed Small Business Administration reform. Minority businesses need to know about important recent developments in this area.

"Secretary Weinberger's agreement to meet with me and other members of the Congressional Black Caucus was a positive gesture on his part, an indication that our concerns will be heard in the Department. We expressed to him during the meeting that the interim final regulations published in the May 4th Federal

TRI STAR
2505 N. 24th St. #406B
Omaha, NE 68110 - 2118
402-451-6110

8(a) Approved
SIC 4522

Defense Acquisition Regulatory Council
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

Dear Mr. Lloyd,

Our firm is generally pleased that the interim rules for DOD "Contract Goals for Minorities" have been implimented. However one of the areas of concern that could be addressed in the rules are that there could be a word change that would give more flexibility to the 5% setasides. It seems that if latitude were given to having an alternative to using areas where there might only be one SDB in that particular field of endeavor. This could be accomplished by changing the use of "rule of two" to reflect that also SDB's in areas of small participation could be used in the 5% set aside if there neotiated price is within 10% of the FMP. This could be done as shown by this excerpt; "whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns or that the contract award price will not exceed fair market price by more than 10 percent."
Also of note that we have some comment on is whether or not the remaining contract goal amounts will be carried over for inclusion in the dollar amounts to be awarded in fiscal 1988 and 1989 being that the date of implimetation was so late in the fiscal year to have been effective.
Thank you for your time and we hope to be involved in DOD purchasing.

Respectfully,

Von R. Trimble Jr.

Von R. Trimble, Jr.
Contract Officer
Tri Star

7/9/87

CHEMCO

July 7, 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 the following important issues have been overlooked.

1. The regulations contain no express provisions for subcontracting.
2. The regulations do not provide for the participation of minority colleges, universities and institutions.
3. It is unclear on what basis advance payments will be available to minority businesses in pursuit of the 5% goal.
4. The partial set asides have been specifically prohibited despite their potential ability to facilitate minority business participation.

I will appreciate hearing from you at your convenience.

Sincerely,

Kamal P. Yadav

Kamal P. Yadav, Ph.D.
President

KPY/tn

cc: Congressman William L. Clay
2470 Rayburn Office Building
Washington, D.C. 20515-2501

CHEMCO INDUSTRIES, INC.
4888 BAUMGARTNER RD. • ST. LOUIS, MISSOURI 63129 • 314-846-1888 / 800-846-4236

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

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

(1) The following channels may be used to operate any kind of device (any object or apparatus, except an R/C transmitter), including a model aircraft device (any small imitation of an aircraft) or a model surface craft device (any small imitation of a boat, car or vehicle for carrying people or objects, except aircraft): 26.995, 27.045, 27.095, 27.145, 27.195 and 27.255 MHz.

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

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

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

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

* * * * * *

(e) (Reserved.)

* * * * * *

[FR Doc. 87-9784 Filed 5-1-87; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF DEFENSE

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

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

AGENCY: Department of Defense (DoD).

ACTION: Interim rule and request for comment.

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

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

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

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

B. Regulatory Flexibility Act

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

publication of the referenced proposed rule. Comments are invited.

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

C. Paperwork Reduction Act

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

D. Determination to Issue an Interim Regulation

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

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

Government procurement.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

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

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

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

PART 204—ADMINISTRATIVE MATTERS

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

204.671-5 Instructions for completion of DD Form 350.

* * * * *

(e) * * *

(3) * * *

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

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

* * * * *

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

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

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

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

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

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

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

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

(2) Reserved for OSD.

(3) Reserved for OSD.

(4) Reserved for OSD.

PART 205—PUBLICIZING CONTRACT ACTIONS

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

205.202 Exceptions.

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

* * * * *

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

205.207 Preparation and transmittal of synopses.

* * * * *

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

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

PART 206—COMPETITION REQUIREMENTS

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

Subpart 206.2—Full and Open Competition After Exclusion of Sources

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

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

(a) To fulfill the objective of section 1207 of Pub. L. 99–661, contracting officers may, for Fiscal Years 1987, 1988 and 1989, set-aside solicitations to allow only small disadvantaged business concerns as defined at 219.001 to compete under the procedures in Subpart 219.5. No separate justification or determination and findings is required under this Part to set-aside a contract action for small disadvantaged business.

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 consideration in any future acquisition; however, the contracting officer may question the SDB status of an apparently successful offeror at any time. A contracting officer's protest is always timely whether filed before or after award.

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

(6) If the SBA determination is not received by the contracting officer within 10 working days after SBA's receipt of the protest, it shall be presumed that the questioned offeror is a 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

Wednesday, February 11, 1987

SBA's Businessman of Year Award to South Countian

The Small Business administration's St. Louis district Minority Small Business Person of the Year award was recently presented to Kamal P. Yadav, Ph.D., president of Chemco, located at 4888 Baumgartner road, Mehlville. He was cited "for outstanding achievements in the American free enterprise system."

Dr. Yadav, a native of India, came to the United States in 1961 where he was educated at University of Missouri-Columbia. After gaining experience and training in the chemical field, he founded Chemco in 1975.

Dr. Yadav

The South County firm manufactures and distributes cleaning and maintenance chemicals to industries, institutions and municipalities in eight midwest states. It has been averaging a 30 percent annual growth rate since its inception, with "almost all" financed interally.

In 1985, the firm acquired Easy Care Janitorial Supply, Carbondale, Ill., giving it access to the janitorial supply and related equipment market.

Dr. Yadav and his wife of 29 years, Sudha, have a son and daughter. They are both active in several charitable and social organizations.

The honoree said he is "a strong believer in personal initiative and the free enterprise system which is available to everyone in this 'land of opportunity'."

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]

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July 11, 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

Subj: Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of PL 99-661; Set Asides for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

This is an addendum to our comments of May 30, 1987 on the implementation of the subject law by DOD.

Please support the intent to establish a 10% preference differential for SDBs where price is a primary decision factor.

Support the concept of partial set-asides for SDB's.

Sincerely,

Delis Negron

Delis Negron, Jr.
President

ACCESS INC.
4882 OLD MOUNTAIN PARK RD.
ROSWELL, GA., 30075 (404) 587-1234

June 29, 1987

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

Dear Charles:

Upon reviewing DAR case 87-33, I would like to commend the excellent work that has been completed so far.

Thanking you in advance,
I remain,

Lance H. Herndon

Lance H. Herndon

LHH:gfb

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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

RE: DAR Case 87-33

Dear Mr. Lloyd:

By way of introduction we should explain that the Associated General Contractors of California is the largest regional construction association in the United States. Included among our over 2,000 members are contractors who probably perform over 90 percent of all the Department of Defense construction in California. Because of that fact, we are very concerned with the regulations covered by the subject case.

On June 1, 1987, you were sent a letter by Hubert Beatty of the AGC of America setting forth the specific concerns of our National Association over those regulations. As we concur with the positions presented by Mr. Beatty, we will not presume to burden you by repeating those positions in this correspondence.

To supplement the arguments presented by Mr. Beatty, we would point out that our Association has developed specific data in California that show so-called "special preference" programs, such as set-asides, substantially increase the cost of construction, while doing little to assist the intended beneficiaries. To support this contention we have enclosed a position statement previously adopted by our Association plus a document entitled "Impacts of Special Preference Programs on Public Works Construction." The latter publication summarizes the results of a comprehensive and independent survey regarding public works construction performed in California during 1986. We would encourage your review of this document and are in a position to provide with you much more detailed data on which this summary was based.

It is our position that the restrictions on open competition contained in the interim regulations were totally ill-advised and represent a serious misuse of public funds.

Very truly yours,

Richard B. Munn

Richard B. Munn
Executive Vice President

RBM/pg

enclosures

bxc: Hubert Beatty
Al Otjen

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

POSITION STATEMENT ON SPECIAL PREFERENCE PROGRAMS

The Construction Industry Research Board (CIRB) recently completed an in-depth survey of contractors involved in minority and other special preference programs in public works construction. The Associated General Contractors of California (AGC) believes the information contained clearly points out that special preference programs have placed an additional cost burden on public construction far in excess of the questionable social benefits that may have been derived from these programs.

The CIRB survey found that the restricted competition resulting from special preference programs added at least $43 million to the cost of public works construction in California last year. AGC contends that these expenditures are an inappropriate and wasteful use of tax monies, which already fall far short of most federal, state and local infrastructure needs. The survey also shows clearly that the intended beneficiaries of these programs, minority and women-owned businesses, are not being prepared to enter the highly competitive construction industry because of the preferential and subsidized access to public works contracts they receive.

While AGC's position is that existing special preference programs, many of which originate at the federal level, represent an unconscionable waste of public funds, this Association also believes that minority and other disadvantaged businesses need and are justified in receiving special

assistance to prepare them to compete in this risky industry. That assistance should take the form of a broad range of training programs under the direction of responsible public agencies, working in conjunction with established contractor associations such as AGC. In addition, programs to assist bonding, initial financing, and other forms of preliminary support to maximize the success rate of these firms would be an effective and appropriate expenditure of public funds.

AGC of California also believes that affirmative action programs requiring the active solicitation and recruitment of disadvantaged firms as subcontractors on public works projects are appropriate and should be continued. Only the "quotas" and the near-total disregard of the responsible "low bidder" concept found in existing special preference programs should be discontinued as contrary to the public interest.

Disadvantaged firms should and can have equal access to all construction markets, both public and private, but they will succeed only if they are able to compete. Special preference programs, with their excessive costs, are totally ineffective in preparing these firms to enter this highly competitive business. Only through comprehensive programs as described above will those needing special assistance be assured of an opportunity to succeed in the construction industry in this state. Special preference is nothing more than "welfare" and is not the answer.

# # # # #

GRANITE
CONSTRUCTION
COMPANY

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

Reference: DAR Case 87-33

Dear Mr. Lloyd:

You have been furnished the comments from the Associated General Contractors of America, signed by Hubert Beatty, and we wish to indicate to you our concurrence with those comments. It is felt that further amplification on our part will serve no meaningful purpose.

Very truly yours,

GRANITE CONSTRUCTION COMPANY

A. V. Otjen
Vice President

AVO:ssr

Administration
Box 900 — Watsonville, CA 95077
(408) 724-1011

WEST TEXAS CHAPTER

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

CHAPTER OFFICE: 4090 F SO. DANVILLE • P.O. BOX 5365 • ABILENE, TEXAS 79608 • 915/698-1000
LUBBOCK OFFICE AND PLAN ROOM: 8212 ITHACA • P.O. BOX 53010 • LUBBOCK, TEXAS 79453 • 806/797-8898

June 26, 1987

Mr. Charles W. Floyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD (P) DARS
C/O OASD (P&L) (M&RS)
ROOM 36841
The Pentagon
Washington, D.C. 20401-3062

Re: DAR Case 87-33

Dear Mr. Floyd,

The West Texas Chapter of AGC is in full support of the enclosed letter from our national AGC office. We in West Texas have Sheppard AFB, TX, Dyess AFB, TX, Goodfellow AFB, TX, Reese AFB, Altus AFB, OK, and Ft. Sill, OK in our area. We are very much affected by your decisions and methods of procurement.

Sincerely,

Virgil R. Hughlett

Virgil R. HUghlett
President, West Texas Chapter

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TELEX 279 354 AGC WSH

DANA HUESTIS, *President* JAMES W. SUPICA, *Senior Vice President* PAUL EMERICK, *Vice President*

F. THOMAS WESTCOTT, *Treasurer* HUBERT BEATTY, *Executive Vice President*

June 3, 1987

TO: Chapter Managers

SUBJECT: Chapter Comments Requested -- Department of Defense 5% Set-Aside for Small Disadvantaged Businesses

Each AGC Chapter is requested to comment to the address in the attachment on this subject. Your written comments can be:

- Your own version of the enclosure or as much of the enclosure as you decide to use, or
- A letter to Mr. Lloyd indicating your chapter's agreement with AGC's letter.

Regardless of your choice, it is important to have maximum industry comments on the public record.

As reported in Heavy-Industrial Bulletin #87-3 (May 8, 1987), The Defense Acquisition Regulatory Council (DAR) has issued an interim rule implementing a provision in the FY'87 DoD Authorization Act which requires a goal of awarding five percent of DoD contract dollars to small business concerns owned and controlled by socially and economically disadvantaged individuals (SDB's). The interim rule establishes a "Rule of Two" regarding set-asides for SDB firms.

Although the interim rule is effective for all DoD solicitations issued on or after June 1, 1987, DoD will accept comments on the rule until August 3, 1987.

Enclosed is a copy of AGC comments opposing the "Rule of Two" set-aside provision. Chapters are strongly encouraged to submit additional comments to DoD before the August 3, 1987 comment period expires.

Absent significant opposition from the construction industry, the interim rule will most assuredly become a permanent rule and thus add yet another inflexible special preference procurement program to the construction industry.

Please send a blind copy of your comments to AGC of America.

Sincerely,

Hubert Beatty

Hubert Beatty
Executive Vice President

Enclosure

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TELEX 279 354 AGC WSH

DANA HUESTIS, *President* JAMES W. SUPICA, *Senior Vice President* PAUL EMERICK, *Vice President*

F. THOMAS WESTCOTT, *Treasurer* HUBERT BEATTY, *Executive Vice President*

June 1, 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 America 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.

Implementation of SDB Set-Aside Regulations Is Not Necessary Nor Authorized for Military Construction

Section 1207(e)(3) of the National Defense Authorization Act for Fiscal Year 1987 provides the Secretary of Defense with authority to enter into contracts using less than full and open competitive procedures and to award such contracts to SDB firms at a price in excess of fair market price by no more than 10 percent only "when necessary to facilitate achievement of the 5 percent goal." The legislative intent is clear that only when existing resources are inadequate to achieve the 5 percent objective should the Secretary of Defense consider using less than full and open competitive procedures such as set-asides.

While such restrictive procurement procedures may be necessary to achieve the 5 percent objective in certain classifications of Department of Defense procurements, such procedures are clearly not necessary in military construction. In fiscal year 1985 disadvantaged businesses were awarded 9 percent of Department of Defense construction contracts ($709 million out of $7.9 billion). Clearly the 5 percent objective has already been achieved and exceeded through the full and open competitive procurement process for military construction contracts.

Applying the "Rule of Two" SDB set-aside procedures to military construction procurements is not only not necessary, but clearly not authorized by the legislation since such set-asides are not "necessary to facilitate achievement of the 5 percent goal."

Contract Award to SDB Firms at Prices That Do Not Exceed 10 Percent of Fair Market Cost Is Not Necessary Nor Authorized for Military Construction

Application of the legislative authority to award contracts to SDB firms at a price not exceeding fair market cost by more than 10 percent to military construction procurements is also not authorized by the legislation since the same condition is placed on that provision as is placed on the provision allowing the use of procurement procedures utilizing less than full and open competition; that is, the 10 percent price differential is to be utilized only "when necessary to facilitate achievement of the 5 percent goal."

The routine and arbitrary use of the 10 percent price differential provision in military construction procurements will only serve to increase the cost of construction to the taxpaying public and yet bear no relationship to achieving the 5 percent objective.

The ten percent allowance is nothing more than an add-on cost, to the detriment of taxpayers, particularly since the definition of fair market cost contained in the interim regulations is based on reasonable costs under normal competitive conditions and not on the lowest possible costs. This definition ignores the market realities of how prices are derived. Fair market prices are exclusively the

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?

USA - Contracts

N G C. Inc.

Engineers & Contractors
Established 1961

JUL 10 1987

1 July 1987

7805 Old Georgetown Road
Bethesda, Maryland 20814
301.652.5566

President Ronald Reagan
The White House
1600 Pennsylvania Avenue, N. W.
Washington, D. C.

Dear President Reagan:

We call to your attention an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661). The statute permits DoD to enter into contracts using less than full and open competitive procedures, when practical and necessary to facilitate achievement of a goal of awarding 5% of contract dollars to small disadvantaged business concerns during FY 1987, 1988 and 1989, provided the contract price does not exceed fair market cost by more than 10%.

We understand and appreciate that the Department of Defense is endeavoring to respond to the needs of Small Disadvantaged Businesses; however, taking 100% of the proposed set aside from a military market that already exceeds the 5% objective does not appear to be fair or reasonable. Obviously, these procedures will put hundreds of small business people out of business in the short term.

We believe the following questions need to be asked, to fully disclose our concerns:

1. Is DOD aware that this "rule of two" will effectively foreclose all bidding opportunities from firms which are not disadvantaged?

2. Does not the "rule of two" in the construction industry become an exclusionary 100% rule for disadvantaged firms over the next three fiscal years?

3. Has not the construction industry exceeded the 5% threshold, cited in the regulation as the goal to be achieved, for years?

4. Why is the construction industry, the very industry currently in compliance, the only industry covered by the interim rule? Is aerospace affected? Research and development? High technology contractors? If not, why not?

5. Was an economic impact statement conducted? If not, why not? If one was compiled, what is the projected impact on small business organizations in the construction industry?

6. Why were no public comments received prior to the implementation of the interim rule? Why an interim rule in the first instance? Has the Administrative Procedures Act been violated?

7. Did the DOD acquisition regulation get OMB clearance? If not, why not? Has Director Miller been briefed on the subject at all? Has anyone in Administration other than DOD personnel reviewed the proposal?

We believe this regulation has been very poorly conceived, that normal administrative procedures have been clearly circumvented, and that other defense industries are receiving preferential treatment at the expense of the construction industry. We cannot believe that was the intent of Pub. L. 99-661; therefore, we respectfully request that you respond to our urgent appeal to correct this obviously flawed regulation.

Very truly yours,

N G Chacos

NICHOLAS G. CHACOS
PRESIDENT

MARLOWE

Heating/Air Conditioning — Commercial Refrigeration

871 Warner Dr.
Huntingtown, Md. 20679

855-8237

May 23, 1987

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

Attn: Mr. Charles W. Lloyd, Executive Secretary

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

Dear Mr. Lloyd,

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

ASSOCIATION OF OKLAHOMA GENERAL CONTRACTORS
P. O. BOX 53385 / 301 N. E. EXPRESSWAY
OKLAHOMA CITY, OKLAHOMA 73152 / PHONE 405 843-5661

June 5, 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 Association of Oklahoma General Contractors considers the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987, to be a continuing abuse of the construction procurement process; and we strongly urge that the interim regulations not be implemented for military construction procurement. It is our sincere opinion that these regulations are not required to achieve the goal of awarding 5 percent of military construction contract dollars to small disadvantaged businesses. Additionally, we believe these regulations to be discriminatory in nature to those small businesses that cannot qualify as SDB firms.

Here in Oklahoma, we have observed the disastrous discriminatory effect of the Small Business Administration's 8A Program. We have seen SDB firms participate in this "giveaway program" receive negotiated contracts. Frequently, these contracts exceeded the competitive bid price by more than 40 percent. We have then observed these SDB firms subcontract 85 percent of the dollars to a non-SDB firm, and do nothing more than observe the work of the non-SDB Contractor to receive their 15 percent of the contract price. Such abuses were repeated over and over by the SBA and the same SDB firm. While this "giveaway program" was going on, many small non-SDB firms faltered and failed because they had no opportunity to submit competitive bids. Such rash discrimination by the Federal Government

is inexcusable and a total waste of taxpayer dollars. To our knowledge, not one SDB firm that participated in the SBA 8A program developed into a firm that was capable of bidding in a competitive bid market. Implementation of the Section 1207 interim regulations invites this type of abuse to even a greater extent than the 8A program.

We are in complete agreement with The Associated General Contractors of America letter to you dated June 1, 1987; which outlines in detail abuses that will be created by the implementation of the Section 1207 interim regulations. We urge you carefully consider the devastating economic impact that these regulations will have on the construction industry; and withdraw the interim regulations immediately.

Sincerely,

BILL SKEITH
Executive Director

General Contractors

P.O. Box 559
509 Cooper Street
Camden, N.J. 08101-0559
[redacted]41-4100

87-33

June 4, 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,

Larry Evans

LE/drf

LEV
Enterprises, Inc.

KETRON, INC.

Corporate Office
Suite 1710, Rosslyn Center
1700 N. Moore Street
Arlington, VA 22209
(703) 558-8700
Telex: 710-955-0219

May 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 is in the response to the Federal Register of May 4, 1987. I cite DAR Case 87-33. It has to do with set-asides for disadvantaged business concerns.

A key element of the proposed regulation appears to be "specifically, whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns, and that there is a reasonable expectation that the award price will not exceed fair market price by more than 10 percent, the contracting officer is directed to reserve the acquisition for exclusive competition among such SDB firms."

For whatever acquisitions to which the above policy would pertain, I suggest the following alternative. For any disadvantaged firm that responds to this proposal request, its cost proposal will be discounted by 10 percent. Once this discount has been applied, the contract award will be made on the basis of otherwise normal selection criteria. For such contracts, all proposers, both disadvantaged and non-disadvantaged, will be notified of this handicap.

Let me outline the basis for this suggestion. First of all, the provisions of the original statement are extremely hazardous, if not actually ridiculous -- particularly the requirement that the contracting officer determine that the award price is unlikely to succeed the fair market price by more than 10 percent. Given the difficulty of pricing government defense contracts, this determination is inherently impossible for any contracting officer to make. For almost any category of defense procurement, actual bids typically vary by at least 30 percent. It is not unusual for them to vary by over 100 percent, and this includes good faith bids by technically competent contractors. This means that, based on actual current DOD acquisition experience, these determinations by the contracting officer will be totally and demonstrably arbitrary. It may be

helpful to phrase the problem in two other ways: first, if the competition was structured according to my suggested alternative, and a contracting officer had already lined up at least two disadvantaged firms to bid, what do you think he could say about the probability that a disadvantaged firm would win; second, suppose (contrary to the normal process) the contracting officer were to announce ahead of time what he considered the fair market price to be. What is the likelihood that a non-disadvantaged firm would bid more than 10 percent below that price?

Clearly, either one of these provisions will produce a real strain on the "non-disadvantaged" firms. In the one case, they will be arbitrarily precluded from bidding; in the second case, they will be discouraged from bidding because of the risk of being underbid by an actual higher bid. This strain will, in turn, interfere with DOD being able to procure the best available support for its projects. I do not argue with the apparent DOD decision that some interference of this sort is an appropriate price to pay for the positive social consequences of improving the lot of disadvantaged individuals. I do say that the alternative I suggest will enable DOD to help the disadvantaged with much less interference with effective procurement than must be anticipated by the original wording.

Sincerely,

John D. Kettelle
Chairman, Board of Directors

JDK:dlm

OLD TIME ENTERPRISES, INC.

POST OFFICE BOX 51507
NEW ORLEANS, LOUISIANA 70151

2700 NORTH PETERS STREET
NEW ORLEANS, LOUISIANA 70117
(504) 948-3171

May 30, 1987

Defense Acquisition Regulatory Council

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

Dear Mr. Lloyd:

Ref. DAR Case 87-33. Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Public Law 99-661; Set-Asides for Small Disadvantaged Business Concerns. (Interim Rule and Request for Comment.)

We are Coffee Roasters and Processors. (Primary Business Activity SIC Code: 2095; Related Secondary SIC Code: 2099.)

In the entire coffee industry we are the only SDB concern capable of delivering to the Department of Defense coffee products processed, packaged, boxed, palletized and shipped in accordance with standard contractual requirements. To the best of our knowledge no other SDB bids for this business. The list of coffee roasters/processors bidding for coffee is usually very small.

In our case the "rule of two" (See A Background. and Section 219.502-72.) may have the effect of keeping us from competing for Set-Asides for SDB Concerns. We trust a solution can be found.

Thanking you for your kind consideration, we remain

Sincerely yours,

Jack Bolanos
President

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

DELTA TECHNOLOGY SYSTEMS

a subsidiary of LME

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

Dear Mr. Lloyd:

The recommended change to Small Business set-aside contracts as cited in the DAR Case 87-33 will have an adverse effect on our company. It may ultimately result in the termination of this company.

We strongly urge that you cancel this recommended interim ruling in order that our company can remain competitive in the business environment.

Thank you for your consideration.

Very truly yours,

M. Schulman, President
Delta Technology Systems, Inc.
605 Louis Drive, Suite 503B
Warminster, PA 18974

MS/dg

arcata
associates, inc.
System Manufacturing Division

June 2, 1987

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

Attention: Mr. Charles Lloyd, Executive Secretary

Subject: DODs Interim Rules Implementing A Statutory 5 Percent Minority Contracting Goal (DAR Case 87-33)

Gentlemen:

Subsequent to our review of your proposed interim rules, the following areas seem to require edification.

Under the 'Other DAR Council Considerations' there were thoughts regarding the approach of allowing a 10 percent preferential factor application to the Small Disadvantaged Business (SDB) price in competitive negotiations, when selection is based primarily on price. This approach, in effect, eliminates Cost type contracts. We suggest a revision of this approach be included to allow the application of the 10 percent preferential factor to the costs proposed by the SDB in the competition of Cost type contracts.

In further support of the intent of Public Law (PL) 99-661 we suggest the degree of subcontracting by the prime SDB contractors also include goals to encourage the networking and support of smaller SDBs.

In an effort not to damage one Government program for the benefit of another we recommend that the 5 percent minority contracting goal be against the eligible dollars (exclusive of those allocated for 8(a) goals and women-owned goals).

When determining the number of qualified SDBs, we request that all revenues as a result of 8(a) participation be excluded as the size of many SDBs are unrealistically inflated through subcontracts with the Small Business Administration.

The protest process requires more guidance and policy. The issue of exactly who is qualified to challenge the process remains unclear. An 'interested party' requires definition. Our suggestion is that only qualified SDB offerors have the right to challenge. Timeframes must be defined to prevent or discourage the use of the PL 99-661 program.

3200 POLARIS, UNIT #9, 45 • LAS VEGAS, NEVADA 89102 • (702) 367-1300

Request the establishment of a supportive policy outlining an aggressive program in determining the availability of SDBs to perform on DOD contracts (in consonance with the rule of two).

The intent of PL 99-661 is well accepted by our Company. We look forward to your consideration and implementation of the comments we've provided above.

Sincerely,

Buck W. Wong
President

87-33

SAXON CAPERS
A·I·A
ARCHITECTS/PLANNERS
1530 SPRUCE STREET
PHILADELPHIA, PA 19102
215/735-3035

June 10, 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

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 provision for subcontracting. Second, there is not 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 agressively in pursuing the 5% goal set by law.

Sincerely,
SAXON/CAPERS, AIA

Robert S. Saxon, AIA

Theodore R. Capers, AIA

RSS/TRC:sg

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:

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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

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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

TRACTELL, Inc.
Consulting, Research and Engineering
4490 NEEDMORE ROAD · DAYTON, OHIO 45424
(513) 233-6550

26 May 1987

Mr. Charles W. Lloyd
Executive Secretary
ODASD (P) DARS
c/o OASD (P&L) (M&RS)
Room 3c-841, The Pentagon
Washington, DC 20302-3062

Dear Mr. Lloyd:

This letter responds to your request for public comment concerning the development of procurement methods to be used to implement Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (P.L. 99-661).

1. As a reference, the Federal Register, Thursday, July 21, 1983, Part II, contains comments on the "Participation by Minority Business Enterprises in Department of Transportation Programs". In reading P. L. 99-661, exactly the same problems are re-emerging for DoD as were handled by DoT in 1983.

2. Reference the Interim DAR rule including the statement: " competition among SDB concerns whenever the contracting officer determines that offers can be anticipated from two or more SDB concerns, and that the contract award price will not exceed fair market price by more than 10 percent... "

The practical implementation of such a procedure requires much more information than the average contracting officer ordinarily possesses. It also seems that this rule is either impossible to implement, or if it is implemented, it becomes a prime candidate for abuse. To "anticipate" that two or more SDBs will respond to an offer appears to imply knowing "which" firms might respond; knowing the price range they will offer requires even more specific knowledge of such potential respondees. This is easy to write as policy, but almost impossible for humans to do (witness the IRS W-4 form!).

We recommend the "pre-established" criteria for SDB set-aside under P.L. 99-661 be more practically based on the estimated dollar value for the award (typically done by requirement-side personnel anyway), and the generic capabilities of SDBs that might respond to such solicitations.

We also recommend that certain "larger dollar" solicitations become "on-the-spot" set-aside candidates, based on the determined capabilities of the SDB actually responding, rather than those expected to respond. This would encourage capable SDBs into gradual competition with higher expectations of success, which should be the ultimate goal of P.L. 99-661, but not penalize any responding vendor.

2. Another concern is the proposal of "exception five" whereby a direct award could be made to an SDB without competition when sources sought identified only one responsible SDB to fulfill requirements,... where set-aside criteria are not met ... ". The latter statement (underlined) is meaningless, unless further defined. What is the scope of responsibility within DoD for which a specific set-aside criteria is met, or not met? Is this criteria to be DoD wide? for a single agency, such the Air Force; for a specific contracting agency? a geographic region. This needs a lot more clarification.

3. A second proposal establishes a 10 percent preference differential for SDB concerns for the objective to attain a specific goal. Again, the scope of responsibility within DoD for the application for a specific goal is not clear. Also, this proposal appears to be a set-aside after-the-fact of a sealed bid process, wherein both non-SDBs and SDBs are being solicited. This could be a source of major confusion if not pre-specified in a formal solicitation, or other anouncement, requesting bids.

4. The formal definition of "SDB" is reasonably clear. Notably, Part 204, Federal Register/ Vol 52/ 4 May 1987 regarding increased categorizations of SDBs. In practice within DoD, "SDB" is systematically interpreted to mean a firm with SBA 8(a) certification, especially for the meaningful, larger dollar value efforts.

There will be a definite conflict with the existing SBA 8(a) program, as administered, if indeed P. L. 99-661 intends to increase participation of minorities in DoD contracting. As a rule, certification in the SBA 8(a) program is a extremely tedious, often endless process, constrained by the personnel and locations of SBA certifying offices.

In effect, this current SBA 8(a) certification process is a major constriction. Some other type of "pre-certification" should be devised to apply to all SDB firms in the broader definition. Otherwise, the presence of firms with 8(a) certifications may be used to screen out SDBs without certification, since both are covered by P.L. 99-661; indeed this would be counter-productive.

To attain maximum exposure to capable non-SBA(8a) firms, we recommend DoD make maximum use of State-supported certification of SBEs/SBDs and MBEs, regardless of their current SBA 8(a) status.

4. We recommend a specific category of contracting within the scope of P. L. 99-661 be devised for SDBs interacting, or seeking to interact, directly with Historically Black Colleges and Universities in contracted efforts that mutually enhance each, and dually respond to DoD needs. We also recommend a specific category of set-aside expediency in contracting when such efforts are consumated involving Historically Black Colleges, much like the "Short Form Research Contract".

We strongly recommend policies be developed at the DoD level that accent the need for increased attention to the systemic inadequacies of HBCUs in dealing with the intricacies of DoD contracting. Significantly more emphasis and latitude should be included in those contracts with HBCUs that seek to "establish an increased capacity" to compete more effectively in the DoD mainstream. For example, costs of inclusion of specific support to an institution from an SDB should be accented as a capability enhancement for the HBCU, since this synergy covers TWO objectives related to P. L. 99-661.

Also, when set-aside criteria CANNOT be met for either SDBs and/or HBCUs, the capacity to use non-SDB firms in joint efforts with SDBs, and/or HBCUs should be considered BEFORE the set-aside category is withdrawn.

5. Finally, we recommend a strong evaluation process be superimposed on the implementation of P. L. 99-661 to assure that the subsequently designed policies do what they suppose to do, or possess a mechanism for change if they do not. This should include before and after analyses, and pre-set targets for both the number of SDBs involved in DoD contracting, and the dollar

values of these awarded contracts. Policy goals for set asides need to be more clearly and explicitly defined, as cited above.

Such an evaluation is essential because the worse possible outcome of P. L. 99-661 would be minimal, or no increase in participation of SDBs in DoD contracting. Such an outcome would cancel -- forever -- all future legislation related to such objectives.

Sincerely,

Eugene E. Jones, PhD
President, TRACTELL, Inc.

ENCL: Capability Microbrochure

87-33

AGC
VERMONT

Associated
General
Contractors
of Vermont

47 Court Street
P.O. BOX 750
MONTPELIER
VT 05602
(802) 223-2374

June 6, 1987

Charles W Lloyd, Exec Secy
Defense Acquis Reg Council
Room 3C841, The Pentagon
Washington, D C 20301-3062

Dear Mr Lloyd,

There is no need of repeating the discussion in the AGC of America letter to your office, dated June 1, 1987. This Chapter of 160 supports the arguments in that letter.

This being a small state, would have many problems in trying to carry out the provisions of the "Rule of Two."

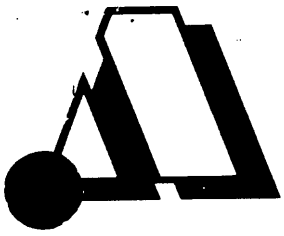
It is our hope that you will discard your proposal.

Sincerely,

William J Keogh

WILLIAM J KEOGH
Executive Vice President

87-33



arcata
associates, inc.
System Manufacturing Division

June 2, 1987

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

Attention: Mr. Charles Lloyd, Executive Secretary

Subject: DODs Interim Rules Implementing A Statutory 5 Percent Minority Contracting Goal (DAR Case 87-33)

Gentlemen:

Subsequent to our review of your proposed interim rules, the following areas seem to require edification.

Under the 'Other DAR Council Considerations' there were thoughts regarding the approach of allowing a 10 percent preferential factor application to the Small Disadvantaged Business (SDB) price in competitive negotiations, when selection is based primarily on price. This approach, in effect, eliminates Cost type contracts. We suggest a revision of this approach be included to allow the application of the 10 percent preferential factor to the costs proposed by the SDB in the competition of Cost type contracts.

In further support of the intent of Public Law (PL) 99-661 we suggest the degree of subcontracting by the prime SDB contractors also include goals to encourage the networking and support of smaller SDBs.

In an effort not to damage one Government program for the benefit of another we recommend that the 5 percent minority contracting goal be against the eligible dollars (exclusive of those allocated for 8(a) goals and women-owned goals).

When determining the number of qualified SDBs, we request that all revenues as a result of 8(a) participation be excluded as the size of many SDBs are unrealistically inflated through subcontracts with the Small Business Administration.

The protest process requires more guidance and policy. The issue of exactly who is qualified to challenge the process remains unclear. An 'interested party' requires definition. Our suggestion is that only qualified SDB offerors have the right to challenge. Timeframes must be defined to prevent or discourage the use of the PL 99-661 program.

3200 POLARIS, UNIT #9, 45 • LAS VEGAS, NEVADA 89102 • (702) 367-1300

Request the establishment of a supportive policy outlining an aggressive program in determining the availability of SDBs to perform on DOD contracts (in consonance with the rule of two).

The intent of PL 99-661 is well accepted by our Company. We look forward to your consideration and implementation of the comments we've provided above.

Sincerely,

Buck W. Wong
President

Office of the
General Manager

marta

2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlanta, Georgia 30365-4301

May 29, 1987

Mr. Charles Lloyd
Executive Secretary
OSAD(P)/DARS
c/o OSAD (A&L) M&RS
Room 3C841
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

I would appreciate it very much if you would provide me with a copy of the Department of Defense's proposed procedures for achieveing the 5% minority contracting goal (reference: DAR Case 87-33)

This information should be sent to:

Mr. John S. Schadl
Assistant to the General Manager
for Equal Employment Opportunity
Metropolitan Atlanta Rapid Transit
Authority
2200 Peachtree Summit
401 W. Peachtree Street, N.E.
Atlanta, Georgia 30365-4301

Thank you for your assistance.

Sincerely,

John S. Schadl
Assistant to the General Manager
for Equal Employment Opportunity

dkh

BOLAND SERVICES

12320 PARKLAWN DRIVE
ROCKVILLE, MARYLAND 20852-1786
TELEPHONE: Main (301) 984-2400
Parts (301) 984-2494
Service (301) 984-2480

June 3, 1987

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

Dear Senator Sarbanes,

We call to your attention an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661). The statute permits DoD to enter into contracts using less than full and open competitive procedures, when practical and necessary to facilitate achievement of a goal of awarding 5 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 percent. 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 has happened as of June 1st.

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

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.

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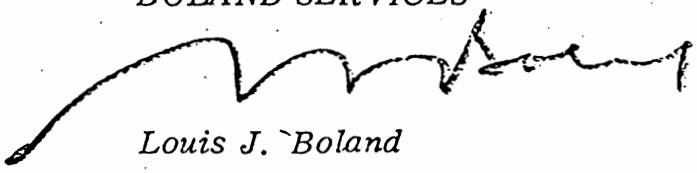
We have no quarrel with set asides per se; however, what has been done in this instance is to close a specific market to specific contractors who have had access to it in the past.

Senator Sarbanes, we need your help in resolving this situation.

Sincerely,

BOLAND SERVICES



Louis J. Boland

LJB:pb

ZACHRY

H. B. ZACHRY COMPANY
General Contractors

D. R. Schad
Vice President

June 11, 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:

With regard to the above referenced case, please be advised that H. B. Zachry Company is in complete agreement with the letter written to you by the Associated General Contractors of America on June 1, 1987. We, along with the AGC, urge that the interim regulations not be implemented on June 1 for military construction procurement; and 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.

Should you wish to discuss this matter further, please feel free to contact us at any time.

Sincerely,

D. R. Schad

lk

NAMC NATIONAL ASSOCIATION OF MINORITY CONTRACTORS
NEW JERSEY CHAPTER, P.O. Box 1604 Union, New Jersey 07083

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,
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

Hamilton V. Bowser, Sr.
Legislature Comm. of NJC, NAMC

HVB:vp

ASSOCIATED GENERAL CONTRACTORS of New Jersey

Richard L. Forman, Executive Director

June 15, 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:

For the same reasons cited by Mr. Hubert Beatty, Executive Vice President of the Associated General Contractors of America, in his June 1, 1987 letter to you, the AGC of New Jersey also objects to the proposed "Rule of Two" set aside provision for Small Disadvantaged Businesses.

While there is no question about the government's intent in providing set asides for genuinely disadvantaged small businesses, it is neither necessary nor authorized by Congress to achieve the 5 per cent goal of total dollars awarded.

Further, experience has proven (witness FY 1984), that the mcehanism used in small business set asides results in an inordinate number of defense construction contracts being set aside under this program.

We strongly urge that the interim regulations not be implemented for military construction procurement until such time as the Defense Department conducts an economic impact analysis of the regulations in compliance with the Regulatory Flexibility Act of 1980.

Sincerely,

Richard L. Forman

Richard L. Forman,
Executive Director

Mail: 7 Centre Drive, Suite 8, Jamesburg, NJ 08831, (609) 655-2997

NATIONAL CONGRESS
FOR COMMUNITY
ECONOMIC DEVELOPMENT
1612 K Street, N.W., Suite 510, Washington, D.C. 20006 202/659-8411

June 15, 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

Dear Mr. Lloyd:

I would like to receive a copy of the proposed Department of Defense Federal Acquisition Regulation Supplement, Implementation of Section 1207 of Public Law 99-661 - "Set-aside for Small Disadvantaged Business Concerns" (DAR Case 87-33). Please send a copy of these regulations to my attention at the address below:

NCCED
1612 K St., N.W.
Suite 510
Washington, D.C. 20006

Thank you for your time and assistance.

Very truly yours,

Kevin P. McQueen
Program Director

KPM/vqa

THE ASSOCIATED GENERAL CONTRACTORS OF ILLINOIS
3219 EXECUTIVE PARK DRIVE ■ P.O. BOX 2579 ■ SPRINGFIELD, ILL. 62708 ■ TELEPHONE (217) 789-2650

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 Mr. Lloyd:

Please be advised that the Associated General Contractors of Illinois, a Statewide Highway/Heavy and Utility Contractors Association representing 259 members, endorses the letter dated June 1, 1987 to you from Hubert Beatty, AGC of America.

Sincerely,

John P. Harrelson
Executive Vice President

JPH/jw

The Kansas Contractors Association, Inc.

316 WEST 33rd STREET P.O. BOX 5061

Topeka, Kansas 66605-0061

Phone 913-266-4152

June 8, 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:

It is our understanding that the Department of Defense has established a 5% Set-Aside for Small Disadvantaged Businesses and that the interim rule establishes a "Rule of Two" regarding set-asides.

The Kansas Contractors Association believes that the "Rule of Two" was not authorized by Congress and is a waste of tax payers money in America. If this rule is allowed to remain, contracting officers will be forced to set-aside many more projects than the proposed 5%.

The letter to you from Mr. Hubert Beatty, Executive Vice-President of the Associated General Contractors of America dated June 1, 1987 spells out in an excellent manner why the set-aside is not needed, why the set-aside will waste millions of dollars and why the rule will penalize hundreds of thousands of contractors in America who only ask for the opportunity to submit competitive sealed bids for Department of Defense projects.

We ask that you follow the provisions of the bill as dictated by congress. Thank you for your consideration.

Most sincerely,

Glenn R. Coulter
Manager

GRC:clm

SKILL · RESPONSIBILITY · INTEGRITY
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

ASSOCIATED GENERAL CONTRACTORS OF MAINE, INC.

June 8, 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 Maine is very much concerned with the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987.

The SBA and 8(a) set-aside programs have placed serious constraints on the construction industry in Maine for the past several years. The programs have resulted in additional costs to the American Taxpayer, while eliminating, for all practical purposes, the competitive bidding process and inviting contractors from outside of Maine to complete work which should remain with local firms. With large defense contracts being awarded to majority-owned firms, the SBA set-aside program have been applied to the great majority of smaller defense projects in Maine.

The interim DOD 5% "Rule of Two" Set-Aside for SDBs just adds more fuel to an already well-fueled fire and results in an unwarranted and unnecessary taxpayer expense, particularly since the program has not been authorized by Congress.

AGC of Maine respectfully urges that the interim regulations not be implemented for military construction procurement.

Very truly yours,

JGH:s

Jerry G. Haynes
Executive Director

WHITTEN ROAD, P.O. BOX N, AUGUSTA, MAINE 04330 207/622-4741

Arizona Chapter

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

P.O. BOX 6878 / 1825 W. ADAMS
PHOENIX, ARIZONA 85005
PHONE (602) 252-3926

June 12, 1987

Mr. Charels W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(PA)DARS
%OSAD(P&C)(M&MRS)
Room 3C841
The Pentagon
Washington, D.C. 20301-3062

RE: Case #DAR87-33

Dear Mr. Lloyd:

Our Chapter would like to echo the sentiments voiced in the June 11, 1987 letter from Hurbert Beatty, Executive Vice-President of the Associated General Contractors.

It is our feeling that set-aside programs of any configuration violate the basic tenets of the competive bidding process and create excess costs for the taxpayers.

The purpose of defense spending is to insure a prepared America in the event armed force is necessary. To this extent we see no value or purpose other than social engineering to create a favored bidding climate for a select few.

We would urge you to view Mr. Beatty's letter in a positive light and implement his requested course of action.

Sincerely,

James R. McDonald
Executive Secretary

JRMcD:ncm

cc: Senator Dennis DeConcini
Senator McCain
Congressman John J. Rhodes III
Congressman Morris K. Udall
Congressman Bob Stump
Congressman John Kyl
Congressman Jim Kolbe

AGC
MASSACHUSETTS

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 Mr. Lloyd:

The Associated General Contractors of Massachusetts opposes the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for FY 1987.

AGC of Massachusetts is a trade association of general contractors, of whom over 90 percent qualify as small businesses. AGC of Massachusetts has a total membership of 256 member firms, of whom 135 are general contractors. AGC is in its 52nd year of existence in Massachusetts.

Our opposition to the interim regulations is based on the following:

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

2) The Act authorizes the Secretary to use less than full and open competitive procedures only "when necessary to facilitate achievement of the 5 percent goal." Since disadvantaged businesses were awarded 9 percent of DOD construction contracts in FY 85 -- and that happened through the full and open competitive bidding process -- special measures are neither necessary nor authorized in the present case.

3) The same is true of "exceeding the fair market price by a ten percent differential." In the case of construction, it is not necessary, and so is not authorized.

4) There is in the interim regulations a strange proposal: If the acquisition history shows within the past 12 months a

> responsive bid from at least one small disadvantaged business within the 10 percent differential ... then the contracting officer must reserve the solicitation for small disadvantaged business set-aside procedures. Such a proposal in regulations borders on the weird. It seems to say: Of 30 projects bid in Region I in the past year by approximately 200 small businesses, if one small disadvantaged business came within 10 percent of the low price on one of the 30 projects, then -- for the 30 such projects coming up this year in Region I --all must be under the set-aside procedures for small disadvantaged businesses.

AGC of Massachusetts urges more reflection and care be given to the regulations for construction in the regulations implementing military procurement in the coming year. The interim regulations should be withdrawn and redrafted.

Respectfully submitted,

William D Kane

WILLIAM D. KANE
Director of Government Relations

wdk/dml

Copy to The Honorable Silvio O. Conte

ASSOCIATED GENERAL CONTRACTORS OF INDIANA, INC.

9000 Keystone Crossing, Suite 890
Indianapolis, Indiana 46240
Telephone: (317) 848-9095
In State Wats: (800) 752-8823

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

Dear Mr. Lloyd:

The Associated General Contractors of Indiana is a chapter of the Associated General Contractors of America located in Washington, D.C. Our chapter represents building and industrial contractors, subcontractors, and suppliers of material and services to Indiana's construction industry.

We wish to wholeheartedly support and endorse the letter which our national AGC executive vice president, Hubert Beatty, wrote to you on June 1, 1987, regarding the interim regulations implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal Year 1987. We are in total agreement and support of Mr. Beatty's letter.

We could repeat many of the issues Mr. Beatty lists in his letter of June 1, but we will save you the time of reading them again.

We urge that the interim regulations not be implemented on June 1 for military construction procurement.

Very truly yours,

Troy T. Comer, Jr.
Executive Vice President

TTC/seh

ASSOCIATED GENERAL CONTRACTORS OF TENNESSEE

BUILDING - MUNICIPAL UTILITIES - HEAVY INDUSTRIAL CONTRACTORS

2924 FOSTER CREIGHTON DRIVE • NASHVILLE, TENNESSEE 37204 • PHONE 615/244-4555

June 8, 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 -- Department of Defense 5% Set-Aside for Small Disadvantaged Businesses

Dear Mr. Lloyd:

The Associated General Contractors of Tennessee fully endorse the entire letter regarding the above subject, as written by the Associated General Contractors of America, dated June 1, 1987.

We urge you and your associates to not implement these regulations 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,

Donald D. Powelson

Donald D. Powelson
Executive Vice President
AGC of Tennessee

DDP/dp

Hea[redacted]ation

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

855-8237

May 23, 1987

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

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

Dear Mr. Lloyd

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
President

SADUR AND PELLAND
CHARTERED
ATTORNEYS AT LAW
2000 L STREET, N. W., SUITE 612
WASHINGTON, D. C. 20036-4993
(202) 872-8383

ARVIN P. SADUR *
FRANCIS J. PELLAND ×
JOEL S. RUBINSTEIN ‡
GAIL A. NETTLETON *
ROBERT J. SCIARONI +
SHEIRA MILLER *

* ADMITTED D. C. MD.
× ADMITTED D. C. MD. VA.
‡ ADMITTED D. C. MD. ILL. N. Y.
+ ADMITTED D. C. CA.

June 8, 1987

Defense Acquisition Regulatory Council
OASD (P&L) DASD (P) DARS
c/o Room 3D 139
Pentagon
Washington, D.C. 20301

Attn: Charles W. Lloyd, Executive Director

Re: Comments On Interim Rule
DAR Case 87-33
Implementation of Section 1207 of Pub.L. 99-661
Set Asides for Small Disadvantaged Business Concerns

Gentlemen:

The proposed regulation aimed at fostering the economic growth of small socially and economically disadvantaged business (SDB) concerns by means of SDB set asides fails to take into account Executive Order No. 12138 (May 18, 1979, Fed. Reg. 29637), which recognizes the "many obstacles facing women entrepreneurs" and "the need to aid and stimulate women's business enterprise." The Order directs each department and agency of the Executive branch to "take appropriate action to facilitate, preserve and strengthen women's business enterprise and to ensure full participation by women in the free enterprise system."

FAR §19.901 implemented the Executive Order by requiring the inclusion of clause 52.219-13 "Utilization of Women-Owned Small Businesses" in all contracts expected to exceed the small purchase dollar limitation. It requires the contractor

> to use its best efforts to give women-owned small businesses the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with the efficient performance of its contract.

In view of the strong interest demonstrated by the administration in assisting and promoting the use of women-owned businesses, we believe that the DAR Council should consider adding women business enterprises as a group eligible for award under this Regulation.

Very truly yours,

Francis J. Pelland

FJP:djk
cc: Washington Area Contracting Center, Andrews AFB

PRO-MARK, INC.
Consulting/Research

June 1, 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

Reference: DAR Case 87-33

Dear Mr. Lloyd:

I am submitting comments pertaining to the interim rules published in the May 4, 1987, Federal Register to implement Section 1207 of Pub.L.99-661.

My comments are based on my experiences as the President and Chief Executive Officer of an SBA 8(a) certified firm that has competed for and performed government contracts. I support the intent of Pub.L.99-661 and I offer these comments with the hope of making the implementation of this law productive for all who are involved.

First, it is crucial that an aggressive policy and effort is established to identify and determine the availability of small disadvantaged business concerns. The proposed rule calls for the contracting officer to determine--based on the rule of two--the existence of two or more capable SDB firms. My experience leads me to suggest that other experienced SDB advocates should be involved in making this determination. Contracting officers should be required to make their determination based on specific input from appropriate Office of Small Business Utilization (OSDBU) personnel and procurement outreach technical assistance providers.

Second, the definition of who can challenge and/or protest the set aside process needs to be looked at more carefully and closely. This is necessary in order to prevent frivolous challenges and protests that will result in a delaying tactic to discourage contracting officers to set aside procurements. Interested parties who can challenge and/or protest should be limited to qualified SDB offerors. There should be time frames for processing the challenges and/or protests that are short enough to avoid delaying the procurement. And there should be

Eastover Bank Building • 120 N. Congress • Suite 605
Jackson, Mississippi 39201 (601) 352-0161

penalities imposed on frivolous protestors to discourage use of challenges and protest as delaying tactics.

Third, specific limitations should be placed on the amount of subcontracting allowed under Section 1207 of Pub.L.99-661. The intent of this law is to increase economic activity in the small disadvantaged business community. As a result, they should be required to perform from 55 to 75 percent of the work themselves. However, to encourage networking and joint ventures among minority businesses this limitation should be waived if the subcontract is with another qualified small disadvantaged business.

Any finally, there should be some distinction made between the SBA 8(a) program and this DoD program. The size of many minority firms is unrealistically inflated by the revenues they are earning in the 8(a) program. In order to expand the base of eligible firms who can take advantage of this program it is important that revenues obtained as a result of participating in the 8(a) program are not counted.

I appreciate this opportunity to offer these comments and I would like to continue to be informed about your efforts to implement this most important law.

Sincerely,

Leslie G. Range
President

wolf Sell

MAY 29 1987

May 19, 1987

The Honorable Lloyd Bentsen
United States Senate
Room 703 Hart Bldg.
Washington, D.C. 20510

Dear Senator Bentsen:

For more than 40 years, Parkhill, Smith & Cooper, Inc., has provided professional services to many Federal agencies. We have served a number of U.S. Department of Defense (DoD) agencies and installations in Texas with architectural and engineering services.

I was disappointed to read in the May 4, 1987, Federal Register a proposed DoD regulation to allow that agency to use "less than full and open competitive procedures" in order to meet "small disadvantaged business concern" contracting goals. I urge you to contact appropriate DoD officials to express your displeasure with this proposal which would negatively impact many firms like ours in Texas.

Until 1986, Parkhill, Smith & Cooper, Inc., was considered a "small business concern" under Federal guidelines. Last year, the Small Business Administration revised these guidelines, reducing the definition of small business from $7.5 million gross annual receipts over a three-year period to just $2.5 million. Our ability to compete for DoD contracts has been significantly affected by this change since we can now only compete for work along with the larger design firms. Previously we could also compete for the "small business setaside" projects.

We are neither a small nor a large firm. We are best described as a medium-sized firm. We are now being regarded as too big for the small jobs, but too small for the larger jobs. We have been trying to adjust to this situation. The May 4, 1987, proposed regulations to allow DoD to further set aside projects for smaller firms will only make this situation even more difficult for firms like ours.

There are many qualified small business architectural and engineering firms in Texas -- both "disadvantaged" and not. There is no need to put aside the normal competitive procurement procedures for professional services contracts. This is certainly no time for the Federal government to be paying up to 10 percent more for these services as the proposed regulations will allow.

Parkhill, Smith & Cooper, Inc.

Engineers • Architects • Planners
4010 Avenue R, Lubbock, Texas 79412 806-747-0161
Lubbock El Paso Midland Austin

I will certainly appreciate your expressing an interest in this issue on our behalf.

Sincerely,

PARKHILL, SMITH & COOPER, INC.

By C. Clayton Yeager
C. Clayton Yeager, P.E.
President

CCY/dkb

UNITED INDIAN DEVELOPMENT ASSOCIATION

June 18, 1987

Defense Acquistion Regulatory Council
Atten: Mr. Charles W. Lloyd
Executive Secretary, 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:

We would like to take this opportunity to submit our written comments concerning the interim rule amending the Defense Federal Acquistions Regulation Supplement implementing section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (P.L. 99-661).

We recommend the following:

1. At the end of the first sentence of Section A "Background" the following should be addded:

   "(4) Indian Tribes and Tribal Organizations"

2. The section on Definitions (219.001) should contain a definition of American Indians, as follows:

   "American Indian Tribes" means members of, or tribal organizations representing, federally recognized Indian Tribes".

Los Angeles Region/ National Center
9650 Flair Drive, Suite 303
El Monte, CA 91731
(818) 442-3701
(800) 423-0452

Phoenix Region
2111 E. Baseline Rd., Ste. F-8
Tempe, AZ 85283
(602)831-7524

Northern California Region
411 J Street, Suite 7
Eureka, CA 95501-0581
(707) 445-8488

Northern Arizona Region
9 West Cherry Ave., Suite A
Flagstaff, AZ 86001
(602) 774-3315

San Diego Region
365 W. Second Ave., Ste. 204
Escondido, CA 92025
(619) 746-7356

3. The section on General Policy (219.201) should include language and referral to the "Buy Indian Act" 25 U.S.C. 47 and 20 BIAM5. Suggested language shall read:

   "The Buy Indian Act (25 U.S.C. and 20) will be utilized for procurement awards to American Indian firms".

   This is further justified by the "Buy Indian" provisions of the Defense Appropriations Act.

4. At the end of Section 219.502-72(b) the following should be added as one of the circumstances to set-aside an acquistion:

   "(4) two or more responsible Buy Indian contractors express an interest in bidding on a contract which will use Indian labor and create employment on Reservations".

5. The title of Section 219.803 needs to be changed to note the Buy Indian provision and a section (d) needs to be added. The new Section (d) should read:

   "(d) in cases where Buy Indian firms are qualified and available, the contracting officer shall use the provision of 25 U.S.C. 47 and 20 to award contracts not inconsistent with the intent of Section 1207".

United Indian Development Assocation is the largest and oldest American Indian business and economic development organization in the U.S. We appreciate this opportunity to submit our comments. Should you have any questions please call me at (818) 442-3701.

Sincerely,

Steven L.A. Stallings
President

/sd

cc: Senator Pete V. Domenici
Dan Lewis, Senator McCain
Alan Parker, Senate Select Committee on Indian Affairs
Richard West, Attorney at Law

BLACKHAWK INC.
Electrical Contractors
•INDUSTRIAL
•RESIDENTIAL
•COMMERCIAL

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, being an electrical contractor, most of our jobs we serve as subcontractors, I am concerned 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,

Ronald Heigler

Ronald Heigler
President

1812 SOUTH 22nd STREET, PHILADELPHIA, PENNSYLVANIA 19145 • (215) 463-4200

8733

Associated General Contractors of Virginia Inc.
P.O. Box 6878
2311 Westwood Avenue
Richmond, Virginia 23230
(804) 359-9288

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 Mr. Lloyd:

We strongly support the position taken by the Associated General Contractors of America in their letter to you of June 1, 1987, concerning the above referenced matter.

This interim regulation implementing Section 1207 of Public Law 99-661, the National Defense Authorization Act for Fiscal year 1987, is non-competitive and an unfair cost burden on the taxpaying public. It also adds another inflexible special preference procurement program to the construction industry.

We urge interim regulations not be implemented. your consideration will be appreciated.

Very Truly Yours,

James F. Duckhardt
Executive Director

JFD/mav

cc: The President of the United States
Caspar W. Weinberger, Secretary of Defense
James C. Miller, III, Director of Office of Management and Budget

TELOS

June 25, 1987
TFE 87-0692

Defense Acquisition Regulatory Council
Room 3C841
The Pentagon
Washington, DC 20301-3062

Subject: Small Disadvantaged Service Contracts

Gentlemen:

It is our belief that any attempt to set-aside five percent (5%) of contract dollars to small disadvantaged business concerns would be extremely detrimental to other small and medium sized businesses.

TELOS is engaged in the service of computers, hardware and software maintenance, and we are one of many third party service organizations nationwide that service computers. We have many small and large contracts with the Federal Government at twenty-one (21) locations.

To the best of our knowledge, there are four or five small disadvantaged businesses that service computers, to give them five percent (5%) of the total dollars for computer service contracts would amount to millions of dollars with only the same small firms competing for the business.

TELOS has clearly been a victim of the 8A program in the last year. As the incumbent contractor at Fort Rucker, Alabama our contract was re-bid from the new Contracting Office at TRADOC Contracting - East, Fort Eustis, Virginia. The new Contracting Officer decided he would utilize the 8A program and negotiated with IMR Corporation to service the computers at Fort Rucker. Although the award may have been proper, it clearly was not for ten precent (10%) of the fair market price and we believe an investigation is warranted to determine how they arrived at the fair market price. Using TELOS' previous prices, (as the incumbent) it is clear that we would have saved the U.S. Government over $15,000.00 per month. The award was NOT within regulations and should be investigated ensuring that any subsequent yearly option period not be exercised.

TELOS FIELD ENGINEERING • 98 North 500 West • Bountiful, Utah 84010 • (801) 298-8000
CORPORATE OFFICE • 3420 Ocean Park Boulevard • Santa Monica, California 90405 • (213) 450-2424 • Telex 215678

Please be careful when proceeding with any rule that would preclude services competition, because the 8A companies for this field are extremely limited.

If you should desire additional information, please do not hesitate to call me directly at (801) 298-8000 or Terry Black in my absence.

Sincerely,

TELOS FIELD ENGINEERING

Mark W. Hester
Vice President
Field Service Engineering

MWH:cp

LYNN MARTIN
16TH DISTRICT, ILLINOIS

HOUSE ARMED SERVICES COMMITTEE

VICE CHAIRMAN
REPUBLICAN CONFERENCE

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

WASHINGTON ADDRESS:
SUITE 1208
LONGWORTH HOUSE OFFICE BUILDING
PHONE: (202) 225-5676

DISTRICT OFFICES:
150 NORTH 4TH STREET
ROCKFORD, IL 61104
PHONE: (815) 987-4326

420 AVENUE A
STERLING, IL 61081
PHONE: (815) 626-1616

July 1, 1987

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

Dear Mr. Green:

Enclosed is the carbon copy of a letter that Woodward Governor Company of Rockford, Illinois, sent to my office regarding the 50% evaluation factor of the Balance of Payments Program currently being used by the U.S. Corps of Engineers for equipment used for domestic civil works projects.

Obviously since the original copy of this letter was addressed to your office, you are aware of Woodward Governor's concerns. I am simply passing this copy along requesting that Woodward Governor's comments be kept in mind as a decision is made on this important matter.

Your careful consideration of this delicate issue that will have an effect on America's balance of trade is appreciated.

Sincerely,

Lynn Martin

LYNN MARTIN
Member of Congress

LM:kr
Enclosure

We submit that continuing developments in the international marketplace accompanied by our growing trade deficit require that actions be taken to provide a positive impact on our economy; therefore, we ask for your support in retaining the 50% evaluation factor.

Your very truly,

WOODWARD GOVERNOR COMPANY

Ben K. Schleicher
Public Affairs and Community
Relations Coordinator

cc: The Honorable Lynn Martin
1208 Longworth House Office Building
Washington DC 20515-1316

3056b
bm[c]

KR 15307

JUN 29 1987 pend 14745 BF

WOODWARD GOVERNOR COMPANY

DESIGNER AND BUILDER OF CONTROLS FOR ALL PRIME MOVERS

5001 NORTH SECOND STREET · P. O. BOX 7001 · ROCKFORD, ILLINOIS 61125-7001

PHONE 815 877-7441

ESTABLISHED 1870

June 24, 1987

Defense Acquisition Regulatory Council
Attention; Mr. Owen Green, Acting Executive Secretary
ODASD(P)/DARS
c/o OASD (A & L) (M & RS)
Room 3C841
The Pentagon
Washington DC 20301-3062

Gentlemen:

With reference to pages 12440 and 12441 of the Federal Register/Vol. 52, No. 73/Thursday, April 16, 1987/Proposed Rules, 48CFR Part 225, we are writing to express our opposition to the proposed change in the 50% evaluation factor of the Balance of Payments Program currently being used by the U.S. Corps of Engineers for equipment used for domestic civil works projects.

The 50% factor, which the U.S. Corps of Engineers has applied, since 1964, as a penalty in evaluating bids which have foreign content in excess of 50%; has been a positive factor for our company, as well as our country. By comparison, the U.S. Bureau of Reclamation, using the standard 6% evaluation factor during approximately the same period of time, has purchased significantly more foreign equipment which has an unfavorable impact on our trade deficit.

One of our divisions, which recently moved into a new facility in Stevens Point, Wisconsin, manufactures hydraulic turbine governing equipment for use in hydro-electric generating stations. They are currently proposing new equipment for the Richard B. Russell hydro-electric project in the Savanah District of the U.S. Corps of Engineers and will have the opportunity in the future to submit quotations for equipment to upgrade or replace existing, obsolete equipment. If the 50% evaluation factor is eliminated, it could have a negative impact on our company, our suppliers, our community, and, of course, our country.

MAZAL FUEL COMPANY INC.
1141 EAST MAIN STREET · BRIDGEPORT, CONNECTICUT 06608 · (203) 335-3385

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 the final regulations.

Sincerely,

Ralph Mazal
President

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

Re: DAR Case 87-33

Dear Mr. Lloyd:

During the past few years I have discussed subcontracting and purchasing concerns with small disadvantaged business (SDB) firms I've encountered at trade fairs such as the one held annually by U.S. Congressman Esteban Torres in Whittier, California.

Many of these SDB firms informed me that they are not looking for handouts-just a hand. They maintain that the reason federal contractors don't call them is not that their prices are too high, but rather because federal contractor acquisition personnel tend to call "known sources". In other words, acquisition personnel have no reason to call alternative sources who, in many cases, happen to be SDB firms.

A second point to consider is that many government prime contractors have not achieved their established contracting goals for SDB firms.

I believe that by changing the current interim DAR Council regulations pertaining to Section 1207 of the Defense Authorization Act (Public Law 99-661) to final regulations, the above-noted problems could be eliminated.

Lastly, I would encourage the DAR Council to make Section 1207(e) of the Act as a "flow down clause" applicable to to all government contractors and their subcontractors.

Sincerely,

Henry Rodriguez 805-763-6359
Henry Rodriguez
Socio-Economic Programs Admininistrator(Prime Contractor)

CC: E. Torres, U.S. Congress
R. Jauregui,LBA

4301 KEITH WAY
BAKERSFIELD CALIF 93309

quired performance is completed, the Govt must ensure that the profit allowed on the UCA reflects (1) any reduction in contractor's cost risk with respect to costs incurred during contract performance prior to negotiation of the final price, and (2) contractor's reduced cost risk with respect to costs incurred during the remaining contract performance period.

DOD interim regs implementing these requirements are set forth in full at 52 Fed. Reg. 12387.

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Claims Court Order Provides For Using Alternative Dispute Resolution Procedures

In response to the rising cost and delay involved in litigating complex legal claims by the traditional judicial process, the U.S. Claims Court has issued a *General Order No. 13* which will enable its litigants to use some *voluntary alternative* disputes resolution (ADR) techniques. The Court believes that resorting to the techniques is most appropriate where the parties anticipate a *lengthy discovery* period followed by a *protracted trial* ("typically" a situation where the disputed amount exceeds $100,000 and the trial is expected to last more than one week).

Designed to encourage the parties to settle their disputes, the two techniques adopted (which require the *agreement of both* parties) are the use of (1) a Settlement Judge (S/J), and (2) a mini-trial (M/T).

The S/J is a different individual than the judge who will preside at the trial if the settlement efforts are unsuccessful. He provides the parties with a neutral judicial assessment of their settlement positions, without jeopardizing their ability to obtain an impartial resolution from the presiding judge if settlement is not reached.

The M/T is an expedited proceeding which also takes place before a judge other than the presiding one. The Court states that the technique should only be used in cases which involve factual disputes that are governed by well-established legal principles—not in cases which present novel legal issues or where the credibility of witnesses is a major factor. The entire M/T process (including discovery) should be concluded in one to three months. The M/T hearing itself should generally not exceed one day.

Except as allowed by Federal Rule of Evidence 408, states the Order, all representations made in the course of the selected ADP proceeding are confidential and may not be used for any reason in subsequent litigation. On the other hand, the Order also provides that discovery taken for the purpose of a M/T may be used in further proceedings if settlement is not achieved.

★ **Note**—(1) The above Order makes it clear that the Court's implementation of the above ADR methods does not bar the parties from resorting to other ADR techniques which do not require the Court's involvement.

(2) For a description of an M/T approach adopted by a procuring agency contract appeals Board, see 27 G.C. ¶ 4.

¶ 139

Reg Proposed To Implement Goals For Awards To Small Disadvantaged Firms

Sec. 1207 of the 1987 Defense Authorization Act (P.L. 99-661) established a goal that 5% of DOD contract dollars be awarded to small disadvantaged business (SDB) firms during fiscal years 1987, 1988 and 1989. In order to facilitate attainment of that goal, § 1207(e) permits DOD to use *less than full and open competitive procedures* in awarding contracts to such firms, provided that the contract prices do not exceed fair market prices by more than 10%.

The Defense Acquisition Regulatory Council has now adopted interim regulations to implement this provision. The regs establish a so-called "*rule of two*" regarding set-asides for SDB firms which is similar to the approach long followed in connection with general set-asides for small business firms generally. Specifically, Contracting Officers are directed to reserve acquisitions for exclusive competition among SDB firms when they determine that (1) offers can be anticipated from at least two responsible SDB firms, and (2) the contract price will not exceed a fair market price by more than 10%.

Written comments on this interim rule may, until 3 Aug. 1987, be submitted (citing DAR case 87-33) to Charles W. Lloyd, Executive Secy., DAR Council, ODASD(P)DARS, c/o OASD(P&L)(M&RS), Room 3C841, Pentagon, Wash., D.C. 20301-3062. (52 Fed. Reg. 16263)

★ **Note**—(1) In a related announcement (at 52 Fed. Reg. 16290), the Council (a) stated that it was considering two additional procedures for implementing § 1207, and (b) invited the public to comment on these and other possible methods. Such comments must be submitted to the above address by 3 June 1987.

(2) Early last year, OFPP proposed eliminating the "rule of two" in connection with general small business set-asides. However, in passing the fiscal year 1987 Omnibus Continuing Appropria-

PLM POWER LINE MODELS, INC. ELECTRIC POWER ENGINEERING
P.O. BOX 550 EVERGREEN, COLORADO 80439 TELEPHONE (303) 674-1398

June 30, 1987

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

Attn: Mr. Charles W. Lloyd
Executive Secretary

Dear Mr. Lloyd:

Power Line Models is a small disadvantaged business with over 10 years of professional experience in the electric power field. We have reviewed with extreme interest your proposed interim rule identified as DAR 87-33. We are hopeful that implementation of this rule will increase the number of procurement actions that are set aside. The majority of architect-engineer services are being given to the large firms in the belief that "big is better". We would agree if the firm has the high standards of professional engineering. However, as a firm that has cleaned up after many "big firms", we would offer a word of caution. This also applies to small firms who do not have an established policy of high standards. PLM is a strong believer in selecting the most qualified firm.

Over the past 10 years, PLM has submitted on over 150 different CBD announcements and have been selected five times. Three under open competition and two as Indian owned set asides. We are persistent, but the system favors large firms.

We offer the following comments:

- It is our opinion that most procurement offices will resist the new 5% rule. These offices have had bad experiences with some small businesses and will not expect the number of "good firms" to increase.

- We do not see the need for the contract price to exceed the fair market cost by more than 10%. Contract price should be the actual negotiated price and close to the expected costs.

- We would recommend that the contracting officers be allowed to waiver the DCAA audit for all A/E services under $500,000. The cost of preparation for these audits is excessive compared to the benefit.

Synterra Ltd.
SITE ARCHITECTURE, DEVELOPMENT PLANNING
philadelphia • new york • washington • miami

18 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, 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 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 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,

William Wilson

☐ philadelphia • 628 west rittenhouse street, philadelphia, pa., 19144., (215) 843-0700
☐ new york • 170 west 74th street, suite 1115, new york, n.y., 10023., (212) 496-0959
☐ washington • 1747 church street, nw. washington, d.c., 20036., (202) 265-2270
☐ miami •

ASSOCIATED BUILDERS AND CONTRACTORS, INC.

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, DC 20301-3062

Re: DAR Case 87-33, Set-Asides for Small Disadvantaged Business Concerns

Dear Mr. Lloyd:

Associated Builders and Contractors (ABC) appreciates the opportunity to submit comments on the above-mentioned interim regulation.

ABC requests that the Department of Defense withdraw this badly flawed proposal to allow consideration of more appropriate alternatives, such as those proposed in these comments, for fulfilling its mandate in Section 1207 of The National Defense Authorization Act for Fiscal Year 1987 (P.L. 99-661).

ABC represents 20,000 general contractors, subcontractors, material suppliers and related firms that employ more then one million workers in the open shop segment of the construction industry which now performs 70% of all work across the nation. The Association promotes the Merit Shop concept of construction, which means that a contract should be awarded to the lowest most responsible bidder under fair and open competition.

One of ABC's most fundamental tenets is that government procurement should be conducted with totally open and fair competition. The Association is committed to the belief that it is the responsibility of government to obtain the lowest possible price through unrestricted competition, as utilized in the free enterprise system, in the government procurement process.

However, ABC recognizes that Congress, in Section 1207(e) of the FY '87 Defense Authorization Act, permitted the Secretary of Defense to enter into contracts using "less than full and open competitive procedures when practical and necessary to facilitate achievement of a goal of awarding 5% of contract dollars to small disadvantaged business concerns during FY 1987, 1988 and 1989, providing the contract price does not exceed fair market cost by more than 10%."

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The Association objects to the Department's decision to utilize the "Rule of Two" to implement this provision of Public Law 99-661. ABC proposes the publication of a revised proposed regulation that implements Section 1207 by 1) emphasizing greater DOD assistance and outreach efforts, as mandated by Congress in Section 1207(c), to help increase the percentage of contract awards to Small Disadvantaged Businesses (SDBs); and 2) replacing the Rule of Two with a "sufficient number" standard.

Use of the Rule of Two Is Not Mandated By The Law and Is Inappropriate For The Construction Industry

Section 1207 of The FY '87 Defense Authorization Act is silent on the issue of which guidelines the Secretary of Defense may use in entering into contracts with SDBs under "less than full and open competitive procedures." Therefore, DOD is given wide latitude in selecting an appropriate mechanism for preferential procurement.

By proposing to use the Rule of Two, the Department is contemplating a set-asides system based on the most onerous and restrictive of procurement rules. Under this rule, a DOD contracting officer would be required to severely limit competition by setting aside a contract whenever he/she thinks that two SDBs might have an interest in doing the specified work. The rule functions as an automatic trigger mechanism and achieves what is practically sole-source procurement -- only two bidders.

The special characteristics of the construction industry and the practical facts of construction contracting clearly demonstrate that the Rule of Two is not appropriate for implementing Section 1207.

The industry is composed of a large number of small firms which by their nature are highly competitive. The longstanding competitive bid process exemplified by the construction industry assures that firms compete on an equal basis in the free enterprise system. This process works well and promotes competitiveness and, in turn, cost-effective construction. Small construction firms usually compete with their equals because it would not be economical for large firms to bid on work more efficiently handled by the small firms. To do so would drain financial and personnel resources large firms need to bid on contracts more suited to their greater capabilities and requirements.

As the Department is aware, small companies in general are awarded a significant share -- up to 90% in some areas -- of federal set-aside contracts. Congress has reviewed this situation and has directed the SBA, in Public Law 99-661, to review small business size standards with the goal of limiting small business procurement levels to approximately 30% of dollar volume.

Additionally, entry into the construction industry is relatively easy and requires little start-up capital. Since there are relatively few barriers to entering this business, new small firms are constantly emerging, which assures competition. Construction firms compete for contracts on the basis of price and ability to perform work.

Since offers are generally received from 10 to 12 firms in federal construction procurement at all times, this means that exclusive small business set-asides frequently occur on a repetitive basis with the Rule of Two. Utilizing this rule will not necessarily result in more contract awards to SDBs -- it will only cause more contracts to be set aside for restricted bidding. The true result could be an exclusionary 100% set-aside for SDBs.

The Association is alarmed that the Rule of Two, as proposed in this interim regulation, will unfairly burden the construction industry. Currently, 64% of all non-residential federal construction (SIC Code 1542) is performed through small business set-asides and SBA 8(a) contract awards. In construction specialty trades, construction set-asides can reach as high as 91.7% in the carpentry trade (SIC Code 1751).

Section 1207(b) mandates a 5% SDB set-aside goal for the "total combined amounts" of four DOD acquisition activities -- procurement; research development, test and evaluation; military construction; and operations and maintenance. Under this provision, it is not necessary to achieve the 5% SDB set-aside goal in any one of the four activities -- only in the total value of the four areas.

ABC is extremely concerned that DOD contracting officers will attempt to meet the overall 5% goal by setting aside an unreasonably high number of construction contracts for exclusive bidding by SDBs simply because federal construction is characterized by a high level of set-asides. The Association believes it would be unfair to achieve the 5% goal by compensate for lower SDB set-aside levels in the other acquisition activities.

The Rule of Two Is Inconsistent With The Requirements of The Competition Contracting Act

The Competition In Contracting Act of 1984 (CICA) requires "full and open competition in the procurement of property and services ... by establishing policies, procedures, and practices that assure that the executive agency receives a 'sufficient number' of responses. This would be carried out by requiring contracting officers to demonstrate that a sufficient number of small business concerns will respond ... taking into account the size, character, and complexity of each contract and the pool of prospective firms."

In passing CICA, Congress clearly intended to maximize full and open competition to meet the government's procurement needs. The "Rule of Two" unreasonably restricts the contracting officer's discretion to consider the factors specified in CICA. In actual practice, the Rule of Two goes far beyond the "less than full and open competitive procedures" standard of Section 1207. Requiring a contracting officer to create an SDB set-aside based on the expectation that only two such firms may have an interest in bidding on the contract effectively prevents the development of evidence to justify what is virtually sole-source procurement.

The Rule of Two Will Result in Higher Procurement Costs and Will Not Increase The Level of SDB Contracting

Additionally, the highly restrictive nature of the Rule of Two invites higher procurement costs above and beyond the 10% premium allowed by the Act. Specifically, the Department will face increased costs -- as well as contract delays -- due to the defaults that will occur due to unqualified SDBs being awarded contracts beyond their capabilities solely because of their SDB status. ABC has been provided with a study of the mechanical (plumbing, heating, cooling) subcontracting field which shows that 18% -- or almost one in five -- of the MBE (minority business enterprise) firms defaulted on government contracts awarded through set-aside programs. In cases such as this, the government agency must absorb the financial loss, face delays in completing the project, and reissue the contract -- all of which create higher procurement costs.

From FY 1981 through FY 1986 -- the period of the administration's massive defense build-up, when overall contract awards to business increased by 57% -- the percentage of awards to SDBs varied by 0.3%. Further, the dollar volume of DOD contracts to all small businesses never varied by more than 2%. Clearly, if the opportunities created by the recent increases in defense spending have not, by their sheer size, resulted in more contract awards to small businesses and SDBs, the Department may be close to maximizing the SDB procurement capability available.

Moreover, using the Rule of Two to fulfill the requirements of Section 1207 may actually reduce the overall level of minority contracting by the Department. By relying on the Rule of Two, the proposed regulation gives DOD contracting officers a simple, expedient option for setting aside contracts for exclusive SDB participation. The availability of this procedure can be expected to reduce minority set-asides under the SBA 8(a) program, which is considerably more complex and requires more effort on the part of contracting officers to set aside contracts and certify contractors as eligible to participate in the 8(a) program. The simplicity and expediency afforded by the proposed DOD regulation -- coupled with the existing availability of known minority contractors in the Department's 8(a) program -- will encourage contracting officers to redirect contracts and contractors from the 8(a) program to meet the requirements of Section 1207 (and, in turn, the proposed regulation).

Congress already recognizes the potential for this redirecting of minority contracts by including in FY 1988 authorization legislation provisions to prevent this situation. Section 846 (b) (5), (6), (7) and (8) of H.R. 1748 requires the Secretary of Defense to issue regulations (emphasis added) that:

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

Clearly, Congress realizes how easy it will be for DOD contracting officers to use the pool of existing 8(a) contractors for the purpose of fulfilling the requirements of Section 1207. Moreover, these provisions in the FY 1988 Defense Authorization bill are directed at closing this regulatory loophole and safeguarding the 8(a) set-aside program.

Alternatives to the Rule of Two

ABC believes that Section 1207(c) clearly directs the Secretary of Defense to pursue a balanced regulatory approach for the purpose of meeting the requirements of Public Law 99-661. Specifically, paragraph (c) mandates the Secretary to:

> "... 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."

This language is significantly more proscriptive than Section 1207(e) (3), which states:

> "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... (emphasis added)"

Associated Builders and Contractors understands and appreciates the need to facilitate the establishment of SDBs in the construction industry and assist these firms in obtaining the experience necessary to compete in the private sector. ABC is concerned, however that the 5% SDB goal -- and DOD's proposal to utilize the Rule of Two to achieve it -- do not take into consideration that a sufficient number of qualified SDBs may not be available. The Association further believes that increased participation in the construction marketplace by SDBs can best be achieved on a long-term basis by upgrading the job skills of these workers and the management abilities of owners and supervisors. Accordingly, ABC offers the following recommendations:

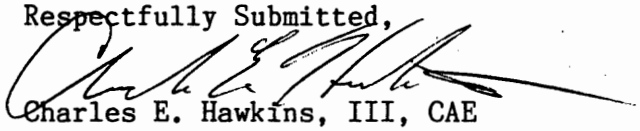
> 1) The Secretary of Defense should make the fullest possible use of his mandate in Section 1207(c) to provide the assistance necessary to help qualified SDBs compete for DOD contracts. This effort would concentrate on identifying potentially capable SDBs as well as providing ongoing training and management development over the terms of their contracts to help SDBs increase their capabilities to perform.

2) As part of this outreach and assistance program, SDBs should be qualified by contracting officers as to their capability to successfully perform the particular projects on which they are bidding. Criteria should include, but not be limited to: on-site visits, personal interviews, license examination, analysis of bonding capacity, listing of work completed, resume of principal owners, and financial capacity and type of work preferred. Section 1207 does not prohibit the Secretary of Defense from establishing qualification criteria, and such standards would help assure the Department of more efficient and cost-effective procurement using SDBs. Further, a set of uniform qualification standards promotes the original intent of Section 1207 -- to develop the business abilities of SDBs in the DOD procurement arena.

3) The Rule of Two should be replaced with a "sufficient number" standard that allows contracting officers more discretion in determining whether to set aside a contract for exclusive SDB participation under Section 1207. As previously mentioned, the sufficient number standard allows contracting officers to demonstrate that a sufficient number small business concerns will respond to a request for bids, with consideration given to the size, character and complexity of individual contracts as well as the pool of available firms. This standard returns discretion to the contracting officer in choosing to restrict competition. Under the Rule of Two, the contracting officer is allowed almost no discretion, even to the point of not permitting even an examination of the SDB's ability to perform a particular contract. In the alternative ABC, suggests that the Department examine DBE programs in civilian federal agencies as potential models for its Section 1207 program.

ABC urges the Department of Defense to adopt these recommendations in the interest of promoting equity and efficiency in SDB procurement. The Association's staff will be pleased to assist the Department in any way in refining the proposed regulation to achieve these goals.

Respectfully Submitted,



Charles E. Hawkins, III, CAE
Vice President, Government Affairs

DENNIS ANDERSON CONSTRUCTION CORPORATION
General Contractor
P.O. Box 935
Waldorf, Maryland 20601
(301) 843-7400

May 26, 1987

Mr. Charles W. Lloyd, c/o OASD
Defense Acquisition Regulatory Council
Rm. 3C841, The Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 87-33

Dear Sir:

Pertaining to the new interim rule being discussed, we would like to offer the following:

A. In our opinion, in a public bid situation, any contractor, minority or not, has no advantage or disadvantage. The low responsible bidder should receive the award. Everyone has the same opportunity to submit their price.
B. The so-called disadvantaged contractors are in a lot of cases, just fronts for either larger contractors or a wealthy investor or someone that has unofficially established a partnership. This new policy will only encourage further fraudulent activity and discourage the small businesses, like ours, that are honestly scratching to survive but legally do not qualify for all the so-called assistance the government provides.
C. As a taxpayer, we feel that a competitive public situation by far compliments peoples hard earned money rather than narrowing down the bidding public to two or more bids.

In summary, we would like to voice great displeasure in this rule. Being involved first hand in bid situations, we see plainly how the system works and this new rule will not in any way better it.

Sincerely,

Dennis Anderson, Jr.
President

groups shall contain full instructions as to where and by what method shippers may file their requests and complaints, together with a sample of the rate request form, if one is used, or, in lieu thereof, a statement as to what supporting information is considered necessary for processing the request or complaint through conference channels. All changes made in such instructions shall be published in said tariffs, supplements thereto, or reissues thereof, in accordance with the tariff filing requirements of section 18(a) of the Act.

§ 560.703 Filing of minutes.

(a) The parties to each approved conference agreement, agreement between or among conferences, or agreements subject to this part whereby the parties are authorized to fix rates (except leases, licenses, assignments or other agreements of similar character for the use of terminal facilities) shall, through a designated official, file with the Commission a report of all meetings describing all matters within the scope of the agreement which are discussed or taken up at any such meeting, and shall specify the action taken with respect to each such matter. For the purpose of this part, the term "meeting" shall include any meeting of parties to the agreement, including meetings of their agents, principals, owners, committees or sub-committees of the parties authorized to take final action in behalf of the parties. If the agreement authorizes final action by telephonic or personal polls of the membership, a report describing each matter so considered and the action taken with respect thereto shall be filed with the Commission. These reports need not disclose the identity of parties that propose actions, or the identity of parties that participated in the discussions of any particular matter.

(b) The reports subject to paragraph (a) of this section shall be filed with the Commission within 30 days after such meetings and shall be certified as to accuracy and completeness by the Conference Chairman, Secretary, or other official.

(c) No report need be filed under paragraph (a) of this section with respect to any discussion of or action taken with regard to rates that, if adopted, would be required to be published in a tariff on file with the Commission. This reporting exemption does not apply to discussions involving general rate policy, general rate changes, the opening or closing of rates, or discussions involving items, that, if adopted, would be required to be published in other tariff sections as specified in Part 550 of this chapter.

§ 560.704 Filing of reports on admissions, withdrawals, and expulsions.

(a) Prompt notice of admission to membership to a conference shall be furnished to the Commission and no admission shall be effective prior to the postmark date of such notice.

(b) Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Commission.

(c) Notice of withdrawal of any party shall be furnished promptly to the Commission.

(d) No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of such notification submitted to the Commission.

Subpart H—[Reserved]

Subpart I—Penalties

§ 560.901 Failure to file agreements.

Any common carrier by water in interstate commerce or other person subject to the Act entering into or carrying out an agreement subject to the Act which has not been filed with and approved, or has not been exempted by the Commission is in violation of section 15 of the Act and this part and subject to penalties of up to $1000 for each day such violation continues.

§ 560.902 Failure to file reports.

Compliance is mandatory and failure to file the reports required by this part may result in disapproval of agreements under section 15 of the Act or penalties of up to $100 for each day of such default under section 21 of the Act.

§ 560.903 Falsification of reports.

Knowing falsification of any report required by the Act or this part is a violation of the rules of this part and is subject to the penalties set forth in section 21 of the Act and may be subject to the criminal penalties provided in 18 U.S.C. 1001.

Subpart J—Paperwork Reduction

§ 560.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96-511. The Commission intends that this part comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

[CODES TO BE ASSIGNED BY OMB]

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 87-10005 Filed 5-1-87; 8:45 am]

BILLING CODE 6730-01-M

DEPARTMENT OF DEFENSE

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

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

AGENCY: Department of Defense (DoD)

ACTION: Notice of Intent to develop a proposed rule to help achieve a goal of awarding 5 percent of contract dollars to small disadvantaged businesses.

SUMMARY: The Defense Acquisition Regulatory (DAR) Council invites public comment concerning the development of procurement methods to be used to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), entitled "Contract Goal for Minorities."

DATES: Comments should be submitted in writing to the DAR Council at the address shown below no later than June 3, 1987, to be considered in the formulation of a proposed rule. 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 OASD (P&L) (M&RS), Room 3C841, The Pentagon, Washington, DC 20301-3062.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

The DAR Council is publishing an interim rule appearing elsewhere in this Federal Register to implement section 1207 of Pub. L. 99-661. 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 10 percent.

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

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

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

[FR Doc. 87-10100 Filed 5-1-87; 8:45 am]

BILLING CODE 3810-01-M

VETERANS ADMINISTRATION

48 CFR Part 819

Acquisition Regulations for Small Business Concerns

AGENCY: Veterans Administration.

ACTION: Proposed regulations.

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

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

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

FOR FURTHER INFORMATION CONTACT: Thomas A. Hamilton, Supply Management Representative, Policy Division, Office of Procurement and Supply (91A), (202) 233-3882.

SUPPLEMENTARY INFORMATION:

I. Background

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

II. Executive Order 12291

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

III. Regulatory Flexibility Act (RFA)

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

IV. Paperwork Reduction Act

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

List of Subjects in 48 CFR Part 819

Government procurement.

Approved: April 27, 1987.

Thomas K. Turnage,

Administrator.

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

PART 819—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

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

Authority: 38 U.S.C. 210 and 40 U.S.C. 486(c).

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

Subpart 819.6—Certificates of Competency and Determinations of Eligibility

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

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

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

PRO-MARK, INC.
Consulting/Research

June 1, 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

Reference: DAR Case 87-33

Dear Mr. Lloyd:

I am submitting comments pertaining to the interim rules published in the May 4, 1987, Federal Register to implement Section 1207 of Pub.L.99-661.

My comments are based on my experiences as the President and Chief Executive Officer of an SBA 8(a) certified firm that has competed for and performed government contracts. I support the intent of Pub.L.99-661 and I offer these comments with the hope of making the implementation of this law productive for all who are involved.

First, it is crucial that an aggressive policy and effort is established to identify and determine the availability of small disadvantaged business concerns. The proposed rule calls for the contracting officer to determine--based on the rule of two--the existence of two or more capable SDB firms. My experience leads me to suggest that other experienced SDB advocates should be involved in making this determination. Contracting officers should be required to make their determination based on specific input from appropriate Office of Small Business Utilization (OSDBU) personnel and procurement outreach technical assistance providers.

Second, the definition of who can challenge and/or protest the set aside process needs to be looked at more carefully and closely. This is necessary in order to prevent frivolous challenges and protests that will result in a delaying tactic to discourage contracting officers to set aside procurements. Interested parties who can challenge and/or protest should be limited to qualified SDB offerors. There should be time frames for processing the challenges and/or protests that are short enough to avoid delaying the procurement. And there should be

Eastover Bank Building • 120 N. Congress • Suite 605
Jackson, Mississippi 39201 (601) 352-0161

penalities imposed on frivolous protestors to discourage use of challenges and protest as delaying tactics.

Third, specific limitations should be placed on the amount of subcontracting allowed under Section 1207 of Pub.L.99-661. The intent of this law is to increase economic activity in the small disadvantaged business community. As a result, they should be required to perform from 55 to 75 percent of the work themselves. However, to encourage networking and joint ventures among minority businesses this limitation should be waived if the subcontract is with another qualified small disadvantaged business.

Any finally, there should be some distinction made between the SBA 8(a) program and this DoD program. The size of many minority firms is unrealistically inflated by the revenues they are earning in the 8(a) program. In order to expand the base of eligible firms who can take advantage of this program it is important that revenues obtained as a result of participating in the 8(a) program are not counted.

I appreciate this opportunity to offer these comments and I would like to continue to be informed about your efforts to implement this most important law.

Sincerely,

Leslie G. Range
President

NATIONAL
ASSOCIATION
OF
MINORITY
PETROLEUM
DEALERS

IN THE DEPARTMENT OF DEFENSE

DEFENSE ACQUISITION REGULATORY COUNCIL

COMMENTS ON OTHER PROCUREMENT METHODS WHICH MAY FORM THE BASIS FOR A PROPOSED RULE IN CASE NO. 87-33

Submitted by:

National Association of
Minority Petroleum Dealers, Inc.
1633 Sixteenth Street, N.W.
Washington, D.C. 20009

The National Association of Minority Petroleum Dealers, Inc. (NAMPD), is a trade association established to promote the business welfare of petroleum distribution firms owned by racial and ethnic minority group members across the country.

Among its constituency are a number of companies which provide, or have provided, petroleum products to agencies of the federal government under both competitive and Section 8(a) contracting procedures, specifically through the coordinating function of the Defense Fuel Supply Center, Defense Logistics Agency.

NAMPD welcomes this opportunity to comment on the development of procurement methods (52 F.R. 16289) to be used in implementing Section 1207 of P.L. 99-661, National Defense Authorization Act of 1987, particularly as such proposals may relate to minority oil dealers.

DAR Council's first proposal would allow direct award to a small disadvantaged business (SDB), as a sole source, where "only one responsible SDB concern which could fulfill DoD's requirements" can be identified, and then, only where "necessary to achieve the 5 percent goal."

First, and most importantly, it is NAMPD's position that, to the extent feasible, the 5 percent goal be achieved through equitable distribution of contracting opportunities throughout DoD. For example, minimal 5 percent goals should be assigned each of the four areas of procurement, research and development, military construction, and operation and maintenance. Likewise parity should

be encouraged among "basic" procurement units, such as Defense Fuel Supply Center, Defense General Supply Center, and Defense Personnel Support Center. Assuming some basic procurement units actually exceed their individual 5 percent goals in a given fiscal year, the excess should not be figured in DoD's overall 5 percent goal, where goals of other basic procurement units remain largely unmet. By establishing a department-level entity capable of monitor- the progress of, and results achieved by, basic procurement units, the integrity of the Section 1207 program can be maintained, and DoD should be able to assure that no business sector having responsible SDB concerns would remain underutilized with respect to the dollar value of contract actions under Section 1207.

The proposed sole source SDB contracting procedure should not be employed merely as a stand-by measure to achieve the 5 percent goal. Particularly among acquisitions centered on geographical commercial market areas (CMAs)- such as DFSC's ground fuels program- a number of responsible SDBs virtually would be denied access to the Section 1207 program, solely for reason that they are located in CMAs having no other SDBs to trigger the "rule of two." NAMPD suggests that the sole source procedure might be extended to such situations, given adequate safeguards to prevent its abuse.

DAR Council's second proposal would allow a 10 percent preference differential for SDB concerns under sealed bid competitive acquisitions where "necessary to attain the 5 percent goal." As a general statement, NAMPD supports this methodology. Certainly, it

would appear to provide greater overall access to Section 1207 contracting opportunities than would any "rule of two" concept. While the "rule of two" necessarily locks two or more SDBs into a process in which only one can prevail, the instant proposal does not presume involvement of a second SDB bidder. If applied to a fair proportion of competitive solicitations, it is much more likely that Section 1207 contract actions will be spread over a greater number of small disadvantaged businesses. Additionally, there does not appear to be any significant acquisition cost consideration between the preference differential and "rule of two" contracting procedures.

NAMPD currently takes no position on the extension of this procedure to competitive negotiated acquisitions where source selection will be based primarily on price.

DAR Council may anticipate supplemental responses from NAMPD, and, in particular, with regard to the interim rule published at 52 F.R. 16263.

Respectfully submitted,

Robert O. Welch
President

Julius E. Mensah
General Counsel

Dated: June 2, 1987

BENNETT & ROBINSON
ATTORNEYS AT LAW
SUITE 1102
1726 M STREET N.W.
WASHINGTON, D.C. 20036

WILLIAM W. BENNETT, JR.
ALFREDA ROBINSON

202/457-0602

June 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 pleased to submit these comments to the Department of Defense ("DoD") in response to its May 4th Federal Register Notice of Intent to publish a proposed rule concerning procurement methods other than set aside competition methods to attain the 5 percent goal established in Section 1207 of P.L. 99-661. It is essential that DoD publish and promulgate such a rule if the 5 percent goal for participation by Small Disadvantaged Businesses ("SDB") in DoD procurements in fiscal years 1987, 1988 and 1989 is to become a reality.

DoD itself recognized the need to initiate a rulemaking to develop innovative tools that contracting officers would use to attain the 5 percent goal when in its own policy statement of March 24, 1987, Deputy Secretary of Defense William K. Taft lamented that "[i]n spite of all the initiatives we implemented during FY 1986, we did not come close to attaining the five percent goal. I remain firmly convinced that the Department can and should do more to increase the participation of small disadvantaged businesses in Defense procurement and research." Not only "should" DoD do more to increase the participation of SBDs in defense procurement and research, but it must do so.

In Section 1207, Congress has delegated to the Secretary of Defense, the power to exercise vast discretion to implement a

procurement program of "less than full and open competition procedures..." to facilitate achievement of the 5 percent goal. The delegation of power by the Congress is a mandate that such power be used. Congress granted the Secretary of Defense vast discretion to design and operate such a procurement program. DoD is well served, then, to initiate an informal rulemaking to promulgate procedures by which that vast discretion will be guided. The need for a proposed rule that allows a contracting officer to use other than full competitive measures to attain the 5 percent goal is evident and paramount.

Commonly, in military construction contracts, performance and payment bonds are required, and bid bonds may also be specified in the invitation for bid. These are facets of full competition in such military construction procurements which must be reexamined with regard to Section 1207 if the 5 percent goal is to become more than a mirage for SDBs in the construction business.

One major problem small disadvantaged construction companies experience is that of bonding. Many of them have not been able to comply with the bonding provisions in invitations for bid and contracts because surety companies have imposed exacting requirements of financial indemnity and historical experience which many small disadvantaged construction companies are not able to meet. It does no good for a small construction company to be awarded a construction contract from DoD if that contractor cannot obtain the bonding necessary to perform the contract.

In its proposed rule, DoD should address bond waiver regulations, contract segmentation procedures, and letters of credit regulations. There should be other creative means of eliminating bonding as an impediment to DoD's attaining the 5 percent goal established in P.L. 99-661. Pursuant to Section 1207(g)(4)(B), after such programs have been put into effect, DoD should report to the public and to Congress on the impact, if any, which the use of innovative techniques for removing the bonding obstacle has had on the successful performance of military construction projects.

A second major problem SDBs face is that of obtaining initial working capital to finance performance of construction and other contracts. Innovative means of providing the advance payments mandated in Section 1207(e)(2) of P.L. 99-661 must be explored in the proposed rulemaking. Further, DoD should examine the assurances it may give a potential private lender during the post-contract award phase to facilitate private lending to an SDB. In this regard, it is crucial that DoD involve the banking community in the rule promulgation process. Finally, in meeting its responsibilities under Section 1207(c) to provide technical assistance to SDBs, DoD should solicit actively and encourage the participation of members of the

banking industry in this process, including convening joint conferences among banking associations and small defense contractors.

We also encourage DoD to initiate a rulemaking to establish procedures for awarding contracts to a SDB when, after appropriate market review, it is determined by a contracting officer that only one SDB is available and responsible to perform a particular procurement. Such a proposed rule is consistent with the underlying purposes of Section 1207.

Long-term purposes of Section 1207 are to expand, deepen and preserve full and free competition, and thereby to assure the economic well-being of this Nation by encouraging the development of active and potential business capacity among the small disadvantaged business sector of our economy. These purposes are nullified when a contract is denied the small disadvantaged business community simply because only one responsible SDB is available for a particular procurement. There may be sectors of the DoD contracting market in which SDBs in recent years have not entered. Yet, there may be individuals in academia and in the business community, who, in combination, may have the technical expertise and business acumen to form and operate an enterprise which could responsibly perform a DoD contract in market sectors where no SDB has participated previously.

The importance of market diversification and of the development of new competitors to the economic well-being of the Nation, cannot be denied. A regulation which encourages diversification and formation of new responsible competitors in the small disadvantaged business community should be given serious consideration. Therefore, we encourage DoD to publish for comment a rule which would allow a contracting officer to award a contract to a SDB when it is the only responsible SDB available to perform a particular procurement.

In the history of this Nation, the military services have been at the forefront of expanding opportunities for all American citizens. By initiating a rulemaking to promulgate rules that will permit contracting officers to use other than full and open competition techniques to meet the 5 percent goal established in Section 1207 of P.L. 99-661, the military services will again be at the forefront of expanding opportunities for American citizens and of assuring the economic well being of the Nation by developing competitors among the small disadvantaged business community.

Sincerely,

William W. Bennett, Esquire
for the Firm

WWB/md

Squire, Sanders & Dempsey

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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

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202

Audit Policy
and Oversight

MAY 12 1987

MEMORANDUM FOR EXECUTIVE SECRETARY, DEFENSE ACQUISITION REGULATORY COUNCIL

SUBJECT: Defense Acquisition Regulation Case Number 87-33, Implementation of Section 1207 of Public Law 99-661; Set-Asides for Small Disadvantaged Business Concerns

We have reviewed your interim rule amending Parts 204, 205, 206, 219, and 252 under the subject Defense Acquisition Regulation Case. We believe it adequately implements the requirements under Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661), entitled "Contract Goal for Minorities."

We have also reviewed your notice of intent to develop a proposed rule with two additional procedures for achieving the goal of awarding 5 percent of contract dollars to Small Disadvantaged Business (SDB) concerns. The procedures would enable the contracting officer to award a contract to a SDB concern where (a) only one qualified SDB source is available, or (b) a qualified SDB concern is within 10 percent of the low offeror's bid in a source selection based primarily on price. Both of the proposed procedures appear acceptable under Section 1207. However, we would like to defer further comments until the proposed rule has been drafted.

We appreciate the opportunity to comment on this matter.

James H. Curry
Assistant Inspector General
for Audit Policy and Oversight

87-33
Exec. Sec
12 MAY 1987

PHONE (312) 873-2456

SCIPIO ENGINEERING CO.

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MR. HARVEY J. GORDON
EXECUTIVE SECRETARY
DEFENSE ACQUISITION REGULATION COUNCIL
U.S. DEPT. OF DEFENSE
THE PENTAGON
WASHINGTON, D.C., 20301-155

MAY, 1, 1987

DEAR SIR:

THIS LETTER CONCERNS THE LACK OF SUBCONTRACTING FOR MINORITY ENGINEERING SMALL BUSINESS FIRMS.

EXAMPLE: AEROSPACE CO. HAS $700 MILLION DOLLAR SYSTEM ENGINEERING CONTRACT WITH U.S. AIR FORCE. AEROSPACE CO. IS LOCATED IN LOS ANGELES CALIFORNIA. AND YET ONLY $2 MILLION DOLLARS IS AWARDED TO SMALL MINORITY BUSINESS. MOST OF THE $2 MILLION DOLLARS IS FOR PHOTOCOPIES, PAPER CLIPS PENCILS & E.T.C. UNDER THE NEW SETASIDE LAW THE FOLLOWING CALCULATIONS:

$700 MILLION DOLLAR CONTRACT
X .05 (5% SETASIDE)
$35.00 MILLION DOLLARS } FOR MINORITY SMALL BUSINESS

IN ORDER TO MEET THIS GOAL AEROSPACE WILL HAVE TO UTILIZE MORE MINORITY ENGINEERING CONSULTANTS. BUT AEROSPACE IS NOT DOING THIS.

EXAMPLE: LOCKHEED Co. IN SUNNYVALE CALIFORNIA HAS $1 BILLION DOLLAR CONTRACT FOR RESEARCH & DEVELOPMENT FOR THE U.S. NAVY TRIDENT II MISSILE. AND YET ONLY $5 MILLION DOLLARS IS AWARDED TO MINORITY SMALL BUSINESS FIRMS. MOST OF THE $5 MILLION DOLLARS IS SPENDT ON PAPER CLIPS, PHOTO COPIES, AND ART DECORATIONS. VERY LITTLE GOES TO MINORITY ENGINEERING FIRMS THAT WOULD BENEFIT IN TERMS OF GAINING EXPERIENCE FROM PARTICIPATING IN RESEARCH & DEVELOPMENT OF TRIDENT II MISSILE.

$1 BILLION DOLLAR CONTRACT
X .05 } 5% SETASIDE } FOR MINORITY BUSINESS
$50 MILLION DOLLARS } SHOULD BE AWARDED TO MINORITY BUSINESS
AND YET ONLY $5MILLION HAS BEEN AWARDED

EXAMPLE: TRW Co. IN LOS ANGELES CALIFORNIA HAS $70 MILLION DOLLAR CONTRACT FOR RESEARCH & DEVELOPMENT FOR SMALL INTERCONTENENTAL BALLISTIC MISSILE, OR SMALL ICBM. ONLY $20,000 DOLLARS HAS BEEN AWARDED TO MINORITY SMALL BUSINESS. THIS IS DISGRACEFUL. MOST OF THE $20,000 IS SPENDT ON PHOTOCOPIES, NOTEBOOK PAPER, AND PAPER CLIPS.

DUNN ENGINEERING ASSOCIATES, INC.,
Cambridge, Mass., April 30, 1958.

Mr. WILLIAM HOLADAY,
Special Assistant for Guided Missiles to the Secretary of Defense,
Department of Defense, Washington, D.C.

DEAR MR. HOLADAY: In an address delivered at a meeting of the Society of Automotive Engineers early in April you observed that you favor more trained engineers as the best way to beat the overtime problem. The intent of this letter is to present one small company's reaction to your observation.

I believe that the additional trained engineers you seek are actually available to the Defense Department at the present time. I have attempted below to show the foundation for this belief.

My company has a group of highly qualified and able engineers performing research and development work in the electronics and electromechanical fields, largely in the area of missile guidance. Our principal work to date has been on the Talos, Atlas, Hustler, Sparrow, Polaris, and similar programs. We are in the position of being too small for most prime contracts and therefore must seek work from the large prime contractors. But, in spite of the fact that we have been very diligent in our efforts to make the talents of a group of well-trained engineers available to prime contractors with "overtime problems," we have been seeking, more than getting. I do not believe that we are alone in this predicament.

In October 1957, due to a rapidly dwindling backlog of defense work, we found it necessary to discharge 20 employees, one-third of our total force. Eight of them were graduates of one of the top engineering schools in the world, excellently trained young engineers showing tremendous future promise. None of these employees wanted to leave. None were released for incompetence. All had been very carefully screened before being hired and were well-qualified parts of a smoothly functioning organization doing what we have been told was an excellent job for defense. Some of them exercised options to buy stock in the corporation on the day they were leaving. Some expressed a desire to return when the company is able to take them back. All had faith in the company's future.

Some of the released engineers, in seeking new jobs, went to extraordinary lengths to avoid going to work for another company doing defense work, for fear of a repetition of the experience with us. Those who did go to defense jobs went to larger companies in this area, the very same companies which we have been soliciting for some time, and found themselves in organizations with the "overtime problem." In other words, they left a company which they did not want to leave, but which was unable to sell their services on a subcontract basis, to go to companies which held large prime contracts but were unwilling to let go of any portion which could be done inside with overtime help. The overtime problem appears to be one which, in many instances, the prime contractors have encountered by choice, not necessity.

We now have approximately one-third of our engineering group working on in-the-house projects, much more effort than we can long sustain on such projects. These are trained engineers, qualified, far above the average, for research and development work on missile programs.

Here, and in other small organizations like our own, are the trained engineers available to alleviate the overtime problem, if the Defense Department and its prime contractors can find a way to make use of them. I am convinced that something can and should be done about it.

Sincerely,

JOSEPH M. DUNN, *President.*

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE,
Washington, D.C., May 19, 1958.

Mr. JOSEPH DUNN,
President, Dunn Engineering Associates, Inc.,
Cambridge, Mass.

DEAR MR. DUNN: This is in reply to your letter of April 30, addressed to Mr. Holaday, concerning the availability of trained engineers.

We have instituted controls of overtime and shift premium pay chargeable to the Government, which we believe now have the effect of eliminating excesses of such premium costs. If such controls mean that more engineers must be put on the job to avoid overtime, prime contractors and upper tier subcontractors can either hire engineers or subcontract to firms such as yours.

In our supply contracts, contractors agree "to accomplish the maximum amount of subcontracting to small business concerns that the contractor finds to be consistent with efficient performance" of his contract.

However, the final decision is one which must be left to the contractor, who has the responsibility for contract performance.

Sincerely yours,

G. C. BANNERMAN,
Director for Procurement Policy.

×

DEAR SIR:

THESE LETTERS ARE OVER 30 YEARS OLD. AND YET THE OVERTIME PROBLEM STILL EXISTS TODAY.

MANY MINORITY ENGINEERS SUCH AS MYSELF COULD BE USED AS CONSULTANTS AS SUBCONTRACTORS, TO PRIME CONTRACTORS.

EXAMPLE: AEROSPACE CO., IN LOS ANGELES, CALIF., HAS A 1 BILLION DOLLAR YEARLY CONTRACT TO DO ENGINEERING WORK FOR THE AIR FORCE. AEROSPACE DOES ABOUT 2 MILLION DOLLAR WORTH of CONTRACTING TO MINORITY SMALL BUSINESS. PUBLIC LAW 99-661 SECTION 1207 SPECIFIES 5% ON CONTRACTS.

1 BILLION x 5% = 50 MILLION DOLLARS

IN ORDER THAT AEROSPACE MEET THAT GOAL OF 50 MILLION DOLLARS. IT WOULD SEEM APPROPRIATE TO UTILIZE MINORITY ENGINEERING FIRMS AS SUBCONTRACTORS, TO A GREATER DEGREE.

SINCERELY YOURS
Wilbert C. Supple

87-33

Morin Industries, Inc.

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May 12, 1987

Defence 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

REF: DAR case 87-33

Dear Mr. Lloyd:

We as a Small Disadvantaged Business Concern and are in support of implementing section 1207 of the National Defence Authorization Act for Fiscal year 1987, entitled "Contract Goals for Minorities" to amend the DFARS.

As an SDB we are looking forward to participating in the set aside program. We feel that this program will be beneficial to many SDB's, and enable minorities to have the opportunity to develop into a competitive company and compete in the open market.

We hope that this set aside program will be extended beyond the 3 year limit, so that other SDB's like ourselves, can participate in the program.

In closing we would like to add that of the two proposals we feel that both would be beneficial to the set aside program for SDB's.

President
Juan Morin

Juan Morin

Atlantic Petroleum Corporation

401 Farragut Street, N.E.
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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

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

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS
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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

TIGHE, CURHAN & PILIERO

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June 3, 1987

Defense Acquisition Regulatory Council
ODASD(P) DARS
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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

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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DANA HUESTIS, *President* JAMES W. SUPICA, *Senior Vice President* PAUL EMERICK, *Vice President*

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June 1, 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 America 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.

Implementation of SDB Set-Aside Regulations Is Not Necessary Nor Authorized for Military Construction

Section 1207(e)(3) of the National Defense Authorization Act for Fiscal Year 1987 provides the Secretary of Defense with authority to enter into contracts using less than full and open competitive procedures and to award such contracts to SDB firms at a price in excess of fair market price by no more than 10 percent only "when necessary to facilitate achievement of the 5 percent goal." The legislative intent is clear that only when existing resources are inadequate to achieve the 5 percent objective should the Secretary of Defense consider using less than full and open competitive procedures such as set-asides.

While such restrictive procurement procedures may be necessary to achieve the 5 percent objective in certain classifications of Department of Defense procurements, such procedures are clearly not necessary in military construction. In fiscal year 1985 disadvantaged businesses were awarded 9 percent of Department of Defense construction contracts ($709 million out of $7.9 billion). Clearly the 5 percent objective has already been achieved and exceeded through the full and open competitive procurement process for military construction contracts.

Applying the "Rule of Two" SDB set-aside procedures to military construction procurements is not only not necessary, but clearly not authorized by the legislation since such set-asides are not "necessary to facilitate achievement of the 5 percent goal."

Contract Award to SDB Firms at Prices That Do Not Exceed 10 Percent of Fair Market Cost Is Not Necessary Nor Authorized for Military Construction

Application of the legislative authority to award contracts to SDB firms at a price not exceeding fair market cost by more than 10 percent to military construction procurements is also not authorized by the legislation since the same condition is placed on that provision as is placed on the provision allowing the use of procurement procedures utilizing less than full and open competition; that is, the 10 percent price differential is to be utilized only "when necessary to facilitate achievement of the 5 percent goal."

The routine and arbitrary use of the 10 percent price differential provision in military construction procurements will only serve to increase the cost of construction to the taxpaying public and yet bear no relationship to achieving the 5 percent objective.

The ten percent allowance is nothing more than an add-on cost, to the detriment of taxpayers, particularly since the definition of fair market cost contained in the interim regulations is based on reasonable costs under normal competitive conditions and not on the lowest possible costs. This definition ignores the market realities of how prices are derived. Fair market prices are exclusively the

product of competition. Competition forces business firms to seek the lowest possible cost methods of producing or providing service. The fair market price 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 conditions 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 restricted 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(a), that in making SDB set-asides for research and development or architect-engineer acquisitions, 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) of the interim regulations provides that the contracting officer must, in implementation of the Rule of Two, reserve a solicitation for SDB set-aside procedures if 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. This requirement effectively transforms the anti-competitive "Rule of Two" into an even more anti-competitive "Rule of One." For example, a contract awarded under full and open competition at $1 million, might have 5 competitive bidders within 3% of the award price. Yet, the existence of a non-competitive bid by an SDB firm, 10% over the award price, would require the contracting officer to set aside similar subsequent solicitations.

Section 219.502-72(b)(1) is a 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,

Hubert Beatty
Executive Vice President

cc: The President of the United States
Caspar W. Weinberger, Secretary of Defense
James C. Miller, III, Director of Office of Management and Budget

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August 3, 1987

Mr. Charles Lloyd
Sec, ODASD (P) DARS
c/o OASD (P&L) (M&RS)
Pentagon
Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As a supporter of a Small Disadvantaged Business I am writing to add my support for the Interim Rule implementing Public Law 99-661. I, along with many others, appreciate the impact that the 8a program is having on minority-owned businesses enabling them acess to contracts that might not have been available to them through normal contracting procedures. Public Law 99-661 will provide additional opportunities to those deserving corporations; however, the Interim Rule implementing the law does have some major discrepancies that could reduce its effectiveness.

The Interim Rule would not provide any special considerations for those companies already participating in and qualified under the SBA Section 8(a) program, thereby diluting the effectiveness of both programs. Contracting Officers should, as part of the Interim Rules, be provided decision-making criteria that would provide a fair distribution of contracts between those companies participating in the 8(a) program and those in the DOD program.

Minority MBE 8(a) program "graduates" should be encouraged by DOD to participate in the DOD goals program. That could be accomplished by changes to the regulation to allow no portion of gross receipts or employment levels awarded pursuant to 8(a) to be included in contracts to be awarded under SDB set-aside program (See H.R.1 1807-Sec 7), or to allow some other appropriate increase in size-levels.

I also feel strongly that Small and Disadvantaged Business Utilization (SADBU) representatives should be part of the SDB set-aside process and appeal rights under DFAR 19-505 should apply to all SDB set-aside program contracts. SDB set-aside protests should be restricted to qualified SDB offerors, with penalties assessed for frivolous protests.

The inclusion of some measure for a contracting officers job performance directly tied to satisfactory progress towards meeting the 5% SDB goal would encourage the maximum utilization of the program.

The Interim Rule for implementation of Public Law 99-661 should also include the authority to award portions of contracts to SDBs. The authority would allow contracting officers to increase SDB participation and ease the burden on reaching the 5% goal for defense contracts.

The Interim Rule should also include a provision for application to contracts let OCONUS. While some contracts fall under local treaty provisions requiring participation by foreign corporations, a significant number of contracts are let overseas for U.S. companies only. The inclusion of a provision requiring overseas contractors to honor the Public Law 99-661 would greatly increase the participation by minority corporations in international business and provide a further opportunity for defense to meet its 5% goal.

I must reiterate that the Interim Rule for implementation of Public Law 99-661 is basically a fine program. However, with minor changes the program could increase participation, provide more opportunities for minority-owned corporations, and allow the Defense Department to realize its 5% goal.

Sincerely,

Hossein Molayem

COMPUTER RESOURCES CORPORATION
1335 - 11th Street, N.W.
Washington, D.C. 20001

August 3, 1987

Mr. Charles Lloyd
Sec, ODASD (P) DARS
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Washington, D.C. 20301-3082

Dear Mr. Lloyd:

As an Executive of a Small Disadvantaged Business I am writing to add my support for the Interim Rule implementing Public Law 99-661. I, along with many others, appreciate the impact that the 8a program is having on minority-owned businesses enabling them acess to contracts that might not have been available to them through normal contracting procedures. Public Law 99-661 will provide additional opportunities to those deserving corporations; however, the Interim Rule implementing the law does have some major discrepancies that could reduce its effectiveness.

The Interim Rule would not provide any special considerations for those companies already participating in and qualified under the SBA Section 8(a) program, thereby diluting the effectiveness of both programs. Contracting Officers should, as part of the Interim Rules, be provided decision-making criteria that would provide a fair distribution of contracts between those companies participating in the 8(a) program and those in the DOD program.

Minority MBE 8(a) program "graduates" should be encouraged by DOD to participate in the DOD goals program. That could be accomplished by changes to the regulation to allow no portion of gross receipts or employment levels awarded pursuant to 8(a) to be included in contracts to be awarded under SDB set-aside program (See H.R.1 1807-Sec 7), or to allow some other appropriate increase in size-levels.

I also feel strongly that Small and Disadvantaged Business Utilization (SADBU) representatives should be part of the SDB set-aside process and appeal rights under DFAR 19-505 should apply to all SDB set-aside program contracts. SDB set-aside protests should be restricted to qualified SDB offerors, with penalties assessed for frivolous protests.

The inclusion of some measure for a contracting officers job performance directly tied to satisfactory progress towards meeting the 5% SDB goal would encourage the maximum utilization of the program.

The Interim Rule for implementation of Public Law 99-661 should also include the authority to award portions of contracts to SDBs. The authority would allow contracting officers to increase SDB participation and ease the burden on reaching the 5% goal for defense contracts.

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I must reiterate that the Interim Rule for implementation of Public Law 99-661 is basically a fine program. However, with minor changes the program could increase participation, provide more opportunities for minority-owned corporations, and allow the Defense Department to realize its 5% goal.

Sincerely,

Wilbert J. Lewis

Wilbert J. Lewis
President

August 3, 1987

Mr. Charles Lloyd
Sec, ODASD (P) DARS
c/o OASD (P&L) (M&RS)
Pentagon
Washington, D.C. 20301-3082

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Gerald Jackson

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DEVELOPMENT & TECHNOLOGY WORLDWIDE
1377 K Street, N.W.
Washington, D.C. 20005

August 3, 1987

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c/o OASD (P&L) (M&RS)
Pentagon
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Sincerely,

Theresa Newsuan
Executive Director

GREG WIMS AND ASSOCIATES
530 N Street, S.W.
Suite S909
Washington, D.C. 20024

August 3, 1987

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c/o OASD (P&L) (M&RS)
Pentagon
Washington, D.C. 20301-3082

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W. Gregory Wims
President