

NOV 09 2005



Homeland
Security

MEMORANDUM FOR: All Heads of the Contracting Activities (HCA's)

FROM: Gregory D. Rothwell
Chief Procurement Officer

A handwritten signature in black ink that reads "Gregory D. Rothwell".

SUBJECT: Class Deviation from Federal Acquisition Regulation (FAR)
19.8 – Section 8(a) Awards and Part 52, Solicitations Provisions
and Contract Clauses.

Purpose: To issue a class deviation from the requirements of FAR 19.8, 52.219-11, 219-12, 219-17, and 52.219-18.

Effective Date: Immediately

Background: The Department of Homeland Security (DHS) and the U.S. Small Business Administration (SBA) entered into a Partnership Agreement pursuant to Civilian Agency Acquisition Council (CAAC) Letter 98-3, "Direct 8(a) Contracting," dated May 1, 1998. The CAAC Letter recommended that civilian agencies authorize a class deviation to implement the changes to FAR Subpart 19.8 and Part 52 necessary for those agencies which have entered into a Partnership Agreement with SBA for the direct award of 8(a) contracts by the requiring agency. The letter serves as evidence of the required consultation with the Chairman of the CAAC.

The purpose of the Partnership Agreement is to streamline the award of 8(a) contracts. The Partnership Agreement permits DHS to make awards directly to eligible 8(a) concerns. SBA's signature on such contracts is not required. SBA's General Counsel has determined that there is statutory authority to enter into this Partnership Agreement and to delegate contract execution authority to DHS.

In accordance with FAR 1.404 and HSAR 3001.404, I hereby authorize a deviation, on a class basis, to 48 CFR Subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program) and Part 52, Solicitation Provisions and Contract Clauses, through the SBA-DHS Partnership Agreement. The specific terms of DHS's deviation are attached.

Expiration Date: This class deviation will remain in effect until the SBA-DHS Partnership Agreement is rescinded or the changes are permanently implemented in the FAR.

**Class Deviation from the Federal Acquisition Regulation (FAR)
Subpart 19.8 and Part 52 regarding Section 8(a) Awards**

Determination and Findings

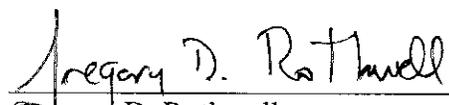
Under the authority granted by the Civilian Agency Acquisition Council (CAAC) Letter 98-3, Direct 8(a) Contracting, the Department of Homeland Security has authorized a class deviation from the Federal Acquisition Regulation (FAR) 52.219-11, 52.219-12, 52.219-17, and 52.219-18 to implement the "Partnership Agreement between the U.S. Small Business Administration and the Department of Homeland Security."

Findings

The FAR requires the procuring activities to issue a prime contract with the SBA, which in turn subcontracts performance of the contract to the 8(a) firm. The CAAC Letter 98-3 allows agencies that have entered into the Partnership Agreement with SBA to award contracts directly to the 8(a) concerns. Since the affected regulations do not reflect the revised process permitted by the Partnership Agreement, the SBA and FAR regulations must be amended. The FAR will be amended following the promulgation of a SBA modification to their regulations. The DHS deviations to the FAR coverage to implement the 8(a) Partnership Agreement are attached to this Determination and Findings.

Determination

In accordance with FAR 1.404, I have issued this class deviation. Consultation and approval for this class deviation is granted under CAAC Letter 1998-03. This class deviation shall remain in effect until the SBA-DHS Partnership Agreement is rescinded or upon the effective date of a pertinent FAR change, whichever occurs first.



Gregory D. Rothwell
Chief Procurement Officer
Department of Homeland Security

11/9/05

Date

**FAR Deviation to Implement the 8(a) Partnership Agreement
Between SBA and DHS**

Part 19 - Small Business Programs

Subpart 19.8 - Contracting with the Small Business Administration (The 8(a) Program).

19.800 General (Deviation).

Replace paragraph (f) with the following:

(f) By Partnership Agreement dated April 25, 2003, between the Small Business Administration (SBA) and the Department of Homeland Security (DHS), the SBA delegated to DHS Chief Procurement Officer its authority under paragraph 8(a)(1)(A) of the Small Business Act (5 U.S.C. 637(a)) to enter into 8(a) prime contracts, and its authority under 8(a)(1)(B) of the Small Business Act to award the performance of those contracts to eligible 8(a) Program participants. Under the Partnership Agreement, a contract may be awarded directly to an 8(a) firm on either a sole source or competitive basis. The SBA reserves the right to withdraw the delegation issued as a result of the Partnership Agreement; however, any such withdrawal shall have no effect on contracts already awarded under the Partnership Agreement.

19.803 Selecting acquisitions for the 8(a) Program.

Add 19.803-70:

19.803-70 Simplified procedures for 8(a) acquisitions under Partnership Agreements (Deviation).

Contracting activities may use the simplified acquisition procedures of Part 13 to issue purchase orders or contracts, not exceeding \$100,000, to 8(a) Participants. The following applies to such acquisitions:

- (a) Neither offering letters to, nor acceptance letters from the SBA are required.
- (b) The contracting activity will use the SBA's PRO-Net database on the Internet (<http://pro-net.sba.gov>) to establish that the selected 8(a) firm is a current program participant.
- (c) The contracting officer will issue the purchase order directly to the 8(a) firm.
- (d) Once an 8(a) contractor has been identified, the agency contracting officer will establish the price with the selected 8(a) contractor and prepare and issue a purchase order or contract in accordance with the provisions of Part 13. The applicable clauses prescribed in 19.811-3 shall be included in the award document.

(e) The contracting officer will forward to the SBA District Office serving the 8(a) firm a copy of the purchase order or contract within 5 days after the order is issued.

19.804 Evaluation, offering and acceptance.

19.804-2 Agency offering (Deviation).

Replace paragraph (a) with the following:

(a) When applicable, this notification must identify that the offering is in accordance with the Partnership Agreement identified in 19.800.

19.804-3 SBA Acceptance.

Add 19.804-70:

19.804-70 SBA Acceptance under Partnership Agreements for acquisitions exceeding \$100,000 (Deviation).

(a) Acceptance of requirements covered by Partnership Agreements on acquisitions that exceed \$100,000.

(1) The SBA's decision whether to accept the requirement will be transmitted to the contracting agency in writing within 5 working days of receipt of the offer.

(2) The SBA may request, and the contracting agency may grant, an extension beyond the five-day limit.

(3) SBA's acceptance letters should be faxed or e-mailed to the offering contracting agency.

(4) If the contracting activity has not received an acceptance or rejection of the offering from SBA within 5 days of SBA's receipt of the offering letter, the contracting activity may assume that the requirement has been accepted and proceed with the acquisition.

(b) The contents of SBA's acceptance letter shall be limited to the eligibility of the recommended 8(a) contractor.

19.805 Competitive 8(a).

19.805-2 Procedures (Deviation).

Add paragraph (b)(3):

(b)(3) For requirements exceeding \$100,000 processed under the Partnership Agreement cited in 19.800, the contracting officer shall submit the name, address, and telephone number of the low bidder (sealed bid requirements) or the apparent successful offeror (negotiated acquisitions) to

the SBA Business Opportunity Specialist at the field office servicing the identified 8(a) firm. The SBA will determine the eligibility of the firm(s) and advise the contracting officer within 2 working days of the receipt of the request. If the firm is determined to be ineligible, the contracting officer will submit information on the next low offeror or next apparent successful offeror (as applicable) to the cognizant SBA field office.

19.806 Pricing the 8(a) contract (Deviation).

Replace paragraph (a) with the following:

(a) When required by FAR Subpart 15.4, the contracting officer shall obtain certified cost or pricing data directly from the 8(a) contractor if the contract is being awarded under the Partnership Agreement cited in 19.800.

19.808 Contract negotiation.

19.808-1 Sole source (Deviation).

Replace paragraphs (a) and (b) with the following:

(a) If the acquisition is conducted under the Partnership Agreement cited in 19.800, the 8(a) contractor is responsible for negotiating with the agency within the time established by the agency. If the 8(a) contractor does not negotiate within the established time, and the agency cannot allow additional time, the agency may, after notification and approval by SBA, proceed with the acquisition from other sources.

(b) If the acquisition is conducted under the Partnership Agreement cited in 19.800, the agency is delegated the authority to negotiate directly with the 8(a) participant; however, if requested by the 8(a) participant, the SBA may participate in negotiations.

19.811 Preparing the contracts.

19.811-1 Sole source (Deviation).

Add paragraph (e):

(e) If the award is to be made under the Partnership Agreement cited in 19.800, the contract to be awarded by the contracting activity to the 8(a) firm shall be prepared in accordance with the normal procedures the contracting activity would use for a similar, non-8(a) acquisition, except for the following:

(1) The award form shall cite 41 U.S.C. 253 (c)(5) and 15 U.S.C. 637(a) as the authority for use of other than full and open competition.

(2) Appropriate contract clauses shall be included, as necessary, to reflect that the acquisition is an 8(a) contract awarded under the authority of the Partnership Agreement cited in 19.800.

(3) The contracting activity shall include SBA's requirement number on the contract unless the acquisition does not exceed \$100,000.

(4) A single award document shall be used between the agency and the 8(a) contractor. As such, a single signature by the agency's contracting officer who is identified as having concurrent authority under the Partnership Agreement cited in 19.800 to enter into 8(a) contracts will suffice (that is, an SBA signature will not be required). The 8(a) contractor's signature shall be placed on the award document as the prime contractor. The 8(a) contractor's name and address shall be placed in the "awarded to" or "contractor name" block on the appropriate forms.

19.811-2 Competitive (Deviation).

Replace paragraphs (a) and (b) with the following:

(a) If the award is to be made under the Partnership Agreement cited in 19.800, competitive contracts for 8(a) firms will be prepared in accordance with the same standards as 8(a) sole source contracts. See FAR 19.811-1.

(b) If the acquisition is conducted under the Partnership Agreement cited in 19.800, the process for obtaining signatures shall be as specified in FAR 19.811-1(e).

19.811-3 Contract Clauses (Deviation).

Add paragraph (d)(3) and paragraph (f):

(d)(3) The contracting officer shall insert the clause at FAR 52.219-18 with its Alternate III (Deviation), when the acquisition is processed under the Partnership Agreement cited in 19.800.

(f) The contracting officer shall insert the clause at 52.219-71, "Section 8(a) Direct Award (Deviation)," in direct contracts and purchase orders processed under the Partnership Agreement cited at 19.800; and the clauses at FAR 52.219-11, Special 8(a) Contract Conditions, 52.219-12, Special 8(a) Subcontract Conditions, and 52.219-17, Section 8(a) Award, shall not be used.

19.812 Contract Administration (Deviation).

Add paragraph (e):

(e) Awards under the Partnership Agreement cited in 19.800 are subject to 15 U.S.C. 637(a)(21). These contracts contain the clause at 52.219-71, "Section 8(a) Direct Award," which requires the 8(a) contractor to notify the SBA and the contracting officer when ownership of the firm is being transferred.

Part 52 - Solicitation Provisions and Contract Clauses

Add **Alternate III (Deviation) (November 2005)** to 52.219-18:

52.219-18 Notification of Competition Limited to Eligible 8(a) Concerns - Alternate III (Deviation) (November 2005)

In accordance with 19.811-3(d)(3), substitute the following for the paragraph (c) in FAR 52.219-18:

(c) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

Add 52.219-71:

52.219-71 Section 8(a) Direct Awards (Deviation).

As prescribed in 19.811-3(f), insert the following clause:

Section 8(a) Direct Award (Deviation) (November 2005)

(a) This contract is issued as a direct award between the contracting activity and the 8(a) contractor pursuant to a Partnership Agreement between the Small Business Administration (SBA) and the Department of Homeland Security (DHS). SBA retains responsibility for 8(a) certification, 8(a) eligibility determinations and related issues, and providing counseling and assistance to the 8(a) contractor under the 8(a) program. The cognizant SBA district office is:

[To be completed by Contracting Officer at time of award]

(b) The contracting activity is responsible for administering the contract and taking any action on behalf of the Government under the terms and conditions of the contract. However, the contracting activity shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the contract. The contracting activity shall also coordinate with SBA prior to processing any novation agreement. The contracting activity may assign contract administration functions to a contract administration office.

(c) The contractor agrees:

(1) to notify the Contracting Officer, simultaneously with its notification to SBA (as required by SBA's 8(a) regulations), when the owner or owners upon whom 8(a) eligibility is based plan to relinquish ownership or control of the concern. Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of ownership or control.

(2) to adhere to the requirements of FAR 52.219-14, Limitations on Subcontracting.

(End of Clause)