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http://www.sba.gov/aboutsba/sbaprograms/gc/programs/gc_waivers_nonmanufacturer.html

Nonmanufacturer Rule (NMR) Frequently Asked Questions

1. What is the NMR?

The Small Business Act and SBA's regulations impose performance requirements (limitations on subcontracting) on firms that are awarded set-aside contracts. 15 USC §§ 637(a)(14), 644(o); 13 CFR § 125.6; Federal Acquisition Regulation (FAR) §§ 52.219-14, 52.219-27. On a supply contract, a firm must perform 50 percent of the cost of manufacturing the supplies (not including the cost of materials). The NMR is an exception to the performance requirements, and provides that a firm that is not a manufacturer may qualify as a small business on a supply contract set aside for small business if, among other things, it supplies the product of a small business made in the United States. 15 USC § 637(a)(17); 13 CFR § 121.406.

2. What is a manufacturer?

A manufacturer is a concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. 13 CFR § 121.406(b)(2); FAR § 19.102(f)(1).

3. What is a nonmanufacturer?

A concern may qualify a nonmanufacturer if it:

- (i) Does not exceed 500 employees;
- (ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied; and
- (iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement. 13 CFR § 121.406(b).

4. Are there exceptions to the NMR?

Yes. For acquisitions processed under Simplified Acquisition Procedures with a value that will not exceed \$25,000, an offeror need not supply the end product of a small business concern, as long as the product acquired is manufactured or produced in the United States and the offeror does not exceed 500 employees. 13 CFR § 121.406(d); FAR § 19.102(f)(7). In addition, except as discussed above, there are no waivers to the NMR for HUBZone contracts. 13 CFR § 126.601(e). On any HUBZone supply contract valued above \$25,000, the offeror must supply a product manufactured by a HUBZone small business concern.

5. Does the NMR apply to service contracts?

No. The NMR is an exception to the manufacturing performance requirements (limitations on subcontracting) applicable to supply contracts. Service and construction contracts have different performance requirements. See 13 CFR § 125.6; FAR §§ 19.102(f), 19.502-2(c).

6. How does the contracting officer assign a North American Industry Classification System (NAICS) code to the solicitation?

The contracting officer designates the proper NAICS code and size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry description in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. Other factors considered include previous Government procurement classifications of the same or similar products or services, and the

classification which would best serve the purposes of the Small Business Act. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value.

7. Can a contracting officer assign a wholesale or retail trade NAICS code to a procurement for supplies?

No. Procurements for supplies must be classified under the appropriate manufacturing NAICS code, not under the wholesale or retail trade NAICS code. 13 CFR § 121.402(b). The wholesale and retail trade NAICS codes and size standards are only applicable to SBA's financial assistance programs, e.g., loans. For procurement purposes, the size standard for a nonmanufacturer is 500 employees.

8. Can SBA waive the requirement that a nonmanufacturer supply the product of a small business concern?

Yes. There are two types of waivers. An "individual" waiver applies to a specific solicitation. A "class" waiver waives the requirement that a nonmanufacturer supply the product of a small business made in the United States for as long as the waiver remains in place.

9. What is an individual waiver?

SBA may issue an individual waiver where a contracting officer has determined that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications of a particular solicitation and SBA reviews and accepts that determination. The waiver only applies to that particular procurement.

10. Who can request an individual waiver of the NMR?

The contracting officer.

11. How should a contracting officer request an individual waiver?

The contracting officer should identify the specific products for which a waiver is requested, and provide SBA with market research supporting a determination that no offeror can supply a product manufactured by a small business that meets the requirements of the solicitation.

12. What sources must a contracting officer use to determine that there are no known small business manufacturers?

The contracting officer must describe in detail the market research that was conducted to support a determination that there are no known small business manufacturers. The contracting officer should telephone potential offerors, search the Central Contractor Registration Dynamic Small Business database, and document any other methods used to make a determination. 13 CFR § 121.1204(b)(1)(iii).

13. Does a contracting officer have to request a waiver if the prerequisites for a waiver are met?

No.

14. Can the SBA's individual waiver decision be appealed?

No. The Director, Office of Government Contracting's decision is the final agency decision, and there is no administrative appeal. 13 CFR § 121.1204(a)(6). However, SBA will consider any new information, for use in future waiver requests.

15. Does SBA issue "blanket" waivers?

No. A contracting officer's request for a waiver must include a definite statement of the specific item(s) to be waived. SBA cannot issue a waiver for items or products that are unknown or that may be added at a later date, or items for which no market research has been conducted. Nor can SBA issue an individual waiver that applies to recurring or subsequent solicitations or contracts. As discussed below, SBA can issue a class waiver if circumstances warrant.

16. Can SBA issue an individual waiver after offers have been received?

No. If SBA has not granted a waiver prior to the date set for the receipt of offers, each offeror has to either certify that it would manufacture the product (13 CFR § 125.6; FAR § 52.219-14) or qualify as non-manufacturer and supply the product of a small business made in the United States. 13 C.F.R. §

121.406; FAR § 52.219-6(c). Since the basis of an individual waiver request is a determination that no small business manufacturers exist, none of the offerors are eligible for award under the terms of the solicitation. If the procuring agency agrees to cancel the solicitation and re-solicit, SBA can then process the individual waiver request.

17. What is a class waiver?

SBA may issue a class waiver if SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market. A class waiver applies government-wide and is effective unless and until SBA withdraws the class waiver.

18. Who can request a class waiver?

Anyone.

19. How should someone request a class waiver?

The requester should supply SBA with the relevant NAICS code and other identifying information concerning the item such as a Product Service Code. The requester should also supply SBA with market research and other data to support a determination that no small business manufacturer is participating in the Federal procurement market.

20. Can SBA's decision to issue a class waiver be appealed?

No, but SBA may withdraw a class waiver if it receives information that a small business manufacturer exists.