



U.S. Small Business
Administration



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The Nonmanufacturer Rule (NMR) Waiver Program

nmrwaivers@sba.gov

Stephanie Lewis – Individual Waivers

Valerie Coleman – Class Waivers

Overview

- The Nonmanufacturer Rule (NMR)
- Applicability of the NMR
- NMR Class Waivers
- NMR Individual Waivers

Supplying a Product as a Manufacturer or NonManufacturer

13 CFR 121.406(a)

General. In order to qualify as a small business concern for a small business set-aside, a socioeconomic set-aside, a partial set-aside, or a set aside of an order against a multiple award contract to provide manufactured products or other supply items, an offeror must either:

(1) Be the manufacturer or producer of the end item being procured (and the end item must be manufactured or produced in the United States)

or

(2) If not the manufacturer, must comply with the Nonmanufacturer Rule (NMR)

Who is the manufacturer?

There can be only one manufacturer of the end item being acquired

- The manufacturer is the 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.
- End item possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed.
- The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item.
- Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item.

SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

- (A) The **proportion of total value** in the end item added by the efforts of the concern, (excluding costs of overhead, testing, quality control, and profit)
- (B) The **importance of the elements added** by the concern to the function of the end item, regardless of their relative value
- (C) The **concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.**
 - (ii) Firms that provide computer and other information technology equipment primarily consisting of component parts (such as motherboards, video cards, network cards, memory, power supplies, storage devices, and similar items) who install components totaling less than 50% of the value of the end item are generally not considered the manufacturer of the end item.

What Self-Performance Requirements are Imposed Upon Manufacturers?

The Limitations on Subcontracting (LOS)

- 13 CFR 125.6
- FAR 52.219-14

Nonmanufacturing Requirements

13 CFR 121.406(b)(1)

To qualify as a small nonmanufacturer, a firm:

- Cannot exceed 500 employees;
- Must be primarily engaged in retail or wholesale and normally sells type of product being supplied;
- Must take ownership or possession of the item(s) in a manner consistent with industry practice; **and**
- Must supply the end product of a small business, 8(a), WOSB, EDWOSB, HUBZone, or SDVOSB manufacturer or processor made in U.S. **or obtains a waiver (class or individual)**

(Even if a waiver is granted, the nonmanufacturer must still comply with the top three requirements)

The Nonmanufacturing Rule

The Nonmanufacturer Rule (NMR) allows an otherwise responsible business concern to be awarded a procurement contract to supply a product or supply – even though it is not the manufacturer or processor of the product

13 CFR § 121.1203 – Provides guidance as to when SBA will grant an NMR waiver

13 CFR § 121.1204 - Identifies the procedures for requesting and granting waivers

Applicability of the NMR

13 CFR 121.406(a) and (d)

The NMR applies to:

- Small business set-asides above the simplified acquisition threshold (SAT)
- Socioeconomic set-asides above the micro-purchase threshold(MPT):
 - 8(a)
 - SDVOSB
 - WOSB/EDWOSB
 - HUBZone
- Manufacturing or supply contract (not services)
- NMR does not apply to:
 - Subcontracts
 - Full-and-open contracts (unless the HUBZone PEP is applied)
 - Service Contracts
 - Small Business set asides under the SAT
 - Socioeconomic set asides under the MPT

NMR Applicable NAICS Codes

The NMR only applies to manufacturing and supply acquisitions with certain assigned NAICS codes:

- 31XXXX-33XXXX
- 511210 (software but does not include subscription or remote software)
- 541519 footnote 18 (Information Technology Value Added Reseller – ITVAR that meets the 150-employee limit)

Waivers for Software

13 CFR 121.1203(g)

SBA may grant an individual waiver for the procurement of software provided that the software being sought is an item that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and the item:

- (i) Has been sold, leased, or licensed to the general public, or has been offered for sale, lease, or license to the general public;
- (ii) Is sold in substantial quantities in the commercial marketplace; and
- (iii) Is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

If the value of services provided exceeds the value of the item itself, the procurement should be identified as a service procurement, even if the services are provided as part of the same license, lease, or sale terms.

- If a contracting officer cannot make a determination of the value of services being provided, SBA will assume that the value of the services is greater than the value of items or supplies, and will not grant a waiver.

Subscription services, remote hosting of software, data, or other applications on servers or networks of a party other than the U.S. Government are considered by SBA to be services and not the procurement of a supply item.

- SBA will not grant waivers of the nonmanufacturer rule for these types of services.

Value of NMR waivers

- Allows a procurement to be set aside for small business or socioeconomic groups when the ultimate manufacturer is large or foreign
- Would otherwise have to be issued as unrestricted because manufacturer is large or foreign (LOS/NMR cannot be met)
- Protects SB manufacturers so that nonmanufacturers do not get contracts by supplying a LB manufacturer's item when SB manufacturers exist



Class Waivers

Standard for Class NMR Waivers

13 CFR § 121.406(b)(5)(ii)

A class waiver is justified when **no** small business manufacturers are

- **available to participate**
- in the **federal market**
- for a **class of products**

“Class of Products”

- “Class of products” refers to an individual subdivision within a NAICS Industry Number (6 digit NAICS)
- SBA uses a combination of NAICS code **and** a description to identify the “class of products” for a class waiver to the NMR
 - PSC is no longer used

NAICS CODE	NAICS DESCRIPTOR	DATE POSTED IN FEDERAL REGISTER	FEDERAL REGISTER NOTICE
332420	Bulk Storage Tanks, Heavy Gauge Metal, Manufacturing	4/27/2006	71 Fed. Reg. 24889
332420	Gas Storage Tanks, Heavy Gauge Metal Manufacturing	4/27/2006	71 Fed. Reg. 24889
332420	Cylinders, Pressure, Heavy Gauge Metal, Manufacturing	4/27/2006	71 Fed. Reg. 24889

“Available to Participate”

- “Available to participate” means that small business contractors have performed, been awarded, or submitted an offer on a federal government contract/solicitation for the class of products within last 24 months
 - **13 C.F.R. § 121.1202(c)**
- If just **one** small business manufacturer has been awarded or submitted a bid for a solicitation concerning the class of products in question over the previous 2 years, the class waiver request must be denied.

Procedures for Requesting and Establishing a Class Waiver

13 CFR § 121.1204(a)(1-3)

- Any government agency (including the SBA), business association, or interested party may request an NMR waiver for a class of products
- The class waiver request must include
 - A statement of the class of products to be waived (NAICS code and detailed description)
 - **Detailed** information on efforts to identify domestic small business manufacturers for the class of products

Procedures for Reviewing and Terminating Class Waivers

13 CFR § 121.1204(a)(7)

- A class waiver to the NMR has no time limitation
- Discovery of just **one** small business manufacturer will trigger termination of the class waiver
 - Federal Register intent to terminate a class waiver, public comment period, and final FR notice

SBA Class Wavier List

- Existing NMR class waivers can be found at the following link: <https://www.sba.gov/contracting/contracting-officials/non-manufacturer-rule/class-waivers>

To determine whether a class waiver exists for an item, the item should be listed under the “NAICS Descriptor” column, even if the NAICS code no longer matches. NAICS codes can change over time so the NAICS code when the waiver was granted may not be the current NAICS code for the item. View the supporting Federal Register for more information on the exact item(s) covered under the class waiver.

Read the Federal Register Notice to determine exactly what products have a class waiver

NAICS CODE	NAICS DESCRIPTOR	DATE POSTED IN FEDERAL REGISTER	FEDERAL REGISTER NOTICE
336413	Aircraft auxiliary parts (e.g., crop dusting, external fuel tanks, inflight refueling equipment) Manufacturing	6/23/2008	73 Fed. Reg. 35433
336999	ATV, Wheeled or Tracked, Manufacturing Snowmobiles and Parts, Off-Road ATV and Wheeled or Tracked Manufacturing	4/23/2009	74 Fed. Reg. 18603

Who Makes the Determination of Whether The Item Being Procured is on SBA's Class Waiver List?

The Contracting Officer

For instance, are defibrillators on the class waiver list?

334510	<p>Electromedical and Electrotherapeutic Apparatus Manufacturing.</p> <p>Note: This U.S. industry comprises establishments primarily engaged in manufacturing Electromedical and electrotherapeutic apparatus, such as magnetic resonance imaging equipment, medical ultrasound equipment, pacemakers, hearing aids, electrocardiographs, and electromedical endoscopic equipment.</p>	12/20/2007	72 Fed. Reg. 72433
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GAO B-422433 Knudsen Systems

SBSA for sound navigation and ranging (SONAR) sounding sets on Navy ships, NAICS 334511

GAO upheld argument that the solicitation's amended terms render the agency's market research and resulting set-aside decision unreasonable, and the requirement should be competed on an unrestricted basis.

Initial solicitation did not include FAR clause 52.219-33(NMR Rule) but instead stated that a class waiver applied for this NAICS.

334511	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing;	2/12/1997	62 Fed. Reg. 6454
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Two offers received. One intended to use equipt. Manufactured in Canada. Proposal found unacceptable because class waiver was not applicable (does not include this SONAR equipment).

Agency took corrective action by amending solicitation - removed class waiver reference and insert FAR clause 52.219-33 (NMR Rule).

GAO Appeal - Agency should have conducted additional market research in its decision to set aside solicitation. It no longer had a reasonable expectation of receiving two offers from small businesses.



Individual Waivers

Standard for Individual NMR Waivers

13 CFR § 121.406(b)(5)(i)

Individual waivers apply only to a single solicitation (one-time waiver) and the **specific item(s)** identified in the waiver request

SBA will grant an individual waiver to the NMR after determining that “no small business manufacturer or processor can reasonably be expected to supply the product meeting the specifications of the solicitation”

- Does not necessarily mean that there are no SB manufacturers of that item. It could merely relate to the lack of availability of SB manufacturers for the specific contract at issue due to timing (e.g., small business manufacturers are currently tied up with other commitments) or capacity (e.g., there are small business manufacturers, but those manufacturers cannot provide the item in the quantity that is required).

Individual NMR Waiver Request Checklist

13 CFR § 121.406(b)(1)

- ✓ Proposed solicitation number or other ID
- ✓ Estimated total dollar amount of the contract
- ✓ Assigned manufacturing or supply NAICS code(s) for the solicitation
- ✓ Brief statement of the procurement history
- ✓ For contracts over \$500,000, the Statement of Work (or equivalent such as Product Description)
- ✓ A definitive statement of the item(s) to be waived and justification for why they should be waived
- ✓ Market research and supporting documentation demonstrating that there is no small business manufacturer or processor that can reasonably be expected to supply the product meeting the solicitation's specifications
- ✓ Request signed by the contracting officer

SBA should not need to conduct further market research or data exploration. The evidence and explanation provided by the agency should adequately demonstrate that there are no SB manufacturers/processors that can reasonably be expected to supply a compliant product.

Can a waiver be granted if there is only one known SB manufacturer?

Agency still cannot meet the rule of two SBSA requirement



No. The waiver must be denied if even one SB manufacturer is identified that can reasonably be expected to supply the product meeting the specifications of the solicitation.

Can a waiver be granted if the agency wants to set aside the solicitation for SDVOSB and there are no SDVOSB manufacturers, but there are small business manufacturers? (Common with VA who must first consider SDVOSB Set-Asides)



No, desired socioeconomic set aside cannot over-ride basic requirement that there are no known small business manufacturers

Can a company request an Individual Waiver?

- No, individual waivers can only be requested by Contracting Officers

Notice of Waivers

13 CFR § 121.1206



- Notice of the waiver must be published with the solicitation so that potential offerors are aware of the waiver and the specific product(s) covered.
 - Applies to Class and Individual Waivers
- An individual waiver can be obtained after the solicitation is issued only if potential offerors are afforded additional time to respond

Application of Individual NMR Waivers

- Does not apply to modifications to the scope of the contract or other procurement actions. Modifications determined by the contracting officer to be within the scope of the contract will require an additional waiver. 13 C.F.R. § 121.1203(b).
- Does not waive other legal requirements applicable to Government procurements, such as the Buy American Act and the Trade Agreements Act.
- CO should inform SBA of the date a contract is entered and provide the contract number and the actual dollar value of the contract.

Mixed Procurements with Supplies and Services

13 CFR 121.406(b)(4)

- The NMR applies only to the supply component of a requirement classified as a manufacturing, supply, or ITVAR contract.
- If a requirement is classified as a service contract, but also has a supply component, the NMR does not apply to the supply component of the requirement
- The rental of an item(s) is a service and should be treated as such in the application of the NMR and LOS
- Example, a procuring agency seeks to acquire computer integration and maintenance services (service) and computer hardware (product).
 - If the procuring agency determines that the principal nature of the procurement is services and classifies the procurement with a service NAICS, the NMR does not apply to the computer hardware portion of the requirement. The contractor must meet the applicable performance of work requirement for the services set forth in the LOS but does not have to supply the computer hardware of a small business manufacturer.
 - If the procuring agency determines that the principal nature of the procurement is for supplies and classifies the procurement with a supply NAICS, the NMR applies to the computer hardware portion of the requirement. The contractor must supply the computer hardware manufactured by a small business (or obtain a waiver) but the contractor does not have to meet the performance of work requirement in the LOS for the services portion of the contract.

Use of an NMR Waiver

- Waiver expires one year after SBA grants the waiver. Where a contract is not awarded within one year, the procuring agency must come back to SBA with revised market research requesting that the waiver be extended.
- Waiver is good for the duration of the contract provided that it does not exceed five years. At the end of the fifth year, whether the contract is in the base period or an option period, the agency must submit and receive a new waiver before entering into the contract's sixth year.

Multiple Item Procurement

In a multi-item procurement, there is no requirement that every item acquired be manufactured by a small business.

At least 50% of the estimated contract value must be composed of items that are manufactured, processed, or produced by domestic small business concerns, or have either a Class Waiver or Individual Waiver, or a combination thereof.

- If at least 50% of the estimated contract value is composed of items that are manufactured, processed, or produced by domestic small business concerns and/or a class waiver exists, an individual NMR waiver is not necessary.
- If at least than 50% of the estimated contract value is not composed of items manufactured, processed, or produced by domestic small business concerns and/or a class waiver exists, then an Individual Waiver may grant for one or more items to achieve 50% of the estimated value of the contract.
- A contracting officer must specifically identify each item for which a waiver is sought.
- SBA's waiver applies only to the specific item(s) identified, not to the entire contract.

Waiver Coverage in Multi-Item Procurements

13 CFR § 125.6(a)(2)(ii)(B)

- NMR waivers are applied on an item-by-item basis. Thus, contracting officers must provide distinct justification and market research for each item for which a waiver is requested
- Potential offerors should be notified of which items are covered by the waiver

Total Contract Value \$100,000

Can this offeror be considered small?

6 items required in this multi-item procurement

An individual NMR waiver was granted for ITEM X.

ITEM A: \$20,000 manufactured by a large business

ITEM B: \$5,000 manufactured by a large business

ITEM C: \$10,000 manufactured by a large business

ITEM X: \$35,000 manufactured by a large business

ITEM Y: \$20,000 manufactured by a large business

ITEM Z: \$10,000 manufactured by a small business



No, ITEM X (for which there is a waiver) and ITEM Z (mfr'd by SB) total \$45,000 which is not at least 50% of the TCV.

Does a nonmanufacturer for an 8(a) sole source contract have to comply with the NMR?

Yes.

Is an individual NMR waiver for an IDIQ contract requested at the contract or order level?

Generally, the NMR rule applies to the contract and the contractor must be in compliance with the NMR rule for the overall contract.

The Contracting Officer determines whether an overall contract NMR individual waiver is appropriate or whether it is more appropriate just for orders. A lot of this depends on the items being procured and whether it is single or multiple items and whether the offerors themselves may be manufacturers of any of the items. An individual waiver can be requested by the CO for the contract or by the ordering level Contracting Officer.

There are some nuances:

- For multiple agency, multi-award contracts (GWACs), the ordering agency must use the order's period of performance of the order to determine compliance;
- If the base contract is not set aside but the order is set aside, the ordering agency must use the order's period of performance to determine compliance; and
- The contracting officer, in his or her discretion, may require the concern to comply with the NMR for each order awarded under a total or partial set-aside contract.

What should a Contracting Officer do if they find that a contractor is not in compliance with the NMR?

- Solicitation Phase -
- Pre-award - An offeror's compliance with the NMR is a component of size status and an allegation of noncompliance should be handled as a size protest.
- Post-award –
- Completed contract –

Common NMR Individual Waiver Requests

- Furniture (e.g. barracks, office)
 - Known SB manufacturers:
 - Neutral Posture (TX)
 - Aura Seating (CA)
 - Heckman Contract (dorm style and home-type furnishings)
 - University ULoft
- “Motorola” Radios
 - Several known SB radio manufactures:
 - BK Technologies (BK), a USA small manufacturer of P25 radios
 - MECHEM ELECTRONICS, INC. (UEI: GKKWYX2THF78)
 - ACG SYSTEMS, INC. (UEI: FKFZBQRZF1G3)
- Brand Name Medical Equipment – carts, beds, etc.
- Fuel
 - SB refineries do exist, but location usually plays a big part

An agency’s market research should directly address known SB manufacturers and why their product is not sufficient to meet the solicitation’s requirements

Questions?

**Thank you for
participating in this
training!**



Questions

1. Is there any way to “disallow” distributors and only open the solicitation up to OEMs?
2. Why does the NMR not benefit small businesses?
3. Distinguish between a vendor and a distributor in the NMR context.
4. Why is there more constraint on a socioeconomic set aside where the rule applies at any dollar threshold but for SBSAs it only applies about the SAT?