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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, 127, 134

RIN: 3245-AG24

Small Business Mentor Protégé Program; Small Business Size Regulations; Government Contracting Programs; 8(a) Business Development/Small Disadvantaged Business Status Determinations; HUBZone Program; Women-Owned Small Business Federal Contract Program; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is proposing to amend its regulations to implement provisions of the Small Business Jobs Act of 2010 and the National Defense Authorization Act for Fiscal Year 2013. Based on authorities provided in these two statutes, the proposed rule would establish a Government-wide mentor-protégé program for all small business concerns, consistent with SBA's mentor-protégé program for Participants in SBA's 8(a) Business Development (BD) program. The proposed rule would also make minor changes to the mentor-protégé provisions for the 8(a) Business Development program in order to make the mentor-protégé rules for each of the programs as consistent as possible. The proposed rule would amend the current joint venture provisions to clarify the conditions for creating and operating joint venture partnerships, including the effect of such partnerships on any mentor-protégé relationships. Finally, the proposed rule would make several additional changes to

current size, 8(a) Office of Hearings and Appeals or HUBZone regulations, concerning among other things, ownership and control, changes in primary industry, standards of review and interested party status for some appeals.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AG24, by any of the following methods: (1) Federal eRulemaking Portal, available at www.regulations.gov, follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Brenda Fernandez, U.S. Small Business Administration, Office of Government Contracting, 409 3rd Street SW, 8th Floor, Washington, DC 20416. SBA will not accept comments to this proposed rule submitted by email.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Government Contracting, 409 3rd Street SW, 8th Floor, Washington, DC 20416; (202) 205-7337; brenda.fernandez@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background.

On September 27, 2010, the President signed into law the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240, which was designed to protect the interests of small businesses and increase opportunities in the Federal marketplace. In April 2010, prior to the enactment of the Jobs Act, President Obama established an Interagency Task Force on Federal Contracting Opportunities for Small Businesses in order to coordinate executive departments' and agencies' efforts towards ensuring that all small businesses have a fair chance to participate in Federal contracting opportunities. The task force was

ordered to produce proposals and recommendations for: (i) Using innovative strategies, such as teaming, to increase opportunities for small business contractors and utilizing and expanding mentorship programs, such as the mentor-protégé program; (ii) removing barriers to participation by small businesses in the Federal marketplace by unbundling large projects, improving training of Federal acquisition officials with respect to strategies for increasing small business contracting opportunities, and utilizing new technologies to enhance the effectiveness and efficiency of Federal program managers, acquisition officials, and the Directors of Offices of Small Business Programs and Offices of Small and Disadvantaged Business Utilization, their managers, and procurement center representatives in identifying and providing access to these opportunities; (iii) expanding outreach strategies to match small businesses, including firms located in HUBZones and firms owned and controlled by women, minorities, socially and economically disadvantaged individuals, and service-disabled veterans, with contracting and subcontracting opportunities; and (iv) establishing policies, including revision or clarification of existing legislation, regulations, or policies, that are necessary or appropriate to effectuate these objectives.

In September 2010, the task force issued a preliminary report and announced three priority objectives for assisting small businesses in Federal contracting,: stronger rules; a better equipped, informed and accountable acquisition work force; and improved outreach and better use of technology and data. Among other recommendations, the task force determined that mentor-protégé programs should be promoted through a new government-wide framework to give small businesses the opportunity to develop their

capabilities with the assistance of experienced businesses in an expanded Federal procurement arena.

With the enactment of the Jobs Act, Congress recognized that mentor-protégé programs serve an important business development function for small business and authorized SBA to establish separate mentor-protégé programs for the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program, the HUBZone Program, and the Women-Owned Small Business (WOSB) Program, each modeled on SBA's existing mentor-protégé program available to 8(a) Business Development (BD) program participants. See section 1347(b)(3) of the Jobs Act.

On January 2, 2013, the President signed into law the National Defense Authorization Act for Fiscal Year 2013 (NDAA), Public Law 112-239. Section 1641 of the NDAA authorized SBA to establish a mentor-protégé program for all small business concerns. This section further provides that a small business mentor-protégé program must be identical to the 8(a) BD mentor-protégé program, except that SBA may modify the program to the extent necessary, given the types of small business concerns to be included as protégés. Section 1641 also provides that a Federal department or agency could not carry out its own agency specific mentor-protégé program for small businesses unless the head of the department or agency submitted a plan for such a program to SBA and received the SBA Administrator's approval of the plan. Finally, section 1641 requires the head of each Federal department or agency carrying out an agency-specific mentor-protégé program to report annually to SBA the participants in its mentor-protégé program, the assistance provided to small businesses through the program, and the progress of protégé firms to compete for Federal prime contracts and subcontracts.

Instead of implementing four new separate small business mentor-protégé programs (i.e., having a separate mentor-protégé program for SDVO SBCs, HUBZone SBCs, WOSB concerns, and all other small business concerns, in addition to the current mentor-protégé program for 8(a) BD Participants), this rule proposes to implement one additional mentor-protégé program for all small businesses since the other three types of small businesses (SDVO, HUBZone and women-owned) would be necessarily included within any mentor-protégé program targeting all small business concerns. Approved mentor-protégé relationships would then be able to seek to perform joint ventures for any contracts for which the protégé firm qualifies as eligible (e.g., women-owned set aside where the protégé firm qualifies as a WOSB concern). Although the NDAA language authorizing a mentor-protégé program for all small businesses could to be read as specifically authorizing a fifth separate mentor-protégé program for certain types of small businesses (i.e., one for small businesses not already covered by SBA's current 8(a) BD mentor-protégé program and not previously contained in the Jobs Act provisions authorizing mentor-protégé programs for HUBZone, SDVO or women-owned small businesses), SBA believes that having five separate small business mentor-protégé programs could become confusing to the public and procuring agencies and hard to implement by SBA.

Currently, the mentor-protégé program available to firms participating in the 8(a) BD program is used as a business development tool in which mentors provide diverse types of business assistance to eligible 8(a) BD protégés. This assistance may include, among other things, technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing

Federal prime contracts through joint venture arrangements. The explicit purpose of the 8(a) BD mentor-protégé relationship is to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts. Similarly, the proposed mentor-protégé program for all small business concerns is designed to require approved mentors to provide assistance to protégé firms in order to enhance the capabilities of protégés, to assist protégés with meeting their business goals, and to improve the ability of protégés to compete for contracts.

Instead of providing one mentor-protégé program for all small business concerns, SBA also considered authorizing separate mentor-protégé programs for each of the specific types of small businesses (i.e., to have five separate mentor-protégé programs, including the current one for 8(a) BD program). SBA believes that it should not make a difference which way the regulations are written. In either approach, a mentor-protégé relationship will be able to perform any small business contract through a joint venture for which the protégé firm is qualified to perform. SBA proposed one program for all small businesses because SBA believed it would be easier for the small business and acquisition communities to use and understand. However, SBA specifically requests comments as to whether SBA should finalize one small business mentor-protégé program, as proposed, or, rather, five separate mentor-protégé programs for the various small business entities.

In addition, the rule would revise the joint venture provisions contained in § 125.15(b) (for SDVO SBCs, and which would now be contained in proposed § 125.18(b)), § 126.616 (for HUBZone SBCs), and § 127.506 (for WOSB and EDOSB concerns) to more fully align those requirements to the requirements of the 8(a) BD

program. The proposed rule would also add a new § 125.8 to specify requirements for joint ventures between small business protégé firms and their mentors. The rule would also make several additional changes to current size, 8(a) BD and HUBZone regulations that are needed to clarify certain provisions or correct interpretations of the regulations that were inconsistent with SBA's intent. These changes are set forth more fully below.

II. Proposed Changes.

Definition of Joint Venture (13 CFR 121.103(h)).

This rule proposes to amend § 121.103(h) regarding the definition of what constitutes a joint venture for all of SBA's programs. Currently, the rule recognizes that a joint venture may be an informal arrangement that exists between two (or more) parties through a written document, or may be a formal written arrangement existing as a separate legal entity. The current language has caused some confusion as to what an informal joint venture arrangement means. The proposed rule attempts to clarify SBA's intent. As with the current regulation, the proposed rule explicitly requires that any joint venture be in writing. SBA never meant that an informal joint venture arrangement could exist without a formal written document setting forth the responsibilities of all parties to the joint venture. SBA merely intended to recognize that a joint venture need not be established as a limited liability company or other formal separate legal entity. The proposed rule attempts to clarify that distinction. In all instances where two (or more) parties execute a written document setting forth their responsibilities as joint venture partners, it is SBA's view that the parties have formed a partnership. It may not be a formal partnership, but the responsibilities of the parties are as partners. The proposed rule specifies that a joint venture may be a formal or informal partnership or exist as a

separate limited liability company or other separate legal entity. However, regardless of form, the joint venture must be reduced to a written agreement.

In addition, the proposed rule would specify that if a joint venture exists as a formal separate legal entity, it may not be populated with individuals intended to perform contracts awarded to the joint venture. This is a change from the current regulation which allows a separate legal entity joint venture to be unpopulated, to be populated with administrative personnel only, or to be populated with its own separate employees that are intended to perform contracts awarded to the joint venture. In the mentor-protégé joint venture context, if SBA continued to allow populated joint ventures, SBA is concerned that it will be difficult to definitively determine that a small protégé firm directly benefits from, and in fact controls, a joint venture with a large business mentor where that joint venture formed a limited liability company that hired its own employees to perform contracts for the joint venture. SBA believes that the benefits received by a protégé from a joint venture are more readily identifiable where the work done on behalf of the joint venture is performed by the protégé and the mentor separately. In such a case, it is much easier to determine that the protégé firm performed at least 40% of all work done by the joint venture, performed more than merely ministerial or administrative work, and otherwise gained experience that could be used to perform a future contract independently. Thus, the rule proposes to allow a separate legal entity joint venture to have its own separate employees to perform administrative functions, but not to have its own separate employees to perform contracts awarded to the joint venture.

SBA also requests comments regarding whether SBA should require all joint ventures formed under mentor-protégé agreements to be formed as separate legal

entities. SBA believes that such a requirement would significantly enhance SBA's ability to monitor and track awards to mentor-protégé joint ventures.

HUBZone Joint Ventures (13 CFR 126.616).

The HUBZone program is a community growth and development program in which businesses are incentivized to establish principal office locations in, and employ individuals from, areas of chronically high unemployment and/or low income in order to stimulate economic development. To further this purpose, the HUBZone program regulations currently permit a joint venture only between a HUBZone SBC and another HUBZone SBC. Joint ventures are not permitted with any non-HUBZone SBC. In authorizing a mentor-protégé relationship for HUBZone qualified SBCs, SBA considered whether this policy should be re-visited for joint ventures between HUBZone protégé firms and their SBA-approved mentors. SBA believes that if it continued to require that joint ventures in the HUBZone program could be between only two or more HUBZone qualified SBCs, then the business development assistance sought to be provided through the mentor-protégé program to HUBZone SBCs would be minimal. Large businesses and non-HUBZone small businesses would not be encouraged to participate in mentor-protégé relationships with HUBZone SBCs and HUBZone SBCs would not significantly benefit from such a program. For this reason, this rule proposes to allow joint ventures for HUBZone contracts between a HUBZone protégé firm and its mentor.

Under the proposed rule, the HUBZone program would be consistent with the other small business programs and would allow a joint venture between a qualified HUBZone SBC and one or more other SBCs. As with the other small business programs, the HUBZone SBC would be required to be the project manager and otherwise control

the performance of a HUBZone joint venture contract. The joint venture would be required to perform the specified percentage of work of the contract, and the HUBZone firm would be required to perform at least 40% of the work done by the joint venture. SBA specifically requests comments as to whether allowing a joint venture between a HUBZone firm and a non-HUBZone firm (other than the HUBZone firm's mentor) makes sense in light of the purposes of the HUBZone program.

SBA requests comments on whether the purposes of the HUBZone program would be appropriately served by allowing non-HUBZone firms to act as mentors and joint venture with protégé HUBZone firms, and whether SBA should allow any joint ventures with non-HUBZone firms.

Joint Venture Certifications and Performance of Work Reports (13 CFR 125.8, 125.18, 126.616, 127.506).

The proposed rule would require all partners to a joint venture agreement that perform a SDVO, HUBZone, WOSB/EDWOSB, or small business set-aside contract to certify to the contracting officer and SBA prior to performing any such contract that it will perform the contract in compliance with the joint venture regulations and with the joint venture agreement. In addition, the parties to the joint venture are required to report to the contracting officer and to SBA how they are meeting or have met the applicable performance of work requirements for each SDVO/HUBZone/WOSB/EDWOSB or small business set-aside contract they perform as a joint venture. Specifically, the joint venture must annually submit a report to the relevant contracting officer and to SBA certifying compliance with the regulations and joint venture agreement, and explaining how the performance of work requirements are being met, and once the contract is completed, a

report certifying compliance and explaining how the performance of work requirements were met for the contract (see proposed § 125.8(h) for joint ventures between small business protégés and their SBA-approved mentors, proposed § 125.18(b)(8) for SDVO SBCs, proposed § 126.616(i) for HUBZone SBCs, and proposed § 127.506(j) for WOSBs/EDWOSBs). For SDVO SBCs, HUBZone SBCs, and WOSBs/EDWOSBs, this requirement would apply to all joint ventures.

SBA believes that joint ventures permitted by SBA’s regulations must benefit small businesses, and must not be used as vehicles to allow companies to fraudulently or improperly benefit from SBA contracting programs. The required certifications will help to ensure accountability within these programs, and assist the Government’s ability to deter wrongdoing through criminal and civil fraud prosecutions as well as other administrative remedies such as suspension and debarment. In this regard, the proposed rule would specify that the Government may consider the failure to comply with the joint venture regulations or to submit the required certifications and reports to be a ground for suspension or debarment.

Tracking Joint Venture Awards.

SBA also believes that it is important to be able to track awards to the joint ventures permitted by SBA’s regulations, and is considering various methods of tracking awards. Possible approaches include: requiring all joint ventures permitted by these regulations to include in their names “small business joint venture,” and if a mentor-protégé joint venture to include in their names “mentor-protégé small business joint venture;” requiring contracting officers to identify awards as going to small business joint ventures or to mentor-protégé small business joint ventures; requiring SBCs to amend

their System for Award Management (SAM) entries to specify that they have formed a joint venture; requiring each joint venture to get a separate DUNS number; or a combination of all of these actions. Ensuring that governmental agencies and members of the public can track joint venture awards will promote transparency and accountability, and thereby deter fraudulent or improper conduct, and promote compliance with SBA's regulations. SBA seeks comments from interested parties on how best to accomplish this and whether these alternatives should be implemented in a final rule.

Applications for SBA's Small Business Mentor-Protégé Program (13 CFR 125.9)

As noted above, SBA has proposed implementing one universal small business mentor-protégé program instead of a separate mentor-protégé program for each type of small business (i.e., HUBZone, SDVO, WOSB, and small business). In addition, the proposed rule would continue to authorize SBA's separate mentor-protégé program for eligible 8(a) BD Program Participants. A small business seeking a mentor-protégé relationship would be required to submit information to SBA in accordance with this proposed rule. SBA's Director of Government Contracting (D/GC) would review and either approve or decline small business mentor-protégé agreements. SBA's Associate Administrator for BD (AA/BD) would continue to review and approve or decline mentor-protégé relationships in the 8(a) BD program. An eligible 8(a) BD Program Participant could choose to seek SBA's approval of a mentor-protégé relationship through the 8(a) BD program, or could seek a small business mentor-protégé relationship through SBA's D/GC. As noted above, SBA is considering having one office review and either approve or decline all mentor-protégé agreements to ensure consistency in the process, and specifically seeks comments as to whether that approach should be implemented.

SBA is uncertain of the number of various small businesses that will seek a mentor-protégé relationship through SBA once these regulations are finalized. If the number of firms seeking SBA to approve their mentor-protégé relationships becomes unwieldy, SBA may institute certain “open” and “closed” periods for the receipt of further mentor-protégé applications. In such a case, SBA would then accept mentor-protégé applications only in “open” periods.

Mentors (13 CFR 124.520 and 125.9).

Under the proposed small business mentor-protégé program, any for-profit business concern that demonstrates a commitment and the ability to assist small business concerns may be approved to act as a mentor and receive the benefits of the mentor-protégé relationship. Pursuant to the authority contained in the NDAA, SBA is attempting to make the small business mentor-protégé program identical to the 8(a) mentor-protégé program. Specifically, section 45(a)(2) of the Small Business Act, 15 U.S.C. 657r(a)(2), which was added by section 1641 of the NDAA, requires the mentor-protégé program for small businesses to be “identical to the [8(a)] mentor-protégé program . . . as in effect on the date of enactment of this section. . . .” Although the current rules for the 8(a) mentor-protégé program allow non-profit entities to act as mentors, this rule proposes to not allow non-profit mentors (i.e., to require mentors to be for-profit business concerns) for the small business mentor-protégé program due to the definition of the term mentor contained in the NDAA. In this regard, section 1641 of the NDAA added section 45(d)(1) of the Small Business Act, 15 U.S.C. 657r(d)(1), which defines the term mentor to be “a for-profit business concern of any size.” These two provisions of the NDAA are in conflict. The small business mentor-protégé program

cannot be “identical” to the current 8(a) mentor-protégé program while at the same time excluding non-profit entities from being mentors. Because the NDAA definition may be read to apply only to the small business mentor-protégé program, and not the 8(a) BD mentor-protégé program (or to mentor-protégé programs for SDVOs, HUBZone SBCs, or WOSBs if SBA had chosen to implement separate mentor-protégé programs under the Jobs Act authority), SBA could have prohibited non-profit mentors only in the small business mentor-protégé program. SBA has not done that in this proposed rule because SBA seeks to have as much consistency between the various programs as possible. As such, this rule proposes not to allow non-profit mentors in any mentor-protégé program, including the 8(a) mentor-protégé program. For the 8(a) mentor-protégé program, this definition requires, and this rule proposes, a change to the current 8(a) regulations. See proposed § 124.520(b)(2).

Generally, a mentor participating in any SBA-approved mentor-protégé program will have no more than one protégé at a time. However, SBA may authorize a concern to mentor more than one protégé at a time where it can demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm (e.g., the second firm may not be a competitor of the first firm). Under no circumstances will a mentor be permitted to have more than three protégés in the aggregate at one time under either of the mentor-protégé programs authorized by § 124.520 or § 125.9. A mentor may choose to have: up to three protégés in the 8(a) BD program; or up to three protégés in the small business program; or one or more protégés in one program and one or more in another program, but no more than three protégés in the aggregate. In proposing this limitation, SBA did not believe it was good policy to

allow one large business mentor to conceivably have up to three protégés in each of the two programs, or a total of possibly six protégé firms. If that were allowed, large businesses might benefit more from small business programs than the intended beneficiaries, the small business proteges. In reviewing a mentor-protégé agreement where a mentor has more than one protégé, SBA will determine whether the mentor has demonstrated that its protégés will not compete against each other.

In addition, consistent with the 8(a) mentor-protégé program, a protégé in the small business mentor-protégé program may not become a mentor and retain its protégé status. The protégé must terminate the mentor-protégé agreement with its mentor before it will be approved as a mentor to another small business concern. SBA requests comments regarding whether this policy makes sense in the small business mentor-protégé program, whether it continues to make sense in the 8(a) mentor-protégé program, or whether a firm should be permitted to be both a protégé and mentor in both programs in appropriate circumstances.

Protégés (13 CFR 124.520 and 125.9).

Currently, in order to qualify as a protégé for the 8(a) BD mentor-protégé program, an 8(a) Program Participant must: have a size that is less than half the size standard corresponding to its primary NAICS code; or be in the developmental stage of its 8(a) program participation; or not have received an 8(a) contract. There is no doubt that the second and third reasons permitting a firm to qualify as a protégé in the 8(a) BD mentor-protégé program (i.e., the firm must be in the developmental stage of its 8(a) participation, or the firm has not received an 8(a) contract) do not apply to a separately authorized small business mentor-protégé program. As such, SBA immediately

eliminated those bases from consideration as criteria to qualify a protégé for the small business mentor-protégé program. The question then becomes whether these criteria continue to make sense in the 8(a) BD program. The 8(a) BD mentor-protégé program was designed to be an additional tool to assist in the business development of 8(a) BD Program Participants. Although it is true that the three types of firms identified as eligible to qualify as a protégé in the 8(a) BD mentor-protégé program would be the firms in most need of business development assistance, SBA questions whether 8(a) BD Participants that do not meet one of those three criteria could also substantially benefit from participating as a protégé in a mentor-protégé program. A Participant may have a size that slightly exceeds one-half the size standard corresponding to its primary NAICS code, be in its first year of the transitional stage of program participation, and have received one small 8(a) contract. Currently, that firm would be ineligible to be a protégé in the 8(a) BD program, even though it could substantially benefit from the assistance provided by a mentor and might not otherwise be able to advance its business development beyond its current level. And, considering that an 8(a) BD Participant that was not in the developmental stage of program participation or had received an 8(a) contract could nevertheless qualify as a protégé under the small business mentor-protégé program, SBA believes that it makes sense to have consistent rules between the mentor-protégé programs and, therefore, is proposing to eliminate those restrictions on qualifying as a protégé for the 8(a) BD mentor-protégé program as well.

SBA then considered whether the final restriction to qualify as a protégé for the 8(a) BD mentor-protégé program (i.e., the requirement that a firm be less than half the size standard corresponding to its primary NAICS code) continues to make sense in the

8(a) BD program, whether it makes sense for the new small business mentor-protégé program, and if not, what, if any, restriction should be imposed in its place. SBA recognizes that many small businesses may need some specific form of business development assistance, and that a mentor-protégé program may be the best vehicle for the small business to obtain such assistance. In addition, many small businesses may lack the tools necessary to advance to the next level. As such, this rule proposes to allow any firm that qualifies as a small business for the size standard corresponding to its primary NAICS code to also qualify as a protégé in either the small business or 8(a) BD mentor-protégé program. In the 8(a) BD program, however, the firm would also have to demonstrate how the business development assistance to be received through its proposed mentor-protégé relationship would advance the goals and objectives set forth in its business plan.

Although SBA has proposed to eliminate the less than half the size standard requirement from the 8(a) BD mentor-protégé program and not apply it to the small business mentor-protégé program, SBA specifically requests comments as to whether the focus of a mentor-protégé program should be restricted to smaller firms or whether, as proposed, the benefits of a mentor-protégé program should be open to any firm that qualifies as small.

A protégé participating in either of the mentor-protégé programs generally will have no more than one mentor at a time. However, a protégé may have two mentors where the two relationships will not compete or otherwise conflict with each other and the protégé demonstrates that the second relationship pertains to an unrelated, secondary NAICS code, or the first mentor does not possess the specific expertise that is the subject

of the mentor-protégé agreement with the second mentor. SBA asks for comments regarding whether there should be a maximum of two mentors per protégé or another maximum.

SBA wants to ensure that only firms that truly qualify as small businesses under their primary NAICS code participate as protégés in the small business mentor-protégé program. Unlike the 8(a) BD program (where firms apply and SBA affirmatively certifies firms as eligible to participate in the program), there is no formal process by which a firm is certified as a “small” business. Status as a small business is based on a firm’s self-certification, and SBA understands that some firms may in good faith believe that they qualify as small but may not fully understand all of the affiliation issues required to be considered small. To ensure that only qualified firms participate as protégé firms, the proposed rule would require that SBA verify that a firm qualifies as a small business before approving that firm to act as a protégé in a small business mentor-protégé relationship. See proposed § 125.9(c)(1). Only those firms that are affirmatively determined to be small businesses and have not received a negative determination from SBA pursuant to a size protest may qualify as a protégé. SBA proposes that this affirmative determination may take place either as part of a firm’s request for participation in the small business mentor-protégé program, or as part of a size protest determination prior to that time. Where SBA previously found a firm to qualify as small as part of a formal size determination or size appeal, the firm would be required to certify that there has been no change in its small business status since that determination. In addition, for the two self-certification programs (SDVO and WOSB), SBA may examine status eligibility as part of its protégé approval process.

Mentor-Protégé Programs of Other Departments and Agencies (13 CFR 125.10).

As noted above, section 1641 of the NDAA provided that a Federal department or agency cannot carry out its own agency specific mentor-protégé program for small businesses unless the head of the department or agency submitted a plan for such a program to SBA and received the SBA Administrator's approval of the plan. The NDAA specifically excluded the Department of Defense's mentor-protégé program, but included all other current mentor-protégé programs of other agencies. Under its provisions, a department or agency that is currently conducting a mentor-protégé program (except the Department of Defense) may continue to operate that program for one year but must then go through the SBA approval process in order for the program to continue after one year. Thus, in order to continue to operate any current mentor-protégé program beyond one year after SBA's mentor-protégé regulations are final, each department or agency would be required to obtain the SBA Administrator's approval. These statutory provisions are proposed to be implemented in new § 125.10 of SBA's regulations.

Finally, proposed § 125.10(d) would implement statutory reporting requirements imposed on each Federal department or agency that has its own mentor-protégé program. Specifically, the head of each Federal department or agency carrying out an agency-specific mentor-protégé program would be required to report annually to SBA the participants in its mentor-protégé program (broken out by various small business categories), the assistance provided to small businesses through the program, and the progress of protégé firms to compete for Federal prime contracts and subcontracts. These proposed changes may require corresponding revisions to agency contract reporting systems and the Government's contract reporting system, FPDS-NG.

Because the SBA's 8(a) BD and small business mentor-protégé programs will apply to all Government small business contracts, and thus to all Federal departments and agencies, conceivably other agency-specific mentor-protégé programs for small business would not be needed. For example, SBA notes that the Department of Veterans Affairs (VA) has separate Veteran-Owned Small Business (VOSB) and Service-Disabled Veteran-Owned Small Business (SDVOSB) mentor-protégé programs. Although this proposed rule would establish a government-wide small business mentor-protégé program, it would not establish mentor-protégé programs specific to either VOSBs or SDVOSBs. The question becomes whether either of those separate mentor-protégé programs would be necessary after SBA's small business mentor-protégé program is established. A VOSB or SDVOSB could obtain a small business mentor-protégé relationship through SBA and then participate in programs specific to VA if VA determined that the firm did indeed qualify as a VOSB or an SDVOSB under VA's rules. SBA requests comments as to whether the VA's VOSB and SDVO mentor-protégé programs should continue after the one-year grace period expires.

SBA also specifically requests comments on whether there would be a continuing need for other small business mentor-protégé programs once SBA's various mentor-protégé programs are implemented. SBA understands that many of the agency-specific mentor-protégé programs incentivize mentors to utilize their protégés as subcontractors. For instance, some agencies provide additional evaluation points to a large business submitting an offer on an unrestricted procurement where the business has an active mentor-protégé agreement, where the business has used the protégé firm as a subcontractor previously, or where the mentor and protégé are submitting an offer as a

joint venture. In addition, some mentor-protégé programs give additional credit to a large business mentor toward its subcontracting plan goals when the mentor uses the protégé as a subcontractor on the mentor's prime contract(s) with the given agency. SBA's mentor-protégé programs assume more of a prime contractor role for protégés, but would also encourage subcontracts from mentors to protégés as part of the developmental assistance that protégés receive from their mentors. Because one or more mentor-protégé programs of other agencies ultimately may not be continued after SBA's various mentor-protégé programs are finalized, SBA requests comments as to whether the subcontracting incentives authorized by mentor-protégé programs of other agencies should specifically be incorporated into SBA's mentor-protégé programs.

Benefits of Mentor-Protégé Relationships (13 CFR 124.520 and 125.9).

As with the 8(a) BD program, under the proposed small business mentor-protégé program, a protégé may joint venture with its SBA-approved mentor and qualify as a small business for any Federal government contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement. In revising its 8(a) regulations in 2011, SBA considered allowing the exclusion from affiliation between a protégé and its mentor to apply only to 8(a) contracts. Comments to SBA's proposed 8(a) rule argued that 8(a) protégé firms receive important developmental benefits in performing non-8(a) contracts and that many of these benefits would be missed if a protégé could not joint venture with a large business mentor. SBA agreed and decided to continue to allow the exclusion from affiliation for all contracts so that a joint venture between a protégé in the 8(a) BD program and its mentor equally qualifies as small for 8(a) and non-8(a) contracts so long as the protégé

qualifies as small. That same rationale has been applied in this proposed rule to the small business mentor-protégé program. This means that a joint venture between a protégé and its approved mentor in the small business mentor-protégé program would be deemed to be a small business concern for any Federal contract or subcontract. It does not mean that such a joint venture affirmatively qualifies for any other small business program. For example, a joint venture between a small business protégé firm and its SBA-approved mentor would be deemed a small business concern for any Federal contract or subcontract for which the protégé qualified as small, but the joint venture would not qualify for a contract reserved or set-aside for eligible 8(a) BD, HUBZone SBCs, SDVO SBCs or WOSBs/EDWOSBs unless the protégé firm met those program-specific requirements as well.

Consistent with the 8(a) BD program, the proposed rule would permit a mentor to a small business to own an equity interest of up to 40% in the protégé firm in order to raise capital for the protégé firm. See proposed § 125.9(d)(2). SBA requests comments on whether this 40% ownership interest should be a temporary interest, being authorized only as long as the mentor-protégé relationship exists, or whether it should be able to survive the termination of the mentor-protégé relationship. Although the proposed rule allows the ownership interest to survive the termination of a mentor-protégé relationship, SBA is concerned that such a rule may allow far-reaching influence by large businesses that act as mentors and enable them to receive long-term benefits from programs designed to assist only small businesses.

Written Mentor-Protégé Agreement (13 CFR 124.520 and 125.9).

The proposed rule requires that all mentor-protégé agreements be in writing, identifying specifically the benefits intended to be derived by the projected protégé firms. Under the proposed rule, SBA must approve any mentor-protégé agreement prior to the firms receiving any benefits through the mentor-protégé program. SBA will not approve the agreement if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts. The proposed rule would also require a firm seeking approval to be a protégé in either the 8(a) BD or small business mentor-protégé programs to identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA. The mentor-protégé agreement submitted to SBA for approval must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor. For example, if a firm is a protégé in a mentor-protégé relationship approved by another agency and seeks to enter a mentor-protégé relationship with the same mentor firm through one of SBA's programs, it cannot merely duplicate the same mentor-protégé agreement. It must demonstrate that the assistance to be provided to the protégé firm is different and in addition to the assistance provided to the firm through the other mentor-protégé relationship.

SBA requests comments regarding whether SBA should consider limiting its review and approval of mentor-protégé agreements to a certain timeframe each year (i.e., allow submissions of agreements only during certain specified months), or allow

submissions of agreements at any time, but limit the number of mentor-protégé agreements it will review and/or approve each year.

The proposed rule also provides that SBA will review a mentor-protégé relationship annually to determine whether to approve its continuation for another year. SBA will evaluate the relationship and determine whether the mentor provided the agreed-upon business development assistance, and whether the assistance provided appears to be worthwhile. SBA proposes to limit the duration of a mentor-protégé agreement to three years. The proposed rule also permits a protégé to have one three-year mentor-protégé agreement with one entity and one three-year mentor-protégé agreement with another entity, or two three-year mentor-protégé agreements (successive or otherwise) with the same entity. SBA invites comments regarding whether three years is an appropriate length of time and whether SBA should allow a mentor and protégé to enter into an additional mentor-protégé agreement upon the expiration of the original agreement.

In addition, SBA proposes to add clarifying language not currently contained in the 8(a) mentor-protégé regulations authorizing the continuation of a mentor-protégé relationship where control or ownership of the mentor changes during the term of the mentor-protégé agreement. Specifically, the proposed rule would provide (for the 8(a) BD and small business mentor-protégé programs) that if control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégé agreement and that it continues its commitment to fulfill its obligations under the agreement. This is current SBA policy for

the 8(a) BD program, but SBA believes that setting it forth in the regulatory text would eliminate any confusion.

Size of 8(a) Joint Venture (13 CFR 124.513).

The proposed rule would amend § 124.513 to clarify that interested parties may protest the size of an SBA-approved 8(a) joint venture that is the apparent successful offeror for a competitive 8(a) contract. This change alters the rule expressed in Size Appeal of Goel Services, Inc. and Grunley/Goel Joint Venture D LLC, SBA No. SIZ-5320 (2012), which concluded that the size of an SBA-approved 8(a) joint venture could not be protested because SBA had, in effect, determined the joint venture to qualify as small when it approved the joint venture pursuant to § 124.513(e). Approval of a joint venture by its Office of Business Development should not immunize the awardee of an 8(a) competitive contract from a size protest. This revision would make clear that unsuccessful offerors on a competitive 8(a) set aside contract may challenge the size of an apparently successful joint venture offeror.

Establishing Social Disadvantage for the 8(a) BD Program (13 CFR 124.103).

The proposed rule would amend § 124.103(c) to clarify that an individual claiming social disadvantage must present a combination of facts and evidence which by itself establishes that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world. This change would alter the rule expressed in several SBA OHA decisions that allowed an individual to establish social disadvantage despite the record lacking sufficient evidence supporting a discriminatory basis for the alleged misconduct. See Matter of Tootle Construction, LLC, SBA No. BDP-420 (2012), StretegyGen Co., SBA No. BDPE-460 (2012). SBA

believes that the burden of establishing eligibility for the 8(a) BD program is on the applicant. Absent any facts or statements as to the qualifications of the individual claiming social disadvantage or those of another individual offered as evidence of discrimination in a statement, it is no more likely that an action or inaction was based on discriminatory conduct than it was based on a legitimate alternative reason. The individual claiming social disadvantage bears the burden of making his or her claims of social disadvantage more likely than possible non-discriminatory reasons for the same outcomes by providing additional facts.

As such, the proposed rule clarifies that SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground. It is the responsibility of the applicant to establish all aspects of eligibility. A statement that a male co-worker received higher compensation or was promoted over a woman does not amount to an incident of social disadvantage by itself.

In addition, when SBA asks for evidence corroborating an individual's claims of social disadvantage, what SBA is really requesting is for the individual to provide additional facts to make his or her claims of discriminatory conduct more likely than possible non-discriminatory reasons for the same outcomes. Because SBA usually has no way to verify the statements made by an individual claiming social disadvantage, and SBA recognizes that documentary evidence is often not available to support the statements, it is vitally important that the narrative contain sufficient detail (i.e., names, dates, location or other specific details) in order to be credible. To constitute sufficient detail to establish social disadvantage, the description of the individual's claims of

discriminatory conduct must generally include: (1) when and where the discrimination occurred; (2) who committed the discrimination; (3) how the discrimination took place; and (4) how the individual was adversely affected by such acts. See Ace Technical, SBA No. SDBA-178, at 4-5 (2008) (citing Matter of Seacoast Asphalt Servs., Inc., SBA No. SDBA-151, at 8 (2001)).

In addition, SBA maintains that it needs the discretion to request corroborating evidence in certain circumstances. Such requests do not raise the evidentiary burden placed on an 8(a) applicant above the preponderance of the evidence standard. SBA is not seeking definitive proof, but rather additional facts to support the claim that a negative outcome (e.g., failure to receive a promotion or needed training) was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons. SBA expects an individual claiming social disadvantage to provide the level of detail consistent with someone with first-hand knowledge of the discriminatory conduct claimed. The proposed rule would add language to the regulations to specifically recognize SBA's right to seek corroborating evidence where appropriate.

Finally, the proposed rule would clarify that each instance of alleged discriminatory conduct must be accompanied by a description of the negative impact of the conduct on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage. This clarification would alter the rule expressed in Matter of Bartkowski Life Safety Corp., SBA No. BDPE-516 (2014), in which OHA ruled that "a petitioner's claims can each be offered as evidence of social disadvantage, negative impact, or both." SBA maintains that each claim of discriminatory conduct or bias experienced by an individual must also include negative

impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage within the meaning of SBA's regulations.

This proposed change clarifies that point.

Substantial Unfair Competitive Advantage Within an Industry Category (13 CFR 124.109, 124.110, and 124.111).

Pursuant to section 7(j)(10)(J)(ii)(II) of the Small Business Act, 15 U.S.C. 636(j)(10)(J)(ii)(II), "[i]n determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) [for purposes of 8(a) BD program entry and 8(a) BD contract award], each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category." For purposes of the 8(a) BD program, the term "Indian tribe" includes any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act). 15 U.S.C. 637(a)(13). SBA's regulations have extended this broad exclusion from affiliation to the other entity-owned firms authorized to participate in the 8(a) BD program (i.e., firms owned by Native Hawaiian Organizations (NHOs) and Community Development Corporations (CDCs)). See §§ 124.109(a), 124.109(c)(2)(iii), 124.110(b), and 124.111(c). This proposed rule will provide guidance as to how SBA will determine whether a firm has obtained or is likely to obtain "a substantial unfair competitive advantage within an industry category."

First, in determining how best to define the term “industry category,” SBA considered how it has defined other similar terms in its regulations. In this regard, § 124.3 defines “primary industry classification” to mean “the six digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant.” Further, § 124.109(c)(3)(ii) defines the “same primary NAICS code” to mean the six digit NAICS code having the same corresponding size standard. SBA believes that it makes sense to apply this same limitation when defining an industry category. Thus, the proposed rule would provide that an entity-owned business concern is not subject to the broad exemption to affiliation set forth in 13 CFR part 124 where one or more entity-owned firms are found to have obtained, or are likely to obtain, a substantial unfair competitive advantage in a particular NAICS code with a particular size standard.

In addition, SBA believes that entity-owned concerns may be found affiliated only if they have obtained, or are likely to obtain, a substantial unfair competitive advantage within a particular industry category on a national scale. Because NAICS codes and their associated size standards are established on a national basis, it is reasonable to conclude that Congress intended SBA to look at “an industry category” nationally to determine whether a particular firm has obtained or is likely to obtain a substantial unfair competitive advantage. In making this assessment, SBA will consider a firm’s percentage share of the national market and other relevant factors to determine whether a firm is dominant in a specific six-digit NAICS code with a particular size standard. SBA anticipates that it will review Federal Procurement Data System data to compare the firm’s share of the industry as compared to overall small business

participation in that industry to determine whether there is a an unfair competitive advantage. The proposed rule does not contemplate a finding of affiliation where an entity-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

Management of Tribally-Owned 8(a) Program Participants (13 CFR 124.109).

The proposed rule would add language to § 124.109(c)(4) specifying that the individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time. This language is taken directly from section 7(j)(11)(B)(iii)(II) of the Small Business Act (15 U.S.C. 636(j)(11)(B)(iii)(II)), but did not also appear in SBA's 8(a) BD regulations. SBA believes it is necessary to incorporate this provision into the regulations to more fully apprise tribally-owned 8(a) applicants and Participants of the control requirements applicable to them.

Native Hawaiian Organizations (NHOs) (13 CFR 124.110).

The proposed rule would add language to § 124.110(d) to clarify the control requirements applicable to NHO-owned firms for 8(a) BD program participation. Specifically, the rule would clarify that the members or directors of an NHO need not have the technical expertise or possess a required license to be found to control an applicant or Participant owned by the NHO. Rather, the NHO, through its members and directors, must merely have managerial experience of the extent and complexity needed to run the concern. As with individually owned 8(a) applicants and Participants, individual NHO members may be required to demonstrate more specific industry-related experience in appropriate circumstances to ensure that the NHO in fact controls the day-

to-day operations of the firm. This would be particularly true where a non-disadvantaged owner (or former owner) who has experience related to the industry is actively involved in the day-to-day management of the firm.

Proposed § 124.110(g) would clarify that an NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the eligibility of individual members, directors or managers. As such, an individual Hawaiian Native who previously qualified his or her own business for 8(a) BD participation could be counted as a Native Hawaiian for NHO eligibility and could use his or her individual economic disadvantage to help qualify the NHO as economically disadvantaged even if he or she previously used his or her disadvantaged status to qualify an individually-owned 8(a) applicant or Participant.

Finally, although the rule does not propose to change the way in which SBA determines whether an NHO is economically disadvantaged, SBA specifically requests comments regarding whether an alternative approach is more suitable. Section 8(a)(4)(A) of the Small Business Act, 15 U.S.C. 637(a)(4)(A), requires that an NHO be economically disadvantaged in order to establish 8(a) eligibility for a concern owned by the NHO. Neither the statute nor its legislative history provide any guidance on how to determine whether an NHO is economically disadvantaged. Currently, § 124.110(c)(1) provides that in determining whether an NHO is economically disadvantaged, SBA will look at the individual economic status of the NHO's members. The NHO must establish that a majority of its members qualify as economically disadvantaged under the rules that apply to individuals as set forth in § 124.104. SBA has received several inquiries from NHOs asking if this is the most sensible approach to establishing economic disadvantage. They have recommended that NHOs establish economic disadvantage in the same way

that tribes currently do so for the 8(a) BD program: that is, by providing information relating to members, including the tribal unemployment rate, the per capita income of tribal members, and the percentage of tribal members below the poverty level. SBA asks for specific comments as to whether SBA should adopt for NHOs the same criteria used for determining whether a tribe is economically disadvantaged. One of the concerns SBA has in adopting such an approach is how to define the community for an NHO that would correspond to the tribal population for a specific tribe. Would the same Native Hawaiian community be used to establish the economic disadvantage of each NHO? If so, would that diminish the entire economic disadvantage requirement for NHOs? After reviewing comments received in response to this issue, SBA will determine how best to proceed in a final rule.

Change in Primary Industry Classification (13 CFR 124.112).

On February 11, 2011, SBA published a final rule in the Federal Register implementing comprehensive revisions to its 8(a) BD program. 76 FR 8221. Included within these revisions was an amendment to the definition of the term “primary industry classification” and provisions authorizing an 8(a) Participant to change its primary industry classification where it can demonstrate to SBA that the majority of its total revenues during a three-year period have evolved from one NAICS code to another. The supplementary information to that final rule stated that it was not SBA’s intent that SBA would be able to change a firm’s primary NAICS code on its own. 76 FR 8221. At that time, SBA did not recognize a need to require a Participant to change the primary industry classification contained in its business plan. SBA’s views have changed. In the context of an entity-owned Participant, SBA believes that it needs to have to ability to

change the Participant's primary industry classification in appropriate circumstances. An entity-owned applicant to the 8(a) BD program (i.e., one owned by an Indian tribe, Alaska Native Corporation (ANC), Native Hawaiian Organization (NHO), or Community Development Corporation (CDC)) cannot own more than 49% of another firm which, either at the time of application or within the previous two years, has been participating in the 8(a) BD program under the same primary NAICS code as the applicant. As such, an entity-owned applicant must select a primary business classification (as represented by a six digit NAICS code) that is different from the primary business classification of any other Participant owned by that same entity. After being certified to participate in the 8(a) BD program, however, there is no current requirement that the newly admitted Participant actually perform most, or any, work in the six digit NAICS code selected as its primary business classification in its application. SBA believes that this inconsistency could permit a firm to circumvent the intent of SBA's regulations by selecting a primary business classification that is different from the primary business classification of any other Participant owned by that same entity merely to get admitted to the 8(a) BD program, and then performing the majority, or even all, of its work in the identical primary NAICS code as another Participant owned by the entity. In order to make the regulations more consistent, this rule proposes to allow SBA to change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. See proposed § 124.112(e). The proposed language is not intended to imply that revenues from its primary NAICS code must account for at least 50% of the firm's total revenues, but rather that revenues from its primary NAICS code

must exceed revenues generated from any other NAICS code. The proposed language also provides discretion to SBA in deciding whether to change a Participant's primary industry classification because SBA recognizes that whether the greatest portion of a firm's revenues is derived from one NAICS code, as opposed to one or more other NAICS codes, is a snapshot in time that is ever changing. The proposed rule would require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate. Where the Participant provides information demonstrating that it has received one or more additional contracts in its primary NAICS code since the end of its most recently completed fiscal year, and such revenue would cause the revenue from its primary NAICS code to exceed the revenue generated from any other NAICS code, SBA would not change the Participant's primary industry classification. Where the revenue generated under its primary NAICS code is close to but less than the revenue generated under another NAICS code, the Participant can demonstrate that it has made good faith efforts to obtain contracts in its primary NAICS code. For example, where a Participant details contract opportunities under its primary NAICS code that it submitted offers for in the last year, but was not successful in winning, and its concrete plans to continue to seek additional opportunities in that NAICS code, SBA may not change the Participant's primary industry classification. SBA requests comments on whether a change in primary industry should instead be automatic, based on FPDS data.

8(a) BD Program Suspensions (13 CFR 124.305)

SBA is also proposing to add two additional bases for allowing a Participant to elect to be suspended from 8(a) BD program participation: where the Participant's principal office is located in an area declared a major disaster area or where there is a lapse in Federal appropriations.

President Obama signed an Executive Order on December 7, 2012 creating the Hurricane Sandy Rebuilding Task Force. The President charged the Task Force with identifying and working to remove obstacles to rebuilding while taking into account existing and future risks and promoting the long-term sustainability of communities. The Final Task Force Implementation Plan made 69 recommendations to implement an effective Rebuilding Strategy, including several relating to small business. In particular, the Task Force recommended authorizing 8(a) BD program suspensions for Participants located in major disaster areas. The Task Force specifically recommended that, upon the request of a certified 8 (a) firm in a major declared disaster area, SBA will suspend the eligibility of the firm for up to a one year period while they recover from the disaster to ensure they are able to take full advantage of the 8(a) BD program, rather than being impacted by lack of capacity or contracting opportunities due to disaster-induced disruptions. During such a suspension, a Participant would not be eligible for 8(a) BD Program benefits, including set-asides, however, but would not "lose time" in its program term due to the extenuating circumstances wrought by a disaster. This rule proposes to implement that recommendation into SBA's 8(a) BD regulations.

In addition, SBA proposes to allow a firm-initiated suspension where there is a lapse in Federal appropriations that could adversely affect a Participant's ability to be awarded one or more 8(a) contracts. The need for such a suspension was brought to light

during the Government shutdown at the beginning of fiscal year 2014. During the lapse of federal appropriations at the end of fiscal year 2013, several Program Participants' term of participation in the 8(a) program ended, and they were unable to finalize 8(a) contracts because there was no funding during the shutdown and they were no longer in the 8(a) BD program (because their term of program participation had ended) by the time the shutdown ended and appropriations were available. Therefore, this rule proposes to allow a Participant to elect to suspend its participation in the 8(a) BD program where: Federal appropriations for one or more federal departments or agencies have expired without being extended via continuing resolution or other means and no new appropriations have been enacted (i.e., during a lapse in appropriations); SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant; and award of the 8(a) sole source contract is pending. A Participant could not elect a partial suspension of 8(a) BD program benefits; if it elects to be suspended during a lapse in Federal appropriations, the Participant would be ineligible to receive any new 8(a) BD program benefits during the suspension. For example, if Department X was funded during a partial Government shutdown but Agency Y was not, a Participant could not elect to be suspended for purposes of executing 8(a) contracts with Agency Y, but not be suspended for purposes of executing 8(a) contracts with Department X. The suspension would start immediately upon the date requested by a Participant and would last the length of the lapse in Federal appropriations. However, once the Government is fully funded and the suspension is lifted, the contracts from both Department X and Agency Y could be finalized.

Benefits Reporting Requirement (13 CFR 124.602).

The proposed rule amends the time frame for the reporting of benefits for entity-owned Participants in the 8(a) BD program. SBA's current regulations require an entity-owned Participant to report benefits as part of its annual review submission. See § 124.604. SBA believes it is more appropriate that this information be submitted as part of a Participant's submission of its annual financial statements pursuant to § 124.602. SBA wants to make clear that benefits reporting should not be tied to continued eligibility, as may be assumed where such reporting is part of SBA's annual review analysis. In response to comments to the proposed rule which initially placed benefits reporting in the continued eligibility section of SBA's regulations (§ 124.112), see 74 FR 55694 (Oct. 28, 2009), SBA moved the benefits reporting requirement to a new section (§ 124.604) under miscellaneous reporting requirements contained in SBA's 8(a) BD regulations to evidence SBA's intent that benefits reporting not be considered a part of continued eligibility. 76 FR 8221 (Feb. 11, 2011). Although SBA changed the place in the regulations where the benefits reporting requirement appeared, it still collected that information with other information relating to a firm's annual review and believed that a perception could still exist that benefits reporting was, nevertheless, somehow tied to continued 8(a) BD eligibility. In order to further clarify SBA's intent and eliminate any doubt that benefits reporting is not in any way tied to continued 8(a) BD eligibility for any entity-owned Program Participant, this proposed rule changes the timing of benefits reporting from the time of a Participant's annual review submission to the time of a Participant's annual financial statement submission. In addition, SBA believes that the data collected by certain Participants in preparing their financial statements submissions may help them report some of the benefits that flow to the native or other community.

The regulatory change will continue to require the submission of the data on an annual basis but within 120 days after the close of the concern's fiscal year instead of as part of the annual submission.

Reverse Auctions (13 CFR 125.2 and 125.5).

SBA is also proposing to amend §§ 125.2(a) and 125.5(a)(1) to address reverse auctions. Specifically, SBA is proposing to reinforce the principle that all of SBA's regulations, including those relating to set-asides and referrals for a Certificate of Competency, apply to reverse auctions. With a reverse auction, the Government is buying a product or service, but the businesses are bidding against each other, which tends to drive the price down (hence the name reverse auction). In a reverse auction, the bidders actually get to see all of the other bidders' prices and can "outbid" them by offering a lower price. Although SBA believes that the small business rules apply to reverse auctions, the proposed rule is intended to make it clear to contracting officials that there are no exceptions to SBA's small business regulations for reverse auctions. Thus, the "rule of two," which directs whether a small business set-aside is appropriate, applies equally to reverse auctions as it does to regular procurement actions.

Processing Applications for HUBZone Certification (13 CFR 126.306).

SBA is proposing to amend § 126.306, which addresses how SBA processes HUBZone applications. SBA is clarifying that the burden to prove eligibility is on the small business applying for certification into the program. Finally, SBA is proposing to amend the regulation to state that SBA will process the application within 90 days, if practicable, to more accurately reflect the amount of time it takes to process a HUBZone

application along with all of the documents needed to verify eligibility and to make that process consistent with the 8(a) BD application process.

Reconsideration of Decisions of SBA's OHA (13 CFR 134.227).

The proposed rule would add clarifying language to § 134.227(c) to permit SBA to file a request for reconsideration in an OHA proceeding in which it has not previously participated. This provision alters the rule expressed in Size Appeal of Goel Services, Inc. and Grunley/Goel JVD LLC, SBA No. SIZ-5356 (2012), which held SBA could not request reconsideration where SBA did not appear as a party in the original appeal.

Administrative Record in 8(a) Appeals (13 CFR 134.406).

The proposed rule incorporates language from a line of OHA cases regarding SBA 8(a) decisions and the administrative record. In reviewing 8(a) cases on appeal, SBA's regulations require the Administrative Law Judge to review SBA's decision to determine whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is reasonable, the Administrative Law Judge must uphold it on appeal. OHA cases have stated that so long as SBA's path of reasoning may reasonably be discerned, OHA will uphold a decision of less than ideal clarity. See, e.g., Matter of Alloy Specialties, Inc., No. SDBA-108 at 6 (1999). The proposed rule would include this language in the regulatory text of § 134.406 in order to more fully apprise the public how OHA must review an 8(a) case on appeal.

Compliance With Executive Orders 12866, 13563, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).
Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for purposes of Executive Order 12866.

Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

The proposed regulations implement section 1347(b)(3) of the Small Business Jobs Act of 2010, Pub. L. 111-240, 124 Stat. 2504, which authorizes the Agency to establish mentor-protégé programs for SDVO SBCs, HUBZone SBCs, and WOSB concerns, modeled on the Agency's mentor-protégé program for small business concerns participating in programs under section 8(a) of the Small Business Act (15 U.S.C. 637(a)). In addition, the proposed rule implements section 1641 of the NDAA, Public Law 112-239, which authorized SBA to establish a mentor-protégé program for all small business concerns. SBA is also updating its rules to clarify areas where small business concerns may have been confused or where OHA's interpretations of SBA rules do not conform to SBA's interpretation or intent.

2. What are the alternatives to this rule?

As noted above in the supplementary information, this rule proposes to implement the Jobs Act and NDAA authorities by creating one new mentor-protégé program for which any small business could participate instead of implementing four new separate small business mentor-protégé programs (i.e., having a separate mentor-protégé program for SDVO SBCs, HUBZone SBCs, WOSB concerns, and all other small business concerns, in addition to the current mentor-protégé program for 8(a) BD Participants).

SBA proposed one program for all small businesses because SBA believed it would be easier for the small business and acquisition communities to use and understand. The statutory authority for this rule specifically mandates that the new mentor-protégé programs be modeled on the existing mentor-protégé program for small business concerns participating in the 8(a) BD program. Thus, to the extent practicable, SBA attempted to adopt the regulations governing the 8(a) mentor-protégé program in establishing the mentor-protégé program for SBCs.

3. What are the potential benefits and costs of this regulatory action?

The proposed regulatory action would enhance the ability of small business concerns to obtain larger prime contracts that would be normally out of the reach of these businesses. The proposed small business mentor-protégé program would allow all small businesses to tap into the expertise and capital of larger firms, which in turn would help small business concerns become more knowledgeable, stable, and competitive in the Federal procurement arena.

SBA estimates that under the proposed rule, approximately 2,000 SBCs, could become active in the proposed mentor-protégé program, and protégé firms may obtain Federal contracts totaling possibly \$2 billion per year. SBA notes that these estimates represent an extrapolation from data on the percentage of 8(a) BD program participants with signed mentor-protégé agreements and joint venture agreements, and are based on the dollars awarded to SBCs in FY 2012 according to data retrieved from the Federal Procurement Data System – Next Generation (FPDS–NG). With SBCs able to compete for larger contracts and thus a greater number of contracts in general, Federal agencies may choose to set aside more contracts for competition among small businesses, SDVO

SBCs, HUBZone SBCs, and WOSB concerns, rather than using full and open competition. The movement from unrestricted to set-aside contracting might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. The added competition for many of these procurements could result in lower prices to the Government for procurements reserved for SBCs, HUBZone SBCs, WOSB concerns, and SDVO SBCs, although SBA cannot quantify this benefit. To the extent that more than two thousand SBCs could become active in the proposed mentor-protégé program, this might entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities.

The proposed mentor-protégé program may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty the actual outcome of the gains and losses among small and large businesses, it can identify several probable impacts. There may be a transfer of some Federal contracts from large businesses to SBC protégés. Large businesses may have fewer Federal prime contract opportunities as Federal agencies decide to set aside more Federal contracts for SBCs, SDVO SBCs, HUBZone SBCs, and WOSB concerns. In addition, some Federal contracts may be awarded to HUBZone protégés instead of large businesses since these firms may be eligible for an evaluation adjustment for contracts when they compete on a full and open basis. This transfer may be offset by a greater number of contracts being set aside for small businesses, SDVO SBCs, HUBZone SBCs, and WOSB concerns. SBA cannot estimate the potential distributional impacts of these transfers with any degree of precision.

The proposed mentor-protégé program is consistent with SBA’s statutory mandate to assist small businesses, and this regulatory action promotes the Administration’s objectives. One of SBA’s goals in support of the Administration’s objectives is to help individual small businesses, including SDVO SBCs, HUBZone SBCs, and WOSB concerns, succeed through fair and equitable access to capital and credit, Federal contracts, and management and technical assistance.

Executive Order 13563

A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, is included above in the Regulatory Impact Analysis under

Executive Order 12866

In an effort to engage interested parties in this action, SBA met with representatives from various agencies to obtain their feedback on SBA’s proposed mentor-protégé program. For example, SBA participated in a government-wide meeting involving Office of Small and Disadvantaged Business Utilization (OSDBU) representatives responsible for mentor-protégé programs in their respective agencies. It was generally agreed upon that SBA’s proposed mentor-protégé program would complement the already existing Federal programs due in part to the differing incentives offered to the mentors under the various programs. SBA also presented proposed small business mentor-protégé programs to businesses in thirteen cities in the U.S. and sought their input as part of the Jobs Act tours. In developing this proposed rule, SBA considered all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in sections 3(a) and 3(b)(2) of that Executive Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this proposed rule would impose new reporting requirements. These proposed collections of information include the following: (1) Information necessary for SBA to evaluate the success of a mentor-protégé relationship; (2) information necessary for SBA to determine whether a prospective mentor possesses a good financial condition (i.e., whether the mentor is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement); (3) information necessary for SBA to evaluate compliance with performance of work requirements; and (4) information detailing the proposed relationship between the mentor and protégé.

Finally, the proposed rule also amends an existing information collection (SBA Form 1450, 8(a) Annual Update – OMB Control Number 3245-0205) by making a minor change to the benefits reporting schedule from the time of an 8(a) Participant’s annual review submission to when the Participant submits its financial statement as required by § 124.602; specifically, within 120 days after the close of the Participant’s fiscal year. There are no substantive changes to the information to be submitted.

The title, summary of each information collection, description of respondents, and an estimate of the reporting burden are discussed below. Included in the estimate is the time for reviewing instructions, searching existing data needed, and completing and reviewing each collection of information.

1. Title and Description: Mentor-protégé annual report [Form number to be determined]. Protégés participating in the proposed small business mentor-protégé program would be required to submit to SBA annual reports on their mentor-protégé relationships. The information to be included in these annual reports is the same type of information that is currently required of protégés participating in SBA’s 8(a) Business Development program, and as such would be modeled on the mentor-protégé annual reporting requirements in Attachment B of SBA Form 1450 (OMB Control Number 3245-0205). Such information includes identification of the technical, management and/or financial assistance provided by mentors to protégés; and a description of how that assistance has impacted the development of the protégés.

Need and Purpose: This information collection is necessary for SBA to, among other things, evaluate whether and to what extent the protégés are benefiting from the relationship and determine whether to approve the continuation of the mentor-protégé

agreement or take other actions as necessary to protect against fraud, waste, or abuse in SBA's mentor-protégé programs.

OMB Control Number: New Collection

Description of and Estimated Number of Respondents: This information will be collected from small business protégés pursuant to proposed § 125.9(g). SBA estimates this number to be 2,000.

Estimated Response Time: 2 hours.

Total Estimated Annual Hour Burden: 4,000.

2. Title and Description: Mentor financial information [Form number to be determined]. The proposed rule requires concerns seeking to benefit from the proposed small business mentor-protégé program as mentors to submit to SBA information to demonstrate that they possess a good financial condition, including either copies of Federal tax returns or audited financial statements, or, if applicable, filings required by the Securities and Exchange Commission.

Need and Purpose: The information requested is necessary for SBA to determine whether prospective mentors are in good financial condition and capable of providing assistance to protégés and enhance their ability to successfully compete for Federal contracts. SBA believes that any additional burden imposed by this requirement would be minimal since the firms would maintain the information in their general course of business.

OMB Control Number: New Collection

Description of and Estimated Number of Respondents: Pursuant to proposed § 125.9(b)(2), this information will be collected from concerns seeking to benefit as

mentors from SBA's mentor-protégé programs under proposed § 125.9. SBA estimates this number to be 600.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 600.

3. Title and Description: Joint venture performance of work report [Form number to be determined]. The proposed rule imposes a requirement on SBC joint venture partners to submit to SBA annually performance of work reports demonstrating their compliance with performance of work requirements. SBA requests comments addressing possible formats with which the information should be transmitted to SBA.

Need and Purpose: This requirement will greatly enhance SBA's ability to monitor compliance with performance of work requirements in its effort to reduce fraud, waste, and abuse. SBA believes that any additional burden imposed by this recordkeeping requirement would be minimal because firms are already required to track their compliance with the performance of work requirements.

OMB Control Number: New Collection

Description and Estimated Number of Respondents: This information will be collected from SBC, SDVO SBC, HUBZone SBC, and WOSB joint venture partners under proposed § 125.8(h), § 125.18(b), proposed § 126.616(i), and proposed § 127.506(j). SBA estimates this number to be 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 2,000.

4. Title and Description: Mentor-protégé agreement [no SBA form number]. As proposed, the agreement between a mentor and protégé would include an assessment of

the protégé's needs and goals; a description of the how the mentor intends to assist protégé in meeting its goals; and the timeline for delivery of such assistance.

Need and Purpose: The agreement must be submitted to SBA for review and approval, to help the Agency to determine whether the proposed assistance would enhance the development of the protégé and not merely further the interest of the mentor. The information would also be beneficial to SBA's efforts to reduce fraud, waste, and abuse in federal contracting programs.

OMB Control Number: New Collection

Description and Estimated Number of Respondents: This information will be collected from small business protégés pursuant to proposed § 125.9(e). SBA estimates this number to be 2,000.

Estimated Response Time: 1 hour.

Total Estimated Annual Hour Burden: 2,000.

SBA requests comments on how these requirements could best be implemented without imposing an undue burden on firms that wish to participate in SBA's small business mentor-protégé program. In addition, SBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of SBA's functions, including whether the information will have a practical utility; (2) the accuracy of SBA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Regulatory Flexibility Act 5 U.S.C., 601-612

Under the Regulatory Flexibility Act (RFA), this proposed rule may have a significant impact on a substantial number of small businesses. Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) addressing the impact of the proposed rule in accordance with section 603, Title 5, of the United States Code. The IRFA examines the objectives and legal basis for this proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this proposed rule; and whether there are any significant alternatives to this proposed rule.

1. What are the need for and objective of the rule?

This proposed regulatory action would implement section 1347(b)(3) of the Small Business Jobs Act of 2010, Public Law 111-240, and section 1641 of the National Defense Authorization Act for Fiscal Year 2013 (NDAA), Public Law 112-239. As discussed above, the Small Business Jobs Act tasked the Agency with establishing mentor-protégé programs for SDVO SBCs, HUBZone SBCs, and WOSB concerns, modeled on the Agency's mentor-protégé program for small business concerns participating in programs under section 8(a) of the Small Business Act (13 U.S.C. 637(a)), commonly known as the 8(a) Business Development program. Similarly, section 1641 of NDAA authorized SBA to establish a mentor-protégé program for all small business concerns that is identical to the 8(a) BD mentor-protégé program, except that SBA may modify the program to the extent necessary given the types of small business concerns included as protégés.

2. What are SBA's description and estimate of the number of small entities to which the rule will apply?

If the proposed rule is adopted in its present form, the rule would be applicable to all small business concerns participating in the Federal procurement market that seek to form mentor/protégé relationships. SBA estimates this number to be between twenty and thirty thousand, which represents between five and nine percent of total firms in the small business community, based on the number of small business concerns listed in the Dynamic Small Business Search database.

3. What are the projected reporting, recordkeeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

The proposed rule imposes the following reporting and recordkeeping requirements: (1) information necessary for SBA to evaluate the success of a mentor-protégé relationship; (2) information necessary for SBA to determine whether a prospective mentor possesses a good financial condition; and (3) information necessary for SBA to evaluate compliance with performance of work requirements. SDVO SBC, HUBZone SBC, and WOSB joint venture partners would be required to submit to SBA performance of work reports demonstrating their compliance with performance of work requirements. SBA estimates this number to be approximately 2,000.

The Paperwork Reduction Act requirements are addressed further above. SBA welcomes any comments on the requirements described.

4. What are the relevant Federal rules which may duplicate, overlap or conflict with the rule?

Thirteen Federal agencies, including SBA, currently offer mentor-protégé programs aimed at assisting small businesses to gain the technical and business skills necessary to successfully compete in the Federal procurement market. While the mentor-protégé programs offered by other agencies share SBA's goal of increasing the participation of small businesses in Government contracts, the other Federal mentor-protégé programs are structured differently than SBA's proposed mentor-protégé programs, particularly in terms of the incentives offered to mentors. For example, some agencies offer additional points to a bidder who has a signed mentor-protégé agreement in place, while other agencies offer the benefit of reimbursing mentors for certain costs associated with protégés' business development. SBA, as the agency authorized to determine small business size status, is uniquely qualified to offer mentor-protégé program participants the distinctive benefit of an exclusion from affiliation. Thus, SBA believes that the small business mentor-protégé program proposed by this rule would complement rather than duplicate, overlap or conflict with the existing Federal mentor-protégé programs by offering to small businesses an additional and unique avenue through which to enhance their Federal procurement capabilities.

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

Section 1347(b)(3) of the Jobs Act authorizes SBA to establish mentor-protégé programs for SDVO SBCs, HUBZone SBCs, and WOSB concerns, modeled on the Agency's mentor-protégé program for small business concerns participating in the 8(a) BD program. Section 1641 of the NDAA authorized SBA to establish a mentor-protégé program for all small business concerns. An alternative to implementing one small

business mentor-protégé program would be to implement the various mentor-protégé programs separately in each of the specific substantive area regulations (i.e., SDVO, HUBZone, WOSB, 8(a), and small business).

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Individuals with disabilities, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 124

Administrative practice and procedures, Government procurement, Hawaiian natives, Indians – business and finance, Minority businesses, Reporting and Recordkeeping requirements, Tribally-owned concerns, Technical assistance.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Organization and functions (Government agencies).

For the reasons set forth in the preamble, SBA proposes to amend 13 CFR parts 121, 124, 125, 126, 127, and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 662, and 694a(9).

2. Amend § 121.103 by revising paragraphs **(b)(2)(ii)**, (b)(6), the last two sentences of the introductory text of paragraph (h), and paragraph (h)(3)(ii) to read as follows.

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(2) * * *

(ii) Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

(A) Common administrative services which are subject to the exception to affiliation include, bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance

or management and can be reasonably pooled or otherwise performed by a holding company or parent entity without interfering with the control of the subject firm.

(B) Contract administration services include both services that could be considered “common administrative services” under the exception to affiliation and those that could not.

(1) Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not shared common administrative services, and would include tasks or functions such as negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing of employees, and overall responsibility for the day-to-day and overall project and contract completion.

(2) Contract administration services that are administrative in nature may constitute administrative services that can be shared, and would fall within the exception to affiliation. These administrative services include tasks such as record retention not related to a specific contract (e.g., employee time and attendance records), maintenance of databases for awarded contracts, monitoring for regulatory compliance, template development, and assisting accounting with invoice preparation as needed.

(C) Business development may include both services that could be considered “common administrative services” under the exception to affiliation and those that could not. Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered “common administrative services” under the exception to affiliation. However, at some point the opportunity identified by the holding company’s or parent entity’s business development

efforts becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity. At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer. This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be involved in preparing an offer. They may be involved in assisting with preparing the generic part of an offer, but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer. In addition, once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should not be performed at a holding company or parent entity level.

* * * * *

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 124.520 or § 125.9 of this chapter is not affiliated with its mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. Similarly, a protégé firm is not affiliated with its mentor solely because the protégé firm receives assistance from the mentor under a federal mentor-protégé program where an exception to affiliation is specifically authorized by statute or by SBA under the procedures set forth in § 121.903. Affiliation may be found in either case for other reasons as set forth in this section.

* * * * *

(h) * * * For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture: must be in writing and must do business under its own name; may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (i.e., the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(5) of this section.

* * * * *

(3) * * *

(ii) Two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.

* * * * *

§ 121.406 [Amended]

3. Amend § 121.406(b)(5) introductory text by removing the phrase “paragraph (b)(1)(iii)” and adding in its place the phrase “paragraph (b)(1)(iv).”

4. Amend § 121.1001 by redesignating paragraph (b)(10) as paragraph (b)(11) and by adding a new paragraph (b)(10) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

* * * * *

(b) * * *

(10) A firm seeking to establish a mentor-protégé relationship pursuant to § 125.9 of this chapter (based on its status as a small business for its primary NAICS code) may request a formal size determination in order to verify its eligibility as a protégé firm.

* * * * *

**PART 124—8(A) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED
BUSINESS STATUS DETERMINATIONS**

5. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), and 637(d); Pub. L. 99-661; Pub. L. 100-656, sec. 1207; Pub. L. 101-37; Pub. L. 101-574, section 8021; Pub. L. 108-87; and 42 U.S.C. 9815.

6. Amend § 124.103 as follows:

- a. Add a sentence at the end of paragraph (c)(1);
- b. Revise paragraph (c)(2)(ii);
- c. Redesignate paragraph (c)(2)(iii) as (c)(2)(iv);
- d. Add a new paragraph (c)(2)(iii);
- e. Revise the introductory text of newly redesignated paragraph (c)(2)(iv); and
- d. Add paragraphs (c)(3) through (6).

The additions and revisions read as follows:

§ 124.103 Who is socially disadvantaged?

* * * * *

(c) *** (1) *** Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

(2) * * *

(ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;

(iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and

(iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history (including experiences relating to both the applicant firm and any other previous firm owned and/or controlled by the individual), where applicable.

* * * * *

(3) An individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world.

(i) Each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.

(ii) SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground.

Example 1 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because he had superior qualifications or because he had greater responsibilities in his employment position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

Example 2 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company Y, she was not permitted to attend a professional development conference, even though male employees were allowed to attend similar conferences in the past. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. It is no more likely that she was not permitted to attend the conference based on gender bias than based on non-discriminatory reasons. She must identify that she was in the same professional position and level as the male employees who were permitted to attend similar conferences in the past, and she must identify that funding for training or professional development was available at the time she requested to attend the conference.

(iii) SBA may disregard a claim of social disadvantage where an individual presents evidence of discriminatory conduct, but fails to connect the discriminatory conduct to consequences that negatively impact his or her entry into or advancement in the business world.

Example to paragraph (c)(3)(iii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She provides instances where one or more male business clients utter derogatory statements about her because she is a woman. After each instance, however, she acknowledges that the clients gave her contracts or otherwise continued to do business with her. Despite

suffering discriminatory conduct, this individual has not established social disadvantage because the discriminatory conduct did not have an adverse effect on her business.

(4) SBA may request an applicant to provide additional facts to support his or her claim of social disadvantage to substantiate that a negative outcome was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons.

(5) SBA will discount or disbelieve statements made by an individual seeking to establish his or her individual social disadvantage where such statements are inconsistent with other evidence contained in the record.

(6) In determining whether an individual claiming social disadvantage meets the requirements set forth in paragraph (c) of this section, SBA will determine whether:

(i) Each specific claim establishes an incident of bias or discriminatory conduct;

(ii) Each incident of bias or discriminatory conduct negatively impacted the individual's entry into or advancement in the business world; and

(iii) In the totality, the incidents of bias or discriminatory conduct that negatively impacted the individual's entry into or advancement in the business world establish chronic and substantial social disadvantage.

* * * * *

7. Amend § 124.105 by revising the introductory text of paragraph (h)(2) to read as follows:

§ 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?

* * * * *

(h) ***

(2) A non-Participant concern in the same or similar line of business or a principal of such concern may not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in the transitional stage of the program, except that a former Participant in the same or similar line of business or a principal of such a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§ 124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant.

* * * * *

§ 124.108 [Amended]

8. Amend § 124.108 by removing “10 percent” in paragraph (a)(4) and adding in its place “20 percent.”

9. Amend § 124.109 by adding paragraphs (c)(2)(iv) and (c)(4)(iii) to read as follows:

§ 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to the 8(a) BD program?

* * * * *

(c) * * *

(2) * * *

(iv) In determining whether a tribally-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will

examine the firm's participation in the relevant six digit NAICS code nationally as compared to the overall small business share of that industry.

(A) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(B) SBA does not contemplate a finding of affiliation where a tribally-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

* * * * *

(4) * * *

(iii) The individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time.

(A) An individual's officer position, membership on the board of directors or position as a tribal leader does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.

(B) Officers, board members, and/or tribal leaders may control a holding company overseeing several tribally-owned or ANC-owned companies, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.

* * * * *

10. Amend § 124.110 as follows:
 - a. Add a sentence to the end of the introductory text of paragraph (b);
 - b. Add paragraphs (b)(1) and (2);
 - c. Revise paragraph (d);
 - d. Redesignate paragraph (g) as paragraph (h); and
 - e. Add a new paragraph (g).

The additions and revisions read as follows:

§ 124.110 Do Native Hawaiian Organizations have any special rules for applying to the 8(a) BD program?

* * * * *

(b) * * * In determining whether an NHO-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where an NHO-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

* * * * *

(d) An NHO must control the applicant or Participant firm. To establish that it is controlled by an NHO, an applicant or Participant must demonstrate that the NHO controls its board of directors, managing members, managers or managing partners.

(1) The NHO need not possess the technical expertise necessary to run the NHO-owned applicant or Participant firm. The NHO must have managerial experience of the extent and complexity needed to run the concern. Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant.

(2) An individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage.

* * * * *

(g) An NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the individual eligibility of the NHO's members, directors, or managers.

(1) The eligibility of an NHO-owned concern is not affected by the former 8(a) BD participation of one or more of the NHO's individual members.

(2) In determining whether an NHO is economically disadvantaged, SBA may consider the individual economic status of an NHO member or director even if the member or director previously used his or her disadvantaged status to qualify an individually owned 8(a) applicant or Participant.

* * * * *

11. Amend § 124.111 by adding a sentence to the end of the introductory text of paragraph (c), and by adding paragraphs (c)(1) and (2) to read as follows:

§ 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to the 8(a) BD program?

* * * * *

(c) * * * In determining whether a CDC-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where a CDC-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

* * * * *

12. Amend § 124.112 by designating the text of paragraph (e) as paragraph (e)(1), and adding paragraph (e)(2) to read as follows:

§ 124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

* * * * *

(e) Change in primary industry classification. (1) * * *

(2) SBA may change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. As part of its

annual review, SBA will consider whether the primary NAICS code contained in a Participant's business plan continues to be appropriate.

(i) Where SBA believes that the primary industry classification contained in a Participant's business plan does not match the Participant's actual revenues over the Participant's most recently completed three fiscal years, SBA may notify the Participant of its intent to change the Participant's primary industry classification.

(ii) A Participant may challenge SBA's intent to change its primary industry classification by demonstrating why it believes the primary industry classification contained in its business plan continues to be appropriate, despite an increase in revenues in a secondary NAICS code beyond those received in its designated primary industry classification.

* * * * *

13. Amend § 124.305 by removing the “.” at the end of paragraph (h)(1)(ii) and adding in its place “; or”, adding paragraphs (h)(1)(iii) and (h)(1)(iv), designating paragraph (h)(5) as (h)(6) and adding a new paragraph (h)(5) to read as follows:

§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

* * * * *

(h)(1) * * *

(iii) A Participant has a principal place of business located in a Federally declared disaster area and elects to suspend its participation in the 8(a) BD program for a period of up to one-year from the date of the disaster declaration to allow the firm to recover from the disaster and take full advantage of the program. A Participant that

elects to be suspended may request that the suspension be lifted prior to the end date of the original request; or

(iv) Federal appropriations for one or more federal departments or agencies have lapsed, SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant, award is pending, and the Participant elects to suspend its participation in the 8(a) BD program during the lapse in federal appropriations.

* * * * *

(5) Where a Participant is suspended pursuant to (h)(1)(iv) of this section, the Participant must notify SBA when the lapse in appropriation ends so that SBA can immediately lift the suspension. When the suspension is lift, the length of the suspension will be added to the concern's program term.

* * * * *

14. Amend § 124.501 by revising the first sentence of paragraph (a) and by adding two sentences to the end of paragraph (b) to read as follows:

§ 124.501 What general provisions apply to the award of 8(a) contracts?

(a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal agencies regardless of the place of performance, including contracts to furnish equipment, supplies, services, leased real property, or materials to them or to perform construction work for them, and to contract the performance of these contracts to qualified Participants. * * *

(b) * * * In addition, for multiple award contracts not set-aside for the 8(a) BD program, a procuring agency may set-aside specific orders to be competed only among eligible 8(a) Participants, regardless of the place of performance. Such an order may be

awarded as an 8(a) award where the order was offered to and accepted by SBA as an 8(a) award and the order specifies that the performance of work and/or non-manufacturer rule requirements apply as appropriate.

* * * * *

15. Amend § 124.513 as follows:

- a. Add paragraph (b)(4);
- b. Revise paragraphs (c)(2), (d) and (e)(1);
- c. Add paragraphs (e)(2)(iii) and (e)(3);
- d. Redesignate paragraphs (f), (g), (h) and (i) as paragraphs (g), (h), (i) and (k), respectively;
- e. Add new paragraph (f);
- f. Revise newly redesignated paragraphs (g) and (i); and
- g. Add paragraph (j) and (l).

The additions and revisions read as follows:

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

* * * * *

(b) * * *

(4) SBA approval of a joint venture agreement pursuant to paragraph (e) of this section does not equate to a formal size determination. As such, despite SBA's approval of a joint venture, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be protested pursuant to § 121.1001(a)(2) of this chapter. See § 124.517(b).

(c) * * *

(2) Designating an 8(a) Participant as the managing venturer of the joint venture and an employee of an 8(a) Participant as the project manager responsible for performance of the contract.

* * * * *

(d) Performance of work. (1) For any 8(a) contract, including those between a protégé and a mentor authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510 of this chapter.

(2) The 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the 8(a) partner(s) to a joint venture must be more than administrative or ministerial functions so that the 8(a) partners gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(e) * * * (1) SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. A Participant may submit a joint venture agreement to SBA for approval at any time, whether or not in connection with a specific 8(a) procurement.

(2) * * *

(iii) If a second or third contract to be awarded a joint venture is not an 8(a) contract, the Participant would not have to submit an addendum setting forth contract performance for the non-8(a) contract(s) to SBA for approval.

(3) Where a joint venture has been established and approved by SBA without a corresponding specific 8(a) contract award (including where a joint venture is established in connection with a blanket purchase agreement (BPA), basic agreement (BA), or basic ordering agreement (BOA)), the Participant must submit an addendum to the joint venture agreement, setting forth the performance requirements, to SBA for approval for each of the three 8(a) contracts authorized to be awarded to the joint venture. In the case of a BPA, BA or BOA, each order issued under the agreement would count as a separate contract award, and SBA would need to approve the addendum for each order prior to award of the order to the joint venture.

(f) Past performance. When evaluating the past performance of an entity submitting an offer for an 8(a) contract as a joint venture approved by SBA pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(g) Contract execution. Where SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award as one to an 8(a) joint venture or an 8(a) mentor-protégé joint venture, as appropriate.

* * * * *

(i) Inspection of records. The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General,

during normal business hours, access to its files to inspect and copy all records and documents.

(j) Certification of compliance. Prior to the performance of any 8(a) contract by a joint venture, the 8(a) BD Participant to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(iii) The parties have obtained SBA's approval of the joint venture agreement and any addendum to that agreement and that there have been no modifications to the agreement that SBA has not approved.

* * * * *

(l) Basis for suspension or debarment. The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (i) of this section.

16. Amend § 124.520 as follows:

a. Remove the words “or non-profit entity” from the first sentence of the introductory text of paragraph (b) and from the second sentence of paragraph (b)(2);

b. Revise the last sentence of paragraph (b)(2);

c. Revise paragraph (c)(1);

d. Revise paragraph (d)(1)(iii);

e. Redesignate paragraphs (e)(2) through(e)(5) as paragraphs (e)(3) through (e)(6), respectively; and

f. Add a new paragraph (e)(2) and add paragraphs (e)(7), and (e)(8).

The revisions and additions read as follows:

§ 124.520 What are the rules governing SBA’s 8(a) mentor-protégé program?

* * * * *

(b) * * *

(2) * * * Under no circumstances will a mentor be permitted to have more than three protégés at one time in the aggregate under the mentor-protégé programs authorized by §§ 124.520 and 125.9 of this chapter.

* * * * *

* * * * *

(c) * * * (1) In order to initially qualify as a protégé firm, a concern must:

(i) Qualify as small for the size standard corresponding to its primary NAICS code; and

(ii) Demonstrate how the business development assistance to be received through its proposed mentor-protégé relationship would advance the goals and objectives set forth in its business plan.

* * * * *

(d) * * *

(1) * * *

(iii) Once a protégé firm graduates or otherwise leaves the 8(a) BD program or grows to be other than small for its primary NAICS code, it will not be eligible for any further 8(a) contracting benefits from its 8(a) BD mentor-protégé relationship. Leaving the 8(a) BD program, growing to be other than small for its primary NAICS code, or terminating the mentor-protégé relationship while a protégé is still in the program, does not, however, generally affect contracts previously awarded to a joint venture between the protégé and its mentor. A protégé firm that graduates or otherwise leaves the 8(a) BD program but continues to qualify as a small business may transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship.

(A) A joint venture between a protégé firm that continues to qualify as small and its mentor may certify its status as small for any Government contract or subcontract so long as the protégé (and/or the joint venture) has not been determined to be other than small for the size standard corresponding to the procurement at issue (or any lessor size standard).

(B) Where the protégé firm no longer qualifies as small, the receipts and/or employees of the protégé and mentor would generally be aggregated in determining the size of any joint venture between the mentor and protégé after that date.

(C) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(D) For contracts with durations of more than five years (including options), where size re-certification is required no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé firm no longer qualifies as small for its primary NAICS code, the joint venture must aggregate the receipts/employees of the partners to the joint venture in determining whether it continues to qualify as and can re-certify itself to be a small business under the size standard corresponding to the NAICS code assigned to that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

* * * * *

(e) * * *

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA. The 8(a) BD mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is

different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

* * * * *

(7) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégé agreement and certifies that it will continue to abide by its terms.

(8) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not benefiting from the relationship or that the parties are not complying with any term or condition of the mentor protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

* * * * *

§ 124.604 [Amended]

17. Amend § 124.604 by removing the phrase “annual review submission” and adding in its place the phrase “annual financial statement submission (see § 124.602)” in the first sentence.

§ 124.520 [Amended]

18. Amend § 124.1002 by removing paragraph (b)(4).

PART 125—GOVERNMENT CONTRACTING PROGRAMS

19. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644; 657f; 657r; Pub. L. 111-240, 124 Stat. 2504.

20. Amend § 125.2 by revising the third sentence of the introductory text to paragraph (a) to read as follows:

§ 125.2 What are SBA’s and the procuring agency’s responsibilities when providing contracting assistance to small businesses?

(a) General. * * * Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, any contract for the sale of Government property, or any contract resulting from a reverse auction, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of: * * *

* * * * *

21. Amend § 125.5 by revising the second and third sentences of paragraph (a)(1) to read as follows:

§ 125.5 What is the Certificate of Competency Program?

(a) General. (1) * * * A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract, including any contract deriving from a reverse auction. The COC Program is applicable to all Government procurement actions, including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award.

* * *

* * * * *

§ 125.6 [Amended]

22. Amend § 125.6 by removing “§ 125.15” from the introductory text of paragraph (b) and adding in its place “§ 125.18”, and by removing “§ 125.15(b)(3)” from paragraph (b)(5) and adding in its place “§ 125.18(b)(3)”.

§§ 125.8 through 125.30 [Redesignated as §§ 125.11 through 125.33]

23. Amend part 125 by redesignating §§ 125.8 through 125.30 as §§ 125.11 through 125.33, respectively.

24. Add new §§ 125.8, 125.9 and 125.10 to the undesignated sections preceding Subpart A to read as follows:

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

(a) General. A joint venture may qualify as a small business as long as the partners to the joint venture in the aggregate meet the applicable size standard or qualify as small under one of the exceptions to affiliation set forth in § 121.103(h)(3) of this chapter.

(b) Contents of joint venture agreement. (1) A joint venture agreement between two or more entities that individually qualify as small need not be in any specific form or contain any specific conditions in order for the joint venture to qualify as a small business.

(2) Any joint venture agreement to perform a contract set aside or reserved for small business between a protégé small business and a mentor authorized by § 125.9 or § 124.520 of this chapter must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating a small business as the managing venturer of the joint venture, and an employee of the small business managing venturer as the project manager responsible for performance of the contract;

(iii) Stating that with respect to a separate legal entity joint venture, the small business must own at least 51% of the joint venture entity;

(iv) Stating that the small business must receive profits from the joint venture commensurate with the work performed by the small business, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a contract set aside or reserved for small business will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the small business partner to the joint venture will meet the performance of work requirements set forth in paragraph (c) of this section;

(viii) Obligating all parties to the joint venture to ensure performance of a contract set aside or reserved for small business and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the small business managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the small business managing venturer upon completion of any contract set aside or reserved for small business that was performed by the joint venture;

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(c) Performance of work. (1) For any contract set aside or reserved for small business that is to be performed by a joint venture between a small business protégé and its SBA-approved mentor authorized by § 125.9, the joint venture must perform the applicable percentage of work required by § 125.6, and the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture.

(2) The work performed by the small business partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(3) The amount of work done by the partners will be aggregated and the work done by the small business protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a small business protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(d) Certification of compliance. Prior to the performance of any contract set aside or reserved for small business by a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (b) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (c) of this section.

(e) Past performance. When evaluating the past performance of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(f) Contract execution. The procuring activity will execute a contract set aside or reserved for small business in the name of the joint venture entity or a small business partner to the joint venture, but in either case will identify the award as one to a small business joint venture or a small business mentor-protégé joint venture, as appropriate.

(g) Inspection of records. The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents.

(h) Performance of work reports. In connection with any contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner must describe how it is meeting or has met the applicable performance of work requirements for each contract set aside or reserved for small business that it performs as a joint venture.

(1) The small business partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each contract set aside or reserved for small business that is performed during the year.

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of

work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

(i) Basis for suspension or debarment. For any joint venture between a protégé small business and a mentor authorized by § 125.9, the Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (b) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (c) of this section; or

(3) Failure to submit the certification required by paragraph (d) of this section or comply with paragraph (g) of this section.

(j) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

§ 125.9 What are the rules governing SBA's small business mentor-protégé program?

(a) General. The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or

loans; subcontracts; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set-aside or reserved for small business so that protégé firms may more fully develop their capabilities.

(b) Mentors. Any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Possesses a good financial condition;

(ii) Possesses good character;

(iii) Does not appear on the federal list of debarred or suspended contractors; and

(iv) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) In order to demonstrate that it possesses a good financial condition, a firm seeking to be a mentor must submit to the SBA copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns, the filings required by the Securities and Exchange Commission (SEC), for the past three years.

(3) Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position.

(4) Generally, a mentor will have no more than one protégé at a time. However, the Director of Government Contracting (D/GC), or designee, may authorize a concern to

mentor more than one protégé at a time where it can demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm (e.g., the second firm may not be a competitor of the first firm). Under no circumstances will a mentor be permitted to have more than three protégés at one time in the aggregate under the mentor-protégé programs authorized by §§ 124.520 and 125.9 of this chapter.

(c) Protégés. (1) In order to initially qualify as a protégé firm, a concern must qualify as small for the size standard corresponding to its primary NAICS code. SBA will verify that a firm qualifies as a small business under its primary NAICS code before approving that firm to act as a protégé. This verification may take place either as part of a firm's request for participation in the small business mentor-protégé program, or as part of a size protest determination relating to the size standard corresponding to the NAICS code for its primary NAICS code prior to that time.

(i) Where SBA has previously found the firm to qualify as small pursuant to a size protest relating to the size standard corresponding to the NAICS code for its primary NAICS code (or with respect to a size standard that is smaller than that associated with its primary NAICS code), the firm must certify that there has been no change in its size status since that determination.

(ii) Where SBA has not previously found the firm to qualify as small pursuant to a size protest relating to the size standard corresponding to the NAICS code for its primary NAICS code (or with respect to a size standard that is smaller than that associated with its primary NAICS code), the firm must request a formal size determination pursuant to § 121.1001(b)(10) of this chapter.

(2) A protégé firm may generally have only one mentor at a time. The D/GC, or designee, may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the assistance set forth in the first mentor-protégé relationship and:

(i) The second relationship pertains to an unrelated NAICS code; or

(ii) The protégé firm is seeking to acquire a specific expertise that the first mentor does not possess.

(3) A protégé may not become a mentor and retain its protégé status. The protégé must terminate the mentor-protégé agreement with its mentor before it will be approved as a mentor to another small business concern.

(4) SBA may examine the Service Disabled Veteran Owned status or Women Owned Small Business status of an applicant concern that claims such status in any Federal procurement database.

(d) Benefits. (1) A protégé and mentor may joint venture as a small business for any government prime contract or subcontract, provided the protégé qualifies as small for the procurement. Such a joint venture may seek any type of small business contract (i.e., small business set-aside, 8(a), HUBZone, SDVO, or WOSB/EDWOSB) for which the protégé firm qualifies.

(i) SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.

(ii) In order to receive the exclusion from affiliation, the joint venture must meet the requirements set forth in § 125.8(b)(2), (c) and (d).

(iii) Once a protégé firm no longer qualifies as a small business for the size standard corresponding to its primary NAICS code, it will not be eligible for any further contracting benefits from its mentor-protégé relationship. However, a change in the protégé's size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

(A) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(B) For contracts with durations of more than five years (including options), where size re-certification is required under § 121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to its primary NAICS code, the joint venture must aggregate the receipts/employees of the partners to the joint venture in determining whether it continues to qualify as and can re-certify itself to be a small business under the size standard corresponding to the NAICS code assigned to that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

(2) In order to raise capital, the protégé firm may agree to sell or otherwise convey to the mentor an equity interest of up to 40% in the protégé firm.

(3) Notwithstanding the mentor-protégé relationship, a protégé firm may qualify for other assistance as a small business, including SBA financial assistance.

(4) No determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé agreement or any assistance provided pursuant to the agreement. However, affiliation may be found for other reasons set forth in § 121.103 of this chapter.

(e) Written agreement. (1) The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs (e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor). The mentor-protégé agreement must:

(i) Address how the assistance to be provided through the agreement will help the protégé firm meet its goals as defined in its business plan;

(ii) Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor-protégé agreement; and

(iii) Provide that the mentor will provide such assistance to the protégé firm for at least one year.

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA. The small business mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

(3) The written agreement must be approved by the D/GC or designee. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts.

(4) The agreement must provide that either the protégé or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor-protégé relationship and to SBA.

(5) SBA will review the mentor-protégé relationship annually to determine whether to approve its continuation for another year. The term of a mentor-protégé agreement may not exceed three years. A protégé may have one three-year mentor-protégé agreement with one entity and one three-year mentor-protégé agreement with another entity, or two three-year mentor-protégé agreements (successive or otherwise) with the same entity.

(6) SBA must approve all changes to a mentor-protégé agreement in advance, and any changes made to the agreement must be provided in writing. If the parties to the mentor-protégé relationship change the mentor-protégé agreement without prior approval by SBA, SBA shall terminate the mentor-protégé relationship and may also propose suspension or debarment of one or both of the firms pursuant to paragraph (h) of this section where appropriate.

(7) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the

change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégé agreement and certifies that it will continue to abide by its terms.

(8) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not benefiting from the relationship or that the parties are not complying with any term or condition of the mentor protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

(f) Decision to decline mentor-protégé relationship. (1) Where SBA declines to approve a specific mentor-protégé agreement, the protégé may request the D/GC to reconsider the Agency's initial decline decision by filing a request for reconsideration within 45 calendar days of receiving notice that its mentor-protégé agreement was declined. The protégé may revise the proposed mentor-protégé agreement and provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

(2) The D/GC, or designee, will issue a written decision within 45 calendar days of receipt of the protégé's request. The D/GC may approve the mentor-protégé agreement, deny it on the same grounds as the original decision, or deny it on other grounds.

(3) If the D/GC declines the mentor-protégé agreement solely on issues not raised in the initial decline, the protégé can ask for reconsideration as if it were an initial decline.

(4) If SBA's final decision is to decline a specific mentor-protégé agreement, the small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) Evaluating the mentor-protégé relationship. (1) Within 30 days of the anniversary of SBA's approval of the mentor-protégé agreement, the protégé must report to SBA for the preceding year:

(i) All technical and/or management assistance provided by the mentor to the protégé;

(ii) All loans to and/or equity investments made by the mentor in the protégé;

(iii) All subcontracts awarded to the protégé by the mentor, and the value of each subcontract;

(iv) All federal contracts awarded to the mentor-protégé relationship as a joint venture (designating each as a small business set-aside, small business reserve, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and

(v) A narrative describing the success such assistance has had in addressing the developmental needs of the protégé and addressing any problems encountered.

(2) The protégé must report the mentoring services it receives by category and hours.

(3) The protégé must annually certify to SBA whether there has been any change in the terms of the agreement.

(4) SBA will review the protégé's report on the mentor-protégé relationship, and may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement or that the assistance has not resulted in any material benefits or developmental gains to the protégé.

(h) Consequences of not providing assistance set forth in the mentor-protégé agreement. (1) Where SBA determines that a mentor has not provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The mentor must respond within 30 days of the notification, explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

(i) SBA will terminate the mentor-protégé agreement;

(ii) The firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement; and

(iii) SBA may recommend to the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture in order to encourage the mentor to comply with its mentor-protégé agreement. Where a protégé firm is able to independently complete performance

of any such contract, SBA may recommend to the procuring agency to authorize a substitution of the protégé firm for the joint venture.

(2) SBA may consider a mentor's failure to comply with the terms and conditions of an SBA-approved mentor-protégé agreement as a basis for debarment on the grounds, including but not limited to, that the mentor has not complied with the terms of a public agreement under 2 CFR 180.800(b).

§ 125.10 Mentor-Protégé programs of other agencies.

(a) Except as provided in paragraph (c) of this section, a Federal department or agency may not carry out a mentor-protégé program for small business unless the head of the department or agency submits a plan to the SBA Administrator for the program and the SBA Administrator approves the plan. Before starting a new mentor protégé program, the head of a department or agency must submit a plan to the SBA Administrator. Within one year of the effective date of this section, the head of a department or agency must submit a plan to the SBA for any previously existing mentor-protégé program that the department or agency seeks to continue.

(b) The SBA Administrator will approve or disapprove a plan submitted under paragraph (a) of this section based on whether the proposed program:

(1) Will assist protégés to compete for Federal prime contracts and subcontracts;
and

(2) Complies with the provisions set forth in §§ 125.9 and 124.520 of this chapter, as applicable.

(c) Paragraph (a) of this section does not apply to:

(1) Any mentor-protégé program of the Department of Defense;

(2) Any mentoring assistance provided under a Small Business Innovation Research Program or a Small Business Technology Transfer Program; and

(3) A mentor-protégé program operated by a Department or agency on January 2, 2013, for a period of one year after the effective date of this section.

(d) The head of each Federal department or agency carrying out an agency-specific mentor-protégé program must report annually to SBA:

(1) The participants (both protégé firms and their approved mentors) in its mentor-protégé program. This includes identifying the number of participants that are:

(i) Small business concerns;

(ii) Small business concerns owned and controlled by service-disabled veterans;

(iii) Small business concerns owned and controlled by socially and economically disadvantaged individuals;

(iv) Small business concerns owned and controlled by Indian tribes, Alaska Native Corporations, native Hawaiian Organizations, and Community Development Corporations; and

(v) Small business concerns owned and controlled by women;

(2) The assistance provided to small businesses through the program; and

(3) The progress of protégé firms under the program to compete for Federal prime contracts and subcontracts.

25. Amend newly redesignated § 125.18 by adding paragraph (b)(1)(iii), revising paragraphs (b)(2) through (6), and adding paragraphs (b)(7) through (10) to read as follows:

§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?

* * * * *

(b) * * *

(1) * * *

(iii) A joint venture between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor (see §§ 125.9 and 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the SDVO procurement.

(2) Contents of joint venture agreement. Every joint venture agreement to perform an SDVO contract, including those between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor (see §§ 125.9 and 124.520 of this chapter) must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the SDVO SBC managing venturer as the project manager responsible for performance of the contract;

(iii) Stating that with respect to a separate legal entity joint venture, the SDVO SBC must own at least 51% of the joint venture entity;

(iv) Stating that the SDVO SBC must receive profits from the joint venture commensurate with the work performed by the SDVO SBC, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an SDVO contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the SDVO SBC partner to the joint venture will meet the performance of work requirements set forth in paragraph (b)(3) of this section;

(viii) Obligating all parties to the joint venture to ensure performance of the SDVO contract and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the SDVO SBC managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the SDVO SBC managing venturer upon completion of the SDVO contract performed by the joint venture;

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(3) Performance of work. (i) For any SDVO contract, including those between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6.

(ii) The SDVO SBC partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(A) The work performed by the SDVO SBC partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(B) The amount of work done by the partners will be aggregated and the work done by the SDVO SBC partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-SDVO SBC partner, all work done by the non-SDVO SBC partner and any of its affiliates at any subcontracting tier will be counted.

(4) Certification of Compliance. Prior to the performance of any SDVO contract as a joint venture, the SDVO SBC partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (b)(2) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (b)(3) of this section.

(5) Past performance. When evaluating the past performance of an entity submitting an offer for an SDVO contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(6) Contract execution. The procuring activity will execute an SDVO contract in the name of the joint venture entity or the SDVO SBC, but in either case will identify the award as one to an SDVO joint venture or an SDVO mentor-protégé joint venture, as appropriate.

(7) Inspection of records. The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents.

(8) Performance of work reports. An SDVO SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each SDVO contract it performs as a joint venture.

(i) The SDVO SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements are being met.

(ii) At the completion of every SDVO contract awarded to a joint venture, the SDVO SBC partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b)(2) of this section.

(9) Basis for suspension or debarment. The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(i) Failure to enter a joint venture agreement that complies with paragraph (b)(2) of this section;

(ii) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (b)(3) of this section; or

(iii) Failure to submit the certification required by paragraph (b)(4) of this section or comply with paragraph (b)(7) of this section.

(10) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

§ 125.22 [Amended]

26. Amend newly redesignated § 125.22 by adding the phrase “, regardless of the place of performance,” in the first sentence of paragraphs (b)(1) and (b)(2)(i) after the words “for small business concerns” and before the words “when there is a reasonable expectation”.

PART 126—HUBZONE PROGRAM

27. The authority citation for part 126 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), and 657a; Pub. L. 111-240, 24 Stat. 2504.

28. Amend § 126.306 as follows:

- a. Revise paragraphs (a) and (b);
- b. Redesignate paragraphs (c) and (d) as paragraphs (f) and (g), respectively; and
- c. Add new paragraphs (c) and (d) and add paragraph (e).

The revisions and additions read as follows:

§ 126.306 How will SBA process the certification?

(a) The D/HUB or designee is authorized to approve or decline applications for certification. SBA will receive and review all applications and request supporting documents. SBA must receive all required information, supporting documents, and completed HUBZone representation before it will begin processing a concern's application. SBA will not process incomplete packages. SBA will make its determination within ninety (90) calendar days after receipt of a complete package

whenever practicable. The decision of the D/HUB or designee is the final agency decision.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the business concern or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until and at the time the D/HUB issues a decision. The decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstance occurring after it has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/HUB may propose for decertification any HUBZone SBC that failed to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

29. Amend § 126.600 by revising the introductory text to read as follows:

§ 126.600 What are HUBZone contracts?

HUBZone contracts are contracts awarded to a qualified HUBZone SBC, regardless of the place of performance, through any of the following procurement methods:

* * * * *

30. Revise § 126.615 to read as follows:

§ 126.615 May a large business participate on a HUBZone contract?

Except as provided in § 126.618(d), a large business may not participate as a prime contractor on a HUBZone award, but may participate as a subcontractor to an otherwise qualified HUBZone SBC, subject to the contract performance requirements set forth in § 126.700.

31. Revise § 126.616 to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer on a HUBZone contract?

(a) General. A qualified HUBZone SBC may enter into a joint venture agreement with one or more other SBCs, or with an approved mentor authorized by § 125.9 of this chapter (or, if also an 8(a) BD Participant, with an approved mentor authorized by § 124.520 of this chapter), for the purpose of submitting an offer for a HUBZone contract. The joint venture itself need not be certified as a qualified HUBZone SBC.

(b) Size. (1) A joint venture of at least one qualified HUBZone SBC and one or more other business concerns may submit an offer as a small business for a HUBZone contract so long as the firms in the aggregate are small under the size standard corresponding to the NAICS code assigned to the contract, unless the contract qualifies under the exception in § 121.103(h)(3) of this chapter. If the contract qualifies under the

exception in § 121.103(h)(3) of this chapter, each firm must be small under the size standard corresponding to the NAICS code assigned to the contract.

(2) A joint venture between a protégé firm and its SBA-approved mentor (see § 125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the HUBZone contract.

(c) Contents of joint venture agreement. Any joint venture agreement to perform a HUBZone contract between a protégé and a mentor authorized by § 125.9 of this chapter must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating a HUBZone SBC as the managing venturer of the joint venture, and an employee of the HUBZone SBC managing venturer as the project manager responsible for performance of the contract;

(3) Stating that with respect to a separate legal entity joint venture, the HUBZone SBC must own at least 51% of the joint venture entity;

(4) Stating that the HUBZone SBC must receive profits from the joint venture commensurate with the work performed by the HUBZone SBC, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a HUBZone contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the HUBZone SBC partner to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section;

(8) Obligating all parties to the joint venture to ensure performance of the HUBZone contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the HUBZone SBC managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the HUBZone SBC managing venturer upon completion of the HUBZone contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) Performance of work. (1) For any HUBZone contract to be performed by a joint venture between a qualified HUBZone SBC and another qualified HUBZone SBC, the aggregate of the qualified HUBZone SBCs to the joint venture, not each concern separately, must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) For any HUBZone contract to be performed by a joint venture between a qualified HUBZone protégé and its SBA-approved mentor authorized by § 125.9 or § 124.520 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6 of this chapter, and the HUBZone SBC partner to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the HUBZone SBC partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the HUBZone protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a HUBZone qualified protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(e) Certification of compliance. Prior to the performance of any HUBZone contract as a joint venture, the HUBZone SBC partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) Past performance. When evaluating the past performance of an entity submitting an offer for a HUBZone contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(g) Contract execution. The procuring activity will execute a HUBZone contract in the name of the joint venture entity or the HUBZone SBC, but in either case will identify the award as one to a HUBZone joint venture or a HUBZone mentor-protégé joint venture, as appropriate.

(h) Inspection of records. The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents.

(i) Performance of work reports. The HUBZone SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each HUBZone contract it performs as a joint venture.

(1) The HUBZone SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each HUBZone contract performed during the year.

(2) At the completion of every HUBZone contract awarded to a joint venture, the HUBZone SBC partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(j) Basis for suspension or debarment. The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

(k) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

32. Revise § 126.618 to read as follows:

§ 126.618 How does a HUBZone SBC's participation in a Mentor-Protégé relationship affect its participation in the HUBZone Program?

(a) A qualified HUBZone SBC may enter into a mentor-protégé relationship under § 125.9 of this chapter (or, if also an 8(a) BD Participant, under § 124.520 of this chapter) or in connection with a mentor-protégé program of another agency, provided that such relationships do not conflict with the underlying HUBZone requirements.

(b) For purposes of determining whether an applicant to the HUBZone Program or a HUBZone SBC qualifies as small under part 121 of this chapter, SBA will not find affiliation between the applicant or qualified HUBZone SBC and the firm that is its mentor in an SBA or other Federally-approved mentor-protégé relationship (including a mentor that is other than small) on the basis of the mentor-protégé agreement or the assistance provided to the protégé firm under the agreement. As such, SBA will not consider the employees of the mentor in determining whether the applicant or qualified HUBZone SBC meets (or continues to meet) the 35% HUBZone residency requirement, or in determining the size of the applicant or qualified HUBZone SBC for any employee-based size standard.

(c) A qualified HUBZone SBC that is a prime contractor on a HUBZone contract may subcontract work to its mentor.

(1) The HUBZone SBC must meet the applicable performance of work requirements set forth in § 125.6(c) of this chapter.

(2) SBA may find affiliation between a prime HUBZone contractor and its mentor subcontractor where the mentor will perform primary and vital requirements of the contract. See § 121.103(h)(4) of this chapter.

(d) A qualified HUBZone SBC that has an SBA-approved mentor-protégé relationship pursuant to § 125.9 or § 124.520 of this chapter may joint venture with its mentor (whether or not the mentor is small) on a HUBZone contract.

(1) A joint venture between a qualified HUBZone SBC and its SBA-approved mentor will qualify as a small business provided the protégé individually qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of § 126.616(c) and (d).

(2) A qualified HUBZone SBC may not joint venture with any mentor that has not been approved by SBA pursuant to § 125.9 or § 124.520 of this chapter unless the mentor is also a qualified HUBZone SBC.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

33. The authority citation for part 127 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644; Pub. L. 111-240, 24 Stat. 2504.

§ 127.500 [Amended]

34. Amend § 127.500 by adding the words “, regardless of the place of performance” to the end of the sentence.

35. Amend § 127.506 as follows:

a. Revise the section introductory text and paragraphs (a), add an italic subject head to paragraph (c), and revise paragraphs (c)(2) and (3);

b. Redesignate paragraph (c)(4) as (c)(7) and paragraph (c)(5) as (c)(10) respectively;

- c. Add new paragraphs (c)(4) and (c)(5) and add paragraph (c)(6);
- d. Revise newly redesignated paragraph (c)(7);
- e. Add paragraphs (c)(8), (c)(9), (c)(11), and (c)(12);
- f. Revise paragraphs (d), (e) and (f); and
- g. Add paragraphs (g), (h), (i), (j), (k) and (l).

The revisions and additions read as follows:

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture, including those between a protégé and a mentor under § 125.9 of this chapter (or, if also an 8(a) BD Participant, under § 124.520 of this chapter), may submit an offer on an EDWOSB or WOSB contract if the joint venture meets all of the following requirements:

(a)(1) A joint venture of at least one EDWOSB or WOSB and one or more other business concerns may submit an offer as a small business for a EDWOSB or WOSB contract so long as the firms in the aggregate are small under the size standard corresponding to the NAICS code assigned to the contract, unless the contract qualifies under the exception in 121.103(h)(3). If the contract qualifies under the exception in 121.103(h)(3), each firm must be small under the size standard corresponding to the NAICS code assigned to the contract.

(2) A joint venture between a protégé firm and its SBA-approved mentor (see § 125.9 and § 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the EDWOSB or WOSB procurement.

* * * * *

(c) Contents of joint venture agreement. * * *

(1) * * *

(2) Designating a WOSB as the managing venturer of the joint venture, and an employee of the WOSB managing venturer as the project manager responsible for performance of the contract;

(3) Stating that with respect to a separate legal entity joint venture, the WOSB must own at least 51% of the joint venture entity;

(4) Stating that the WOSB must receive profits from the joint venture commensurate with the work performed by the WOSB, or in the case of a separate legal entity joint venture, commensurate with their ownership interests in the joint venture;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a WOSB or EDWOSB contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the WOSB partner to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section;

(8) Obligating all parties to the joint venture to ensure performance of the WOSB contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the WOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the WOSB managing venturer upon completion of the EDWOSB or WOSB contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) Performance of work. (1) For any EDWOSB or WOSB contract, the joint venture (including one between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter) must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) The WOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the WOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the WOSB partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by the non-WOSB partner, all work done by the non-WOSB partner and any of its affiliates at any subcontracting tier will be counted.

(e) Certification of compliance. Prior to the performance of any WOSB or EDWOSB contract as a joint venture, the WOSB or EDWOSB SBC partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) Past performance. When evaluating the past performance of an entity submitting an offer for a WOSB or EDWOSB contract as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(g) Contract execution. The procuring activity will execute a WOSB or EDWOSB contract in the name of the joint venture entity or the WOSB or EDWOSB

SBC, but in either case will identify the award as one to a WOSB or ESWOSB joint venture or a WOSB or EDWOSB mentor-protégé joint venture, as appropriate.

(h) Submission of joint venture agreement. The WOSB or EDWOSB must provide a copy of the joint venture agreement to the contracting officer.

(i) Inspection of records. The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents.

(j) Performance of work reports. The WOSB or EDWOSB SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each WOSB or EDWOSB contract it performs as a joint venture.

(1) The WOSB or EDWOSB SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each WOSB or EDWOSB contract performed during the year.

(2) At the completion of every WOSB or EDWOSB contract awarded to a joint venture, the WOSB or EDWOSB SBC partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(k) Basis for suspension or debarment. The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) or comply with paragraph (i) of this section.

(l) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

36. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 648(l), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

37. Amend § 134.227 by revising paragraph (c) to read as follows:

§ 134.227 Finality of decisions.

* * * * *

(c) Reconsideration. Except as otherwise provided by statute, the applicable program regulations in this chapter, or this part 134, an initial or final decision of the Judge may be reconsidered. Any party in interest, including SBA where SBA did not appear as a party during the proceeding that led to the issuance of the Judge's decision,

may request reconsideration by filing with the Judge and serving a petition for reconsideration within 20 days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

38. Amend § 134.406 by revising paragraph (b) to read as follows:

§ 134.406 Review of the administrative record.

* * * * *

(b) Except in suspension appeals, the Administrative Law Judge’s review is limited to determining whether the Agency’s determination is arbitrary, capricious, or contrary to law. As long as the Agency’s determination is not arbitrary, capricious or contrary to law, the Administrative Law Judge must uphold it on appeal.

(1) The Administrative Law Judge must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

(2) If the SBA’s path of reasoning may reasonably be discerned, the Administrative Law Judge will uphold a decision of less than ideal clarity.

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§ 134.501 [Amended]

39. Amend § 134.501 by removing “§ 125.26” from paragraph (a), and by adding “§ 125.29” in its place.

§ 134.515 [Amended]

40. Amend § 134.515 by removing “13 CFR 125.28” from paragraph (a), and by adding “§ 125.31 of this chapter” in its place.

Dated: December 19, 2014.

Maria Contreras-Sweet,
Administrator.

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