



SMALL BUSINESS ADMINISTRATION

13 CFR Part 121, 124, 125, 126, and 127

RIN 3245-AG94

Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendments.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting regulations that published in the *Federal Register* on October 16, 2020. The rule merged the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This document is making several technical corrections to the regulations.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: In response to the President’s directive to simplify regulations, on October 16, 2020, SBA published a final rule revising the regulations pertaining to the 8(a) BD and size programs in order to further reduce unnecessary or excessive burdens on small businesses and to eliminate confusion or more clearly delineate SBA’s intent in certain regulations. (85 FR 66146). This is the second set of corrections. The first set of corrections was published in the *Federal Register* on November 16, 2020. (85 FR 72916). This document augments those corrections.

First, in amending § 121.404(a) to provide clarification as to the time at which size is determined for multiple award contracts, SBA inadvertently deleted the general rule that size is determined as of the date of the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price. In other words, in amending the exception to the general rule for multiple award contracts, the final rule inadvertently deleted the general rule itself. That was not SBA’s intent and SBA did not intend to make any substantive changes to the general rule itself. This rule adds back the general rule language to § 121.404(a).

Second, the final rule eliminated the requirement that 8(a) Participants seeking to be awarded a competitive 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award. The preamble to the final rule explained that such approval is no longer necessary because the size protest process has worked well to ensure that small business joint venture partners control performance on non-8(a) contracts with their large business mentors and could work similarly to monitor a joint venturing activity on competitive 8(a) contracts. To this end, where another offeror believes that a joint venture between a protégé and its large business mentor has not complied with the applicable control regulations, it may protest the size of the joint venture. The appropriate Area Office of SBA’s Office of Government Contracting would then review the joint venture agreement to determine whether it meets

the requirements of SBA's regulations. If that Office determines that the applicable regulations were not followed, the joint venture would lose its exclusion from affiliation, be found to be other than small, and, thus, ineligible for an award as a small business. Because size protests are authorized for competitive 8(a) contracts, SBA reasoned that prior approval is no longer necessary for joint venture agreements seeking to be awarded such contracts.

The final rule inadvertently did not adequately address how the Area Office will review certain joint venture agreements to perform 8(a) contracts formed outside the Mentor-Protégé Program, such as a joint venture between an 8(a) Participant and one or more other small business concerns. Currently, an unsuccessful offeror, SBA, or a contracting officer may protest the status of the apparent successful offeror for a Service-Disabled Veteran Owned (SDVO), Historically Underutilized Business Zone (HUBZone), Women-Owned Small Business (WOSB), or Economically-Disadvantaged Women-Owned Small Business (EDWOSB) contract. In determining the status eligibility of a joint venture apparent awardee, SBA will review the joint venture agreement to assess whether it complies with the formal requirements to receive and perform the award as a joint venture. If the joint venture does not comply with these requirements, SBA will sustain the protest and deem the joint venture ineligible for award. However, there is no existing regulatory process for an unsuccessful offeror, SBA, or a contracting officer to challenge whether a joint venture meets the formal requirements to receive and perform a competitive 8(a) contract. To this end, the eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by a disappointed offeror or any other party because SBA reviews the apparent successful offeror's eligibility for award in connection with each 8(a) contract. In addition, prior to the final rule, where the apparent successful offeror was a joint venture, the joint venture had to be approved by SBA prior to or concurrent with the contract eligibility review. In eliminating SBA's role to review

and approve joint ventures formed to perform competitive 8(a) contracts, it was not SBA's intent to allow 8(a) contract benefits to flow to joint ventures that do not meet the applicable regulatory requirements. To the contrary, as noted above, SBA envisioned that the size protest process would work to ensure compliance with the formal 8(a) joint venture requirements. However, in the context of a joint venture between an 8(a) Participant and one or more other small business concerns, the current size protest procedures are not adequate. Under SBA's size regulations, a joint venture is small if each of the partners to the joint venture individually qualify as small. Thus, a joint venture that does not comply with the applicable requirements set forth in § 124.513(c) and (d) could still qualify as small even though the 8(a) partner to the joint venture was not the lead or controlling partner. This rule amends § 121.103(h)(1)(i) to implement SBA's intent that a joint venture must meet the requirements of § 124.513(c) and (d) in order to be eligible for a competitive 8(a) procurement and to make joint ventures in the 8(a) program consistent with those in the HUBZone, WOSB and SDVO programs. Additionally, SBA inadvertently left out conforming revisions in the final rule to remove references to SBA's now obsolete review and approval of joint ventures formed to receive and perform competitive 8(a) contracts. Specifically, the final rule did not make corresponding changes to § 124.513(a), (f), (g), (h), and (j), leaving inconsistency with respect to the requirement for SBA approval. This rule corrects this inconsistency by removing or clarifying references to joint venture approval in § 124.513(a), (f), (g), (h), and (j).

Third, the final rule added a new § 124.501(k) to clearly make the bona fide office requirement applicable to both sole source and competitive 8(a) awards and better defined the geographical area in which an office needs to be in order to meet the bona fide place of business requirement. Although SBA intended to allow an office in the geographic area served by a contiguous SBA district office to meet the bona fide place of

business requirement, the final regulatory provision did not make that clear. This rule corrects that ambiguity.

Fourth, the final rule clarified a procuring activity's responsibilities when evaluating the past performance, experience, business systems and certifications of an entity submitting an offer for a small business contract as a joint venture. Specifically, the final rule amended § 125.8(e) to provide that when evaluating such offers, the procuring activity should not require a small business protégé partner to the joint venture to individually meet any evaluation or responsibility criteria as those required of other offerors generally. SBA inadvertently left out conforming revisions in the final rule to §§ 124.513, 125.18, 126.616, and 127.506 to address the evaluation of past performance, experience, business systems and certifications of a joint venture formed outside SBA's Mentor-Protégé Program to pursue a contract set-aside or reserved for 8(a) Participants, SDVO small business concerns, HUBZone small business concerns, WOSB concerns, or EDWOSB concerns. This rule corrects the inconsistency by revising §§ 124.513, 125.18, 126.616, and 127.506 to incorporate this clarification.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

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 contracts, Reporting and recordkeeping requirements, Small businesses.

Accordingly, 13 CFR parts 121, 124, 125, 126, and 127 are corrected by making the following correcting amendments:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116-136, Section 1114.

2. Amend § 121.103 by adding a sentence to the end of paragraph (h)(1)(i) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(h) * * *

(1) * * *

(i) * * * For a competitive 8(a) procurement, a joint venture between an 8(a)

Participant and one or more other small business concerns (including two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter) must also meet the requirements of § 124.513(c) and (d) of this chapter as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding in order to be eligible for award.

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3. Amend § 121.404 by adding introductory text to paragraph (a) to read as follows:

§ 121.404 When is the size status of a business concern determined?

(a) *Time of size.* SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price.

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

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

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99-661, Pub. L. 100-656, sec. 1207, Pub. L. 101-37, Pub. L. 101-574, section 8021, Pub. L. 108-87, Pub. L. 116-260, sec. 330, and 42 U.S.C. 9815.

5. Amend § 124.501 by revising the introductory text to paragraph (k) to read as follows:

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

* * * * *

(k) In order to be awarded a sole source or competitive 8(a) construction contract, a Participant must have a bona fide place of business within the applicable geographic location determined by SBA. This will generally be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area (MSA), a contiguous county (whether in the same or different state), or the geographical area serviced by a contiguous SBA district office to where the work will be performed. SBA may determine that a Participant with a bona fide place of business anywhere within the state (if the state is serviced by more than one SBA district office), one or more other SBA district offices (in the same or another state), or another nearby area is eligible for the award of an 8(a) construction contract.

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6. Amend § 124.513 by revising paragraph (a)(1), the second sentence of paragraph (a)(2), and paragraphs (f), (g), (h), and (j) to read as follows:

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

(a) * * *

(1) A Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.

(2) * * * However, where SBA concludes that an 8(a) Participant brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture to receive an 8(a) sole source contract award and will find the joint venture to be ineligible for a competitive 8(a) award if it is determined to be the apparent successful offeror.

* * * * *

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an 8(a) contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the 8(a) Participant to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution.* Where an 8(a) award will be made to 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-protege joint venture, as appropriate.

(h) *Amendments to joint venture agreement.* Where SBA has approved a joint venture for a sole source 8(a) contract, all amendments to the joint venture agreement must be approved by SBA.

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(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:

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

(2) 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.

(3) For a sole source 8(a) contract, 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.

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PART 125—GOVERNMENT CONTRACTING PROGRAMS

7. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

8. Revise § 125.18(b)(5) to read as follows:

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

* * * * *

(b) * * *

(5) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications 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 and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the SDVO SBC to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

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PART 126—HUBZONE PROGRAM

9. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a; Pub. L. 111-240, 24 Stat. 2504.

10. Revise § 126.616(f) to read as follows:

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

* * * * *

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications 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 and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the HUBZone small business concern to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

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PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

11. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

12. Amend § 127.506 by revising paragraph (f) to read as follows:

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

* * * * *

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an EDWOSB or WOSB contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the EDWOSB or WOSB small business concern to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

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