SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, 127 and 128

RIN 3245-AH70

Ownership and Control and Contractual Assistance Requirements for the 8(a) Business Development Program

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: This final rule makes several changes to the ownership and control requirements for the 8(a) Business Development (BD) program, including recognizing a process for allowing a change of ownership for a former Participant that is still performing one or more 8(a) contracts and permitting an individual to own an applicant or Participant where the individual can demonstrate that financial obligations have been settled and discharged by the Federal Government. The rule also makes several changes relating to 8(a) contracts, including clarifying that a contracting officer cannot limit an 8(a) competition to Participants having more than one certification and clarifying the rules pertaining to issuing sole source 8(a) orders under an 8(a) multiple award contract. The rule also makes several other revisions to incorporate changes to SBA's other government contracting programs, including changes to implement a statutory amendment from the National Defense Authorization Act for Fiscal Year 2022, to include blanket purchase agreements in the list of contracting vehicles that are covered by the definitions of consolidation and bundling, and to more clearly specify the requirements relating to waivers of the nonmanufacturer rule.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. It applies to all solicitations issued on or after that date.

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SUPPLEMENTARY INFORMATION: On September 9, 2022, SBA published in the *Federal Register* a comprehensive proposal that primarily proposed changes to the 8(a) Business Development (BD) program, but also proposed changes to SBA's size regulations and SBA's other small business contracting programs. 87 FR 55642. Specifically, the rule proposed to make several changes to the ownership and control requirements for the 8(a) BD program, including recognizing a process for allowing a change of ownership for a former Participant that is still performing one or more 8(a) contracts and permitting an individual to own an applicant or Participant where the individual can demonstrate that financial obligations have been settled and discharged by the Federal Government, and to provisions relating to the award of 8(a) contracts, including clarifying that a contracting officer cannot limit an 8(a) competition to Participants having more than one certification and clarifying the rules pertaining to issuing sole source 8(a) orders under an 8(a) multiple award contract. The rule also proposed to make several other revisions to incorporate changes to SBA's other government contracting programs, including changes to implement a statutory amendment from the National Defense Authorization Act for Fiscal Year 2022, to include blanket purchase agreements in the list of contracting vehicles that are covered by the definitions of consolidation and bundling, and to more clearly specify the requirements relating to waivers of the nonmanufacturer rule.

Contemporaneously, on August 26, 2022, SBA also published a Notice in the *Federal Register* announcing that SBA intended to conduct tribal consultations and listening sessions relating to a proposal to require a Community Benefits Plan laying out how a tribe, Alaska Native Corporation (ANC) or Native Hawaiian Organization (NHO) that owned and controlled one or more 8(a) BD Participants intended to give benefits back to the Native community as a result of its 8(a) BD participation. 87 FR 52602. SBA held consultations in Anchorage, AK on

September 14, 2022, in Albuquerque, NM on September 20, 2022, in Oklahoma City, OK on September 22, 2022, and in Washington, DC on October 5, 2022. In addition, SBA held a listening session on this topic in Honolulu, HI on September 28, 2022. The tribal, ANC and NHO representatives overwhelmingly opposed SBA imposing any target that a certain percentage of an entity's 8(a) receipts should be distributed to benefit the affected Native community or that there should be any specific consequences if the benefit targets were not reached. They believed that any such requirement infringed on self-determination and tribal sovereignty, that the entity (tribe/ANC/NHO) is in the best position to determine how and when to best reinvest in the 8(a) Participant for long-term growth, and that the tribal members or ANC shareholders, and not SBA, are the ones who determine what type of benefits the tribe/ANC provides. SBA listened to the concerns voiced at the tribal consultations. In response to those concerns, at the October 5, 2022, consultation in Washington, DC, SBA announced that the SBA Administrator determined that this final rule would not change any current requirements relating to Native community benefits. As such, the proposed changes to § 124.604 regarding the imposition of a Community Benefits Plan are not included in this final rule. In addition, the questions raised in the proposed rule and the August 26, 2022, Federal Register Notice regarding benefit targets or consequences for failure to meet those targets are also not included in this final rule.

During the proposed rule's 60-day comment period, SBA timely received over 650 comments from 125 commenters, with a high percentage of commenters favoring the proposed changes. A substantial number of commenters applauded SBA's effort to clarify and address ambiguities contained in the current rules. For the most part, the comments supported the substantive changes proposed by SBA.

Section-by-Section Analysis

Section 121.103(h)

Section 121.103(h) sets forth the rules pertaining to affiliation through joint ventures. SBA proposed to make several changes to this section. SBA first proposed to take some of the language currently contained in the introductory paragraph and add it to a new § 121.103(h)(1) for ease of use. SBA believes that the current introductory paragraph is overly complex and separating some of the requirements into a separate subparagraph will be easier to understand and use. In adding a new § 121.103(h)(1), the proposed rule also made corresponding numbering and cross reference adjustments. SBA received no objections to these changes. As such, they are adopted as final in this rule.

SBA's regulations currently provide that a specific joint venture generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. The proposed rule added a sentence to the introductory text of § 121.103(h) to capture SBA's current policy that allows orders to be issued under previously awarded contracts beyond the two-year period (since the restriction is on additional contracts, not continued performance on contracts already awarded). All comments that SBA received regarding this provision supported the clarification pertaining to orders. As such, the final rule adopts the clarification as proposed.

The proposed rule also sought to clarify SBA's distinct treatment of populated and unpopulated joint ventures. The current regulation provides 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. The proposed rule clarified that this requirement was meant to apply only to contracts set aside or reserved for small business (i.e., small business set-aside, 8(a), women-owned small business (WOSB), HUBZone, and service-disabled veteran owned small business (SDVOSB) contracts). The proposed rule clarified that a populated joint venture could be awarded a contract set aside or reserved for small business where each of the partners to the joint venture were similarly situated (e.g., both partners to a joint venture seeking a HUBZone contract were certified HUBZone small business concerns). Any time the size of a

populated joint venture is questioned, the proposed rule also clarified that SBA will aggregate the revenues or employees of all partners to the joint venture. Commenters supported the change to clarify that a populated joint venture could be awarded a contract set aside or reserved for small business where each of the partners to the joint venture were similarly situated. Although several commenters agreed with the language in the proposed rule aggregating the size of joint venture partners where a joint venture is populated, two commenters recommended that populated joint ventures should be permitted for set-aside contracts as long as each party to the joint venture individually qualifies as small under the size standard corresponding to the North American Classification System (NAICS) code assigned to the contract and has any socioeconomic designation that may be required for the contract (i.e., is similarly situated). SBA disagrees. SBA has consistently stated its view that a joint venture is not an on-going business entity, but rather something that is formed for a limited purpose and duration. If two or more separate business entities seek to join together through another entity on a continuing, unlimited basis, SBA views that as a separate business concern with each partner affiliated with each other. Where two or more parties form a separate business entity (e.g., a limited liability company or partnership) and populate that entity with employees intended to perform work on behalf of that entity, SBA similarly views that as an ongoing business entity and will aggregate the receipts/employees of the parties that formed the separate business entity in determining its size. SBA's joint venture regulations provide generally that as long as each partner to the joint venture individually qualifies as small under the NAICS code assigned to the contract, the joint venture will qualify as small. However, that rule assumes that each partner to the joint venture individually performs work under a contract won by the joint venture with its own separate employees. That is not the case where two or more parties form a separate legal entity, populate that entity with employees, and intend to perform contracts with the employees hired by that separate entity. As such, the final rule adopts the language contained in the proposed rule that

where two parties form a populated joint venture, the joint venture will qualify as small only where the parties to the joint venture meet the applicable size standard in the aggregate.

In addition, the proposed rule revised the ostensible subcontractor rule in redesignated § 121.103(h)(3) in two ways. First, it clarified how the ostensible subcontractor rule should apply to general construction contracts. Second, it proposed to add factors to consider in determining whether a specific subcontractor should be considered an ostensible subcontractor to comport with recent decisions of SBA's Office of Hearings and Appeals (OHA).

The proposed rule clarified that the primary role of a prime contractor in a general construction project is to oversee and superintend, manage, and schedule the work, including coordinating the work of various subcontractors. Those are the functions that are the primary and vital requirements of a general construction contract and ones that a prime contractor must perform. Although the prime contractor for a general construction contract must meet the limitation on subcontracting requirement set forth in § 125.6(a)(3), SBA recognizes that subcontractors often perform the majority of the actual construction work because the prime contractor frequently must engage multiple subcontractors specializing in a variety of trades and disciplines. As such, SBA believes that the ostensible subcontractor rule for general construction contracts should be applied to the management and oversight of the project, not to the actual construction or specialty trade construction work performed. The prime contractor must retain management of the contract but may delegate a large portion of the actual construction work to its subcontractors. SBA received 17 comments regarding the proposed clarification to the ostensible subcontractor rule for general construction contracts. All 17 comments supported the clarification. A few commenters suggested adding the word "supervise" and to specifically identify that one of the primary functions of a general construction prime contractor is to coordinate the work of subcontractors. Although SBA does not see a real distinction between oversight and supervision, the final rule nevertheless adds supervision as a primary and vital

requirement as well as adding the coordination of subcontractor work. One commenter recommended adding more specificity as to what managing the contract entails. SBA believes that a general requirement to supervise, oversee, manage, and schedule the work on a contract, including coordinating the work of various subcontractors, is sufficient. SBA is concerned that adding any specificity beyond that or highlighting one or two specific items of managing a contract might be read as SBA believing those one or two items are more important in the analysis than any others. That is not SBA's intent, and SBA believes that an SBA Size Specialist should have discretion to analyze all the facts in determining whether an arrangement rises to the level of an ostensible subcontractor.

One commenter noted that the proposed rule also amended § 126.401(d) to provide that SBA will find that a prime HUBZone contractor is performing the primary and vital requirements of the contract or order and is not unduly reliant on one or more subcontractors that are not HUBZone-certified, where the prime contractor can demonstrate that it, together with any subcontractors that are certified HUBZone small business concerns, will meet the limitations on subcontracting provisions. The commenter sought clarification of that provision in light of the proposed language relating to general construction contractors. Specifically, the commenter believed the two provisions might conflict because a general contractor could perform 15 percent of a construction contract but still be unduly reliant on a large business for the supervision and oversight of the contract. SBA agrees. For a services, specialty trade construction, or supply contract or order, SBA believes that meeting the applicable limitation on subcontracting requirement is sufficient to overcome any claim of the existence of an ostensible subcontractor. However, as the commenter noted, for a general construction contract a prime contractor could conceivably perform 15 percent of the contract but subcontract out all the supervision and oversight responsibilities to another business entity. If that business entity is not a similarly situated entity, that subcontracting could render the prime contractor ineligible due to the ostensible subcontractor rule. The final rule amends § 121.103(h)(3) to clarify the distinction

between meeting the limitation on subcontracting for contracts or orders for services, specialty trade construction or supplies and those for general construction. To ensure consistency between the various programs, the final rule also makes similar changes to § 126.601(d) for the HUBZone program, to § 127.504(g) for the WOSB program, and to § 128.401(g) for the SDVO program.

SBA further proposed to revise the ostensible subcontractor rule in light of the decision of SBA's Office of Hearings and Appeals (OHA) in *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). In that decision, OHA created a four-factor test to indicate when a prime contractor's relationship with a subcontractor is suggestive of unusual reliance under the ostensible subcontractor rule. The four factors are (1) the proposed subcontractor is the incumbent contractor and ineligible to compete for the procurement, (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor, (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract, and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. Under OHA's decisions, when these factors are present, violation of the ostensible subcontractor rule is more likely to be found if the subcontractor will perform 40% or more of the contract. SBA proposed to add two of these four factors to the ostensible subcontractor rule: the reliance on incumbent management and the reliance on the subcontractor's experience. SBA did not include plans to hire a large majority of its intended workforce on a contract from the incumbent contractor as a factor because a successful concern is often required to offer to qualified employees of a predecessor contract the right of first refusal on a subsequent contract, and must hire such individuals if they so opt. Because of this and other practical reasons, it is common for the same individuals to work for multiple different business concerns over time while performing the same function on follow-on contracts.

SBA received comments on both sides of this issue, with seven commenters agreeing with including the identified *Doverstaffing* factors and nine commenters opposing their inclusion. Those opposing the inclusion of these factors into the regulations highlighted that

leveraging the experience of a subcontractor is a tool needed to assist a small business gain experience necessary to compete and win work. They believed that reliance on a subcontractor's experience alone should never result in a finding of an ostensible subcontractor. One commenter argued that as long as the new prime contractor is meeting the limitation on subcontracting requirement, SBA should not care who the subcontractor is. Another commenter believed that it should not matter whether a subcontractor previously performed the requirement or was the incumbent contractor, and that all that should be looked at is determining whether a subcontractor is performing primary and vital requirements of the contract. One commenter similarly argued that whether the prime contractor's proposed management previously served with the subcontractor on the incumbent contract is also irrelevant. The commenter believed that as long as those individuals are now employed by and under the control of the prime contractor, that should not negatively affect whether the subcontractor is an ostensible subcontractor. Even three of the commenters who favored adding the two identified factors to regulatory text believed that identifying factors to consider was appropriate as long as SBA did not apply any mechanically. SBA agrees that the ultimate determination in every case depends upon who is performing the primary and vital requirements of a contract or order and whether a prime contractor is unusually reliant on a subcontractor. SBA also agrees that no factor is determinative and that a prime contractor should be able to use the experience and past performance of its subcontractors to strengthen its offer, even where a subcontractor is the incumbent contractor. As with the existing rule, SBA intends to consider all aspects of the prime contractor's relationship with the subcontractor and would not limit its inquiry to any enumerated factors. SBA continues to believe that the SBA Area Offices should be given discretion to consider and weigh all factors in rendering a formal size determination, and that unique circumstances could lead to a result that does not fully align with the *DoverStaffing* analysis. That being said, SBA believes that identifying factors that can be considered is helpful to contractors. As such, the final rule retains factors that SBA may consider but adds a provision

identifying that no single factor is determinative. The final rules also specifically clarifies that a prime contractor may use the experience and past performance of a subcontractor to enhance or strengthen its offer, including that of an incumbent contractor. It also reenforces that it is only where that subcontractor will perform primary and vital requirements of a contract or order, or where the prime contractor is unusually reliant on the subcontractor, that SBA will find the subcontractor to be an ostensible subcontractor.

One commenter requested that SBA clarify that the ostensible subcontractor rule does not apply to similarly-situated entities. SBA believes that is unnecessary as the current rule already specifies that an "ostensible subcontractor is a subcontractor that is not a similarly situated entity" and that language has been retained in this final rule.

One commenter also questioned whether the ostensible subcontractor rule applied to contracts below the Simplified Acquisition Threshold (SAT). SBA notes that the limitations on subcontracting requirements do not apply to small business acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold. *See* 13 CFR § 121.406(c). That being the case, a small business can subcontract to any business for such contracts and it does not matter who is performing the primary and vital functions of the contract. Although SBA believes that can be inferred from the current regulatory language, the final rule adds clarifying language to § 121.406(c) to eliminate any confusion.

Finally, the proposed rule revised redesignated § 121.103(h)(4) to clarify how receipts are to be counted where a joint venture hires individuals to perform one or more specific contracts (i.e., where the joint venture is populated). Although SBA requires joint ventures to be unpopulated for purposes of performing set-aside contracts in order to properly track work performed and benefits derived by the lead small/8(a)/HUBZone/WOSB/SDVOSB entity to the joint venture, some joint ventures are nevertheless populated for other purposes. Generally, the appropriate share of a joint venture's revenues that a partner to the joint venture must include in its own revenues is the same percentage as the joint venture partner's share of the work

performed by the joint venture. However, that general rule cannot apply to populated joint ventures. Where a joint venture is populated, each individual partner to the joint venture does not perform any percentage of the contract – the joint venture entity itself performs the work. As such, revenues cannot be divided according to the same percentage as work performed because to do so would give each partner $0 corresponding to the 0% of the work performed by the individual partner. In such a case, SBA believes that revenues must be divided according to the same percentage as the joint venture partner's percentage ownership share in the joint venture. The proposed rule specifically incorporated into redesignated § 121.103(h)(4) SBA's belief that revenues should be divided by ownership interest. Comments supported this clarification, and SBA adopts the proposed language in the final rule.

In connection with the comments relating to the proposed changes to § 121.103, SBA also received comments seeking clarification to the joint venture provisions in § 125.8. Specifically, several commenters recommended that SBA provide further guidance regarding what decisions non-managing partners to the joint venture can participate in. The regulations provide that the managing venturer must control all aspects of the day-to-day management and administration of the contractual performance of the joint venture, and that other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary. One commenter recommended that SBA add language providing that a non-managing joint venture partner could participate in decisions that were customary for joint ventures outside of the small business Government contracting environment. SBA believes that is unnecessary as it does not add anything substantively different from the current regulatory language. Another commenter recommended that SBA specifically include in the regulation instances in which a non-managing joint venture partner's concurrence could be required and identified the ability of the joint venture to initiate litigation on behalf of the joint venture as such an instance. As previously noted, the managing joint venture partner must independently control all aspects of the day-to-day management and administration of the

contractual performance of the joint venture. SBA believes that initiating contract litigation is outside the scope of the management of daily contractual performance and instead represents a decision that reasonably falls into the exception that allows other joint venture partners to participate in commercially customary decisions. A joint venture is a mutual agreement between joint venture partners to combine resources for a specific contract or contracts, and litigation is sometimes required to protect those resources. Litigation on behalf of the joint venture is a decision that carries significant risk for both partners and as a result, it is unreasonable and outside the bounds of customary commercial practices to limit that decision to only one partner. Similarly, SBA believes that requiring the concurrence of a non-managing joint venture partner in deciding what contract opportunities the joint venture should seek is also something that would be commercially customary. The partners to a joint venture have formed a joint venture in order to seek contract opportunities. Since the parties will be jointly and severally liable for any contracts awarded to the joint venture, it makes sense that all parties to the joint venture should have a say in what opportunities the joint venture pursues. The final rule adds language specifying that a non-managing venturer's approval may be required in determining what contract opportunities the joint venture should seek and in initiating litigation on behalf of the joint venture. That addition is not meant to be the only decisions in which a non-managing member may participate but is merely illustrative of corporate governance activities and decisions of the joint venture that SBA believes non-managing venturer participation is commercially customary.

Another commenter also sought clarification to a perceived inconsistency in the regulations between § 125.8(b)(2)(xii) and § 125.8(h)(2). Paragraph 125.8(b)(2)(xii) provides that a joint venture must submit a project-end performance-of-work report to SBA and the relevant contracting officer no later than 90 days after completion of the contract. Paragraph (h)(2) provides that 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 its SBA-approved

mentor, and upon request by SBA or the relevant contracting officer, the small business partner to the joint venture must submit a report to the relevant contracting officer and to SBA. The commenter believed that § 125.8(b)(2)(xii) required a performance-of-work report at contract completion while § 125.8(h)(2) stated that such a report must be submitted only when requested by SBA or the contracting officer. The commenter misunderstood SBA's intent in § 125.8(h)(2). That provision meant to require the submission of a performance-of-work report in two instances: first, always at the completion of the contract; and second, whenever requested to do so by SBA or the contracting officer prior to completion of the contract. In order to eliminate any confusion, the final rule adds clarifying language to § 125.8(h)(2).

Section 121.103(i)

The proposed rule put back into the regulations a paragraph pertaining to affiliation based on franchise and license agreements. This provision was inadvertently deleted from § 121.103 when SBA deleted other provisions of § 121.103 in its October 2020 rulemaking. The proposed rule merely added back into the regulations the provision that was inadvertently removed. Several commenters supported adding this provision back into the regulations and no comments opposed. As such, SBA the final rule adopts adding this provision back into the regulations.

Section 121.404

SBA proposed to clarify § 121.404(a)(1)(iv), which provides that size is determined for a multiple award contract at the time of initial offer on the contract even if the initial offer might not include price. The proposed clarification intended to treat orders issued pursuant to a multiple award contract that did not itself include price similarly to orders under multiple award contracts generally. SBA believes there is no justification for treating orders issued on these contracts differently, simply because the contract did not require price with initial offer. Thus, size for set-aside orders will be determined in accordance with subparagraphs (a)(1)(i)(A), (a)(1)(i)(B), (a)(1)(ii)(A), or (a)(1)(ii)(B), as appropriate, which means that for orders issued under any set-aside contract, size will be determined at the time of offer for the multiple award

contract and not at the time of each individual order unless a contracting officer requests size recertification with respect to an individual order.

SBA received comments both supporting and opposing this clarification. Commenters generally agreed that orders for multiple award contracts should be treated similarly whether offers included price for the underlying multiple award contract itself. Several commenters, however, repeated previous concerns raised with SBA regarding the amendments to § 121.404 that were made in 2020. Section 121.404 states that where an order under an unrestricted multiple award contract is set-aside exclusively for small business (*i.e.,* small business, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order. Although the proposed rule did not seek to change that provision, several commenters voiced the view that that provision should not apply to previously awarded multiple award contracts.

A firm's status as a small business does not generally affect whether the firm does or does not qualify for the award of an unrestricted multiple award contract. As such, competitors are very unlikely to protest the size of a concern that self-certifies as small for an unrestricted multiple award contract. In SBA's view, when a contracting officer sets aside an order for small business under an unrestricted multiple award contract, the order is the first time that size status is important because competition is being limited under the contract. That is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size status. SBA never intended to allow a firm's self-certification for the underlying unrestricted multiple award contract to control whether a firm is small at the time of an order is set-aside for small business years after the multiple award contract was awarded. These few commenters believed that SBA attempted to retroactively change the rules pertaining to previously awarded unrestricted multiple award contracts. SBA disagrees. Small business set-aside orders under unrestricted vehicles are completely discretionary. When a

contracting officer exercises this discretion, Federal Acquisition Regulation (FAR, Title 48 of the Code of Federal Regulations) Part 19 and SBA rules apply and change the eligibility requirements of the contract for that order. For example, the contractor must comply with the applicable limitations on subcontracting for that order (whereas the limitations on subcontracting do not generally apply to unrestricted contracts). When a procuring agency for the first time decides to set aside a specific order under an unrestricted multiple award contract for small business, the agency is making an exception to the fair opportunity regularly provided to all the contract holders to be considered for each order under the unrestricted contract. Thus, it follows that a business concern must qualify as small for an order set aside for small business under SBA's regulations in effect at the time of the order to ensure that the exception is applied appropriately at the order level because being a small business concern was not a requirement for any awardees under the unrestricted contract and verifying awardees' size status was not prerequisite to awarding the unrestricted contract. Moreover, the applicable size standard for any specific order set-aside for small business would be the one currently codified in SBA's regulations (not the one that was in effect at the time the underlying multiple award contract was awarded). All firms that self-certified as small for the underlying multiple award contract will continue to be considered to be small businesses for goaling purposes for all orders issued under the multiple award contract on an unrestricted basis.

SBA also proposed to clarify when size recertification is required in connection with a sale or acquisition. In 2016, SBA amended its regulation regarding recertification of size to add the word "sale" in addition to mergers and acquisitions as an instance when recertification is required. *See* 81 FR 34243, 34259 (May 31, 2016). Since that time, some have questioned whether recertification of size status may be required whenever any sale of stock occurs, even de minimis amounts. That was not SBA's intent. Recertification is required whenever there is a merger. However, recertification in connection with a "sale" or "acquisition" is required only where the sale or acquisition results in a change in control or negative control of the concern.

Recertification is not required where small sales or acquisitions of stock that do not appear to affect the control of the selling or acquiring firm occur. The proposed rule added language to clarify SBA's current intent. The comments supported this clarification, and SBA adopts the proposed language in this final rule.

The proposed rule also clarified the recertification requirements set forth in § 121.404(g) for joint ventures. Specifically, the proposed rule added a new § 121.404(g)(6) which set forth the general rule that a joint venture can recertify its status as a small business where all parties to the joint venture qualify as small at the time of recertification, or the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification. The proposed rule also clarified that the two-year limitation on contract awards to joint ventures set forth in § 121.103(h) does not apply to recertification. In other words, recertification is not a new contract award, and thus can occur even if its timing is more than two years after the joint venture received its first contract. Commenters supported both of those clarifications. As such, SBA adopts them as final.

Sections 121.404(a)(1)(i)(B), 121.404(a)(1)(ii)(B), 124.501(h), and 124.502(a)

Sections 121.404(a)(1)(i)(B) and 121.404(a)(1)(ii)(B) provide generally that a business concern that qualifies as small at the time of an offer for a multiple award contract that is set aside or reserved for the 8(a) BD program will be deemed a small business for each order issued against the contract, unless a contracting officer requests a size recertification for a specific order. However, for sole source 8(a) orders issued under a multiple award contract set-aside for exclusive competition among 8(a) Participants, § 124.503(i)(1)(iv) requires an agency to offer and SBA to accept the order into the 8(a) program on behalf of the identified 8(a) contract holder. As part of the offer and acceptance process, SBA must determine that a concern is currently an eligible Participant in the 8(a) BD program at the time of award. *See* § 124.501(h). The proposed rule clarified that because size is something SBA looks at in making an eligibility determination in accepting a sole source offering, a Participant must currently qualify as a small

business for any sole source award in addition to currently being a Participant in the program (i.e., firms that have graduated from or otherwise left the 8(a) BD program are not eligible for any 8(a) sole source award). The proposed rule amended §§ 121.404(a)(1)(i)(B), 121.404(a)(1)(ii)(B), 124.501(h), and 124.502(a) to clarify that position. Although a few commenters opposed this clarification, the majority of commenters supported it. It has always been SBA's interpretation of its statutory authority that a firm must be an eligible Participant on the date of any 8(a) sole source award. As noted, an eligibility determination includes size. As such, the final rule adopts the language proposed that a Participant must currently qualify as a small business for any sole source award.

Section 121.411(c)

The proposed rule corrected an inconsistency between § 121.411(c) and § 125.3(c)(1)(viii). In requiring a prime contractor to notify unsuccessful small business offerors of the apparent successful offeror on subcontracts, § 125.3(c)(1)(viii) provides that a prime contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over the simplified acquisition threshold, while § 121.411(c) requires a prime contractor to inform each unsuccessful subcontract offeror in connection with any competitive subcontract. The proposed rule added the over the simplified acquisition threshold condition to § 121.411(c) and adjusted the language in § 125.3(c)(1)(viii) to make the two provisions consistent. SBA received three comments regarding this provision. All three supported SBA's proposal to resolve the inconsistency in the regulations. As such, SBA adopts the proposed language in this final rule.

Section 121.413

Section 121.413 is currently a Reserved section, with no text. This final rule merely removes § 121.413 entirely. Section 121.401 currently refers to the rules set forth §§ 121.401 through 121.413. With the elimination of § 121.413, the final rule also amends this reference to instead refer to the rules set forth in §§ 121.401 through 121.412.

Sections 121.506 and 121.507

The Small Business Timber Set-Aside Program establishes small business set-aside sales of sawtimber from the federal forests managed by the U.S. Department of Agriculture's Forest Service and the U.S. Department of the Interior's Bureau of Land Management. Current regulations require that a small business concern cannot resell or exchange more than 30% of the sawtimber volume to "other than small" businesses. SBA regulations do not address situations where a small business concern is unable to meet the 30% requirement due to circumstances outside of its control such as natural disasters, national emergencies, or other extenuating circumstances.

As proposed, SBA added § 121.507(d) to allow the SBA's Director of Government Contracting (D/GC) to grant a waiver in limited circumstances when a small business is unable to meet the 30% requirement due to circumstances out of its control. SBA sought comments on the following: whether a waiver is needed; if it is needed, under what circumstances should a waiver be granted; whether SBA should allow partial waivers (i.e., for some but not all of the 30/70 requirement); and how SBA should evaluate a waiver request.

SBA received ten comments on the proposed rule with five supporting the proposed amendment and five opposing it. Commenters in opposition focused on the importance of the 30/70 requirement to ensure access to timber for small businesses and expressed concern that the waiver could weaken the program. While generally in opposition to the waiver, two of the five comments suggested that if SBA were to finalize the proposed amendment, a waiver request must meet a set of strict criteria to ensure that all avenues for compliance have been exhausted. SBA recognizes that the 30/70 requirement is an integral part of the Small Business Timber Set-Aside Program and is committed to a full and fair implementation of the program. SBA does not intend to weaken the requirement with this amendment, it merely establishes the D/GC's authority to approve a waiver in limited circumstances when justified. Historically, SBA has granted few waivers and only in extremely rare circumstances. Due to that rarity, SBA has no

internal procedure to process requests or established criteria to evaluate and approve waivers when needed. This amendment gives SBA the opportunity to set procedure and criteria for processing waiver requests in the future. SBA will continue to apply a strict standard and does not intend to grant a waiver in circumstances of inconvenience, changes in market value, ignorance of contract requirements, or unsupported claims of changed conditions. Accordingly, SBA implements the § 121.507(d) as proposed.

SBA also received comments that urged the agency to amend regulations to reflect the revised terms of the Memorandum of Understanding (MOU) signed by SBA and Forest Service (FS) in 2020. With the updated terms of the MOU, SBA and FS agreed to revise the computation of market share to include timber volume sold under Stewardship Integrated Resource Timber Contracts. To date, SBA has not amended its regulations to reflect the revised agreed upon computation of market share. The commenter recommended that SBA's regulations should be updated to merely include the policy included in the MOU agreed upon by SBA and FS to ensure that that policy is consistently applied and to avoid any confusion regarding the policy. SBA agrees and adopts this comment.

The MOU governs timber sales by FS under the Small Business Timber Set-Aside Program and establishes guidelines for determining "fair proportion," sets a five-year re-computation period for determining the base average shares of timber purchases and establishes a "trigger" mechanism for initiating set-aside timber sales. In 2016, SBA proposed a change to regulations that included both Integrated Resource Timber Contracts and Integrated Services Timber Contracts in the small business market share calculation. (81 FR 66199). Although SBA received comments supporting the amendment, it did not become final due to ongoing negotiations with FS on the updated MOU. Ultimately, the MOU included only Integrated Resource Timber Contracts in the small business market share calculation. To reflect the 2020 update to the MOU, SBA amends its regulations at § 121.506 to add relevant definitions and

adds §121.507(e) to include Integrated Resource Timber Contracts in the small business market share calculation.

Section 121.702

Section 121.702 sets forth the size and eligibility standards that apply to the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs. Paragraph (c)(7) provides guidance relating to the ostensible subcontractor rule in the SBIR/STTR programs. That rule treats a prime contractor and its subcontractor or subgrantee as joint venturers when a subcontractor or subgrantee performs primary and vital requirements of an SBIR or STTR funding agreement. The proposed rule clarified that when an SBIR/STTR offeror is determined to be a joint venturer with its ostensible subcontractor, all rules applicable to joint ventures apply. This means that SBA will apply § 121.702(a)(1)(iii) or § 121.702(b)(1)(ii), which contains the ownership and control requirements for SBIR/STTR joint ventures. This clarification is consistent with how SBA treats entities that are determined to be joint venturers with an ostensible subcontractor for other small business program set-asides. SBA received five comments in response to this clarification. All five supported the change. The commenters felt that if SBA determines that a subcontractor really is a joint venture partner because it is performing primary and vital aspects of the requirement, it makes sense that all requirements that apply to joint ventures generally would apply to the relationship deemed in effect to be a joint venture. SBA adopts the proposed language in this final rule.

Section 121.702(c) relates to size and affiliation for the SBIR/STTR programs. Some of the exceptions to affiliation that are applicable to the SBIR/STTR programs are listed in § 121.702(c). However, others are listed in the general exceptions to size affiliation that are located in section 121.103(b). Currently, there is an exception to affiliation noted in § 121.103(b)(1) for business concerns owned in whole or substantial part by Small Business Investment Companies (SBICs) licensed under the Small Business Investment Act of 1958, as amended. Pursuant to § 121.103(b)(8), this exception applies to entities awarded SBIR or STTR

contracts or grants that are wholly or substantially owned by SBICs. SBA received a comment recommending that SBA specifically clarify that the exception applies to the SBIR/STTR programs. In response, the final rule clarifies this longstanding exception to affiliation and its applicability to the SBIR/STTR programs by specifically referencing the exception at § 121.103(b)(1) in a new § 121.702(c)(11).

Section 121.1001

Section 121.1001 identifies who may initiate a size protest or request a formal size determination in any circumstances. Currently, the language identifying who may protest the size of an apparent successful offeror is not identical for all of SBA's programs. For small business set-aside contracts and competitive 8(a) contracts, any offeror that the contracting officer has not eliminated from consideration for any procurement-related reason may initiate a size protest. For contracts set aside for WOSBs or SDVOSBs, any concern that submits an offer may initiate a size protest. For contracts set aside for certified HUBZone small business concerns, any concern that submits an offer and has not been eliminated for reasons unrelated to size may submit a size protest. SBA believes that making the language for all programs identical will remove any confusion and provide more consistent implementation of the size protest procedures. The proposed rule adopted the language currently pertaining to small business set-asides and competitive 8(a) contracts to all of SBA's programs. Thus, any offeror that the contracting officer has not eliminated from consideration for any procurement-related reason could initiate a size protest in each of those programs. SBA received ten comments on this change. All commenters supported making the protest language for all SBA small business programs identical. As such the final rule make conforming changes in § 121.1001(a)(6)(i) for the HUBZone program, in § 121.1001(a)(8)(i) for the SDVO program, and in § 121.1001(a)(9)(i) for the WOSB program.

With respect to 8(a) contracts, § 121.1001(a)(2) identifies interested parties who may protest the size status of an apparent successful offeror for an 8(a) competitive contract, and

§ 121.1001(b)(2)(ii) identifies those who can request a formal size determination with respect to a sole source 8(a) contract award. Pursuant to § 124.501(g), before a Participant may be awarded either a sole source or competitive 8(a) contract, SBA must determine that the Participant is eligible for award. SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract, and after the apparent successful offeror is identified for a competitive 8(a) contract. For a sole source contract, if SBA determines a Participant to be ineligible because SBA believes the concern to be other than small, § 121.1001(b)(2)(ii) authorizes the Participant determined to be ineligible to request a formal size determination. However, § 121.1001(b)(2)(ii) does not currently authorize a Participant determined to be ineligible based on size to request a formal size determination in connection with a competitive 8(a) contract award. SBA does not believe that the protest authority of § 121.1001(a)(2) was meant to apply to this situation since protests normally relate to another firm challenging the small business status of the apparent successful offeror, not the apparent successful offeror challenging its own size status. The proposed rule provided specific authority to allow a firm determined to be ineligible for a competitive 8(a) award based on size to request a formal size determination. It also authorized the contracting officer, the SBA District Director in the district office that services the Participant, the Associate Administrator for Business Development, and the SBA's Associate General Counsel for Procurement Law to do so as well. SBA received four comments supporting this change. Without any opposing comments, SBA adopts the language as proposed.

Sections 121.1004(a)(ii), 126.801(d)(2)(i), and 127.603(c)(2)

In the context of a sealed bid procurement, SBA's regulations provide that an interested party must protest the size or socioeconomic status (i.e., service-disabled veteran-owned small business (SDVOSB), HUBZone or women-owned small business (WOSB)/economically-disadvantaged women-owned small business (EDWOSB)) of the low bidder prior to the close of business on the fifth business day after bid opening. However, the regulations do not specifically

take into account the situation where a low bidder is timely protested and found to be ineligible, the procuring agency identifies another low bidder, and an interested party seeks to challenge the size or socioeconomic status of the newly identified low bidder. In such a situation, the new low bidder is identified well beyond five days of bid opening. As such, it is impossible for an interested party to file a timely protest (i.e., one within five days of bid opening). It was not SBA's intent to disallow size protests in these circumstances. SBA believes that a protest in these circumstances should be deemed timely if it is received within five days of notification of the new low bidder. The proposed rule specifically provided that where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder would be deemed timely if received within five business days after the contracting officer has notified the protestor of the identity of that new low bidder. Eight commenters supported this change, noting that the change was needed in order to preserve protests rights when an initial low bidder ultimately does not receive the award. SBA adopts the proposed provision in this final rule.

The final rule makes this change in § 121.1004(a)(ii) for size protests, in § 126.801(d)(2)(i) for protests relating to HUBZone status, and in § 127.603(c)(2) for protests relating to WOSB or EDWOSB status. Although the proposed rule also amended § 125.28(d)(2) for protests relating to SDVO status, this final rule does not amend provisions relating to the timeliness of SDVO status protests because SBA included the same provision in the final rule implementing the Veteran Small Business Certification Program and is already contained in § 134.1004(a)(4) of SBA's regulations. *See* 87 FR 73400 (Nov. 29, 2022).

Section 121.1004

The proposed rule added § 121.1004(f) to specify that size protests may be filed only against an apparent successful offeror (or offerors) or an offeror in line to receive an award. SBA will not consider size protests relating to offerors who are not in line for award. This is the current SBA policy, and the proposed rule merely provided additional clarity to § 121.1004(e),

which specifies that premature protests will be dismissed. SBA received three comments, all supporting this clarification. The final rule adopts the proposed language.

Where an agency decides to reevaluate offers as a corrective action in response to a protest at the Government Accountability Office (GAO), the proposed rule added a new § 121.1004(g) providing that SBA would dismiss any size protest relating to the initial apparent successful offeror. When offerors are made aware of the new or same apparent successful offeror after reevaluation, the proposed rule authorized them to again have the opportunity to protest the size of the apparent successful offeror within five business days after such notification. One commenter agreed with proposed § 121.1004(g) as written, and one commenter agreed with the intent of the proposal but sought further clarification. That commenter first recommended that all protests under FAR subpart 33.1 should be treated similarly, meaning that the same consequences should result where there is an agency level protest, a protest at GAO or a case filed regarding the affected procurement at the Court of Federal Claims. SBA agrees and has made that clarification in the final rule both here and in § 121.1009. Additionally, the commenter recommended that the regulation allow a procuring agency to request that a size determination be completed, and for SBA in its discretion to process the size protest, despite corrective actions. It is SBA's policy that with respect to a specific contract, SBA will generally process size protests relating only to the apparent successful offeror. Where a corrective action could cause a procuring agency to change who it selects as the apparent successful offeror, SBA would not agree to continue to process a size protest relating to the initially identified apparent successful offeror. Nevertheless, if a procuring agency can demonstrate that the corrective action would not result in a change in the apparent successful offeror, SBA believes that it could continue to process the size protest. The final rule adds language providing that SBA will complete the size determination where the procuring agency makes a written request to SBA within two business days of the agency informing SBA of the corrective action and demonstrates that the corrective action will not result in a change of

the apparent successful offeror. SBA will not, however, continue to process a size protest where the size protest involves size issues that are determined as of the date of final proposal revision per § 121.404(d).

Section 121.1009

Section 121.1009 details the procedures SBA's Government Contracting Area Offices use in making formal size determinations. Paragraph 121.1009(a)(1) provides that the Area Office will generally issue a formal size determination within 15 business days after receipt of a protest or a request for a formal size determination. As noted above, with respect to a specific contract, SBA will generally process size protests relating only to the apparent successful offeror. SBA sometimes receives a size protest where the award is simultaneously being protested at the GAO. Where this happens, SBA suspends processing the size protest pending the outcome of the GAO decision since that decision may require corrective action which could affect the apparent successful offeror. Although that has been SBA's policy in practice, it is not specifically set forth in SBA's regulations. The proposed rule incorporated that policy, providing that if a protest is pending before GAO, the SBA Area Office will suspend the size determination case. Once GAO issues a decision, the proposed rule noted that the Area Office will recommence the size determination process and issue a formal size determination within 15 business days of the GAO decision, if possible. Similar to the comment in response to proposed § 121.1004(g), one commenter believed that if SBA is going to suspend processing a size protest pending the outcome of a GAO protest, the same should be done for agency level protests and cases filed with the Court of Federal Claims relating to the affected procurement. The commenter also recommended that if the bid protest is not resolved within 40 days, the SBA Area Office should resume consideration of the size protest and issue a formal size determination within 15 business days thereafter, if possible. SBA disagrees with this recommendation. Again, SBA's policy is to process size protests only regarding firms that are in line for award (i.e., for firms that have been selected as the apparent successful offerors). If the apparent

successful offeror could change in light of the FAR subpart 33.1 protest, it does not make sense to SBA to recommence processing a size protest regarding the firm initially determined to be the apparent successful offeror, regardless of the amount of time that has passed since the FAR subpart 33.1 protest was filed. As such, the final rule amends the language to clarify that SBA will suspend processing a size protest whenever a FAR subpart 33.1 protest is filed regarding the same procurement, but does not adopt the recommendation that SBA restart processing the protest if a certain amount of time passes. If the FAR subpart 33.1 decision does not change the apparent successful offeror, SBA will generally issue a formal size determination within 15 business days of the decision. If the decision results in a cancellation of the award or a change of the apparent successful offeror, SBA will dismiss the protest as moot. If the award is cancelled and re-evaluation or other corrective action takes place, interested parties may file a timely size protest with respect to the newly identified apparent successful offeror after the notification of award. Where re-evaluation results in the selection of the same apparent successful offeror, a timely size protest may be filed with respect to that firm.

Sections 121.1009(g)(5), 126.503(a)(2), 127.405(d), and 128.500(d)

Section 863 of the National Defense Authorization Act for Fiscal Year 2022 (NDAA FY22), Pub. Law 117-81, amended section 5 of the Small Business Act, 15 U.S.C. 634, to add three requirements related to size and socioeconomic status determinations. First, section 863 mandates that a business concern or SBA, as applicable, "shall" update the concern's status in SAM.gov not later than two days after a final determination by SBA that the concern does not meet the size or socioeconomic status requirements that it certified to be. SBA believes that the statute intends that a business concern be required to update SAM.gov in all instances in which it is capable of doing so. Only where a business concern is unable to change a particular status (e.g., only SBA can identify a concern as a certified HUBZone small business) will the business concern not be required to change that status in SAM.gov. Second, section 863 requires that, in the event that the business does not update its status within this timeframe, SBA "shall" make the

update within two days of the business's failure to do so. Third, section 863 requires that, where the business is required to make an update, it also must notify the contracting officer for each contract with which the business has a pending bid or offer, if the business finds, in good faith, that the determination affects the eligibility of the concern to be awarded the contract. The proposed rule implemented these provisions by amending SBA's regulations in § 121.1009(g)(5) (for size determinations), § 125.30(g)(4) (for SDVO status determinations), § 126.503(a)(2) (for HUBZone status determinations), and § 127.405(c) (for WOSB/EDWOSB status determinations). Because only SBA can change a firm's status as a certified HUBZone small business concern in SAM.gov, it is not "applicable" under the statute for the business concern to do so. As such, the proposed rule did not add language requiring a HUBZone concern to change its status in SAM.gov within two business days of an adverse status determination. Instead, it required SBA to make such a change within four business days. Several commenters supported the proposed regulatory changes in response to the statutory change. A few commenters also complained about difficulties they encountered trying to update SAM.gov, but those issues are not relevant to the statutory requirements or SBA's implementation of those requirements.

The final rule adopts the language proposed with a few modifications. Because SBA renumbered all SDVO provisions when implementing the Veteran Small Business Certification Program, this final rule implements the provisions relating to section 863 for SDVO status in a new § 128.500(d) instead of § 125.30(g)(4) as proposed. *See* 87 FR 73400 (Nov. 29, 2022). To take into account SBA's new authority to certify and decide protests relating to VOSB status, the final rule also includes VOSB status as something that needs to be changed in response to a final SBA determination finding a firm ineligible as a VOSB. Additionally, the final rule applies the two-day requirement on self-certifications to situations where SBA denies applicants' requests for VOSB or SDVOSB certification or for WOSB certification. Those changes are reflected in § 128.302(f) for VOSB/SDVOSB and in § 127.304(g) for WOSB. For WOSB, the two-day

requirement applies where SBA's determination is based on the ownership or control of the applicant.

SBA's protest decisions are appealable to OHA, and VOSB/SDVOSB certification decisions also are appealable. If a participant or applicant has appealed SBA's determination, the two-day requirement does not apply until OHA issues a final decision finding the firm ineligible. If there is no appeal available, the two-day requirement applies immediately after the firm receives SBA's determination that the firm is ineligible. If an appeal is available but the firm ultimately chooses not to appeal the decision, the two-day requirement applies immediately after the right to appeal lapses.

One commenter sought clarification as to whether there are any consequences if a firm fails to change its status timely in SAM.gov. Specifically, the commenter questioned whether a failure to change status within two days would be a cause to initiate debarment or suspension proceedings. Under the provisions of section 863, the consequence of a firm failing to change its status is that SBA would have authority to change the status on behalf of the firm. SBA will work with the System for Award Management to exercise such authority, but SBA does not presently have the ability in SAM.gov to change a firm's certification status without the firm taking action to accept the change.

Section 863 also requires firms to alert agencies with which the firm has a pending offer when the firm receives a relevant negative status determination. Failure to do so in that instance could lead to protests or penalties. Initiating a debarment or suspension action depends on the facts. If the only thing a firm did was not change its status in SAM.gov within two days, SBA does not believe that would be sufficient cause for debarment or suspension. Failure to notify contracting officers on pending procurements of a firm's change in status could be if SBA believed there was an intent to misrepresent the firm's status in order to win an award. Submitting offers for new set-aside awards would be. Similarly, failure to take timely action to allow an SBA status change to be reflected on the firm's SAM.gov profile could also be grounds

for government-wide debarment or suspension if SBA believed that the firm's failure to accept the change was an intent to conceal the status change or otherwise deceive procuring agencies of its current status. SBA does not believe that that needs to be addressed in this regulation as the debarment and suspension regulations provide authority to initiate actions where a firm intentionally misrepresents its size or status.

Sections 121.1203 and 121.1204

Section 46(a)(4)(A) of the Small Business Act, 15 U.S.C. 657s(a)(4)(A), provides that in a contract mainly for supplies a small business concern shall supply the product of a domestic small business manufacturer or processor unless a waiver is granted after SBA reviews a determination by the applicable contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including the period of performance) required by the contract. Section 121.1203 of SBA's regulations provides guidance as to when SBA will grant a waiver to the nonmanufacturer rule in connection with an individual contract, and section 121.1204 identifies the procedures for requesting and granting waivers.

The proposed rule sought to clarify perceived ambiguities relating to the effect of a waiver in a multiple item procurement. For a multiple item set-aside contract, in order to qualify as a small business nonmanufacturer, at least 50 percent of the value of the contract must come from either small business manufacturers or from any businesses for items which have been granted a waiver to the nonmanufacturer rule (or small business manufacturers plus waiver must equal at least 50 percent). *See* 13 CFR 125.6(a)(2)(ii)(B). In seeking a contract-specific waiver to the nonmanufacturer rule, SBA's regulations provide that a contracting officer's waiver request must include a definitive statement of the specific item to be waived. The proposed rule clarified that for a multiple item procurement, a contracting officer must specifically identify each item for which a waiver is sought when the procuring agency believes that at least 50 percent of the estimated contract value is available only from other than small business

manufacturers and processors. Of course, if at least 50% of the estimated contract value of the contract is composed of items manufactured or processed by small business, then a waiver of the nonmanufacturer rule is not required and there is no requirement that each item acquired in a multiple-item acquisition be manufactured or processed by a small business. The proposed rule also clarified that because a waiver is granted for specific items, once SBA reviews and concurs with an agency's request, SBA's waiver applies only to the specific item(s) identified, not to the entire contract.

SBA received comments both supporting and opposing the clarification that a contracting officer must specifically identify each item for which a waiver is sought. Those opposing the clarification believed it would disrupt and delay procurements, negatively affect the supply chain and the delivery of services to warfighters, and significantly harm small business opportunities. One commenter stated that it understood why SBA proposed to require contracting officers to specifically identify each item in the multi-item procurement for which a contract-specific waiver is sought but was concerned that this will increase the administrative burden and make contracting officers less likely to request contract-specific waivers. Those supporting the clarification stated that the regulations already require this and that it is the appropriate approach to ensure that small business is actually benefitting from set-aside contracts. One commenter believed that if most of the items to be supplied through a multiple item procurement really are not made by small business manufacturers, maybe that procurement should not be set-aside for small business. It is true that small business resellers or nonmanufacturers would still benefit from such a procurement, but the value of the contract going to those small business nonmanufacturers versus the total value of the contract can be only a fraction of what could go to large business manufacturers. Another commenter stated too many times an agency uses some broad waiver (that doesn't specify exact items) to supply the product of a large business to the detriment of legitimate small business manufacturers. That commenter believed that it is fine to help small business non-manufacturers, but not at the expense of small business manufacturers.

One commenter believed that proposed § 121.1203(f) seemed to contradict § 121.406(d)(1). Section 121.406(d)(1) provides that if at least 50% of the estimated contract value of a multiple item procurement is composed of items that are manufactured by small business concerns, then a waiver of the nonmanufacturer rule is not required. Proposed § 121.1203(f) provided that for a multiple item procurement, a waiver must be sought and granted for each item for which the procuring agency believes no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of the solicitation. SBA agrees that proposed § 121.1203(f) was misleading. SBA intended that provision to apply only where waivers were necessary to meet at least 50% of the value of the contract, not where it is clear that at least 50% of the value of the items to be procured will be supplied by small business. In addition, waivers are needed only to the extent that would enable at least 50% of the total estimated value of the items to be purchased to come from small business manufacturers or from large businesses for those items subject to a waiver. In other words, small plus waiver must equal at least 50% of the value of the contract. Small plus waiver does *not* need to equal 100% of the value of the contract. A contracting officer can select some items that are not manufactured by small business to request a waiver, but not others. As long as at least 50% of the anticipated value of the items to be procured in the aggregate come from small business or large business subject to a waiver, then the nonmanufacturer rule is met. The final rule clarifies that a waiver need not be sought if the conditions in § 121.406(d)(1) are present (i.e., where at least 50% of the estimated contract value of the items to be procured are manufactured by small business concerns). The final rule also clarifies that a contracting officer need not seek a waiver for each item for which the procuring agency believes no small business manufacturer or processor can reasonably be expected to offer, but rather must seek a waiver with respect to such items in an amount that would bring the total estimated value of items to be supplied by small business and items subject to a waiver to be at least 50% of the value of the contract.

SBA again notes that prior to the proposed rule, SBA's regulations already required a contracting officer to provide "[a] definitive statement of the specific item to be waived and justification as to why the specific item is required" in order for SBA to grant a contract specific waiver. 13 CFR 121.1204(b)(1)(i). Thus, it is not a change in policy to require that in a multiple item procurement each item for which a waiver is sought must be specifically identified. However, SBA also understands the concern that specifying every part of a multifaceted end item could be overly burdensome. For example, aircraft X has many thousands of parts that make up the aircraft. To specify every part of the aircraft that might need to be replaced as a separate item for which a waiver must be sought would be burdensome. SBA does not expect that. In such a case, the waiver request should state spare parts relating to aircraft X as the item for which a waiver is sought. However, a waiver request cannot be so broad as to have no real identification (e.g., all medical supplies). SBA has added clarifying language in the final rule to address what an "item" is for which a waiver needs to be sought.

SBA also does not agree that contracting officers would be less likely to use set-asides. In order to have a set-aside, at least 50% of the value of the expected items to be procured in the aggregate must come from small business manufacturers or large business manufacturers for which a waiver (either class or contract specific) has been granted. SBA has been told that more than 50% of the value of these multiple item procurements is often supplied by small businesses. When that is the case, waivers for individual items would not be required. Where at least 50% of the estimated value of items to be procured are not manufactured by small business, the contracting officer should request a waiver of one or more specific items that are required under the contract to achieve that 50% value requirement. And, as identified above, the waiver request can be somewhat broad if it is also specific (e.g., all spare parts relating to aircraft X). SBA also notes that contracting officers should be able to rely on past performance. In other words, for a follow-on multiple item procurement if more than 50% of the value of the items on the previously awarded contract came from small business manufacturers or large business

manufacturers for which the identified item(s) supplied were subject to a contract specific waiver, the follow-on contract should be set-aside for some type of small business. Contracting officers can project future compliance with the non-manufacturer rule based on past performance, and not knowing precisely what will be purchased under a multiple item procurement should not prevent the procurement from being set aside for small business.

The proposed rule also added a provision that prohibited contract-specific waivers for contracts with a duration of longer than five years, including options. When SBA grants an individual waiver with respect to a particular item, it does not necessarily mean that there are no small business manufacturers of that item. Instead, it could merely relate to the lack of availability of small business manufacturers for the specific contract at issue due to timing (e.g., small business manufacturers are currently tied up with other commitments) or capacity (e.g., there are small business manufacturers, but those manufacturers cannot provide the item in the quantity that is required). SBA firmly believes that the circumstances surrounding the availability of a specific item from small business manufacturers can greatly change in five years. Beyond five years, new small business manufacturers of a particular item could come into the market, or those previously committed to other projects or who were unable to previously supply the product in the quantity or time constraints required by the contract could become available to meet the agency's requirements. As an alternative, SBA noted in the supplementary information to the proposed rule that SBA was also considering limiting waivers to five years for long term contracts but allowing a procuring agency to seek a new waiver for an additional five years if, after conducting market research, it demonstrates that there are no available small business manufacturers and that a waiver remains appropriate. The proposed rule specifically asked for comments on both approaches. SBA received three comments on the proposal relating to long-term contracts. All three favored the alternative approach which would allow a contracting officer to request a second contract-specific waiver to be effective after the first five years of a contract where the contracting officer can demonstrate that a waiver is still needed.

SBA adopts the alternative approach in this final rule. This will make waivers relating to long-term contracts similar to what is required for a follow-on contract to a normal base and four option years contract. In that context, after a five-year contract is completed and an agency seeks to award a follow-on contract for the same requirements, an agency would be required to again conduct market research and determine that no small business manufacturer or processor reasonably can be expected to offer one or more specific products required by the new solicitation. The same will be required for a long-term contract. A procuring agency will be required to conduct new market research and demonstrate that a waiver is still needed beyond the first five years.

When an agency seeks an individual waiver to the nonmanufacturer rule in connection with a specific acquisition, SBA believes that the agency is ready to move forward with the acquisition process as soon as SBA makes a waiverdecision and expects the solicitation to be issued shortly after such a decision is made. That is why SBA's waiver decision letters provide that the waiver will expire in one year from the date of the waiver decision. SBA expects award to be made within one year. If it is not, SBA believes that the agency should come back to SBA with revised market research requesting that the waiver (or waivers in the case of a multiple item procurement) be extended. Similar to the rationale for not allowing individual waivers beyond five years on long-term contracts, the circumstances surrounding whether there are any small business manufacturers who are capable and available to supply products for a specific procurement may change in one year. Where an agency demonstrates that small business manufacturers continue to be unavailable to fulfill the requirement, SBA will extend the waiver(s). The proposed rule specifically incorporated this policy into a new § 121.1204(b)(5). SBA received three comments on this provision. Two commenters indicated that they had no objection to the proposal. One comment recommended that SBA should consider allowing a waiver decision to last for two years but did not provide accompanying rationale for that position. Presumably, the commenter believes that some procurement actions take longer than

one year to finalize. As noted above, circumstances (availability and new manufacturers coming into the market) can change in a year. SBA believes that is the appropriate amount of time for a contract specific waiver to last for a pending procurement. SBA adopts the proposed language as final in this rule.

Although SBA believes that there is no current ambiguity, the proposed rule also added language specifying that an individual waiver applies only to the contract for which it is granted and does not apply to modifications outside the scope of the contract or other procurement actions. A waiver granted for one contract does not and was never intended to apply to another contract (whether that separate contract was a follow-on contract, bridge contract, or some other contract or order under another contract), but the proposed rule added this language nevertheless to dispel any possible misunderstanding. There was no opposition to this clarification, and SBA adopts it as final.

Finally, the proposed rule clarified that where an agency requests a waiver for multiple items, SBA may grant the request in full, deny it in full, or grant a waiver for some but not all of the items for which a waiver was sought. SBA's decision letter would identify the specific items that SBA identifies as waived for the procurement. SBA received no comments specifically addressing this provision. As such, SBA adopts it as final.

Section 121.1205

Section 121.1205 refers to the list of classes of products for which SBA has granted waivers to the Nonmanufacturer Rule. The reference in the current version of the regulation provides a link to a website that no longer exists. The proposed rule updated the reference to the correct website. A few commenters supported this update, and SBA adopts adding the correct website, which is https://www.sba.gov/document/support-non-manufacturer-rule-class-waiver-list.

Section 124.102

Section 124.102(c) provides that a concern whose application is denied due to size by 8(a) BD program officials may request a formal size determination with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the business is located. SBA notes that during the processing of an application SBA itself can request a formal size determination pursuant to § 121.1001(b)(2)(i). The § 124.102(c) process applies only where SBA has not requested a formal size determination with respect to a specific applicant. Under § 124.102(c), if the concern requests a formal size determination and the Area Office finds it to be small under the size standard corresponding to its primary NAICS code, the concern can immediately reapply to the 8(a) BD program. SBA believes that a concern should not need to reapply to the 8(a) BD program if size was the only reason for decline. In such a case, SBA believes that the Associate Administrator for Business Development (AA/BD) should immediately certify the firm as eligible for the 8(a) BD program. The proposed rule made a distinction for applications denied solely based on size and those where size is one of several reasons for decline. Where size is not the only reason for decline, the proposed rule provided that the concern could reapply for participation in the 8(a) BD program at any point after 90 days from the AA/BD's decline. The AA/BD would then accept the size determination as conclusive of the concern's small business status, provided the applicant concern has not completed an additional fiscal year in the intervening period and SBA believes that the additional fiscal year changes the applicant's size. SBA received seven comments on proposed § 124.102. All comments received supported the proposed change that a concern whose application is denied due to size by 8(a) BD program officials should be able to request a formal size determination. The commenters also agreed that if size is the only reason for decline and OHA reverses SBA, the firm should be admitted to the 8(a) BD program without any further action being necessary on the part of the firm. As such, SBA adopts the proposed language in this final rule.

Section 124.103

Section 124.103 describes the rules pertaining to social disadvantage status. Section 124.103(c) details how an individual who is not a member of one of the groups presumed to be socially disadvantaged may establish his or her individual social disadvantage. It provides that an individual must identify an objective distinguishing feature that has contributed to his or her social disadvantage and lists physical handicap as one such possible identifiable feature. In order to be consistent with recent changes in terms made by the General Services Administration (GSA), 87 FR 6044, as well as with the Americans with Disabilities Act, the proposed rule changed the words physical handicap to identifiable disability. SBA received two comments supporting the proposed change and no comments objecting to it. As such, SBA adopts the proposed language in this final rule.

Section 124.104

Section 124.104 specifies the rules pertaining to whether an individual may be considered economically disadvantaged. Paragraph 124.104(c)(2)(ii) provides that funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth. The paragraph then requires the individual to provide information about the terms and restrictions of the account to SBA in order for SBA to determine whether the funds invested in the account should be excluded from the individual's net worth. SBA does not believe that it is necessary for an individual to provide information about the terms and restrictions of a retirement account to SBA in every instance. As such, the proposed rule changed this provision to requiring an individual to provide information about the terms and restrictions of an IRA or other retirement account only when requested to do so by SBA. SBA received four comments supporting the change and one comment in opposition. The commenter opposing the change believed that removing the requirement could water down the economically disadvantaged criteria. SBA disagrees. The change will not affect SBA’s ability to seek additional information relating to an IRA where appropriate. It merely eliminates the

unnecessary burden of requiring an applicant to submit such information in every instance. SBA adopts the proposed change in this final rule.

This rule also deletes current § 124.104(c)(2)(iii). That provision provides that income received from an applicant or Participant that is an S corporation, limited liability company (LLC) or partnership will be excluded from an individual's net worth where the applicant or Participant provides documentary evidence demonstrating that the income was reinvested in the firm or used to pay taxes arising in the normal course of operations of the firm. SBA does not believe that this provision is necessary because the exact provision is contained in § 124.104(c)(3)(ii) in discussing how SBA treats personal income.

Section 124.105

Section 124.105 describes the ownership requirements pertaining to applicants and Participants for the 8(a) BD program. Paragraph 124.105(h) sets forth ownership restrictions for non-disadvantaged individuals and concerns, and § 124.105(h)(2) specifies ownership restrictions for non-Participant concerns in the same or similar line of business and for principals of such concerns. Current § 124.105(h)(2) recognizes a limited exception to the general ownership restriction for a former Participant in the same or similar line of business or a principal of such a former Participant. This paragraph does not, however, refer to or recognize another exception set forth elsewhere in SBA's regulations, and that is the exception set forth in § 125.9(d)(2) which allows an SBA-approved mentor to own up to 40 percent of its protégé. This proposed rule added language clarifying that the § 125.9(d)(2) authority applies equally to mentors in the same line of business as its protégé that is also a current 8(a) BD Program Participant. SBA received four comments regarding the proposed clarification that a mentor in the same or similar line of business can own up to 40 percent of its protégé firm. All four commenters supported the clarification. The final rule adopts the proposed language.

Paragraph 124.105(i) provides guidance with respect to changes of ownership, and § 124.105(i)(1) specifies that any Participant that was awarded one or more 8(a) contracts may

substitute one disadvantaged individual for another disadvantaged individual without requiring the termination of those contracts or a request for waiver under § 124.515. There has been some confusion as to whether there can be a change of ownership for a former Participant that is still performing one or more 8(a) contracts. As noted in the proposed rule, this would generally not occur with one disadvantaged individual seeking to buy out a disadvantaged principal of a former 8(a) Participant. That is because of the one-time eligibility restriction. For any change of ownership to be approved by SBA, SBA must determine that the individual seeking to replace a former principal does in fact qualify as socially and economically disadvantaged under SBA's regulations. An individual who has previously participated in the 8(a) BD program and has used his or her individual disadvantaged status to qualify one 8(a) Participant would not be deemed disadvantaged if the individual sought to replace a principal of a second 8(a) Participant. Thus, the only individuals who could seek to replace the principal of a former 8(a) Participant would be those who have never participated in the 8(a) BD program before. To do so, such individuals would have to use their one-time eligibility to complete performance on previously awarded 8(a) contracts. The business concern could not be awarded any additional contracts because it is no longer an eligible Participant. If an individual thought the opportunity was sufficient to entice him or her to forego his/her one-time eligibility, he or she might proceed with such a transaction, but SBA does not believe that would often happen. The more likely scenario would be where an entity (tribe, ANC), Native Hawaiian Organization (NHO) or Community Development Corporation (CDC)) seeks to replace the principal of a former 8(a) Participant. The one-time eligibility restriction does not apply to entities. A tribe, ANC, NHO or CDC can own more than one business concern that participates in the 8(a) BD program. As such, an entity could purchase a former Participant and complete performance of any remaining 8(a) contracts. If the tribe, ANC, NHO or CDC seeking to replace the principal of a former 8(a) Participant has or has had a Participant in the 8(a) BD program, its general eligibility has already been established. However, if this would be the first time that a specific entity would own a business seeking 8(a)

BD benefits, the entity must establish its overall eligibility. In the case of an Indian tribe or NHO, it must, among other things, demonstrate that it is economically disadvantaged. The proposed rule clarified that a change of ownership could apply to a former Participant as well as to a current Participant. SBA received nine comments supporting this clarification and no comments opposing it. The final rule adopts the proposed language.

Paragraph 124.105(i)(2) permits a change of ownership to occur without receiving prior SBA approval in certain specified circumstances, including where all non-disadvantaged individual owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction. To ensure that ownership interests are not divided up among two or more immediate family members to avoid SBA's immediate review of a change of ownership, the proposed rule provided that SBA will aggregate the interests of all immediate family members in determining whether a non-disadvantaged individual involved in a change of ownership has more than a 20 percent interest in the concern. Three commenters supported the change. One commenter supported the change but sought further clarification. That commenter believed that the term "immediate family members" in the proposed rule need to be defined and suggested that SBA either reference the list of family members stated in § 121.103(f), or add a definition of the term to § 124.105(i)(2). That commenter also believed that it was inconsistent for the change to cover immediate family members, but not any other "persons with an identity of interest" under § 121.103(f). Given that SBA treats persons with an identity of interest (regardless of type) as being "one party," the commenter recommended that SBA should add persons with an identity of interest generally, such as individuals who are not family members but through common investments are deemed to be "one party" under § 121.103(f). SBA agrees and has made those changes in the final rule.

Section 124.107

Section 124.107 describes the policies relating to potential for success. In order to be eligible for the 8(a) BD program, an applicant concern must possess reasonable prospects for

success in competing in the private sector. This requirement stems from the language contained in § 8(a)(7)(A) of the Small Business Act, 15 USC 637(a)(7)(A), which provides that no small business concern shall be deemed eligible for the 8(a) BD program unless SBA determines that with contract, financial, technical, and management support the concern will be able to perform 8(a) contracts and has reasonable prospects for success in competing in the private sector. There has been some confusion as to whether an applicant must demonstrate that it has specifically performed work in the private sector prior to applying to participate in the 8(a) BD program. That is not the case. The statutory requirement is that SBA must determine that with assistance from the 8(a) BD program a business concern will have reasonable prospects for success in competing in the private sector in the future. The regulation requires an applicant to demonstrate that it has been in business and received revenues in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application, but it does not say that those revenues must have come from the private sector. A business concern that has performed no private sector work but has demonstrated successful performance of state, local or federal government contracts is eligible to participate in the 8(a) BD program. The proposed rule added language clarifying that intent. SBA received eight comments in response to the proposed clarification to § 124.107. All eight comments supported the proposed clarification that a firm can demonstrate potential for success with prior commercial and government contracts, including state and local government contract work. As such, SBA adopts the proposed language in this final rule.

Section 124.108

Section 124.108 establishes other eligibility requirements that pertain to firms applying to and participating in the 8(a) BD program. Paragraph 124.108(e) provides that an applicant will be ineligible for the 8(a) BD program where the firm or any of its principals has failed to pay significant financial obligations owed to the Federal Government. This proposed rule added language clarifying that where the firm or the affected principals can demonstrate that the

financial obligations have been settled and discharged/forgiven by the Federal Government, the applicant will be eligible for the program. Five commenters supported this clarification as proposed. One commenter believed that the terms "financial obligations owed" and "financial obligations have been settled and discharged/forgiven by the Federal Government" are vague. SBA disagrees. The eligibility requirement pertaining to owing federal obligations to the Government has been in SBA's regulations for some time without confusion as to its meaning. Specifically, the regulation prior to the proposed change provided that "[n]either a firm nor any of its principals that fails to pay significant financial obligations owed to the Federal Government . . . is eligible for admission to or participation in the 8(a) BD program." The proposed rule merely attempted to clarify that if the Government has settled a debt (i.e., accepting less than the full amount owed to discharge the debt), the firm/individual would not be barred from participating in the 8(a) BD program on that basis alone. SBA adopts the proposed language in this final rule.

Section 124.109

Section 124.109 provides specific rules applicable to Indian tribes and Alaska Native Corporations for applying to and remaining eligible for the 8(a) BD program. SBA's regulations currently provide that the articles of incorporation, partnership agreement or limited liability company articles of organization of a tribally-owned applicant or Participant must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs. The proposed rule sought to make two changes with respect to that provision. First, the proposed rule clarified that the waiver of sovereign immunity should apply only to concerns owned by Federally-recognized Indian tribes. State recognized tribes are not deemed sovereign and, thus, do not need to waive sovereign immunity because they are already subject to suit. Second, concerns that are organized under tribal law may not have articles of incorporation, partnership agreements or limited liability company articles of organization and

may be unable to strictly comply with the regulatory language. In response, SBA proposed to add language allowing tribally-owned concerns organized under tribal law to waive sovereign immunity in any similar documents authorized under tribal law.

The proposed rule also sought to make a change relating to the potential for success requirement for tribes. One of the ways a tribally-owned business can demonstrate potential for success needed to be eligible for the program is to demonstrate that it has been in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification. Not all tribally-owned concerns file federal income tax returns. The tax return requirement is intended to be an objective means by which a tribally-owned concern can show that it has been in business for at least two years with operating revenues. SBA believes that tax returns are not the only way for a tribally-owned concern to demonstrate its business history. The proposed rule added a provision allowing a tribally-owned applicant to submit financial statements demonstrating that it has been in business for at least two years with operating revenues in the primary industry in which it seeks 8(a) BD certification.

SBA received six comments supporting these two changes and no comments opposing them. As such, SBA adopts the proposed language as final in this rule. SBA also received two comments pertaining to other provisions of § 124.109 that were not addressed in the proposed rule. Because any potential changes pertaining to those provisions are outside the scope of this rulemaking, SBA does not address them in this final rule.

Section 124.110

The proposed rule added a new § 124.110(d)(3) to allow the individuals responsible for the management and daily operations of an NHO-owned concern to manage two Program Participants. This would make the control requirements relating to NHO-owned applicants/Participants consistent with those applying to applicants/Participants owned by tribes and Alaska Native Corporations (ANCs). Although this is a statutory exemption for firms

owned by tribes and ANCs, and is not for firms owned by NHOs, SBA believes that the policies relating to all three entity-owned applicants/Participants should be consistent whenever possible. SBA does not believe that this change for NHO-owned firms in any way contradicts any statutory requirement and would merely allow more flexibility for NHO-owned firms.

In addition, the proposed rule clarified the current policy regarding NHO ownership of an applicant or Participant small business concern. Although SBA currently requires an NHO to unconditionally own at least 51 percent of the applicant or Participant, the proposed rule merely made that requirement explicit in the regulations.

SBA received six comments supporting these two changes and no comments opposing them. Although one comment supported allowing an individual to be involved in controlling two NHO-owned 8(a) concerns, the commenter questioned what SBA means by a "Native Hawaiian leader" in the context of this regulation. The proposed language provided that an individual's officer position, membership on the board of directors or position as a Native Hawaiian leader does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. This language was copied from the provision in § 124.109 for tribally owned firms. In the context of a tribe, the term "leader", as in tribal leader, has some definite meaning. SBA agrees that in the context of Native Hawaiians it does not. As such, the final rule adopts the proposed language with one change. The final rule deletes the reference to Native Hawaiian leader. SBA also received one comment questioning why NHOs cannot use holding companies as part of their ownership of 8(a) BD applicants and Participants as tribes and ANCs can. Although this issue is not part of this rulemaking, SBA will nevertheless address the reason for the disparate treatment. Section 8(a)(4)(A) of the Small Business Act, 15 USC 637(a)(4)(A), provides in pertinent part that the term "socially and economically disadvantaged small business concern" means any small business concern which is at least 51 percent unconditionally owned by "(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or (III) an economically disadvantaged Native

Hawaiian organization . . ." As noted, the statute specifically authorizes tribes (which is also defined to include ANCs) to own an 8(a) Participant through "a wholly owned business entity of such tribe" or in other words through a holding company. The statute does not provide similar authority for NHOs. NHOs have the same statutory requirement as socially and economically disadvantaged individuals, meaning that they must directly own at least 51 percent of an applicant or Participant concern. SBA does not have the authority to change that statutory requirement.

Section 124.204

Section 124.204 details how SBA processes applications for 8(a) BD program admission. It identifies that only the AA/BD can approve or decline an application for participation in the 8(a) BD program. There are, however, certain threshold issues that must be addressed before an application will be fully processed. Specifically, in SBA's electronic 8(a) application system, there are four fundamental eligibility questions that must be answered before an application will be reviewed: an applicant must be a for-profit business (*see* §§ 121.105 and 124.101); every individual claiming disadvantaged status must be a United States citizen (*see* § 124.101); neither the applicant firm nor any of the individuals upon whom eligibility is based could have previously participated in the 8(a) BD program (*see* § 124.108(b)); and any individually-owned applicant must have generated some revenues (*see* §§ 124.107(a) and 124.107(b)(1)(iv)). If an applicant answers that it is not a for-profit business entity, that one or more of the individuals upon whom eligibility is based is not a United States citizen (*see* § 124.104), that the applicant or one or more of the individuals upon whom eligibility is based has previously participated in the 8(a) BD program (*see* § 124.108(b)), or that the applicant is not an entity-owned business and has generated no revenues (*see* §§ 124.107(a) and 124.107(b)(1)(iv)), its application will be closed and it will be prevented from completing a full electronic application. Each of those four bases automatically renders the applicant ineligible for the program and further review would not be warranted. The proposed rule identified these four threshold issues that must be addressed

before an application will be reviewed. SBA received two comments supporting identifying these four reasons that will stop the processing of an 8(a) BD application, one comment stating that threshold application questions are for SBA to determine, and no comments opposing this identification. The final rule adopts the proposed language.

Section 124.302

Section 124.302 addresses graduation and early graduation from the 8(a) BD program. In determining whether an applicant or Participant should be deemed economically disadvantaged, SBA previously required a concern to compare its financial condition to non-8(a) BD business concerns in the same or similar line of business. SBA eliminated that requirement as not being consistent with the statutory authority which requires only that an applicant or concern be owned and controlled by one or more individuals who are economically disadvantaged, not that the concern itself be economically disadvantaged. In addressing graduation, § 124.302(b) retained some of that same language requiring a comparison of an 8(a) BD Participant to non-8(a) businesses. SBA believes that too is inconsistent with the statutory language, which defines the term "graduated" or "graduation" to mean that a Program Participant is recognized as successfully completing the 8(a) BD program by substantially achieving the targets, objectives, and goals contained in its business plan, and demonstrating its ability to compete in the marketplace without assistance from the 8(a) BD program. 15 U.S.C. 636(j)(10)(H). As such, the proposed rule removed § 124.302(b)(5), as not consistent with the statutory oversight responsibilities. The supplementary information to the proposed rule also noted that the requirements for graduation are adequately set forth in § 124.302(a)(1) of SBA's regulations and requested comments on whether the entire § 124.302(b) can be eliminated as unnecessary.

SBA received nine comments supporting the removal of § 124.302(b)(5). In addition, seven commenters recommended that the entire § 124.302(b) be removed as the provisions in § 124.302(a)(1) adequately establish the requirements for graduation. One commenter also believed that the language in § 124.302(b) is overly subjective and should be eliminated on that

basis as well. In response to this comment, SBA more closely reviewed § 124.302(b). Although the paragraph is titled "Criteria for determining whether a Participant has met its goals and objectives," much of § 124.302(b) pertains to the overall financial condition of the 8(a) BD Participant and not to the specific goals and objectives contained in the Participant's business plan. For that reason and because SBA agrees that § 124.302(a)(1) adequately explains what graduation means and what must occur in order for a firm to be graduated from the 8(a) BD program, the final rule removes the entire § 124.302(b) as unnecessary.

Section 124.304

Section 124.304 sets forth the procedures for early graduation and termination from the 8(a) BD program. The proposed rule added a provision to clarify that where SBA obtains evidence that a Participant has ceased its operations, the AA/BD may immediately terminate a concern's participation in the 8(a) BD program by notifying the concern of its termination and right to appeal that decision to OHA. SBA received two comments supporting this provision and no comments opposing it. The final rule adopts the proposed language. SBA continues to believe requiring SBA to go through the normal process to terminate a Participant from the 8(a) BD program (i.e., providing an intent to terminate notice and a 30-day opportunity to respond) is unnecessary where it can be demonstrated that the concern has ceased its business operations. Nevertheless, the final rule requires SBA to notify the concern of its termination and provide it the right to appeal that decision to OHA.

Section 124.402

Section 124.402 requires each firm admitted to the 8(a) BD program to develop a comprehensive business plan and to submit that business plan to SBA as soon as possible after program admission. Currently, § 124.402(b) provides that SBA will suspend a Participant from receiving 8(a) BD program benefits if it has not submitted its business plan to its servicing district office within 60 days after program admission. There is a concern that § 124.402(b) does not clearly provide that a Participant's business plan must be approved by SBA before the

concern is eligible for 8(a) contracts, as required by Section 7(j)(10)(D)(i) of the Small Business Act, 15 U.S.C. § 636(j)(10)(D)(i). The proposed rule clarified that, consistent with the statutory language, SBA must approve a Participant's business plan before the firm is eligible to receive 8(a) contracts. However, SBA recognizes that some firms are admitted to the 8(a) BD program with self-marketed procurement commitments from one or more procuring agencies. SBA also understands that several newly admitted Participants have missed 8(a) contract opportunities in the past because SBA did not approve their business plans before the procuring agencies sought to award such procurement commitments as 8(a) contracts. SBA does not wish to discourage self-marketing activities or prevent a newly admitted Participant from receiving critical business development assistance. At the same time, SBA is constrained by the statutory language requiring business plan approval prior to the award of 8(a) contracts. The proposed rule merely prioritized business plan approval for any firm that is offered a sole source 8(a) requirement or is the apparent successful offeror for a competitive 8(a) requirement. Specifically, the proposed rule provided that where a sole source 8(a) requirement is offered to SBA on behalf of a Participant or a Participant is the apparent successful offeror for a competitive 8(a) requirement and SBA has not yet approved the Participant's business plan, SBA will approve the Participant's business plan as part of its eligibility determination prior to contract award.

SBA received 11 comments in response to the proposed change to § 124.402. Seven comments supported the rule to prioritize business plan review and approval for new 8(a) firms that were offered a sole source 8(a) requirement or were the apparent successful offeror for a competitive 8(a) requirement. Three comments opposed requiring business plan approval prior to a firm being awarded any 8(a) contract. These commenters believed that if a firm submitted its business plan to SBA within 60 days of certification, it should not matter whether SBA approved it before award. They rationalized that if the firm did everything it needed to do, the firm should not be penalized by SBA's failure to approve the business plan. As indicated above, SBA again notes that the authorizing legislation requires business plan approval prior to award.

SBA cannot waive or disregard that statutory requirement. However, the intent of the proposed regulation was to ensure that business plan approval occurred in connection with a normal eligibility determination and that by doing so every Participant on whose behalf a sole source 8(a) requirement is offered or who was identified as the apparent successful offeror in an 8(a) competitive procurement would receive the award. Prioritizing business plan review and approval will ensure that such approval can be timely done and not adversely affect any 8(a) procurement. One comment recognized the statutory requirement but was concerned that performing a business plan review as part of an eligibility determination would slow down eligibility determinations and could cause procuring agencies to avoid using the 8(a) program. SBA disagrees. Currently, SBA generally performs an eligibility determination (either for a sole source offering or a competitive award) within five days, unless SBA seeks and a procuring agency agrees to a longer period. SBA's intent is to review and approve business plans within that same five-day period. Thus, SBA does not envision any additional time being added to the normal eligibility review timeframe. The final rule adopts the proposed language.

Section 124.403

Section 124.403 sets forth the requirements relating to business plans. Paragraph 124.403(a) provides that each Participant must annually review its business plan with its assigned Business Opportunity Specialist (BOS) and modify the plan as appropriate. The wording of this paragraph caused some to believe that a Participant needed to submit a business plan to SBA every year even where nothing had changed from the previous year. That was not SBA's intent. The "as appropriate" language was meant to infer that a Participant need not submit a business plan if nothing had changed from the previous year. The proposed rule clarified that a Participant must submit a new or modified business plan only if its business plan has changed from the previous year.

SBA received seven comments supporting the provision to require business plan submissions only if a business plan had changed or been modified from the previous year and no

comments opposing the provision. The commenters believed that eliminating needless submissions would reduce the paperwork burden on Participants and enable them to more thoroughly focus on business development. The final rule adopts the proposed language.

Sections 124.501, 126.609, 127.503(e), and 128.404(d)

There has been some confusion as to whether a contracting officer can limit an 8(a) competition (whether for an 8(a) contract or an order set-aside for 8(a) competition under an unrestricted contract) to Participants having more than one certification (e.g., 8(a) *and* HUBZone). SBA believes that § 8(a)(1)(D)(i) of the Small Business Act, 15 U.S.C. 637(a)(1)(D)(i), requires any 8(a) competition to be available to all eligible Program Participants. SBA has consistently interpreted this provision as prohibiting SBA from accepting a requirement for the 8(a) BD program that seeks to limit an 8(a) competition only to certain types of 8(a) Participants, rather than allowing competition among all eligible Participants. In other words, SBA has interpreted this authority to prohibit an agency from requiring one or more other certifications in addition to its 8(a) certification. This interpretation is currently contained in § 125.2(e)(6)(i) but is not specifically contained in the 8(a) BD regulations. Likewise, the statutory authority for HUBZone set asides, 15 U.S.C. 657a(c)(2)(B), provides authority for competition restricted to certified HUBZone small business concerns and does not permit a "dual" set-aside for firms that are both HUBZone-certified and 8(a) Participants. The proposed rule added a sentence to § 124.501(b) to clarify SBA's position that prohibits a contracting activity from restricting an 8(a) competition to Participants that are also certified HUBZone small businesses, certified WOSBs or certified SDVO small businesses. SBA also proposed to make similar clarifications to the regulations for the SDVO (in § 125.22(d)), HUBZone (in new § 126.609), and WOSB (in § 127.503(e)) programs. As noted earlier, the SDVO program regulations have been moved to a new part 128 as part of implementing the Veteran Small Business Certification Program. *See* 87 FR 73400 (Nov. 29, 2022). As such, the final rule amends § 128.404(d) as opposed to § 125.22(d) as proposed.

SBA received ten comments supporting the clarification to more clearly set forth SBA's position prohibiting a contracting activity from restricting a competition to firms with multiple certifications. One commenter supported the provision but also recommended further clarification. Specifically, the commenter believed that agencies could follow the prohibition (i.e., not limiting competition to firms with multiple certifications) but circumvent SBA's intent by providing significant evaluation preferences to firms with one or more other certifications, and thus exclude firms with one certification from any meaningful opportunity to be awarded a specific contract or order. The commenter recommended that SBA amend this provision to also specify that a procuring activity also cannot give additional evaluation points or any evaluation preference to firms having one or more additional certifications. SBA agrees and has added this language to each of the associated regulatory provisions: § 124.501(b) for the 8(a) BD program; § 126.609 for the HUBZone program; § 127.503(e) for the WOSB program; and § 128.404(d) for the SDVO program.

SBA also proposed to clarify § 124.501(b) by noting that an agency may award an 8(a) sole source order against a multiple award contract that was not set aside for competition only among 8(a) Participants. SBA believes that such awards are consistent with SBA's statutory authority at section 8(a)(16) of the Small Business Act, 15 U.S.C. 637(a)(16), to enter 8(a) sole source awards. Furthermore, this type of 8(a) sole source order is beneficial to both 8(a) Participants, who benefit from increased contracting opportunities, and to procuring agencies, that can take advantage of pre-negotiated terms and pricing. SBA received six comments in response to this provision. All comments received supported the proposed language. As such, SBA adopts the proposed language in this final rule.

The proposed rule also revised the introductory language to § 124.501(g). The revised language first required SBA to notify an 8(a) Participant any time SBA determines the Participant to be ineligible for a specific sole source or competitive 8(a) award. SBA notes that this is currently required in FAR 19.805-2, and is something that should occur routinely, but

believes that highlighting this in SBA's regulations would be helpful. SBA also proposed to clarify that where a joint venture is the apparent successful offeror in connection with a competitive 8(a) procurement, SBA will determine whether the 8(a) partner to the joint venture is eligible for award but will not review the joint venture agreement to determine compliance with § 124.513. SBA believes that there was some confusion as to what an eligibility determination entailed in the context of a competitive 8(a) joint venture apparent successful offeror. The proposed rule sought to make clear that SBA's determination of eligibility relates solely to the 8(a) partner to the joint venture and does not represent a full review of the 8(a) joint venture under § 124.513. SBA received three comments supporting this clarification regarding the eligibility of a joint venture offeror, and no comments opposing it. One commenter also requested clarification as to whether a review of the joint venture agreement is required where a joint venture is offered a sole source order under a previously awarded competitive 8(a) multiple award contract. SBA does not believe that SBA should review the joint venture agreement itself in this context. The underlying contract is an 8(a) competitive award. SBA's regulations do not require review of joint venture agreements with respect to 8(a) competitive awards. Once awarded, SBA does not believe it should review joint venture agreements in connection with one or more individual sole source orders under the 8(a) multiple award contract. As such, SBA adopts the proposed language in this final rule with the added clarification regarding sole source orders to a joint venture under a previously competitively awarded 8(a) multiple award contract.

Finally, the proposed rule also made several clarifications to the bona fide place of business requirement contained in § 124.501(k). Section 8(a)(11) of the Small Business Act, 15 U.S.C. 637(a)(11), requires that to the maximum extent practicable 8(a) construction contracts "shall be awarded within the county or State where the work is to be performed." SBA has implemented this statutory provision by requiring a Participant to have a bona fide place of business within a specific geographic location. In the October 2020 rulemaking, *supra*, SBA clarified that the Small Business Act does not differentiate between sole source 8(a) construction

contracts and competitive 8(a) construction contracts. As such, the statutory "maximum extent practicable" requirement applies equally to sole source and competitive 8(a) contracts. SBA understands that some have expressed the view that the "to the maximum extent practicable" statutory language should be read in a way that affords procuring agencies the discretion to broaden or do away with the bona fide place of business requirement where they deem it to be appropriate, for whatever reason. SBA disagrees that the statutory language affords such flexibility. In SBA's view, "to the maximum extent practicable" denotes Congress's intent that something be followed whenever possible, not merely when a procuring agency thinks it is the best option or appropriate in particular circumstances. Thus, SBA will continue to apply the bona fide place of business requirement to both sole source and competitive 8(a) construction procurements unless SBA determines that it is not "practicable" to do so. In this regard, because of the COVID-19 pandemic, employees in both the public and private sector were expected to telework on a significant basis. In response, SBA issued a Policy Notice temporarily placing a moratorium on the bona fide place of business requirement with respect to all 8(a) construction contracts offered to the 8(a) BD program prior to September 30, 2022, based on SBA's determination that it was not "practicable" to impose that requirement during the maximum telework policies. SBA Policy Notice 6000-819056 (August 25, 2021). Prior to the expiration of that Policy Notice, the SBA Administrator determined that requiring a bona fide place of business in a particular location continues to be impracticable due to the lingering effects of the COVID-19 pandemic and extended the moratorium on the requirement through September 30, 2023. SBA will continue to examine the practicality of the rule considering economic realities. Once the conditions exist that demonstrate that it is no longer impracticable to require a bona fide place of business, SBA will again implement the statutory provision to do so with respect to all construction requirements offered to the 8(a) program. As such, the proposed rule sought to clarify several components of the bona fide place of business requirement to be in place when the circumstances dictate that it is again practicable to enforce the rule.

Before discussing the specific proposed changes to the bona fide place of business rule and the comments received regarding those changes, SBA will first discuss the comments received to the rule in general. Several commenters agreed that current circumstances make it impracticable to require a bona fide place of business at this time and recommended that the moratorium be extended. As noted above, the moratorium is currently in place through September 30, 2023. Before the expiration of the moratorium, SBA will examine workplace realities. If telework policies and other economic conditions continue to make requiring a bona fide place of business impracticable, SBA will again extend the moratorium. SBA cannot, however, make that commitment at this point. Several other commenters urged SBA to eliminate the bona fide place of business rule entirely, believing that the rule is outdated and no longer makes sense. One commenter noted that the moratorium has demonstrated that construction work can be performed without a brick-and-mortar presence and recommended that the bona fide place of business rule be eliminated. SBA believes that it does not have the option of eliminating the requirement entirely. As noted above, the Small Business Act statutorily imposes a strong preference for local construction firms in the performance of 8(a) contracts. SBA has implemented that preference through the bona fide place of business rule. SBA cannot ignore that statutory language. A few commenters believed that the rule should apply only to competitive 8(a) construction requirements, but not to sole source 8(a) construction requirements. The statutory authority does not make a distinction between sole source and competitive requirements, but rather talks of all "construction" contracts awarded through the 8(a) BD program. As such, SBA believes that the statutory preference must be applied equally to all competitive and sole source 8(a) construction procurements. Recognizing the Small Business Act requirement, several other commenters applauded SBA's efforts to lessen the burden to establish a bona fide office. SBA will now address those proposed changes, the comments to them and SBA's response.

When SBA revised the bona fide place of business rule in October 2020, it intended that a Participant with a bona fide place of business anywhere in a particular state should be deemed eligible for a construction contract throughout that entire state (even if the state is serviced by more than one SBA district office). However, because the regulatory text used the word "may", several Participants sought clarification of SBA's intent. The proposed rule clarified SBA's intent.

The proposed rule also clarified that where a Participant is currently performing a contract in a specific state, it would qualify as having a bona fide place of business in that state for one or more additional contracts. This clarification is specifically intended to apply to the situation where a business concern is performing a construction contract in a specific location, the procuring activity likes the work done by the business concern and seeks to award an 8(a) construction contract to the same business concern in the same location as the previous contract. SBA believes that it does not make sense to say that a business concern is not eligible for such award because it has not officially sought and approved to have a bona fide place of business in that location. The proposed clarification, however, limited that exclusion only to the state where the firm is currently performing a contract. It provided that the Participant could not use contract performance in one state to allow it to be eligible for an 8(a) contract in a contiguous state unless it officially establishes a bona fide place of business in the location in which it is currently performing a contract (or in that contiguous state or another state touching that contiguous state).

The proposed rule also clarified that a Participant could establish a bona fide place of business through a full-time employee in a home office. In addition, an individual designated as the full-time employee of the Participant seeking to establish a bona fide place of business in a specific geographic location need not be a resident of the state where he/she is conducting business. In the past, some SBA district offices have required the designated employee to possess a driver's license issued by the state corresponding to the location of the office. SBA believes that is not appropriate. There is no requirement that a specific employee must

permanently reside in a specific location. A Participant merely needs to demonstrate that one or more employees are operating in an office within the identified geographic location. A Participant should be able to rotate employees in and out of a specific location as it sees fit, and as long as one individual (but not necessarily the same individual) remains at that location, that location can be considered a bona fide place of business. Finally, the proposed rule provided guidance on how SBA interprets the bona fide place of business requirement where a contract requires work to be performed in more than one location and those different locations may not be within the boundaries of the bona fide place of business. Although this is SBA's current interpretation of the bona fide place of business requirement, SBA believes putting it in the regulations will clarify any confusion that currently exists. For a single award 8(a) construction contract requiring work in multiple locations, the proposed rule provided that a Participant is eligible if it has a bona fide place of business where a majority of the work is to be performed. For a multiple award 8(a) construction contract, the proposed rule required a Participant to have a bona fide place of business in any location where work is to be performed.

Commenters overwhelmingly supported the specific proposed changes to make it easier to meet the bona fide place of business requirement. Commenters supported the changes regarding allowing home offices to meet the bona fide place of business requirement, noting that this will reduce overhead costs. Commenters also supported the clarification that an individual need not be a full-time resident of a state in order to count as an employee for bona fide office purposes. They believed that this clarification to allow "floaters" will provide needed flexibility to enable a firm to engage with clients in different states as needed and meet client needs more efficiently at a lower cost. SBA adopts the proposed language for those provisions in this final rule.

SBA also received several comments supporting the clarification regarding having an approved bona fide place of business in one state and being eligible for work in a contiguous state. One commenter sought further clarification of that provision. Specifically, the commenter

asked whether an 8(a) construction firm that has a bona fide office in Virginia, but does not have a bona fide office in North Carolina, will qualify for an 8(a) sole source construction project in North Carolina because the states border each other. The language of the rule states that a firm will be eligible for work that will be performed in the geographical area serviced by a contiguous SBA district office to where the firm has a bona fide place of business (in addition to stating a firm will be eligible for work anywhere in a state in which the firm has a bona fide place of business). There are two SBA district offices servicing Virginia: the Washington Metropolitan Area District Office services northern Virginia and the Richmond District Office services the rest of Virginia. North Carolina has only one SBA district office, so any district office whose geographic area touches any part of North Carolina will be eligible for any 8(a) construction contract anywhere in the entire state. Only the geographic area serviced by the Richmond District Office touches North Carolina. As such, a firm having a bona fide place of business in the geographic area serviced by the Richmond District Office will be eligible for 8(a) construction contracts in North Carolina. Firms having a bona fide place of business in the geographic area serviced by the Washington Metropolitan Area District Office will be not eligible because the geographic area serviced by that office is not contiguous to that of the area serviced by the North Carolina District Office. SBA believes that the proposed regulatory language clearly stated that, and thus no change is needed to the regulatory text as proposed.

Several commenters also supported the proposed change regarding the guidance on how SBA interprets the bona fide place of business requirement where a contract requires work to be performed in more than one location and those different locations may not be within the boundaries of the bona fide place of business. Commenters agreed that a firm should not be required to have a bona fide place of business in each state in which work will be performed. One commenter requested SBA to define how it will determine what a "majority" of work will be for contracts with more than one location. SBA intends to apply this by the dollar value of the work to be performed. SBA also understands that a requirement may have an indefinite aspect to

it where the dollar value to be performed at each location is not exactly known at the time of contract award. As such, the final rule adds language defining majority in terms of dollar value but also ties it to the "anticipated" work to be performed. A procuring agency should be able to identify where it anticipates a majority of the dollars on a contract will be spent.

Finally, several commenters recommended that the rule allow part-time employees to count in establishing a bona fide place of business. Although several commenters agreed that part-time employees should be sufficient to establish a bona fide place of business, most did not define what they believed a "part-time" employee to be. One commenter recommended that SBA adopt the definition of part-time employee used in the HUBZone program, believing that consistency between the programs was important. One commenter recommended that an individual who works at least 20 hours per week should count in establishing a bona fide place of business. This commenter believed that 20 hours per week evidences the small business concern's commitment to establish a bona fide place of business while at the same time giving it some needed flexibility. In the HUBZone program, a part-time employee counts as a HUBZone employee if the individual works a minimum of 40 hours during the four-week period immediately prior to the relevant date of review. 13 CFR § 126.103. SBA does not believe that definition works in establishing a bona fide place of business for 8(a) construction contracts. If SBA applied that definition to the bona fide place of business rule, an individual could work 40 hours in one week and the "office" could be empty and closed for the remaining three weeks of the month. As noted above, the Small Business Act directs that 8(a) construction contracts generally be awarded within the county or State where the work is to be performed. SBA believes this means that a Participant small business concern must have a legitimate presence in the geographic area close to where the work is to be performed. SBA does not believe that a firm that could be closed three weeks every month meets that legitimate presence, but rather that there should be a presence at the bona fide place of business every week. SBA agrees with the commenter that 20 hours per week creates the proper balance between establishing a legitimate

presence in a location and providing needed flexibility to small business construction firms. As such, SBA amends the definition of bona fide place of business in § 124.3 to allow a Participant to demonstrate a bona fide place of business in a location with at least one employee who works at least 20 hours per week at that location.

Section 124.503(a)

Section 124.503(a) provides that SBA will decide whether to accept a requirement offered to the 8(a) BD program within ten working days of receipt of a written offering letter if the contract value exceeds the SAT. In consideration of mutual responsibilities under SBA's 8(a) Partnership Agreements with federal procuring agencies, SBA has agreed to issue an acceptance letter or rejection letter for such offers within five business days unless the agency grants an extension. This proposed rule clarified that the ten-day acceptance timeframe under section 124.503(a) applies only to 8(a) offers made outside the 8(a) Partnership Agreement authority. One commenter recommended that the ten-day period be calendar days instead of business days. The regulatory text before this clarification identified the acceptance period as ten business days. The proposed rule did not seek to alter that timeframe. Rather, it merely intended to formally recognize in the regulation that SBA and the procuring activity may agree to a shorter timeframe for SBA's review under a Partnership Agreement delegating 8(a) contract execution functions to the agency. As such, SBA adopts the proposed language in this final rule.

Section 124.503(a)(4)(ii) authorizes a procuring activity to award an 8(a) contract without requiring an offer and acceptance where the requirement is valued at or below the SAT and SBA has delegated its 8(a) contract execution functions to the agency. The paragraph goes on to provide that in such a case, the procuring activity must notify SBA of all 8(a) awards made under this authority. Some agencies have relied on this language to justify proceeding to award an 8(a) contract under the SAT without first requesting an eligibility determination from SBA of the apparent successful 8(a) contractor (which is required by § 124.501(g)). It was not SBA's intent to allow an award without a determination of eligibility being made. To do otherwise could

result in agencies awarding 8(a) contracts to ineligible firms. Although it authorizes an expedited review, the partnership agreement between SBA and procuring agencies identifies that an eligibility determination must still be made in these cases. The proposed rule merely clarified that requirement in SBA's regulations. SBA received two comments supporting the clarification that SBA determines eligibility in cases where it has delegated 8(a) contract authority to procuring agency. Thus, SBA adopts the proposed language in this final rule.

Section 124.503(a)(5) authorizes a procuring agency to seek acceptance of an 8(a) offering letter with the AA/BD where SBA does not respond to an offering letter within the ten-day period set forth under § 124.503(a). The proposed rule clarified that this ten-day time period is intended to be ten business days. One commenter supported the clarification, and one opposed it. The comment in opposition recommended instead that the time frame be measured in calendar days. Because the language in § 124.503(a) is measured in business days, SBA believes it makes sense to consistently identify time periods throughout the section in the same way. As such, SBA adopts the proposed language as final in this rule.

Section 124.503(i)(1)(ii)

SBA's current regulations require a procuring agency to notify SBA where it seeks to reprocure a follow-on requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants and the previous/current 8(a) award was not so limited. *See* 13 CFR § 124.504(d)(1). There has been some confusion as to whether this conflicts with § 124.503(i)(1)(ii), which provides that an agency need not offer or receive acceptance of individual orders into the 8(a) BD program if the underlying multiple award contract was awarded through the 8(a) BD program. These provisions were not meant to conflict. Although formal offer and acceptance is not required, it is important for SBA to be notified of any work that is intended to be moved to an 8(a) multiple award contract that was previously performed under an 8(a) contract that was not limited to specific 8(a) Participants (i.e., either a sole source award to a specific Participant or an 8(a) competitive award that was

open to all eligible Program Participants). As SBA noted in the supplementary information to the final rule implementing the notification requirement contained in § 124.504(d)(1), an 8(a) incumbent contractor may be seriously hurt by moving a procurement from an 8(a) sole source or competitive procurement to an 8(a) multiple award contract to which the incumbent is not a contract holder. *See* 85 FR 66146, 66163 (Oct. 16, 2020). In such a case, the incumbent would have no opportunity to win the award for the follow-on contract and would have no opportunity to demonstrate that it would be adversely impacted by the loss of the opportunity to compete for the follow-on procurement. SBA believes that not allowing an incumbent 8(a) contractor to compete for a follow-on contract where that contract accounts for a significant portion of its revenues contradicts the business development purposes of the 8(a) BD program.

In order to eliminate any confusion and ensure that notification occurs where a procuring agency seeks to issue an order under an 8(a) multiple award contract and some or all of the work contemplated in that order was previously performed through one or more other 8(a) contracts, the proposed rule amended § 124.503(i)(1)(ii) to clarify that an agency must notify SBA where it seeks to issue an order under an 8(a) multiple award contract that contains work that was previously performed through another 8(a) contract. Where that work is critical to the business development of a current Participant that previously performed the work through another 8(a) contract and that Participant is not a contract holder of the 8(a) multiple award contract, SBA may request that the procuring agency fulfill the requirement through a competition available to all 8(a) BD Program Participants.

SBA received six comments agreeing that SBA should be notified when standalone 8(a) work is migrating as an order under an 8(a) multiple award contract. SBA adopts the proposed language.

Section 124.503(i)(1)(iv)

SBA's current regulations authorize a sole source 8(a) order to be awarded under a multiple award contract to a multiple award contract holder where the multiple award contract

was set-aside or reserved for exclusive competition among 8(a) Participants. The procuring agency must offer, and SBA must accept, the order into the 8(a) BD program on behalf of the identified 8(a) contract holder. To be eligible for the award of a sole source order, SBA's regulations currently specify that a concern must be a current Participant in the 8(a) BD program at the time of award of the order. There has been some confusion as to whether the business activity target requirements set forth in § 124.509 apply to the award of such an order. In other words, it was not clear whether a Participant seeking a sole source 8(a) order under a multiple award contract set-aside or reserved for eligible 8(a) Participants needed to be in compliance with any applicable competitive business mix target established or remedial measure imposed by § 124.509 at the time of the offer/acceptance of the order. Because SBA is determining eligibility anew at the time of a new sole source order, it was always SBA's intent to not only require a firm to still be a current and otherwise eligible 8(a) Participant at the time of offer/acceptance of a sole source order, but to also require the firm to be in compliance with any applicable competitive business mix target established or remedial measure imposed by § 124.509. As such, the proposed rule clarified that compliance with the § 124.509 business activity target requirements will be considered before SBA will accept a sole source 8(a) order on behalf of a specific 8(a) Participant multiple award contract holder. Where an agency seeks to issue a sole source order to a joint venture, the proposed rule clarified that SBA will review and determine whether the lead 8(a) partner to the joint venture is currently an eligible Program Participant and in compliance with any applicable competitive business mix target established or remedial measure imposed by § 124.509. SBA received 21 comments in response to this proposal. Nineteen comments supported the proposed language specifically authorizing sole source awards under 8(a) multiple award contracts and requiring eligibility and business activity target compliance at the time of the order award. These commenters believed that any sole source award, whether an individual contract or an order under a previously awarded multiple award contract, should be treated similarly. In other words, these commenters agreed with

SBA's position that eligibility for a sole source 8(a) order must be determined as of the date of the order, not the underlying multiple award contract itself. Two commenters opposed the proposed change. They believed that it would harm 8(a) firms that were awarded 8(a) multiple award contracts but have grown throughout the life of the contract. SBA notes that Participants that received an 8(a) multiple award contract will generally continue to be eligible for orders that are competitively awarded under that contract throughout the life of the contract. Of course, a contracting officer may request recertification of size and/or eligibility with respect to a specific order and recertification of size and status must occur after the fifth year on a long-term contract, but firms that grow to be other than small and/or firms that have graduated or otherwise left the 8(a) BD program may be awarded competitive orders under the multiple award contract. However, SBA continues to believe that sole source awards are unique. Sole source authority does not derive directly from an underlying competitively awarded 8(a) multiple award contract. SBA believes that the rules governing the award of a sole source 8(a) contract should also apply to the award of a sole source 8(a) order. That means that a firm must still be an eligible Participant that qualifies as small as of the date the order is issued. Part of any eligibility determination for a sole source award is an examination of a Participant's compliance with its applicable business activity target. Therefore, SBA adopts the proposed language as final.

In addition, the proposed rule further clarified the rules pertaining to issuing sole source orders to joint ventures under an 8(a) multiple award contract. There has been some confusion as to whether the requirement set forth in § 121.103(h) that a joint venture may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, applies to such sole source orders and whether SBA must approve the joint venture in connection with the sole source order as generally required by § 124.513(e)(1). The proposed rule specifically clarified that the two-year restriction does not apply to a sole source 8(a) order under an 8(a) multiple award contract. In other words, the sole source order can be issued more than two years after the date the joint venture received its first contract award. In addition, the

proposed rule provided that SBA would not review and approve a joint venture where the joint venture had already been awarded a competitive 8(a) multiple award contract and is seeking a sole source 8(a) order under that multiple award contract at some point during the performance period of the contract. SBA believes that the general requirement set forth in § 124.513(e)(1) that SBA review a joint venture in connection with a sole source 8(a) award should not apply to sole source orders issued under a competitively awarded 8(a) multiple award contract because the joint venture's eligibility for the contract was already established at the award of the underlying contract. The procuring agency and other interested parties had the opportunity to challenge whether the joint venture was properly formed at that time. SBA received two comments supporting the proposed clarifications relating to joint ventures and no comments opposing them. As such, SBA adopts the proposed language in this final rule.

Finally, in making this clarification to § 124.509, SBA noticed two instances in SBA's rules where SBA intended to cross reference § 124.509, but instead cited to § 124.507. This rule amends §§ 124.303(a)(15) and 124.403(c)(1) to change the cross reference to § 124.509.

Section 124.503(i)(2)(ii)

SBA has received inquiries as to whether an agency can issue an order under the Federal Supply Schedule (FSS) as an 8(a) award, and if so, what procedures must be used. As with any unrestricted multiple award contract, SBA believes that an order can be issued under the FSS as an 8(a) award if the procedures set forth in § 124.503(i)(2) are followed. This means that the following requirements must be met: the order must be offered to and accepted into the 8(a) BD program; the order must require the concern to comply with applicable limitations on subcontracting provisions and the nonmanufacturer rule, if applicable, in the performance of the individual order; before award, SBA must verify that the identified apparent successful offeror is an eligible 8(a) Participant as of the initial date specified for the receipt of proposals contained in the order solicitation, or at the date of award of the order if there is no solicitation; and the order must be competed exclusively among only the 8(a) awardees of the underlying multiple award

contract. There is some confusion as to what that last requirement means. In the case of a multiple award contract awarded under full and open competition, SBA believes that the current regulatory language is clear. All contract holders that have certified as 8(a) eligible must be able to submit an offer for the order if they choose. An agency cannot limit competition to a subset of contract holders that have claimed to be 8(a) eligible. Of course, the apparent successful offeror's eligibility must be verified by SBA prior to award to ensure that the concern was in fact an eligible Participant as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation. For an order under the FSS that an agency seeks to issue through the 8(a) BD program, there has been some confusion as to what procedures must be used to issue the order. Specifically, agencies have told SBA that it is not clear whether an agency can merely follow the FAR 8.4 requirements or must allow all FSS holders who claim 8(a) status the opportunity to compete. SBA believes that orders issued under the FSS are unique from orders issued under multiple award contracts competed using full and open competition. GSA has established procedures for issuing orders under the FSS. SBA believes that those procedures should be used when an agency seeks to issue an 8(a) award under the FSS. The proposed rule clarified that distinction. An agency need not open the order up to competition among all FSS contract holders claiming 8(a) status. However, an agency must consider the quote from any FSS contract holder claiming 8(a) status who submits one. As with 8(a) orders issued under unrestricted multiple award contracts, however, the apparent successful offeror for an 8(a) order under the FSS must be an eligible Participant as of the initial date specified for the receipt of offers contained in the request for quote, or at the date of award of the order if there is no solicitation. Several commenters supported these clarifications, and none opposed. As such, SBA adopts the proposed language as final in this rule.

Section 124.504

Section 124.504(d) sets forth the procedures authorizing release of a follow-on requirement from the 8(a) BD program. Paragraph (d)(3) provides that SBA will release a requirement where the procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside. Some procuring activities have read this to mean that SBA will always release a requirement from the 8(a) BD program if the procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside. That was not SBA's intent. The 8(a) BD program is a business development program. SBA takes that purpose seriously and will always consider whether an incumbent 8(a) contractor would be adversely affected by the release of a follow-on procurement from the 8(a) BD program. Accordingly, the proposed rule amended § 124.504(d)(3) by changing the words "SBA will release" to "SBA may release" to clarify that SBA has discretion in any release decision. The fact that a procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside is a positive factor for release, but SBA must still consider any adverse consequences to an incumbent 8(a) Participant. The release process has also caused some confusion regarding how a follow-on requirement may be procured if SBA agrees to release. Again, the current rule provides that release may occur only where a procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside. In other words, a strict reading of the rule would not allow release where an agency seeks to award a follow-on requirement as a set-aside order under a multiple award contract that is not itself a set-aside contract. Thus, even if an agency sought to procure a follow-on requirement as an 8(a) order under an unrestricted multiple award contract, the current regulatory language could be read to preclude that approach. That was not SBA's intent. As long as an agency identifies a procurement strategy that would target small businesses for a follow-on procurement, release may occur. In fact, release to such a contract vehicle may be appropriate where the incumbent 8(a) contractor has graduated from the program but still qualifies as a small business, the requirement is critical to the incumbent contractor's overall

business development, the incumbent contractor is a contract holder on an unrestricted multiple award contract, and the procuring agency has evidenced its intent to set-aside an order for small business under the multiple award contract for which the incumbent contractor is a contract holder. This would give the incumbent contractor the opportunity to compete for the follow-on procurement and ensure that award would be made to a small business. The proposed rule clarified that release may occur whenever a procuring agency identifies a procurement strategy that would emphasize or target small business participation.

SBA received 11 comments supporting this clarification and no comments opposing it. Commenters believed that an 8(a) incumbent contractor may be seriously hurt by moving a procurement from an 8(a) sole source or competitive procurement to an 8(a) multiple award contract to which the incumbent is not a contract holder (such as a FSS holder) because the incumbent, who may have done a fantastic job in the past, would have no opportunity to be awarded for the follow-on contract, nor would it have the opportunity to demonstrate that it would be adversely impacted by the loss of the opportunity to compete for the follow-on procurement. Commenters also supported the provision requiring a procuring agency to "coordinate with" SBA when it seeks to re-procure a follow-on requirement through a pre-existing, limited contracting vehicle that is not available to all 8(a) Participants. They believed that this will facilitate meaningful dialogue between the procurement agency and SBA and promote the purposes of the 8(a) program. SBA agrees with the comments and adopts the proposed language in this final rule.

Section 124.506(b)(3)

In explaining SBA's ability to accept a sole source 8(a) requirement on behalf of a tribally-owned, ANC-owned or NHO-owned Participant above the general competitive threshold amounts, § 124.506(b)(2) provided that a procurement may not be removed from competition to award it to a Tribally-owned, ANC-owned or NHO-owned concern on a sole source basis. There has been some confusion as to what the phrase "may not be removed from competition" means.

Some have misinterpreted this provision to believe that a follow-on requirement to one that was previously awarded as a competitive 8(a) procurement cannot be awarded to an entity-owned firm on a sole source basis above the applicable competitive threshold. That is not SBA's intent. The provision prohibiting a procurement from being removed from competition and awarded to an entity-owned Participant on a sole source basis was meant to apply only to a current procurement, not the predecessor to a current procurement. A procuring agency may not evidence its intent to fulfill a requirement as a competitive 8(a) procurement, through the issuance of a competitive 8(a) solicitation or otherwise, cancel the solicitation or change its public intent, and then procure the requirement as a sole source 8(a) procurement to an entity-owned Participant. A follow-on procurement is a new contracting action for the same underlying requirement, and if the procuring agency has not evidenced a public intent to fulfill it as a competitive 8(a) procurement it can be fulfilled on a sole source basis to an entity-owned Participant. The proposed rule added language clarifying that intent. SBA received 12 comments supporting the clarification to allow a sole source award to an entity-owned Participant where the procuring activity has not evidenced its intent to fulfill the current requirement as a competitive 8(a) procurement and no comments opposing it. As such, SBA adopts the proposed language in this final rule.

The proposed rule also sought comments as to whether a specific provision should be added to the regulations requiring SBA to consider the effect that losing an opportunity to compete for a follow-on contract would have on an incumbent Participant's business development where the follow-on procurement is offered to SBA as a sole source 8(a) procurement on behalf of an entity-owned Participant. In response, SBA received five comments. The comments opposed adding such a provision to the regulations. Commenters noted that while they understood SBA's intent to ensure program participants are not negatively impacted when a follow-on 8(a) procurement is awarded on a sole source basis, they believed that procuring agencies should have discretion in how best to procure a requirement through the

8(a) BD program. Commenters also noted that a procuring agency oftentimes changes its procurement strategy because of an incumbent's unsatisfactory performance on a contract. They believed that a procuring agency should not be saddled with a contractor whose performance is lacking merely because the contract would advance the firm's business development. Finally, one commenter also believed that it is important to consider the business development needs of all Participants, meaning both the entity-owned Participants as well as the Participants who previously performed certain incumbent contracts in this context. SBA believes that a specific regulatory change is not needed to capture SBA's role in ensuring that the business development purposes of the 8(a) BD program are served. As such, SBA makes no further changes to this section in the final rule.

Section 124.506(d)

The proposed rule clarified SBA's rules pertaining to the award of sole source 8(a) contracts to individually-owned 8(a) Participants. The proposed rule added a provision to § 124.506(d) to clarify that an individually-owned 8(a) Participant could receive a sole source award in excess of the $4.5M and $7M competitive threshold amounts set forth in § 124.506(a)(2) where a procuring agency has determined that one of the exceptions to full and open competition set forth in FAR 6.302 exists. For example, if a procuring agency has determined that an unusual and compelling urgency exists and has identified an individually-owned 8(a) Participant that is capable of fulfilling its needs, the agency can offer that requirement to SBA as a sole source award on behalf of the identified Participant even if the requirement exceeds the applicable competitive threshold. Because the agency could use its authority under FAR 6.302 to award a sole source contract outside the 8(a) BD program, SBA believes that it only makes sense to allow the agency to make an award as a sole source contract within the 8(a) BD program if it chooses to do so.

In addition, if such an award exceeds $25M, or $100M for a Department of Defense (DoD) agency, the proposed rule also clarified that the agency would be required to justify the

use of a sole source contract under FAR 19.808-1 or Defense Federal Acquisition Regulation Supplement (DFARS) 219.808-1(a) before SBA could accept the requirement as a sole source 8(a) award. Although those justifications and approvals generally apply to sole source 8(a) contracts offered to SBA on behalf of entity-owned Program Participants, the FAR and DFARS justification and approval provisions are not restricted to entity-owned Participants. Instead, those provisions apply to any 8(a) sole source contract that exceeds the $25M or $100M threshold. As such the proposed rule merely added language to clarify what SBA believes the current requirement is and does so in order to avoid any confusion.

SBA received four comments on these proposed clarifications. Three supported the clarifications and one opposed. The one comment in opposition believed that allowing a sole source award above the competitive thresholds to an individually-owned Participant could lead to small businesses being exploited. The three comments supporting the changes agreed that if an agency could justify the use of a sole source award outside the 8(a) program, it makes sense to allow them to use the 8(a) program instead. SBA does not agree with the one commenter's concerns that a small business could be exploited because of this change. The authority that SBA recognizes is very limited. A procuring activity must be able to justify a sole source award to a particular Participant based on one of the FAR 6.302 exceptions to full and open competition. If that justification exists, SBA not allowing the procuring activity to use the 8(a) BD program would not prevent an award to the identified concern from occurring. The award could still be made to the same small business concern, and the activity could still count the award towards its small disadvantaged business goal. A sole source award outside the 8(a) BD program, however, would not necessarily require inclusion of the applicable limitations on subcontracting provision. If the limitations on subcontracting provision were not included, the concern could subcontract any portion of the award to one or more other business concerns. SBA believes that there is a greater chance for exploitation in that scenario than through an 8(a) award. Thus, SBA adopts the language as proposed in this final rule.

Section 124.509

Section 124.509 establishes non-8(a) business activity targets to ensure that Participants do not develop an unreasonable reliance on 8(a) awards. SBA amended this section as part of a comprehensive final rule in October 2020. *See* 85 FR 66146, 66189 (Oct. 16, 2020). In that final rule, SBA recognized that a strict prohibition on a Participant receiving new sole source 8(a) contracts should be imposed only where the Participant has not made good faith efforts to meet its applicable non-8(a) business activity target. Since that rule became effective in November 2020, Participants have sought guidance as to how they may demonstrate their good faith efforts. The proposed rule sought to provide guidance by incorporating SBA's interpretation of good faith efforts in this context. Specifically, the proposed rule provided two ways by which a Participant could establish that it has made good faith efforts. Specifically, a Participant could demonstrate to SBA either that it submitted offers for one or more non-8(a) procurements which, if awarded, would have given the Participant sufficient revenues to achieve the applicable non-8(a) business activity target during its just completed program year, or explain that there were extenuating circumstances that adversely impacted its efforts to obtain non-8(a) revenues. This proposed rule also identified possible extenuating circumstances, which would include but not be limited to a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, or having one or more prime contractors award less work to the Participant than originally contemplated.

Commenters largely supported SBA's efforts to provide clarity on how a Participant may demonstrate that it made good faith efforts to meet its applicable non-8(a) business activity target. One commenter urged SBA to adjust the period of measurement for submitting offers for non-8(a) procurements, which, if awarded, would have given the Participant sufficient non-8(a) revenues to achieve the applicable non-8(a) business activity target during its just completed program year. This commenter believed that providing a list of proposals submitted during the applicable program year (irrespective of award or when contract revenues would be realized)

would provide a more bright-line and consistent approach. While SBA recognizes the value of clear regulatory standards, compliance with the business activity target requirement is measured based on a Participant's 8(a) and non-8(a) revenues in a given program year. As such, in assessing whether a Participant has made good faith efforts to meet its applicable non-8(a) business activity target, SBA believes it should only consider non-8(a) receipts which would have been realized during the relevant program year. In addition, it is unclear how SBA should treat contract revenues that would not be derived in the pertinent program year. In SBA's view, a Participant must demonstrate to SBA that it submitted offers for one or more non-8(a) procurements which, if awarded during its just completed program year, would have given the Participant sufficient revenues to achieve the applicable non-8(a) business activity target during that same program year. The final rule revises the proposed language to clarify this policy. In addition, two commenters urged SBA to expand the list of extenuating circumstances that may be considered to include: unanticipated labor or supply shortages which may preclude a Participant from submitting a proposal; and marketing efforts such as responding to an agency's Request for Information or attendance at industry days or other procurement conferences. As proposed, the regulatory text provides that the list of extenuating circumstances is not exhaustive. This is consistent with SBA's intent to consider all relevant circumstances out of the Participant's control which adversely impacted its efforts to obtain sufficient non-8(a) revenues. This rule adopts the proposed language as final.

There has also been some confusion as to how SBA should best track business activity targets. The statutory requirement for such targets relates to program years, meaning a Participant should receive a certain percentage of non-8(a) business during certain years in the program. In the October 2020 final rule, SBA changed all references to looking at business activity compliance from fiscal year to program year to align with the statutory authority. A program year lines up with the date that a Participant was certified as eligible to participate in the 8(a) BD program. That date generally is not the same as a Participant's fiscal year. Participants

have financial statements relating to their fiscal year activities, but most do not have financial statements relating to program year. To capture program year data, SBA has asked Participants to estimate as best they can program year revenues for both 8(a) and non-8(a) activities. However, it was brought to SBA's attention that these sales estimates were difficult to prepare and inaccurate. In response to these concerns, the proposed rule specifically requested comments as to how firms believe it would be easiest for them to meet the program year information requirements. The supplementary information to the proposed rule explained that SBA was considering an approach to capture program year data based on the Participant's interim financial statements. This would require a Participant to submit monthly, quarterly, or semi-annual financial statements, as appropriate, to SBA where the close of its fiscal year and its program anniversary date are separated by more than 90 calendar days. SBA could then assess the Participant's compliance with the business activity target based on the breakdown of 8(a) and non-8(a) sales set forth in the applicable interim financial statements. For example, Participant A's fiscal year closes on December 31, and its program anniversary date is May 9. In connection with its annual review, Participant A would submit quarterly financial statements for the periods of April 1– June 30, July 1 – September 30, and October 1 – December 31, from its most recently completed fiscal year, and the period of January 1 – March 31 in its current fiscal year. SBA could then determine Participant A's compliance with the applicable business activity target based on the breakdown of 8(a) and non-8(a) sales during the 12-month period covered by these quarterly financial statements. While this approach would exclude revenues derived during the final weeks or months leading up to a Participant's program anniversary date, SBA explained that it would most closely capture a Participant's program year activities without placing an undue burden on the Participant to estimate its 8(a) and non-8(a) revenues on a program year basis.

Commenters were split on SBA's approach to capture program year business activity based on interim financial statement figures. Three commenters confirmed that the incumbent

policy requiring Participants to estimate their 8(a) and non-8(a) sales on a program year basis is challenging and yields inaccurate figures, especially where a Participant's program anniversary date falls in the middle of a calendar month. On the other hand, four commenters voiced concern that requiring a Participant to submit its interim financial statements would impose an undue administrative burden and cost on the 8(a) community. One such commenter urged SBA to accept interim financial statements prepared in-house if this approach is adopted. Through its independent research, SBA recognizes that it could be burdensome on some businesses to report sales estimates based on interim reporting periods spanning different fiscal years where they do not currently prepare interim quarterly statements. After carefully considering these comments and findings, SBA will continue to allow Participants to estimate as best they can program year revenues for both 8(a) and non-8(a) activities. The final rule revises § 124.509 to explicitly incorporate SBA's current business activity reporting policy. However, as noted above, SBA is mindful that estimating program year sales in this manner is neither practical nor precise for some 8(a) Participants. To address these concerns, the final rule will also revise § 124.509 to permit program year sales reporting based on the Participant's interim financial statement figures, which may be prepared in-house. Because SBA does not seek to impose unnecessary reporting or compliance burdens on the 8(a) portfolio, the final rule provides that a Participant need not submit the underlying monthly, quarterly, or semi-annual financial statements in connection with its annual review. SBA believes this approach will reduce administrative burdens across the entire 8(a) portfolio while simultaneously promoting accurate reporting and oversight.

Sections 124.513(a), 126.616(a)(2), 127.506(a)(3), and 128.402(a)(3)

The proposed rule added a new § 124.513(a)(3) to provide that a Program Participant cannot be a joint venture partner on more than one joint venture that submits an offer for a specific 8(a) contract. Although the proposed rule applied this requirement to all contracts, procuring agencies and small businesses have raised concerns to SBA in the context of multiple

award contracts where it is possible that one firm could be a member of several joint ventures that receive contracts. In such a situation, several agencies were troubled that orders under the multiple award contract may not be fairly competed if one firm was part of two, three or more quotes. They believed that one firm having access to pricing information for several quotes could skew the pricing received for the order.

To ensure that the HUBZone, WOSB and SDVOSB programs have rules as consistent as possible to those for the 8(a) BD program, the proposed rule added similar language as that added to § 124.513(a)(3) for those programs in proposed § 125.18(b) (for SDVOSB), § 126.616(a)(2) (for HUBZone), and § 127.506(a)(3) (for WOSB).

The proposed rule also specifically requested comments as to whether this provision should be limited only to 8(a)/HUBZone/WOSB/SDVOSB multiple award contracts or whether it should apply to all contracts set-aside or reserved for 8(a)/HUBZone/WOSB/SDVOSB, and to all orders set-aside for such businesses under unrestricted multiple award contracts.

SBA received seven comments responding to whether a firm should be able to be a joint venture partner on more than one joint venture that submits an offer for a specific small business contract. All commenters supported the proposed change. Commenters believed that the changes will help maintain fair market competition within the small business programs and prevent firms from unduly benefiting from the programs at the expense of other, less sophisticated small business concerns. Commenters also believed that the rule should apply to all contracts set-aside or reserved for 8(a)/HUBZone/WOSB/SDVOSB, and to all orders set-aside for such businesses under unrestricted multiple award contracts. As such, SBA adopts the changes to § 124.513(a)(3) (for the 8(a) program), to § 126.616(a)(2) (for the HUBZone program), and to § 127.506(a)(3) (for the WOSB program). Although the proposed rule also amended § 125.18(b) for joint ventures relating to the SDVO program, the final rule modifies § 128.402(a)(3) instead. SBA included the same provision in the final rule implementing the Veteran Small Business Certification Program and is already contained in § 128.402(a)(3) of

SBA's regulations for the SDVO program. *See* 87 FR 73400 (Nov. 29, 2022). This final rule slightly modifies the language in § 128.402(a)(3) to be identical to that for the HUBZone and WOSB programs. The restriction on being a member of more than one joint venture will apply equally to apply to all contracts or orders set-aside or reserved for the 8(a), HUBZone, WOSB, or SDVO programs.

Section 124.515

Section 124.515 implements section 8(a)(21) of the Small Business Act, 15 U.S.C. 637(a)(21), which generally requires an 8(a) contract to be performed by the concern that initially received the contract. In addition, the statute and § 124.515 provide that where the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, any 8(a) contract that the concern is performing shall be terminated for the convenience of the Government unless the SBA Administrator, on a nondelegable basis, grants a waiver based on one or more of five statutorily identified reasons. The proposed rule revised § 124.515(c) for clarity. Specifically, it broke one longer paragraph into several smaller subparagraphs and clarified that if a Participant seeks a waiver based on the impairment of the agency's mission or objectives, it must identify and provide a certification from the procuring agency relating to each 8(a) contract for which a waiver is sought.

Under the procedures that existed prior to this rule, a Participant (or former Participant that is still performing an 8(a) contract) submitted its request for a waiver to the termination for convenience requirement to the Participant's (or former Participant's) SBA servicing district office. These requests for waivers are often complicated and can take a long time to be approved. Processing a waiver request can take several months in an SBA district office and then several months in SBA's Office of Business Development in SBA's Headquarters. To streamline the process, the proposed rule sought comments regarding where requests for waivers should be initiated. Specifically, SBA sought comments as to whether waiver requests should be sent directly to the AA/BD instead of to the servicing district office.

SBA received 13 comments regarding the proposed changes to § 124.515. One commenter believed there was no need to change the request for waiver process. Twelve commenters supported changing the process. The commenters supporting a change believed that streamlining the waiver process is beneficial to small businesses. Commenters noted that the process initiating at the district office level was lengthy and often dissuaded firms from initiating a waiver request. They believed that requests get bogged down in SBA for months, which can make deals fall apart. Commenters noted that disadvantaged individuals are penalized in the waiver process because it is difficult to negotiate a price for a business that will be acquired a year or more into the future. Commenters recommended that waiver requests be initiated with the AA/BD. Commenters also recommended that time limits be put into the regulation to provide that SBA will process such requests in a certain amount of time. SBA agrees that the termination for convenience waiver process was oftentimes exceedingly lengthy. In order to streamline the process, the final rule provides that waiver requests will be initiated with the AA/BD and that SBA will process a request for waiver within 90 days of receipt of a complete waiver package by the AA/BD.

SBA also received a comment questioning SBA's implementation of a waiver based on the transfer of ownership and control to another eligible Program Participant. Specifically, the commenter questioned why SBA would not grant a waiver with respect to a specific 8(a) contract if the work to be performed under the contract is not similar to the type of work previously performed by the acquiring 8(a) Participant. The commenter believed that SBA should be looking at the eligibility of the acquiring firm, as required by the statutory authority, but should not be attempting to determine the responsibility of the acquiring firm to perform the contract prior to the acquisition or question the acquiring firm's business strategy going forward. SBA agrees. The statutory authority speaks solely to requiring SBA to ensure that the acquiring firm is an eligible Participant prior to the transfer. As such, the final rule deletes the last

sentence of current § 124.515(d), which restricted the transfer of 8(a) contracts to another Participant that had not previously performed work similar to that being transferred.

Sections 124.604 and 124.108

Section 124.604 currently requires each Participant owned by a Tribe, ANC, NHO or CDC to submit to SBA information showing how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program through one or more firms.

The proposed rule sought to add a requirement that each entity having one or more Participants in the 8(a) BD program establish a Community Benefits Plan that outlines the anticipated approach it expects to deliver to strengthen its Native or underserved community over the next three or five years. The proposed rule also sought comments regarding such a Community Benefits Plan and whether and how SBA should seek to ensure that benefits derived from the 8(a) BD program flow back to the native or disadvantaged communities served by tribes, ANCs, NHOs and CDCs. As noted above, SBA held five tribal consultations and listening sessions to hear from the Native communities. The tribal, ANC and NHO representatives overwhelmingly opposed any changes to the benefits reporting provisions. In addition, in response to the proposed rule SBA received 35 comments further opposing any changes to the benefits reporting requirements and imposing a new Community Benefits Plan requirement. One commenter, however, agreed that entities should have a Community Benefits Plan given the unique benefits available to entity-owned firms and that it makes sense that entity-owned firms should demonstrate how they are substantively improving the lives of the communities they serve. During the last tribal consultation in Washington, DC, SBA announced that it would not finalize anything new pertaining to benefits reporting. As such, this final rule does not adopt any new language to § 124.604 or any new language to § 124.108 dealing with benefits or benefits reporting.

Section 124.1002

Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661 (100 Stat. 3816, 3973), authorized a set-aside program at DoD for small disadvantaged businesses, separate from the authority for contracts awarded under the 8(a) BD program. The "Section 1207" or SDB Program also had a price evaluation preference and a subcontracting component. SBA implemented regulations establishing the eligibility requirements for the SDB Program and authorizing a protest and appeal process to SBA regarding the SDB status of apparent successful offerors. In 2008, the United States Court of Appeals for the Federal Circuit ruled that preferential treatment in the award of DOD prime defense contracts based on race under the Section 1207 program (as implemented in 10 USC 2323) was unconstitutional. *Rothe Dev. Corp. v. DOD*, 545 F.3d 1023. This effectively eliminated the SDB Program.

In response to the ruling, the FAR Council revised the SBA protest process for SDBs in the FAR to a "review" process in a final rule effective October 2014 (79 FR 61746). SBA brought its own regulations up to date in 2020 by removing references to an SDB protest. 85 FR 27290 (May 8, 2020). Recently, SBA's Office of Inspector General (OIG) has questioned why a protest process no longer exists to challenge a firm's SDB status. Despite SBA's explanation that the Section 1207 program (the basis for SBA's previous SDB regulatory authorities) no longer exists, OIG continues to believe that general authority to protest a firm's SDB status should exist. SBA notes that since the FAR Council replaced the protest process with a review process in 2014, SBA has not received any requests for review. Although SBA believes that such authority would not be often utilized, in response to OIG's concerns the proposed rule added a new § 124.1002 authorizing reviews and protests of SDB status in connection with prime contracts and subcontracts to a federal prime contract. The proposed rule copied similar text contained in FAR 19.305.

SBA did not receive any comments relating to § 124.1002, and SBA adopts the proposed language in this final rule. Under the rule, SBA will be able to initiate the review of the SDB status on any firm that has represented itself to be an SDB on a prime contract (for goaling

purposes or otherwise) or subcontract to a federal prime contract whenever it receives credible information calling into question the SDB status of the firm. In addition, as already stated in the FAR, a contracting officer or the SBA may protest the SDB status of a proposed subcontractor or subcontract awardee. Finally, where SBA determines that a subcontractor does not qualify as an SDB, prime contractors must exclude subcontracts to that subcontractor as subcontracts to an SDB in its subcontracting reports, starting from the time that the protest was decided. SBA believes that a prime contractor should not get SDB credit for using a subcontractor that does not qualify as an SDB. However, in order not to penalize a prime contractor who acted in good faith in awarding a subcontract or to impose an additional burden of correcting past subcontracting reports, the rule disallows SDB subcontracting credit only prospectively from the point of an adverse SDB determination.

Sections 125.1, 125.3(c)(1)(i), 125.3(c)(1)(x), and 125.3(c)(2)

SBA proposed to make changes to several provisions in part 125 that reference the term commercial item. This is in response to recent changes made to the FAR with regard to the definition of "commercial item". 86 FR 61017. Primarily, the changes to the FAR split the definition of commercial items into two categories, commercial products and commercial services. SBA proposed to amend its regulations to adopt these changes when SBA's regulation is referring to a commercial product, a commercial service, or both. Specifically, the proposed rule amended the definition for "cost of materials" in 125.1 to refer only to commercial products. Further, SBA proposed to amend 125.3(c)(1)(i), (c)(1)(x), and (c)(2) to update the references to both commercial products and commercial services.

SBA received no comments in response to these proposed changes and adopts them as final in this rule.

Section 125.1

The proposed rule added definitions of the terms "Small business concerns owned and controlled by socially and economically disadvantaged individuals" and "Socially and

economically disadvantaged individuals" for purposes of both SBA's subcontracting assistance program in 15 U.S.C. 637(d) and the goals described in 15 U.S.C. 644(g). The proposed rule sought to implement consistency among SBA's programs and referred to requirements set forth in part 124 for 8(a) eligibility. SBA received no comments on this proposed change and adopts it as final in this rule. SBA believes that the change will provide clarity for small disadvantaged business eligibility requirements contained in other statutes that refer to 15 U.S.C. 637(d) for their eligibility.

SBA also proposed to include blanket purchase agreements (BPAs) in the list of contracting vehicles that are covered by the definitions of consolidation and bundling. There are two kinds of BPAs: GSA's FSS BPAs covered under FAR 8.4 and BPAs established under Simplified Acquisition Procedures (*see* FAR 13.303). The proposed rule requested comments as to whether the list should apply to both types of BPAs, FSS and FAR 13.303, and whether it should apply to both BPAs established with more than one supplier and BPAs established with a single firm. Generally, a consolidated requirement is one that consolidates two or more previous requirements performed under smaller contracts into one action. A bundled requirement is a type of consolidated requirement in which multiple small-business requirements are consolidated into a single, larger requirement that is not likely suitable for award to small businesses. In most cases, because of the potential negative impact on small business contracting opportunities, the contracting agency is required to conduct a financial analysis, execute a determination that the action is necessary and justified, and in some cases notify impacted small businesses and the public, before proceeding with a bundled or consolidated requirement. The Small Business Act, 15 U.S.C. 632(j), requires agencies to avoid unnecessary bundling of "contract requirements." SBA interprets the term "contract requirements" to include BPAs for the purposes of this statutory provision on avoiding bundling. This is similar to how SBA interprets the term "proposed procurement" under the Small Business Act's requirement for agencies to coordinate with procurement center representatives on prime contract opportunities.

SBA thus intended the consolidation and bundling provisions to apply to BPAs. The Government Accountability Office (GAO), however, ruled in two recent bid protests that, because SBA's regulations do not specifically address BPAs, the consolidation and bundling procedures do not apply when the resulting requirement is a BPA.

SBA routinely sees consolidation in BPAs. Bundling on a BPA has the same detrimental effect on small-business incumbents as bundling on other vehicles, such as contracts or orders. Regardless of whether the resulting requirement is a BPA, the bundled action will convert multiple small business contracting actions into a single action to be awarded to a large business. If agencies are not required to follow SBA regulations regarding notification and a written determination for bundled BPAs, the small business incumbents may not know that work that they are currently performing has been bundled and moved to a single award to a large business and may not have the opportunity to challenge such action. Awarding a requirement as a BPA does not lessen the negative impact of bundling on small businesses, and, therefore, SBA proposes to incorporate into the regulations its current belief that the bundling and consolidation rules should apply with equal force where the resulting award will be a BPA.

SBA received ten comments regarding the change to include BPAs in the definition of bundling. All ten commenters supported the inclusion of BPAs. Commenters agreed that the consolidation and bundling requirements should not be limited to either BPAs established with more than one supplier or a single firm and should apply to both BPAs established under FAR Part 8 or Part 13 procedures. One commenter commended SBA for this change, believing that it can prevent contracts from being bundled and taken away from small business. Several commenters also recommended that SBA amend the definition of consolidation to include BPAs as well. SBA agrees that the consolidation and bundling requirements should apply to BPAs established with a more than one supplier or a single firm and to both BPAs established under FAR Part 8 or Part 13 procedures. SBA has added BPAs to both the definitions of bundling and consolidation in this final rule.

Additionally, several procuring agencies have asserted that the analysis, determination, and notification requirements for consolidation or bundling do not apply when existing requirements are combined with new requirements. SBA disagrees. There is no basis in statute, regulation, or case law for agencies to interpret "requirement" as excluding a combination of existing and new work. The statutory language speaks solely to the value of existing work. As long as the combined existing work is greater than $2 million, the statute defines it to be consolidation. New work is not relevant to that determination. To eliminate any confusion, the proposed rule clarified SBA's current position that agencies are required to comply with the Small Business Act and all SBA regulations regarding consolidation or bundling regardless of whether the requirement at issue combines both existing and new requirements into one larger procurement that is considered to be "new." Commenters agreed that "consolidation" and "bundling" can occur regardless of whether an agency adds additional new requirements to a procurement or whether the overall requirement can be considered "new" due to its increase in scope, value or magnitude. SBA adopts that language in this final rule.

Section 125.2

Section 125.2 sets forth guidance as to SBA's and procuring agencies' responsibilities when providing contracting assistance to small businesses. Paragraph 125.2(d) contains guidance on how procuring agencies determine whether contract bundling and substantial bundling is necessary and justified. Specifically, § 125.2(d)(2)(ii) states that a cost or price analysis may be included to support an agency's determination of the benefits of bundling. This language combined with the language at § 125.2(d)(2)(v) is intended to mean that price analysis is always necessary, and, if the analysis results in a price reduction, the agency may use the price reduction to demonstrate benefits of the bundled approach. In order to demonstrate "measurably substantial" benefits as required by the Small Business Act, SBA's regulations and the FAR (benefits equivalent to 10 percent of the contract or order value where the contract or order value is $94 million or less, or benefits equivalent to 5 percent of the contract or order value or $9.4

million, whichever is greater, where the contract or order value exceeds $94 million), SBA believes that a cost or price analysis must be conducted. Some have argued that the Small Business Act does not require a cost/price analysis. They point to the language of § 15(e)(2)(B) of the Small Business Act which provides that in demonstrating "measurably substantial benefits" the identified benefits "may include" cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, and any other benefits. 15 U.S.C. 644(e)(2)(B). However, if a cost/price analysis is not required, SBA does not believe that it is possible to demonstrate benefits equivalent to 10 percent (or 5 percent/$9.4 million) of the contract or order value – exactly what is required by SBA's regulations and the FAR. This interpretation is even clearer in paragraph 125.2(d)(2)(v), which acknowledges that an agency will perform a price analysis and describes a specific type of price comparison to include in the analysis.

In order to clarify any misperceptions, SBA proposed to clarify § 125.2(d)(2)(ii) to plainly state that an analysis comparing the cumulative total value of all separate smaller contracts with the estimated cumulative total value of the bundled procurement is required as part of the analysis of whether bundling is necessary and justified. Neither a procuring agency nor SBA can have a complete view of the small business contract dollars impacted by a bundled procurement if this price analysis is not performed. The analysis requires that an agency identify all impacted separate smaller contracts. An agency can search the Federal Procurement Data System or use the agency's own contract records to determine the complete universe of separate contracts impacted by the bundled procurement. Identification of every impacted firm is not only important for purposes of the price analysis but is also necessary to comply with the statutory and regulatory notice requirements for bundled contracts. Furthermore, if 8(a) contracts will be subsumed in the bundled procurement, an agency must know which 8(a) contracts are impacted in order to comply with the required 8(a) program release or notification requirements.

SBA received five comments on the proposal to require a cost/price comparative analysis as part of any bundling justification. Commenters first noted that bundling has a serious negative impact on small businesses because the requirements will result in diminished opportunities for many small businesses to compete for prime contracts. One commenter believed such a comparative analysis was not necessary without providing any reasons for that belief. Four commenters agreed that no bundling analysis could have real meaning without such a comparison. They believed that a procuring activity could not adequately justify any consolidation or bundling without comparing the cost/price to previously acquire the goods or services to the projected cost/price to acquire those same goods or services through the consolidated or bundled requirement and demonstrating the required savings. A commenter also noted that if services that were previously provided in-house were added to a consolidated or bundled requirement, the analysis should include a comparison of Government in-house cost to that of the projected contract cost. SBA agrees such an analysis should be performed in those circumstances. SBA adopts the proposed comparative cost/price analysis language in this final rule.

Section 125.3

Section 125.3 discusses the types of subcontracting assistance that are available to small businesses and the rules pertaining to subcontracting generally. Paragraph 125.3(a)(1)(i)(B) provides that purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor are not included in the subcontracting base. SBA received an inquiry as to whether this language would allow a prime contractor to count an award to a joint venture in which it is a partner as subcontracting credit. That was not SBA's intent. SBA believes that exclusion is covered in the current regulatory text, which already alludes to not counting awards to affiliates. Nevertheless, in order to clarify that a prime contractor cannot count an award to a joint venture in which it is a partner as subcontracting credit, SBA proposed to add clarifying language to that effect.

Several commenters sought revisions to the clarifying language and argued that the proposal is, in fact, a change in policy and not a clarification. One commenter asked that SBA still allow subcontracting credit for the amount performed by the small business partner in a joint venture. Another asked that "or sales to" be removed from the proposed language, believing that is the exact opposite of what the proposal is seeking to do. One commenter noted that SBA's proposed language does not implement its intended change to the rule, because it states, "joint venture … that is an affiliate of the prime contractor." The commenter pointed out that a large business that is also a minority-member of a mentor-protégé joint venture is not affiliated with that joint venture due to the exclusion to affiliation afforded mentor-protégé joint ventures. As a result, SBA's proposed language would not effectuate the rule change it seeks. SBA agrees that the proposed language did not adequately capture SBA's intent and clarifies that intent in this final rule. First, the final rule separates out the treatment of joint ventures from that of affiliates. Second, SBA is not including the "or sales to" language in the final rule. SBA notes that, where an other-than-small contractor subcontracts to its own unpopulated joint venture, the work performed by a small-business member of that joint venture is considered a subcontract and the contractor may take subcontracting credit for that small-business work.

SBA also proposed to amend § 125.3(a)(1)(iii) to delete bank fees from the list of exclusions from the subcontracting base. SBA's current regulations provide that bank fees are excluded from the subcontracting base. This means that when a large contractor is calculating the percentage of work being subcontracted to small businesses, it does not have to factor bank fees into this calculation. This gives the contractor little incentive to work with small banks. However, there are over 900 small businesses registered in the Dynamic Small Business Search (DSBS) database under banking NAICS codes. Given the number of small banks available to do work on federal prime contracts, SBA did not believe bank fees should be excluded from the subcontracting base. SBA received several comments supporting this change. One commenter opposed this change, arguing that bank fees are often not allowable expenses.

SBA's exclusions, though, do not apply broadly to all unallowable expenses, so that classification as unallowable does not, by itself, mean that bank fees should be excluded from the subcontracting plan.

In addition, SBA proposed to amend § 125.3(c)(1)(iv) to require that large businesses include indirect costs in their subcontracting plans. Currently, large businesses have the option of including or excluding indirect costs in their individual subcontracting plans. Many large businesses opt to exclude indirect costs. As a result, small businesses that provide services generally considered to be indirect costs – such as legal services, accounting services, investment banking, and asset management – are often overlooked by large contractors. SBA stated that by requiring indirect costs to be included in their individual subcontracting plans, large businesses will have an incentive to give work to small businesses that provide those services.

SBA received some supportive comments to the proposal, but comments were primarily negative. Commenters asserted that tracking, collecting, and allocating indirect costs will be overly burdensome on the businesses with subcontracting plans. They also observed that indirect costs already are included in summary subcontracting reports, but those costs are unpredictable, making it very difficult to include them in subcontracting goals. Another commenter observed that SBA's definition of "subcontracts" does not cover the indirect costs that SBA was most concerned with because those costs are not typically related to the work that the contractor with the plan has undertaken. The same commenter questioned whether contractors with subcontracting plans are properly recording the size of their subcontractors.

To the comment about SBA's definition of subcontract, SBA did not propose to change the present definition. Such a change would be a major change in practice, and SBA did not intend to change what types of work fall under that definition. Instead, SBA sought to have some accountability for the indirect costs that contractors currently report on their summary subcontracting plans. Based on the comments received, SBA understands including indirect costs in all subcontracting plans would result in a significant, widespread burden. Therefore,

SBA is limiting the revision in three ways. First, only prime contractors would be required to include indirect costs in the individual subcontracting plans and reports; other contractors may continue to choose whether or not to continue to include them. Second, including the indirect costs would be required only for contracts valued at $7.5 million or more, which is 10 times the threshold at which a subcontracting plan is required for most contracts. Third, prime contractors may rely on a pro-rata formula to allocate indirect costs to covered individual contracts, to the extent that the indirect costs are not already allocable to specific contracts.

Section 125.6

Section 125.6 sets forth the requirements pertaining to the limitations on subcontracting applicable to prime contractors for contracts and orders set-aside or reserved for small business. Section 125.6(d) provides that the period of time used to determine compliance for a total or partial set-aside contract will generally be the base term and then each subsequent option period. This makes sense when one agency oversees and monitors a contract. However, on a multi-agency set-aside contract, where more than one agency can issue orders under the contract, no one agency can practically monitor and track compliance. In order to ensure that this statutory requirement is met for the contract, SBA believes that compliance should be measured order by order by each ordering agency. The proposed rule clarified § 125.6(d) accordingly.

SBA received five comments on the proposed clarification to § 125.6(d). Four comments, including one executive agency, supported the change, agreeing that no procuring activity is accountable where no one tracks the cumulative work ordered under a multi-agency set aside contract. These commenters wanted to ensure that small businesses (either directly or with similarly situated entities) actually performed the required percentages of work and that large businesses or non-similarly situated small businesses did not unduly benefit from small business set aside contracts. One commenter believed that the change was not needed since the rules currently permit contracting officers from ordering agencies to require compliance with the limitations on subcontracting on an order-by-order basis. SBA believes this comment misses the

point. SBA recognizes that contracting officers may require compliance with the limitations on subcontracting on an order-by-order basis. However, if they do not, there is no one agency tracking overall limitations on subcontracting compliance with the aggregate of all orders issued by multiple agencies. SBA adopts the proposed language in this final rule.

SBA also proposed to add a new § 125.6(e) to provide consequences to a small business where a contracting officer determines at the conclusion of contract performance that the business did not meet the applicable limitation on subcontracting on any set-aside contract (small business set-aside; 8(a); WOSB; HUBZone; or SDVOSB). The current rules provide discretion to contracting officers to require contractors to demonstrate compliance with the limitations on subcontracting at any time during performance and upon completion of a contract. SBA's current rules do not, however, address what happens if a contracting officer determines that a firm fails to meet the statutorily required limitation on subcontracting requirement at the conclusion of contract performance. SBA's proposed rule provided that a contracting officer could not give a satisfactory/positive past performance evaluation for the appropriate evaluation factor or subfactor to a contractor that the contracting officer determined did not meet the applicable limitation on subcontracting requirement at the conclusion of contract performance.

SBA received comments both supporting and opposing this proposal. Those supporting the proposal believed that in order to promote the integrity of small business contracting, there should be consequences for those business concerns that do not take seriously the limitations on subcontracting and make minimal, superficial efforts to meet the applicable requirement. Several commenters who opposed the proposal believed that compliance with the limitations on subcontracting is a complex calculation, that there should be a safe harbor for contractors that made good faith efforts to meet the application limitation on subcontracting, and that a contractor should be able to provide extenuating or mitigating circumstances that impacted its ability to meet the applicable requirement. SBA maintains that having negative consequences for not meeting the applicable limitation on subcontracting would help ensure the requirements are

being met, and that set-aside contracts are being performed in a manner consistent with SBA's regulations and the Small Business Act. However, SBA also believes that a contractor should not be penalized for circumstances beyond its control. In extenuating circumstances, SBA supports providing discretion authorizing a contracting officer to give a satisfactory orpositive past performance evaluation for the appropriate evaluation factor or subfactor to a contractor that did not meet the applicable limitation on subcontracting requirement. SBA is concerned that a negative past performance evaluation could be repeatedly avoided in situations in which a concern continually and knowingly exceeds the limitation on subcontracting, as extenuating circumstances could be argued by such a concern in every instance where the limitation is not met under a contract or order. SBA believes there should be greater accountability for these determinations, through the use of higher-level review, to ensure that concerns that knowingly exceed the limitations experience adverse consequences.

Whenever a contracting officer determines at the conclusion of contract performance that a small business did not meet the applicable limitation on subcontracting on any set-aside contract, the final rule would first give the business concern the opportunity to explain contributing circumstances that negatively impacted its ability to do so. The final rule adds language authorizing a contracting officer to give a satisfactory orpositive past performance evaluation for the appropriate evaluation factor or subfactor to a contractor that did not meet the applicable limitation on subcontracting requirement where the contracting officer determines that the reason for noncompliance was outside of the firm's control and an individual at least one level above the contracting officer concurs with that determination. Examples of extenuating or mitigating circumstances that could lead to a satisfactory/positive rating include, but are not limited to, unforeseen labor shortages, modifications to the contract's scope of work which were requested or directed by the Government, emergency or rapid response requirements that demand immediate subcontracting actions by the prime small business concern, unexpected changes to a subcontractor's designation as a similarly situated entity (as defined in § 125.1),

differing site or environmental conditions which arose during the course of performance, force majeure events, and the contractor's good faith reliance upon a similarly situated subcontractor's representation of size or relevant socioeconomic status. The contracting officer could not rely on any circumstances that were within the contractor's control, or those which could have been mitigated without imposing an undue cost or burden on the contractor. Without this discretionary authority, SBA agrees that long-term deleterious consequences could result to otherwise well-performing small business prime contractors.

Section 125.9

Section 125.9 sets forth the rules governing SBA's small business mentor-protégé program. SBA's regulations currently provide that a mentor can have no more than three protégé small business concerns at one time. SBA has been asked whether a mentor that purchases another business concern that is also an SBA-approved mentor can take on those mentor-protégé relationships if the total number of protégés would exceed three. The reason SBA has limited the number of protégé firms one mentor can have at any time is to ensure that a large business mentor does not unduly benefit from programs intended to benefit small businesses. That is also the reason that the limit of three protégés applies to the mentor family (i.e., the parent and all of its subsidiaries in the aggregate cannot have more than three protégé small business concerns at one time). If each separate business entity could itself have three protégés, conceivably a parent with three subsidiaries could have 12 small business protégé firms. SBA believes that would allow a large business to unduly benefit from small business programs. The regulations implementing the mentor-protégé program also provide that a small business can have only two mentor-protégé relationships in total. Thus, if SBA were to say that a mentor that purchased another business entity which is also a mentor could not take on the selling business entity's mentor-protégé relationships, the ones who would be hurt the most would be the small business protégés of the selling business. Their mentor-protégé relationships with the selling mentor would end early and would count as one of the two mentor-protégé relationships that they were

authorized to have. Because SBA did not intend to adversely affect protégé firms in these circumstances, SBA has informally permitted a mentor to take on the mentor-protégé relationships of a firm that it purchased even where its total number of mentor-protégé relationships would exceed three. The proposed rule added language to § 125.9(b)(3)(ii) to recognize this exemption. Specifically, the proposed rule added a paragraph that where a mentor purchases another business entity that is also an SBA-approved mentor of one or more protégé small business concerns and the purchasing mentor commits to honoring the obligations under the seller's mentor-protégé agreement(s), that entity may have more than three protégés. In such a case, the entity could not add another protégé until it fell below three in total.

SBA received six comments in response to this proposed clarification. Five commenters supported the proposal and one opposed. The commenter opposing the clarification believed that the current three protégé limit is a good one. SBA generally agrees with the current provision limiting a mentor to three protégé firms at one time. However, as noted above, imposing that limit in the context of an acquisition by a firm that is a mentor could harm small business protégés. SBA believes that the exception in the context of one mentor purchasing another makes sense. SBA also believes that this is not something that will occur often, but that protection of protégé firms should be in place in those limited instances when it does. The five comments supporting the clarification cited SBA's intent to not harm protégé firms as a worthwhile objective. SBA adopts the proposed language in this final rule.

The proposed rule also amended § 125.9(e) to add language recognizing that a mentor that is a parent or subsidiary of a larger family group may identify one or more subsidiary firms that it plans to participate in the mentor-protégé arrangement by providing assistance and/or participating in joint ventures with the protégé firm. The proposed rule provided that all entities intended to participate in the mentor-protégé relationship should be identified in the mentor-protégé agreement itself.

SBA received five comments in response to this proposed change. Commenters agreed with SBA's proposal to allow mentor companies additional flexibility in assigning their subsidiaries to assist protégé small business concerns. In addition to making the terms more attractive to mentors, they believed that this change will also benefit those protégés where the mentor parent company is not specialized in the protégé's industry. One commenter was concerned with allowing a subsidiary company with no experience in a protégé's primary industry to joint venture with the protégé, limiting the role of and benefit to the protégé. SBA believes this comment misses the intent of the change. The purpose of allowing subsidiary companies of a mentor to participate in the business development of a protégé firm and to form joint ventures to seek procurement opportunities with the protégé is to broaden the protégé's experience, not limit it. In most cases, the parent mentor has experience in the primary industry of the protégé business concern. The protégé expects to joint venture with and gain experience from that parent mentor in that industry. However, if a subsidiary of the mentor has experience in a different industry in which the protégé seeks to enter, that subsidiary should be able to assist the protégé firm gain experience in that distinct industry as well. SBA adopts the proposed language in this final rule.

Finally, one commenter sought clarification as to whether a protégé could extend or renew its mentor-protégé relationship for an additional six years with the same mentor instead of ending that relationship at the end of six years and seeking a new business entity to be its mentor. SBA believes that the current regulations allow that to occur and has administratively permitted it in appropriate circumstances. The final rule adds specific language authorizing a second six-year mentor-protégé relationship with the same mentor. In order for SBA to approve a second six-year mentor-protégé relationship with the same mentor, the mentor-protégé agreement for the second six-year term must provide additional business development assistance to the protégé firm.

Sections 126.306(b), 127.304(c), and 128.302(d)

Sections 126.306 and 127.304 set forth the procedures by which SBA processes applications for the HUBZone and WOSB programs, respectively. The proposed rule added language to both processes to provide that where SBA is unable to determine a concern's compliance with any of the HUBZone or WOSB/EDWOSB eligibility requirements due to inconsistent information contained in the application, SBA will decline the concern's application. In addition, the proposed rule added language providing that if, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. This language is consistent with that already appearing in SBA's regulations for the 8(a) BD program, and SBA believes that all of SBA's certification programs should have similar language on this issue. SBA received four comments in response to these proposed changes. All four comments supported the proposals as consistent with the 8(a) application procedures. Commenters believed all SBA certification programs should have similar provisions. The final rule adopts the proposed language with clarifying edits and also adds identical language to the provisions pertaining to VOSB and SDVOSB certification in § 128.302(d).

Sections 126.503(c), 127.405(d), and 128.310(d)

The proposed rule amended § 126.503 by adding a new paragraph (c) to specifically authorize SBA to initiate decertification proceedings if after admission to the HUBZone program SBA discovers that false information has been knowingly submitted by a certified HUBZone small business concern. SBA believes that this is currently permitted under the HUBZone regulations but proposed to add this provision to eliminate any doubt. SBA received four comments supporting this provision and no comments opposing it. As such, SBA adopts the proposed language in this final rule. SBA also adds the same language to § 127.405(d) for the WOSB program. The SDVO program has similar language contained in § 128.201(b). The final

rule deletes that language from § 128.201(b) and instead adopts the identical language that was added for the HUBZone and WOSB programs to § 128.310(d) for the SDVO program. SBA believes that § 128.310(d) is a better location than § 128.201(b) since that section pertains to decertification, which is the same substantive topic as that contained in §§ 126.503(c) and 127.405(d) for the HUBZone and WOSB programs, respectively.

Section 126.601(d)

The proposed rule amended § 126.601(d) to clarify how the ostensible subcontractor rule may affect a concern's eligibility for a HUBZone contract. Where a subcontractor that is not a certified HUBZone small business will perform the primary and vital requirements of a HUBZone contract, or where a HUBZone prime contractor is unduly reliant on one or more small businesses that are not HUBZone-certified to perform the HUBZone contract, the prime contractor would not be eligible for award of that HUBZone contract. SBA received five comments supporting this clarification and no comments opposing it. As such, SBA adopts the proposed language in this final rule.

Section 126.616(a)(1)

The proposed rule amended § 126.616(a) to clarify that a HUBZone joint venture should be registered in SAM (or successor system) and identified as a HUBZone joint venture, with the HUBZone-certified joint venture partner identified. SBA has received numerous questions from HUBZone firms and contracting officers expressing confusion about how to determine whether an entity qualifies as a HUBZone joint venture and thus is eligible to submit an offer for a HUBZone contract. Part of the confusion stems from the fact that there is no way for an entity to be designated as a HUBZone joint venture in SBA's DSBS database; this certification can only be made in SAM. In addition, the process for self-certifying as a HUBZone joint venture in SAM is apparently unclear because such certification does not appear in the same section as the other socioeconomic self-certifications. Since it is not known when these systems might be updated to clear up this confusion, SBA proposed to amend § 126.616(a) by adding a new

subparagraph (a)(1) to help HUBZone firms and contracting officers understand how to determine whether an entity may be eligible to submit an offer as a HUBZone joint venture. Two commenters supported the proposed change. One of the two also requested that SBA clarify whether and if so how this applies to multiple award contracts. Section 126.616(a) provides that a certified HUBZone small business concern may enter into a joint venture agreement with one or more other small business concerns or with an SBA-approved mentor for the purpose of submitting an offer for a HUBZone contract. Thus, the provision applies whenever submitting an offer for "a HUBZone contract." That is meant to apply to all HUBZone contracts, whether a single award or multiple award contract. SBA does not believe that further clarification is necessary. SBA adopts the proposed language in this final rule.

Section 126.801

The proposed rule amended § 126.801(b) to clarify the bases on which a HUBZone protest may be filed, which include: (i) the protested concern did not meet the HUBZone eligibility requirements set forth in § 126.200 at the time the concern applied for HUBZone certification or on the anniversary date of such certification; (ii) the protested joint venture does not meet the requirements set forth in §126.616; (iii) the protested concern, as a HUBZone prime contractor, is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract; and/or (iv) the protested concern, on the anniversary date of its initial HUBZone certification, failed to attempt to maintain compliance with the 35% HUBZone residence requirement. The proposed rule also amended § 126.801(d)(1), addressing timeliness for HUBZone protests.

The proposed rule added a new subparagraph (d)(1)(i) to clarify the timeliness rules for protests relating to orders or agreements that are set-aside for certified HUBZone small business concerns where the underlying multiple award contract was not itself set-aside or reserved for certified HUBZone small business concerns. Specifically, a protest challenging the HUBZone

status of an apparent successful offeror for such an order or agreement will be considered timely if it is submitted within 5 business days of notification of the identity of the apparent successful offeror for the order or agreement. The proposed rule also added a new subparagraph (d)(1)(ii) to clarify that where a contracting officer requires recertification in connection with a specific order under a multiple award contract that itself was set-aside or reserved for certified HUBZone small business concerns, a protest challenging the HUBZone status of an apparent successful offeror will be considered timely if it is submitted within five business days of notification of the identity of the apparent successful offeror for the order.

SBA received four comments in response to the proposed changes to § 126.801. All four supported the proposed changes without any further comment. As such, SBA adopts the proposed language in this final rule.

126.801(e)(2) and 127.603(d)(2)

For purposes of HUBZone and WOSB/EDWOSB contracts, the HUBZone/WOSB/EDWOSB prime contractor together with any similarly situated entities must meet the applicable limitation on subcontracting (or must perform a certain portion of the contract). If a subcontractor is intended to perform primary and vital aspects of the contract, the subcontractor may be determined to be an ostensible subcontractor under proposed § 121.103(h)(3), and the prime contractor and its ostensible subcontractor would be treated as a joint venture. However, if the ostensible subcontractor qualifies independently as a small business, a size protest would not find the arrangement ineligible for any small business contract. To address that situation, the current regulations for the HUBZone program (in §§ 126.601(d) and 126.801(a)(1)) and the WOSB program (in §§ 127.504(g) and 127.602(a)) prohibit a non-similarly situated subcontractor from performing primary and vital requirements of a contract and permit a HUBZone/WOSB/EDWOSB status protest where an interested party believes that will occur. The proposed rule added a paragraph to each of the HUBZone/WOSB/EDWOSB status protest provisions to clarify that any protests relating to whether a non-similarly situated

subcontractor will perform primary and vital aspects of the contract will be reviewed by the SBA Government Contracting Area Office serving the geographic area in which the principal office of the HUBZone/WOSB/EDWOSB business is located. SBA's Government Contracting Area Offices are the offices that decide size protests and render formal size determinations. They are the offices with the expertise to decide ostensible subcontractor issues. Thus, for example, if a status protest filed in connection with a WOSB contract alleges that the apparent successful offeror should not qualify as a WOSB because (1) the husband of the firm's owner actually controls the business, and (2) a non-WOSB subcontractor will perform primary and vital requirements of the contract, SBA's WOSB staff in the Office of Government Contracting will review the control issue and refer the ostensible subcontractor issue to the appropriate SBA Government Contracting Area Office. The SBA Government Contracting Area Office would determine whether the proposed subcontractor should be considered an ostensible subcontractor and send that determination to the Director of Government Contracting, who then would issue one WOSB status determination addressing both the ostensible subcontractor and control issues. The same would be true for HUBZone status protests (except that in the HUBZone context the Director of the Office of HUBZones would issue the HUBZone status determination). To accomplish this, the proposed rule added clarifying language in § 126.801(e)(2) (for HUBZone), and § 127.603(d) (for WOSB/EDWOSB). The proposed rule also added similar language in § 125.28(e) (for SDVO status protests). The language added with respect to SDVO status has been overcome by SBA's implementation of the Veteran Small Business Certification Program. *See* 87 FR 73400 (Nov. 29, 2022). That rule authorized OHA to hear and decide protests relating to VOSB and SDVOSB status. That office will decide all issues relating to VOSB and SDVOSB status, including issues relating to the ostensible subcontractor rule. As such, there is no need to involve SBA's Government Contracting Area Offices in VOSB and SDVOSB status protests relating to the ostensible subcontractor rule. The Veteran Small Business Certification Program rule specifically recognizes OHA's authority to decide protests relating to the ostensible

subcontractor rule in §134.1003(c). Thus, the final rule adopts the proposed changes relating to the WOSB and HUBZone programs, but not those with respect to the SDVO program.

Section 127.102

SBA proposed to amend the definition of WOSB to clarify that the definition applies to any certification as to a concern's status as a WOSB, not solely to those certifications relating to a WOSB contract. SBA has received inquiries as to whether this definition applies to a firm that certifies as a WOSB for goaling purposes on an unrestricted procurement. It has always been SBA's intent to apply that definition to all instances where a concern certifies as a WOSB, and this proposed rule merely clarified that intent.

SBA received three comments on this proposed change, two of which supported the revised definition. The third commenter was opposed, but the purported opposition is based on a misunderstanding of the proposed change. The commenter mistakenly thought SBA was proposing to permit a WOSB Program participant to compete for a WOSB set-aside award even if the participant was not small for the NAICS code attached to the award; the proposed language would not affect this rule. SBA adopts the change as proposed.

Sections 127.200 and 126.200

Section 127.200 specifies the requirements a concern must meet to qualify as an EDWOSB or WOSB. To qualify as an EDWOSB, an entity must be a small business. Paragraph 127.200(a)(1) requires a concern to be a small business for its primary industry classification to qualify as an EDWOSB, while § 127.200(b)(1) merely states that a concern must be a small business to qualify as a WOSB. The proposed rule provided that the applicant must represent that it qualifies as small under the size standard corresponding to any NAICS code under which it currently conducts business activities. SBA believes that this standard makes more sense than requiring an applicant to qualify as small under the size standard corresponding to its primary industry classification. To be eligible for a specific WOSB/EDWOSB contract, a firm must qualify as small under the size standard corresponding to the NAICS code assigned to

that contract. Whether a firm qualifies as small under its primary industry classification is not relevant to that determination (unless the size standard for the firm's primary industry classification is that same as that for the NAICS code assigned to the contract, but even then, the only relevant size standard is that corresponding to the NAICS code assigned to the contract). SBA believes that a firm that does not qualify as small under its primary industry classification should not be precluded from seeking and being awarded WOSB/EDWOSB contracts if it qualifies as small for those contracts. The certification process should ensure that an applicant is owned and controlled by one or more women and that it could qualify as a small business for a WOSB/EDWOSB set-aside contract.

SBA received six comments on the proposed changes to Section 127.200. All six supported bringing § 127.200(a) in line with § 127.200(b). The proposed rule also noted that SBA believes it is important to align the WOSB/EDWOSB eligibility requirements with the eligibility requirements for veteran-owned small business (VOSB) concerns and service-disabled veteran-owned small business (SDVOSB) concerns wherever possible. SBA finalized its rules pertaining to VOSB and SDVOSB certification on November 29, 2022. 87 FR 73400. In that final rule, SBA requires a VOSB/SDVOSB to be a small business concern as defined in part 121 under the size standard corresponding to any NAICS code listed in its SAM profile. *See* 13 CFR § 128.200(a)(1). To ensure consistency between the WOSB and SDVOSB programs, the final rule modifies the WOSB regulations regarding size to adopt the same language as that used in the VOSB/SDVOSB regulations. Specifically, the final rule changes the requirement that a WOSB must qualify as small for the size standard corresponding to any NAICS code under which it currently conducts business activities to requiring a WOSB to be small under the size standard corresponding to any NAICS code listed in its profile in the System for Award Management (SAM.gov). The wording of both provisions was intended to have the same meaning. However, to avoid any confusion and to dispel any concerns that SBA intended to apply size requirements differently between the two programs, SBA adopts the SDVOSB

program language in the WOSB regulations. Since all comments supported the changes to § 127.200, no other changes are being made to that section in this final rule.

Finally, one commenter recommended that the same rule should apply to initial HUBZone eligibility. In other words, the commenter recommended that an applicant to the HUBZone program should qualify as a small business concern for HUBZone certification purposes if it meets the size standard corresponding to any NAICS code listed in its SAM.gov profile. SBA agrees. Unlike the 8(a) BD program, the HUBZone program is not a business development program, and the focus is not on developing a business in any one particular area. It is more in line with the WOSB and SDVO programs in which SBA certifies general eligibility and a certified business concern can then submit offers and seek awards for any HUBZone contracts for which the concern qualifies as small under the size standard corresponding to the NAICS code assigned to the contract. Thus, the final rule amends § 126.200 to change initial size eligibility to be in line with the WOSB and SDVO programs. In making the change to § 126.200, SBA noticed that the same requirements contained in § 126.200 are also contained in § 126.203. This final rule removes the provisions contained in § 126.203 as duplicative and unnecessary.

Section 127.201(b)

Section 127.201 sets forth the requirements for control of a WOSB or EDWOSB. Paragraph (b) specifies that one or more women or economically disadvantaged women must unconditionally own the concern seeking WOSB or EDWOSB status. The proposed rule clarified that this requirement was not meant to preclude a condition that can be given effect only after the death or incapacity of the woman owner. The proposed change intended to make the WOSB Program unconditional ownership requirement the same as that for eligibility for the 8(a) BD program.

SBA received four comments on § 127.201(b). All four supported SBA clarifying the unconditional ownership requirements for WOSBs and EDWOSBs. As such, SBA adopts the language as proposed.

Section 127.202(c)

Section 127.202 sets forth the requirements for control of a WOSB or EDWOSB. The current regulatory language has caused confusion as to whether a woman or economically-disadvantaged woman claiming to control a WOSB or EDWOSB can engage in employment other than that for the WOSB or EDWOSB. The current regulations provide that the woman or economically-disadvantaged woman who holds the highest officer position may not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations. The regulations also provide that such individual must manage the business concern on a full-time basis and devote full-time to it during the normal working hours of business concerns in the same or similar line of business. Taken together, the two provisions allow a woman or economically-disadvantaged woman to engage in outside employment, but only if such employment occurs outside the normal working hours of business concerns in the same or similar line of business and does not prevent her from devoting sufficient time and attention to control the concern's management and daily business operations. SBA believes that this requirement is overly restrictive.

The proposed rule revised the limitations on outside activities. SBA views its role as ensuring that one or more women or economically disadvantaged women actually control the long-term planning and daily operations of the business, not ensuring that they are physically present at the business location during the normal hours of operation for similar businesses or prohibiting them from engaging in outside employment that does not affect their ability to control the business. If a woman starts a small business that she alone operates, SBA does not believe that it makes sense to conclude that she does not control the business simply because she

operates it outside the normal hours of similar businesses. Whether the business can win and perform government contracts is a different question, and not one contemplated by SBA's regulations. Where a woman is the sole individual involved in operating a specific business, there is no question that she controls the business, regardless of whether the number of hours she devotes to the business aligns with those working in similar businesses, and SBA believes that such a business should be eligible to be certified by SBA as a WOSB.

SBA received ten comments on the proposed changes to the WOSB Program's limitations on outside employment. Seven supported, two opposed, and one misunderstood the change. The seven commenters in support of the change all noted that the new regulatory language would provide valuable flexibility to women small business owners. The mistaken commenter articulated opposition to the WOSB Program's current limitation on outside employment, not the proposed revision. The two commenters opposed both thought that the proposed rule was overly broad. One thought that the language requiring a managing woman to devote "sufficient time and attention" to the business was too ambiguous, and that SBA must define the number of hours per week, as well as when the woman manager must work at the small business concern. The second commenter recommended that SBA specifically require the woman manager to be "involved to some extent during normal business hours." SBA agrees that the individual identified as the one who controls the business concern must spend some time actually managing the concern, but believes that both commenters' recommendations are unduly limiting. SBA does not believe that such control necessarily must be exercised only during normal business hours or across a specified number of hours. As noted above, where an identified woman is the only individual involved in a specific business concern and operates that business 10, 20 or any other number fewer than 40 hours per week, there is no doubt that a woman "controls" that business. That is what SBA is charged with determining – whether the business concern is controlled by one or more women. Determining who controls a business, including whether there is any negative control that can be exercised by one or more individuals

who are not women, is a factual issue. SBA must consider all the facts presented by each applicant. Where the identified managing woman spends no time at a business that employs several people and operates 40 hours per week but claims to manage the business in her spare time, the facts would lead SBA to question her management role in that business. SBA is cognizant of ineligible individuals who may seek to gain entry into the program through the use of front companies. However, SBA firmly believes that a proper analysis of all the facts will expose those companies. Thus, although SBA understands the concerns raised by the commenters, SBA believes that the flexibility that 70% of commenters noted would be welcome and beneficial to women business owners outweighs those concerns and that moving forward with the revised requirement on outside employment will help a greater number of eligible women entrepreneurs who are juggling multiple priorities.

One commenter in opposition suggested that if SBA were going to go forward with the revision, it should change the proposed language referring to "outside obligations" to "multiple professional or employment obligations." SBA agrees that "[l]imitation on outside obligations" does not capture its intent, which is to offer women small business owners flexibility in their professional pursuits. "Limitation on outside obligations" could potentially imply that a woman small business owner's eligibility could be affected by factors outside of the professional realm, which it cannot. Accordingly, SBA is changing the proposed language in § 127.202(c) from "[l]imitation on outside obligations" to read "[l]imitation on outside employment." SBA adopts the rest of the proposed language as written.

In the interest of regulatory alignment and consistency, the final rule also revises § 128.203(i) in the SDVO regulations to change "outside obligations" to "outside employment" to clarify that SBA does not intend to require or consider different factors in determining whether a woman or a veteran or service-disabled veteran controls the business concern at issue.

Section 127.400

Section 127.400 describes how a concern maintains its certification as a WOSB or EDWOSB. SBA proposed to amend § 127.400 by omitting § 127.400(a), which requires a certified concern to annually represent to SBA that it meets all program eligibility requirements, and replacing it with § 127.400(b), which states that a certified concern must undergo a program examination at least every three years to maintain program eligibility. SBA believes that these program examinations, in conjunction with other eligibility assessments like material change reviews, status protests, third-party certifier compliance reviews, and program audits, will sufficiently capture eligibility information. The proposed rule also amended the examples to § 127.400 to reflect the proposed change.

SBA received nine comments on the proposed removal of § 127.400(a). Seven supported the change, one opposed, and one discussed the details of a different proposed change. The supportive commenters noted that removing the annual attestation requirement would significantly reduce the administrative burden on small businesses. One noted that the change would bring the WOSB Program re-certification timeframe in line with other certification programs. Another agreed that SBA will be able to assess ongoing eligibility for the WOSB Program through other means. The commenter opposed to removing § 127.400(a) believed that three years is too long for a firm to operate under the assumption of eligibility. The commenter expressed concern that a firm could receive several contracts during its three-year certification period, even if its ownership changed during that period. The commenter asserted that this would be unfair to eligible WOSBs and EDWOSBs in the same industry. SBA believes that the reduced burdens on WOSBs and SBA outweigh any potential eligibility issues that could arise during a firm's three-year certification period. WOSBs will still be required to notify SBA of material changes that affect eligibility, which includes changes in ownership. SBA believes material change reviews, along with all the other program eligibility assessments, including program examinations and status protests, address the commenter's concerns that ineligible firms

may get contracts that would have otherwise been awarded to eligible WOSBs and EDWOSBs in the same industry.

One commenter who supported the change also noted that SBA should remove the requirement that applicants must use third-party certifiers to re-certify. The WOSB Program regulations have never required applicants to use third-party certifiers for re-certification and this has not changed. SBA adopts the changes to § 127.400 as proposed.

Compliance with Executive Orders 12866, 12988, 13132, 13563, the Congressional Review Act (5 U.S.C. 801–808), 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 rule is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

Regulatory Impact Analysis:

1. Is there a need for the regulatory action?

This action implements a statutory enactment—the NDAA FY22—as well as codifies a federal court decision into regulation, and revises SBA guidelines on 8(a) BD program eligibility, 8(a) BD program participation, and subcontracting plan compliance. With respect to the 8(a) BD program, this action is needed to clarify several policies that SBA already has put in place and to apply existing regulations to new scenarios, such as the recently amended SBA mentor-protégé program. This action also is needed to integrate section 863 of NDAA FY22 into SBA regulations and to adopt the holding of a recent federal court decision.

2. <u>What is the baseline, and the incremental benefits and costs of this regulatory action?</u>

SBA has determined that this rule includes eight provisions that are associated with incremental benefits or incremental costs. Outside of the following eight provisions, the other

changes merely clarify existing policy, modify language to avoid confusion, or adopt interpretations already issued by SBA's Office of Hearings and Appeals or through SBA casework.

a. *Require a firm to update SAM within two days and notify certain contracting officers if the firm is found ineligible through size determination, SDVO SBC protests, HUBZone protests, or WOSB Program protests.*

SBA amends section 127.405(c) to provide that a firm found ineligible through a final WOSB program protest must update SAM.gov within two days with its new status and notify agencies with which it has pending offers that are affected by the status change. This requirement already exists in SBA's regulations for size protests and SDVOSB protests.

The change extends the requirement to the WOSB program. SBA has determined that this change will impose costs on the business associated with its notification of contracting agencies of the adverse decision. The number of adverse protest decisions in the WOSB programs is less than five per year. For each such protest, the ineligible business is estimated to be required to notify two agencies. The notification does not take any particular form, so SBA estimates that each notification would take 15 minutes. Thus, the total cost of this change would be 2.5 hours across all firms. At a project-manager-equivalent level, the total cost is less than $280 annually.[1]

b. *Prohibit nonmanufacturer rule waivers from specifically applying to a contract with a duration longer than five years, including options.*

SBA amends section 121.1203 to restrict the grant of individual (i.e., contract-specific) nonmanufacturer rule waivers to contracts with durations of five years or less. A procuring agency may seek, and SBA may grant, a waiver for an additional five years on the same long-term contract if, after conducting market research at the end of five years, the procuring agency

[1] From 2.5 hours saved valued at the mean wage of $55.41 for General and Operations Managers, according to the BLS General and Operations Managers (bls.gov) (retrieved April 12, 2022), plus 100% for benefits and overhead.

demonstrates that there continues to be no available small business manufacturers and that a waiver remains appropriate.

In the prior fiscal year, SBA granted 24 individual waivers for contracts that exceed five years. The estimated total value for contracts covered by these waivers was $4.6 billion.

The most probable effect of denying waivers for such contracts in the future is that the procuring agencies will choose not to set aside those contracts for small business resellers. Instead, the procuring agencies may solicit many of those contracts as full-and-open competitions. It is also possible, however, that the agencies could limit the duration of the contracts to five years in order to promote small-business opportunity through the use of a set-aside.

Of those two possibilities, the first (a full-and-open solicitation) is an economic transfer of the reseller's markup from a small business reseller to what most likely would be an other-than-small reseller. The second (limiting the contract to five years) creates possible benefits at the sixth year for newly established domestic small-business manufacturers. Under the current policy, those manufacturers might be overlooked by the agency and its contractors (i.e., resellers) because the ongoing contract does not require the contractor to purchase from a domestic small-business manufacturer.

SBA estimates that, in a quarter of the cases in which an agency would otherwise seek a waiver for a contract exceeding five years, the agencies would choose to limit the contract (and thus the effect of the waiver) to five years. This amounts to six contracts, with a total value of $1.2 billion. Assuming that these contracts are ten years in length and agencies would recompete the contracts in the five final years, the potential recompeted value is $575 million, unadjusted for inflation. However, it is unknown whether domestic small-business manufacturers would be available to supply the resellers at the point of recompetition—five years after the initial award. Thus, although this change results in potential more opportunities for small business manufacturers in years six and beyond, the benefits of the additional opportunities are not

quantifiable because of lack of information about the domestic small-business manufacturing base in the future.

c. Require information from 8(a) applicants about the terms and restrictions of a retirement account only at the request of SBA, instead of in every instance.

SBA amends section 124.104(c)(2)(ii) to eliminate the prior requirement that 8(a) applicants must provide the terms and conditions of retirement accounts in order to have the values of those accounts excluded from the owner's net worth. Instead, SBA will require the applicant to submit documentation of a retirement account only upon SBA's request.

SBA processes approximately 600 8(a) applications from individual-owned firms per year. Based on sampling, SBA found that 70 percent of those applications disclosed retirement accounts to SBA. Thus, this regulatory change will reduce the documentation burden for about 420 8(a) applicants per year. SBA estimates the existing burden to be 20 minutes per applicant, and the benefit of the rule's cancellation of the documentation requirement therefore to be about $15,500 per year.[2]

d. Permit 8(a) applications to go forward where the firm or its affected principals can demonstrate that federal financial obligations have been settled and discharged or forgiven by the Federal Government.

The final rule amends § 124.108(e) to provide that an applicant will not be denied eligibility to the 8(a) program on the basis that the applicant's prior federal financial obligations have been settled and either discharged or forgiven by the Federal Government. In rare cases, SBA has denied 8(a) eligibility based on prior federal financial obligations, even though the government has discharged the obligation. SBA internal data shows that SBA rejects approximately two applications per year on this basis. SBA estimates that the average financial

[2] From 20 minutes of time saved by 420 applicants valued at the mean wage of $55.41 for General and Operations Managers, according to the BLS General and Operations Managers (bls.gov) (retrieved April 12, 2022), plus 100% for benefits and overhead.

obligation in those cases is $10,000. Therefore, this change results in an estimated annual benefit to future 8(a) applications of $20,000, from an average of two applicants annually with obligations of $10,000 each.

e. Delete bank fees from the list of exclusions in the subcontracting base

SBA amends section 125.3(a)(1)(iii) to delete bank fees from the list of costs excludable from the subcontracting base when a contractor seeks to comply with a subcontracting plan. After reviewing FDIC and Federal Reserve data, SBA estimates that the average bank fee expense per account holder is $300 per year. The number of contractors that hold a subcontracting plan is 5,500. Thus, the total amount to be added to the subcontracting base across all contractors is $1.65 million.

The benefit to small-business subcontractors of the amendment will be additional dollars subcontracted to small business. Assuming that the total level of small-business subcontracting stays consistent at 32%, contractors will spend $525,000 of the added amount with small businesses. However, 18% of economy-wide spending on banking services is spent with banks that qualify as small businesses. Assuming contractor spending approximates economy-wide spending, this equates to $297,000 of the current spending on bank fees through contractors with subcontracting plans. Thus, after subtracting the amount already spent with small-business banks, new spending with small business subcontractors will be about $228,000 annually.

The final rule poses a cost to contractors to track their spending on bank fees in order to include them in the subcontracting base. This may require updating vendor management systems. To determine a cost per contractor for this change, SBA reviewed the Paperwork Reduction Act Supporting Statement for the FAR's Subcontracting Plan forms, under OMB Control No. 9000-0007. Considering the burdens estimated in the Supporting Statement, SBA estimates that the average cost of this change will come to $100 per contractor annually. The cost therefore amounts to $550,000 across all contractors with subcontracting plans.

The total regulatory impact is therefore a net cost of $322,000 annually. The benefits accrue to small business subcontractors, whereas the cost is borne by other-than-small prime contractors with subcontracting plans.

f. Require businesses to include indirect costs in their subcontracting plans.

Section 125.3(c)(1)(iv) requires prime contractors with individual subcontracting plans to report indirect costs in their individual subcontracting reports (ISRs) where the contract value exceeds $7.5 million. Contractors already are required to report indirect costs in their summary subcontracting reports (SSRs). Thus, the only cost associated with the change will be the cost of allocating indirect costs to the ISRs. To determine a cost per contractor for this change, SBA reviewed the Paperwork Reduction Act Supporting Statement for the FAR's Subcontracting Plan forms, under OMB Control No. 9000-0007. Considering the burdens estimated in the Supporting Statement and responses received from public comment, SBA estimates the cost to be $100 per ISR.[3] Between FY18 and FY22, there were 8,172 contracts awarded that exceeded $7.5 million in total base-plus-options value and that required individual subcontracting plans. Those contracts were awarded to 3,126 vendors. Based on the number of vendors affected, the aggregate cost of this change amounts to $312,600 annually.

There may be a benefit to the change because agencies use the ISR to evaluate a contractor's compliance with its subcontracting plan. Thus, by including more indirect costs in the base subcontracting value, contractors will have the incentive to subcontract more to small businesses in order to meet small business goals in their subcontracting plans. This effect may be short-lived because contractors can compensate by negotiating lower subcontracting goals. Thus, SBA cannot quantify the potential benefit for this change.

[3] This number is based on results from OMB's ICR Agency Submission, dated March 15, 2022, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202203-9000-003.

g. Require agencies to assign a negative past performance rating to a small-business contract awardee where the contracting officer determined that the small business failed to meet required limitations on subcontracting

The final rule requires that where a contracting officer determines at the conclusion of contract performance that a small business contractor fails to satisfy the limitations on subcontracting for a particular contract and that the reason for noncompliance was outside of the firm's control, that contractor would receive a negative past-performance rating for that contract for the appropriate factor or subfactor in accordance with FAR 42.1503. SBA determines that this change does not have any incremental cost or incremental benefit. Agencies already are required to submit past performance ratings, and the final rule gives procuring agencies discretion to give positive evaluations where the contracting officer determines compliance to be outside the small business' control. Though a negative rating might affect a firm's ability to obtain a contract in the future, there is no way to gauge the impact on the firm's odds, and, regardless, the end result would likely be only a transfer in the contract award from the noncompliant firm to a firm without a negative past-performance rating. This change therefore does not present a net cost nor net benefit.

3. What are the alternatives to this rule?

The alternative to the final rule would be to keep SBA's processes and procedures as currently stated in the Code of Federal Regulations. However, because so much of this rule codifies practices and interpretations already in place, using the alternative would impose an information-search cost on 8(a) BD participants in particular and small business contractors in general. Many of the clarifications in this rule already have been applied at the case level but are not widely known. This rule makes those clarifications known to the public.

Additionally, this rule implements section 863 of NDAA FY22, regarding changes to SAM.gov after an adverse SBA status decision. There is no alternative to implementing this statutory requirement.

Summary of Costs and Cost Savings

SBA calculates $262,000 in annual aggregate benefits, and approximately $770,500 in annual aggregate costs, with many costs and benefits uncertain. SBA calculates the net annual cost of the rule to be $500,000.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this 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, for the purpose of Executive Order 13132, Federalism, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13563

Executive Order 13563, Improving Regulation and Regulatory Review, directs agencies to, among other things: (a) afford the public a meaningful opportunity to comment through the Internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an "open exchange" of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to Executive Order 12866 (e.g., identifying changing

future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System – Next Generation, DSBS and SAM.

Public participation: Did the agency: (a) afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an "open exchange" of information among government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

SBA afforded a 60-day comment period to the proposed rule and posted comments on www.regulations.gov to allow the public to comment meaningfully on its provisions. SBA received over 650 comments from 125 commenters, with a high percentage of commenters favoring the proposed changes. SBA also discussed the proposals in the proposed rule with stakeholders at various small business on-line procurement conferences.

Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

The final rule is intended to eliminate confusion in its existing regulations and reduce unnecessary burdens on small business.

Congressional Review Act (5 U.S.C. 801–808)

The Congressional Review Act, 5 U.S.C. 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a "major rule" may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major

rule cannot take effect until 60 days after it is published in the *Federal Register*. This rule is not a "major rule" under 5 U.S.C. 804(2).

Paperwork Reduction Act, 44 U.S.C. Ch. 35

This rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

In 2019, SBA revised its regulations to give contracting officers discretion to request information demonstrating compliance with the limitations on subcontracting requirements. *See* 84 FR 65647 (Nov. 29, 2019). In conjunction with this revision, SBA requested an Information Collection Review by OMB (Limitations on Subcontracting Reporting, OMB Control Number 3245-0400). OMB approved the Information Collection. This final rule does not alter the contracting officer's discretion to require a contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract. It merely provides consequences where a contracting officer, utilizing his or her discretion, determines that a contractor did not meet the applicable limitation of subcontracting requirement. The estimated number of respondents, burden hours, and costs remain the same as that identified by SBA in the previous Information Collection. As such, SBA believes this provision is covered by its existing Information Collection, Limitations on Subcontracting Reporting.

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

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The RFA defines ‘‘small entity’’ to include small businesses, small organizations, and small governmental jurisdictions. This final rule involves requirements for participation in SBA’s 8(a) Business Development (BD) Program. Some BD Participants are owned by Tribes, ANCs, NHOs, or CDCs. As such, the rule relates to various small entities. The number of entities affected by the rule includes all Participants in SBA’s 8(a) BD program. For reference, SBA Business Opportunity Specialists assisted over 11,000 entities in 2020.

This final rule implements a statutory enactment and a federal court decision and codifies practices and interpretations already in place for Participants. In doing so, it adds reporting requirements, but these requirements relate to information collected in the normal course of business. SBA therefore expects the collection costs to be de minimis and the costs of reporting to be minimal. Moreover, the reporting requirements, such as the requirement that contractors report indirect costs in their individual subcontracting reports (ISRs), will not fall on small entities. Some of the final rule’s changes, such as that to documentation for retirement plans, reduce reporting requirements for small entities that are Participants. Additionally, the final rule’s clarification of practices and interpretations decreases uncertainty for Participants. Therefore, SBA does not believe the rule will have a disparate impact on small entities or will impose any additional significant costs on them. For the reasons discussed, SBA certifies that this final rule does not have a significant economic impact on a substantial number of small entities.

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.

13 CFR Part 128

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

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 121, 124, 125, 126, 127 and 128 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, 694a(9), and 9012.

2. Amend § 121.103 by:

a. Revising paragraph (h) introductory text and the third sentence of Example 2 to paragraph (h) introductory text;

b. Redesignating paragraphs (h)(1) through (h)(4) as paragraphs (h)(2 through (h)(5), respectively;

c. Adding a new paragraph (h)(1);

d. Revising newly redesignated paragraphs (h)(3) and (h)(4); and

e. Adding paragraph (i).

The revisions and additions to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two-year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. However, a joint venture may be issued an order under a previously awarded contract beyond the two-year period. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may create additional joint ventures, and each new joint venture may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners may lead to a finding of general affiliation between and among them. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture pursuant to paragraph (h)(3) of this section. For purposes of this paragraph (h), contract refers to prime contracts, novations of prime contracts, and any

subcontract in which the joint venture is treated as a similarly situated entity as the term is defined in part 125 of this chapter.

* * * * *

Example 2 to paragraph (h) introductory text. * * * On March 19, year 3, XY receives its fifth contract. * * *

* * * * *

(1) *Form of joint venture.* A joint venture: must be in writing; must do business under its own name and be identified as a joint venture in the System for Award Management (SAM) for the award of a prime contract or agreement; and may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity.

(i) If a joint venture exists as a formal separate legal entity, it cannot be populated with individuals intended to perform contracts awarded to the joint venture for any contract or agreement which is set aside or reserved for small business, unless all parties to the joint venture are similarly situated as that term is defined in part 125 of this chapter (i.e., the joint venture may have its own separate employees to perform administrative functions, including one or more Facility Security Officer(s), but may not have its own separate employees to perform contracts awarded to the joint venture).

(ii) A populated joint venture that is not comprised entirely of similarly situated entities will be ineligible for any contract or agreement which is set aside or reserved for small business.

(iii) In determining the size of a populated joint venture (whether one involving similarly situated entities or not), SBA will aggregate the revenues or employees of all partners to the joint venture.

* * * * *

(3) *Ostensible subcontractors.* A contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. An ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in § 125.1 of this chapter, and performs primary and vital requirements of a contract, or of an order, or is a subcontractor upon

which the prime contractor is unusually reliant. As long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract (or the prime contractor is small if the subcontractor is the SBA-approved mentor to the prime contractor), the arrangement will qualify as a small business.

(i) All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, transfer of the subcontractor's incumbent managers, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation, and whether the prime contractor relies solely on the subcontractor's experience because it lacks any relevant experience of its own. No one factor is determinative.

(ii) A prime contractor may use the experience and past performance of a subcontractor to enhance or strengthen its offer, including that of an incumbent contractor. It is only where that subcontractor will perform primary and vital requirements of a contract or order, or the prime contractor is unusually reliant on the subcontractor, that SBA will find the subcontractor to be an ostensible subcontractor.

(iii) In the case of a contract or order set-aside or reserved for small business for services, specialty trade construction or supplies, SBA will find that a small business prime contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not small businesses, where the prime contractor can demonstrate that it, together with any subcontractors that qualify as small businesses, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

(iv) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

(4) *Receipts/employees attributable to joint venture partners.* For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts. Proportionate receipts do not include proceeds from transactions between the concern and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners) already accounted for in the concern's tax return. In determining the number of employees, a concern must include in its total number of employees its proportionate share of individuals employed by the joint venture. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture. For a populated joint venture (where work is performed by the joint venture entity itself and not by the individual joint venture partners) the appropriate share is the same percentage as the joint venture partner's percentage ownership share in the joint venture. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee counts.

* * * * *

(i) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

§ 121.401 [Amended]

3. Amend § 121.401 by removing the words "§§ 121.401 through 121.413" and adding in their place the words ""§§ 121.401 through 121.412".

4. Amend § 121.404 by:

a. Revising paragraphs (a)(1)(i)(B), (a)(1)(ii)(B), and (a)(1)(iv);

b. Removing the reference to "§ 121.103(h)(2)" in paragraph (d) and adding in its place a reference to "§ 121.103(h)(3)";

c. Revising the first sentence in paragraph (g)(2)(i) and the second sentence in paragraph (g)(2)(iii);

d. Removing the reference to "§ 121.103(h)(4)" in paragraph (g)(5) and adding in its place a reference to "§ 121.103(h)(3)"; and

e. Adding paragraph (g)(6).

The revisions and addition to read as follows:

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

(a) * * *

(1) * * *

(i) * * *

(B) *Set-aside Multiple Award Contracts.* Except as set forth in § 124.503(i)(1)(iv) for sole source 8(a) orders, for a Multiple Award Contract that is set aside or reserved for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for each order or Blanket Purchase Agreement issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement.

(ii) * * *

(B) *Set-aside Multiple Award Contracts.* Except as set forth in § 124.503(i)(1)(iv) for sole source 8(a) orders, for a Multiple Award Contract that is set aside or reserved for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for each order or Agreement issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase.

* * * * *

(iv) For a Multiple Award Contract, where concerns are not required to submit price as part of the offer for the contract, size for the contract will be determined as of the date of initial offer, which may not include price. Size for set-aside orders will be determined in accordance with subparagraphs (i)(A), (i)(B), (ii)(A), or (ii)(B), as appropriate.

* * * * *

(g) * * *

(2)(i) In the case of a merger, acquisition, or sale which results in a change in controlling interest under § 121.103, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. * * *

* * * * *

(iii) * * * If the merger, sale or acquisition (including agreements in principle) occurs within 180 days of the date of an offer relating to the award of a contract, order or agreement and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract, order or agreement. * * *

* * * * *

(6) Where a joint venture must recertify its small business size status under paragraph (g), the joint venture can recertify as small where all parties to the joint venture qualify as small at the time of recertification, or the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification. A joint venture can recertify as small even though the date of recertification occurs more than two years after the joint venture received its first contract award (i.e., recertification is not considered a new contract award under § 121.103(h)).

* * * * *

5. Amend § 121.406 by revising paragraph (c) to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?

* * * * *

(c) The limitations on subcontracting (performance of work) requirements, the ostensible subcontracting rule, and the nonmanufacturer rule do not apply to small business set-aside acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101).

* * * * *

6. Amend § 121.411 by revising paragraph (c) to read as follows:

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

* * * * *

(c) Upon determination of the successful subcontract offeror for a competitive subcontract over the simplified acquisition threshold, but prior to award, the prime contractor must inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror.

* * * * *

§ 121.413 [Removed]

7. Remove § 121.413.

8. Amend § 121.506 by redesignating paragraphs (a), (b), (c), (d), and (e), as paragraphs (b), (d), (e), (f), and (g) respectively, and adding paragraphs (a) and (c) to read as follows:

§ 121.506 What definitions are important for sales or leases of Government-owned timber?

(a) *Computation of Market Share* means the small business share, expressed as a percentage for a market area, based on the purchase by small business over the preceding 5-year period. The computation is done every five years.

* * * * *

(c) *Integrated Resource Timber Contracts* means contracts that combine product removal and service work when the value of included timber exceeds the value of services.

* * * * *

9. Amend § 121.507 by adding new paragraphs (d) and (e) to read as follows:

§ 121.507 What are the size standards and other requirements for the purchase of Government-owned timber (other than Special Salvage Timber)?

* * * * *

(d) The Director of Government Contracting may waive one or more of the requirements set forth in paragraphs (a)(3) and (a)(4) of this section in limited circumstances where conditions make the requirement(s) impractical or prohibitive. A request for waiver must be made to the Director of Government Contracting and contain facts, arguments, and any appropriate supporting documentation as to why a waiver should be granted.

(e) Sawtimber volume from Integrated Resource Timber Contracts shall be included in the Computation of Market Share and set-aside trigger.

10. Amend § 121.702 by:

a. In paragraph (c)(7), revising the first sentence and adding a new second sentence;

b. Adding paragraph (c)(11).

The revisions and addition to read as follows:

§ 121.702 What size and eligibility standards are applicable to the SBIR and STTR programs?

* * * * *

(c) * * *

(7) * * * A concern and its ostensible subcontractor are treated as joint venturers. As such, they are affiliates for size determination purposes and must meet the ownership and control requirements applicable to joint ventures. * * *

* * * * *

(11) *Exception to affiliation for certain investment companies.* There is an exception to affiliation for Small Business Investment Companies (SBICs) that invest in SBIR or STTR awardees, in accordance with 13 C.F.R. 121.103(b)(1).

*****

11. Amend § 121.1001 by revising paragraphs (a)(6)(i), (a)(8)(i) and (a)(9)(i), paragraph (b)(2)(ii) introductory text, and paragraphs (b)(2)(ii)(A) and (C) to read as follows:

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

(a) * * *

(6) * * *

(i) Any offeror for a specific HUBZone set-aside contract that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

* * * * *

(8) * * *

(i) Any offeror for a specific service-disabled veteran-owned small business set-aside contract that the contracting officer has not eliminated from consideration for any procurement-

related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

* * * * *

(9) * * *

(i) Any offeror for a specific contract set aside for WOSBs or WOSBs owned by one or more women who are economically disadvantaged (EDWOSB) that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

* * * * *

(b) * * *

(2) * * *

(ii) Concerning individual sole source and competitive 8(a) contract awards where SBA cannot verify the eligibility of the apparent successful offeror because SBA finds the concern to be other than small, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract, or found to be ineligible for a competitive 8(a) contract due to its size;

* * * * *

(C) The SBA District Director in the district office that services the Participant, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

* * * * *

12. Amend § 121.1004 by revising paragraph (a)(1), adding the words "without a reserve" at the end of paragraph (a)(2)(iii), and adding paragraphs (f) and (g) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(1) *Sealed bids or sales (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* (i) A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid opening for

(A) The contract;

(B) An order issued against a Multiple Award Contract if the contracting officer requested a new size certification in connection with that order; or

(C) Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, an order or Blanket Purchase Agreement set aside for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

(ii) Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified interested parties of the identity of that low bidder.

* * * * *

(f) *Apparent successful offeror*. A party with standing, as set forth in § 121.1001(a), may file a protest only against an apparent successful offeror or an offeror in line to receive an award.

(g) *Bid protest corrective action.* SBA will generally dismiss any size protest relating to an initial apparent successful offeror where an agency decides to reevaluate offers as a corrective action in response to a FAR subpart 33.1 bid protest.

(1) SBA will complete the size determination where the procuring agency makes a written request to SBA within two business days of the agency informing SBA of the corrective action and demonstrates that the corrective action will not result in a change of the apparent

successful offeror, unless the protest involves size issues determined as of the date of final proposal revision per § 121.404(d).

(2) When the apparent successful offeror is announced after reevaluation, interested parties will again have the opportunity to protest the size of the new or same apparent successful offeror within five business days after such notification.

13. Amend § 121.1009 by:

a. Revising paragraph (a)(1);

b. Redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4), respectively; and adding a new paragraph (a)(2); and

c. Revising newly redesignated paragraph (a)(4) and paragraph (g)(5).

The revisions and additions to read as follows:

§ 121.1009 What are the procedures for making the size determination?

(a) * * *

(1) After receipt of a protest or a request for a formal size determination, if no protest is pending under FAR subpart 33.1, the SBA Area Office will issue a formal size determination within 15 business days, if possible;

(2) If a protest is pending under FAR subpart 33.1, the SBA Area Office will suspend processing a valid, timely and specific size protest. Once the procuring agency, GAO or the Court of Federal Claims issues a decision under FAR subpart 33.1, the SBA Area Office will recommence the size determination process.

(i) If the FAR subpart 33.1 decision denies the protest, SBA will issue a formal size determination within 15 business days of the decision, if possible.

(ii) If the decision results in a cancellation of the award or change of the apparent successful offeror, SBA will dismiss the size protest as moot.

(iii) If the decision requires re-evaluation of offers or other corrective action but the award is not cancelled, SBA will continue to suspend processing the protest.

(A) If after re-evaluation or other corrective action occurs the protested concern remains the apparent successful offeror, SBA will issue a formal size determination within 15 business days after notification of the apparent successful offeror, if possible.

(B) If after re-evaluation or other corrective action occurs a different apparent successful offeror is identified, SBA will dismiss the size protest as moot. Interested parties may file a timely size protest with respect to the newly identified apparent successful offeror after the notification of award.

* * * * *

(4) If SBA does not issue its determination in accordance with paragraph (a)(1) of this section (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

* * * * *

(g) * * *

(5) A concern determined to be other than small under a particular size standard is ineligible for any procurement or any assistance authorized by the Small Business Act or the Small Business Investment Act of 1958 which requires the same or a lower size standard, unless SBA recertifies the concern to be small pursuant to § 121.1010 or OHA reverses the adverse size determination. After an adverse size determination, a concern cannot self-certify as small under the same or lower size standard unless it is first recertified as small by SBA. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as small under the same or a smaller size standard on a pending procurement or on an application for SBA assistance, the concern

must immediately inform the contracting officer or responsible official of the adverse size determination.

(i) Not later than two days after the date on which SBA issues a final size determination finding a business concern to be other than small, such concern must update its size status in the System for Award Management (or any successor system).

(ii) If a business concern fails to update its size status in the System for Award Management (or any successor system) in response to an adverse size determination, SBA will make such update within two days of the business's failure to do so.

* * * * *

14. Amend § 121.1203 by redesignating paragraph (d) as paragraph (g) and by adding new paragraphs (d), (e) and (f) to read as follows:

§ 121.1203 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

* * * * *

(d) An individual waiver applies only to the contract for which it is granted and does not apply to modifications outside the scope of the contract or other procurement actions (e.g., follow-on or bridge contracts).

(e) An individual waiver in connection with a long-term contract (i.e., a contract with a duration of longer than five years, including options) cannot exceed five years. A procuring agency may seek a new waiver for an additional five years if, after conducting market research, it demonstrates that there are no available small business manufacturers and that a waiver remains appropriate.

(f) For a multiple item procurement, except those described in § 121.406(d)(1), a waiver must be sought and granted for each item that the procuring agency believes no small business manufacturer or processor can reasonably be expected to offer a product meeting the

specifications of the solicitation and which will bring the total value of items to be procured from small business or subject to a waiver to at least 50% of the estimated value of the contract.

(1) SBA's waiver applies only to the specific item(s) identified, not to the entire contract.

(2) The estimated aggregate value of all items manufactured by small business and those subject to a waiver must equal at least 50% of the value of the contract. A contracting officer need not seek a waiver for each item for which the procuring agency believes no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of the solicitation.

(3) When a contracting officer seeks a waiver for an individual item, the term "item" can be a specific broad identifying thing (e.g., all spare parts related to aircraft X), but cannot be so broad as to have no real identification (e.g., all medical supplies).

* * * * *

15. Amend § 121.1204 by:

a. Revising paragraphs (b)(1)(i) and (ii);

b. Adding a new sentence after the first sentence in paragraph (b)(1)(iii);

c. Redesignating paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4), respectively and adding new paragraph (b)(2)

d. Revising newly redesignated paragraph (b)(4) and adding paragraph (b)(5).

The revisions and additions to read as follows:

§ 121.1204 What are the procedures for requesting and granting waivers?

* * * * *

(b) * * *

(1) * * *

(i) A definitive statement of each specific item sought to be waived and justification as to why the specific item is required;

(ii) The proposed solicitation number, NAICS code, dollar amount of the procurement, dollar amount of the item(s) for which a waiver is sought, and a brief statement of the procurement history;

(iii) * * * For a multiple item procurement, a contracting officer must determine that no small business manufacturer or processor reasonably can be expected to offer each item for which a waiver is sought. * * *

* * * * *

(2) Unless an agency has justified a brand-name acquisition, the market research conducted to support the waiver request should be tailored to attract the attention of potential small business manufacturers or processors, not resellers or distributors.

* * * * *

(4) SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the individual waiver request.

(i) If SBA's research verifies that no small business manufacturers or processors exist for the item, the Director, Office of Government Contracting will grant an individual, one-time waiver.

(ii) If a small business manufacturer or processor is found for the product in question, the Director, Office of Government Contracting will deny the request.

(iii) Where an agency requests a waiver for multiple items, SBA may grant a waiver for all items requested, deny a waiver for all items requested, or grant a waiver for some but not all of the items requested. SBA’s determination will specifically identify the items for which a waiver is granted, and the procuring agency must then identify the specific items for which the waiver applies in its solicitation.

(iv) The Director, Office of Government Contracting’s decision to grant or deny a waiver request represents the final agency decision by SBA.

(5) A nonmanufacturer rule waiver for a specific solicitation expires one year after SBA's determination to grant the waiver. This means that contract award must occur within one year of the date SBA granted the waiver. Where a contract is not awarded within one year, the procuring agency must come back to SBA with revised market research requesting that the waiver (or waivers in the case of a multiple item procurement) be extended.

§ 121.1205 [Amended]

16. Amend § 121.1205 by removing "http://www.sba.gov/aboutsba/sbaprograms/gc/programs/gc_waivers_nonmanufacturer.html" and adding in its place "https://www.sba.gov/document/support-non-manufacturer-rule-class-waiver-list".

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

17. 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, 42 U.S.C. 9815; and Pub. L. 99-661, 100 Stat. 3816; Sec. 1207, Pub. L. 100-656, 102 Stat. 3853; Pub. L. 101-37, 103 Stat. 70; Pub. L. 101-574, 104 Stat. 2814; Sec. 8021, Pub. L. 108-87, 117 Stat. 1054; and Sec. 330, Pub. L. 116-260.

18. Amend § 124.3 by revising the definition of "Bona fide place of business" to read as follows:

§ 124.3 What definitions are important in the 8(a) BD program?

* * * * *

Bona fide place of business, for purposes of 8(a) construction procurements, means a location where a Participant regularly maintains an office within the appropriate geographical boundary which employs at least one individual who works at least 20 hours per week at that location. The term does not include construction trailers or other temporary construction sites.

* * * * *

19. Amend § 124.102 by revising paragraph (c) to read as follows:

§ 124.102 What size business is eligible to participate in the 8(a) BD program?

* * * * *

(c) A concern whose application is denied due to size by SBA may request a formal size determination with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the business is located under part 121 of this chapter. Where the SBA Government Contracting Area Office determines that an applicant qualifies as a small business concern for the size standard corresponding to its primary NAICS code:

(1) The AA/BD will certify the concern as eligible to participate in the 8(a) BD program if size was the only reason for decline; or

(2) The concern may reapply for participation in the 8(a) BD program at any point after 90 days from the AA/BD's decline if size was not the only reason for decline. In such a case, the AA/BD will accept the size determination as conclusive of the concern's small business status, provided the applicant concern has not completed an additional fiscal year in the intervening period and SBA believes that the additional fiscal year changes the applicant's size.

§ 124.103 [Amended]

20. Amend § 124.103 by removing the words "physical handicap" in paragraph (c)(2)(i) and adding in their place the words "identifiable disability".

21. Amend § 124.104 by:

a. Revising the second sentence of paragraph (c)(2)(ii);

b. Removing paragraph (c)(2)(iii); and

c. Redesignating paragraph (c)(2)(iv) as paragraph (c)(2)(iii).

The revision to read as follows:

§ 124.104 Who is economically disadvantaged?

* * * * *

(c) * * *

(2) * * *

(ii) * * * In order to properly assess whether funds invested in a retirement account may be excluded from an individual's net worth, SBA may require the individual to provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.

* * * * *

22. Amend § 124.105 by revising paragraphs (h)(2) and (i)(1), and adding a new sentence after the first sentence in paragraph (i)(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 generally 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:

(i) 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; and

(ii) A business concern approved by SBA to be a mentor pursuant to § 125.9 of this chapter may own up to 40 percent of its 8(a) Participant protégé as set forth in § 125.9(d)(2) of this chapter, whether or not that concern is in the same or similar line of business as the Participant.

(i) * * *

(1) Any Participant or former Participant that is performing one or more 8(a) contracts may substitute one disadvantaged individual or entity for another disadvantaged individual or entity without requiring the termination of those contracts or a request for waiver under § 124.515, as long as it receives SBA's approval prior to the change.

(2) * * * In determining whether a non-disadvantaged individual involved in a change of ownership has more than a 20 percent interest in the concern, SBA will aggregate the interests of all immediate family members as set forth in § 124.3, as well as any individuals who are affiliated based on an identity of interest under § 121.103(f). * * *

* * * * *

23. Amend § 124.107 by revising the introductory text to read as follows:

§ 124.107 What is potential for success?

SBA must determine that with contract, financial, technical, and management support from the 8(a) BD program, the applicant concern is able to perform 8(a) contracts and possess reasonable prospects for success in competing in the private sector. To do so, the applicant concern must show that it has operated and received contracts (either in the private sector, at the state or local government level, or with the Federal Government) in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application, unless a waiver for this requirement is granted pursuant to paragraph (b) of this section.

* * * * *

24. Amend § 124.108 by adding a new sentence at the end of paragraph (e) to read as follows:

§ 124.108 What other eligibility requirements apply for individuals or businesses?

* * * * *

(e) * * * However, a firm will not be ineligible to participate in the 8(a) BD program if the firm or the affected principals can demonstrate that the financial obligations owed have been settled and discharged/forgiven by the Federal Government.

25. Amend § 124.109 by revising the second sentence of paragraph (c)(1) and by revising paragraph (c)(6)(i) to read as follows:

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

* * * * *

(c) * * *

(1) * * * Where an applicant or participating concern is owned by a federally recognized tribe, the concern's articles of incorporation, partnership agreement, limited liability company articles of organization, or other similar incorporating documents for tribally incorporated applicants must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance. * * *

* * * * *

(6) * * *

(i) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) or financial statements (either audited, reviewed or in-house as set-forth in § 124.602) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant seeks 8(a) BD certification; or

* * * * *

26. Amend § 124.110 by adding paragraph (d)(3), by redesignating paragraphs (e) through (h) as paragraphs (f) through (i), respectively, and by adding a new paragraph (e) to read as follows:

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

* * * * *

(d) * * *

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

(i) An individual's officer position or membership on the board of directors 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.

(ii) NHO officers and/or board members may control a holding company overseeing several NHO-owned business concerns, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.

(iii) Because an individual may be responsible for the management and daily business operations of two NHO-owned concerns, the full-time devotion requirement does not apply to NHO-owned applicants and Participants.

(e) For corporate entities, an NHO must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, an NHO must unconditionally own at least a 51 percent interest.

* * * * *

§ 124.111 [Amended]

27. In § 124.111 amend paragraph (d) by removing the words “SIC code” and adding in their place the words “NAICS code.”

28. Amend § 124.204 by revising paragraph (a) to read as follows:

§ 124.204 How does SBA process applications for 8(a) BD program admission?

(a) The AA/BD is authorized to approve or decline applications for admission to the 8(a) BD program.

(1) Except as set forth in paragraph (a)(2) of this section, the DPCE will receive, review and evaluate all 8(a) BD applications.

(2) Where an applicant answers on its electronic application that it is not a for-profit business (*see* §§ 121.105 and 124.104), that one or more of the individuals upon whom eligibility is based is not a United States citizen (*see* § 124.104), that the applicant or one or more of the individuals upon whom eligibility is based has previously participated in the 8(a) BD program (*see* § 124.108(b)), or that the applicant is not an entity-owned business and has generated no revenues (*see* §§ 124.107(a) and 124.107(b)(1)(iv)), its application will be closed automatically and it will be prevented from completing a full electronic application.

(3) SBA will advise each program applicant within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application.

(4) SBA will process an application for 8(a) BD program participation within 90 days of receipt of an application package deemed complete by the DPCE. Incomplete packages will not be processed. Where during its screening or review SBA requests clarifying, revised or other information from the applicant, SBA's processing time for the application will be suspended pending the receipt of such information.

* * * * *

§ 124.302 [Amended]

29. Amend § 124.302 by removing paragraph (b), and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

§ 124.303 [Amended]

30. In § 124.303 amend paragraph (a)(15) by removing the reference to "§ 124.507" and adding in its place a reference to "§ 124.509."

31. Amend §124.304 by:

a. revising paragraph (b); and

b. In paragraph (f)(3) removing the reference to "§ 124.1010" and adding in its place a reference to "§ 124.1002".

The revision reads follows:

§ 124.304 What are the procedures for early graduation and termination?

* * * * *

(b) *Letter of Intent to Terminate or Graduate Early.* (1) Except as set forth in paragraph (b)(2) of this section, when SBA believes that a Participant should be terminated or graduated prior to the expiration of its program term, SBA will notify the concern in writing. The Letter of Intent to Terminate or Graduate Early will set forth the specific facts and reasons for SBA's findings and will notify the concern that it has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination or early graduation.

(2) Where SBA obtains evidence that a Participant has ceased its operations, the AA/BD may immediately terminate a concern's participation in the 8(a) BD program by notifying the concern of its termination and right to appeal that decision to OHA.

* * * * *

32. Amend § 124.402 by adding a sentence at the end of paragraph (b) to read as follows:

§ 124.402 How does a Participant develop a business plan?

* * * * *

(b) * * * Where a sole source 8(a) requirement is offered to SBA on behalf of a Participant or a Participant is the apparent successful offeror for a competitive 8(a) requirement and SBA has not yet approved the Participant's business plan, SBA will approve the Participant's business plan as part of its eligibility determination prior to contract award.

* * * * *

33. Amend § 124.403 by

a. In paragraph (a) adding two new sentences after the first sentence; and

b. In paragraph (c)(1) removing the reference to "§ 124.507" and adding in its place a reference to "§ 124.509".

The additions read as follows:

§ 124.403 How is a business plan updated and modified?

(a) * * * If there are no changes in a Participant's business plan, the Participant need not resubmit its business plan. A Participant must submit a new or modified business plan only if its business plan has changed from the previous year. * * *

* * * * *

34. Amend § 124.501 by:

a. Revising paragraph (b);

b. Revising paragraph (g) introductory text;

c. Revising the first sentence of paragraph (h);

d. Revising paragraph (k) introductory text;

e. Redesignating paragraphs (k)(4) and (5) as paragraphs (k)(7) and (8), respectively; and

f. Adding new paragraphs (k)(4), (k)(5), (k)(6), and (k)(9).

The revisions and additions to read as follows:

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

* * * * *

(b) 8(a) contracts may either be sole source awards or awards won through competition with other Participants. In addition, for multiple award contracts not set aside for the 8(a) BD program, a procuring agency may award an 8(a) sole source order or set aside one or more specific orders to be competed only among eligible 8(a) Participants. 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. A procuring activity cannot restrict an 8(a) competition (for either a

contract or order) to require SBA socioeconomic certifications other than 8(a) certification (i.e., a competition cannot be limited only to business concerns that are both 8(a) and HUBZone, 8(a) and WOSB, or 8(a) and SDVO) or give evaluation preferences to firms having one or more other certifications.

* * * * *

(g) Before a Participant may be awarded either a sole source or competitive 8(a) contract, SBA must determine that the Participant is eligible for award. SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract, and after the apparent successful offeror is identified for a competitive 8(a) contract. Where a joint venture is the apparent successful offeror in connection with a competitive 8(a) procurement or is offered a sole source order under a previously competitively awarded 8(a) multiple award contract, SBA will determine whether the 8(a) partner to the joint venture is eligible for award, but will not review the joint venture agreement to determine compliance with § 124. 513 (*see* § 124.513(e)(1)). In any case in which an 8(a) Participant is determined to be ineligible, SBA will notify the 8(a) Participant of that determination. Eligibility is based on 8(a) BD program criteria, including whether the 8(a) Participant:

* * * * *

(h) For a sole source 8(a) procurement, a concern must be a current Participant in the 8(a) BD program at the time of award and must qualify as small for the size standard corresponding to the NAICS code assigned to the contract or order on the date the contract or order is offered to the 8(a) BD program. * * *

* * * * *

(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. A Participant with a bona fide place of business within a state will be deemed eligible for a construction contract anywhere in that state (even if that state is serviced by more than one SBA district office). SBA may also determine that a Participant with a bona fide place of business in the geographic area served by one of several SBA district offices or another nearby area is eligible for the award of an 8(a) construction contract.

* * * * *

(4) If a Participant is currently performing a contract in a specific state, it qualifies as having a bona fide place of business in that state for one or more additional contracts. The Participant may not use contract performance in one state to allow it to be eligible for an 8(a) contract in a contiguous state unless it officially establishes a bona fide place of business in the location in which it is currently performing a contract, in the contiguous state or in a location in another state in which the geographical area serviced by the SBA district office is contiguous to the district office in the state where the work will be performed.

(5) A Participant may establish a bona fide place of business through a full-time employee in a home office.

(6) An individual designated as the full-time employee of the Participant seeking to establish a bona fide place of business in a specific geographic location need not be a resident of the state where he/she is conducting business.

* * * * *

(9) For an 8(a) construction contract requiring work in multiple locations, a Participant is eligible if:

(i) For a single award contract, the Participant has a bona fide place of business where a majority of the work (as identified by the dollar value of the work) is anticipated to be performed; and

(ii) For a multiple award contract, the Participant has a bona fide place of business in any location where work is to be performed.

35. Amend § 124.502 by revising paragraph (a) to read as follows:

§ 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?

(a) A procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA.

(1) Except as set forth in § 124.503(a)(4)(ii) and § 124.503(i)(1)(ii), a procuring activity contracting officer must submit an offering letter for each intended 8(a) procurement, including follow-on 8(a) contracts, competitive 8(a) orders issued under non-8(a) multiple award contracts, and sole source 8(a) orders issued under 8(a) multiple award contracts.

(2) The procuring activity may transmit the offering letter to SBA by electronic mail, if available, or by facsimile transmission, as well as by mail or commercial delivery service.

* * * * *

36. Amend § 124.503 by:

a. Revising paragraph (a) introductory text, paragraphs (a)(4)(ii) and (a)(5);

b. Adding two sentences at the end of paragraph (i)(1)(ii); and

c. Revising paragraphs (i)(1)(iv) and (i)(2)(ii).

The revisions and additions to read as follows:

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

(a) Acceptance of the requirement. Upon receipt of the procuring activity's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) BD program. SBA's decision whether to accept the requirement will be sent to the procuring activity in writing within 10 business days of receipt of the written offering letter if the contract is valued at more than the simplified acquisition threshold, and within two business days of receipt of the offering letter if the contract is valued at or below the simplified acquisition

threshold, unless SBA requests, and the procuring activity grants, an extension. SBA and the procuring activity may agree to a shorter timeframe for SBA's review under a Partnership Agreement delegating 8(a) contract execution functions to the agency. SBA is not required to accept any particular procurement offered to the 8(a) BD program.

* * * * *

(4) * * *

(ii) Where SBA has delegated its 8(a) contract execution functions to an agency through a signed Partnership Agreement, SBA may authorize the procuring activity to award an 8(a) contract below the simplified acquisition threshold without requiring an offer and acceptance of the requirement for the 8(a) BD program. However, the procuring activity must request SBA to determine the eligibility of the intended awardee prior to award. SBA shall review the 8(a) Participant's eligibility and issue an eligibility determination within two business days after a request from the procuring activity. If SBA does not respond within this timeframe, the procuring activity may assume the 8(a) Participant is eligible and proceed with award. The procuring activity shall provide a copy of the executed contract to the SBA servicing district office within fifteen business days of award.

(5) Where SBA does not respond to an offering letter within the normal 10 business-day time period, the procuring activity may seek SBA's acceptance through the AA/BD. The procuring activity may assume that SBA accepts its offer for the 8(a) program if it does not receive a reply from the AA/BD within 5 business days of his or her receipt of the procuring activity request.

* * * * *

(i) * * *

(1) * * *

(ii) * * * However, where the order includes work that was previously performed through another 8(a) contract, the procuring agency must notify and consult with SBA prior to

issuing the order that it intends to procure such specified work through an order under an 8(a) Multiple Award Contract. Consultation with SBA does not require SBA concurrence or approval. Where that work is critical to the business development of a current Participant that previously performed the work through another 8(a) contract and that Participant is not a contract holder of the 8(a) Multiple Award Contract, SBA may request that the procuring agency fulfill the requirement through a competition available to all 8(a) BD Program Participants. SBA will provide any feedback in response to the procuring agency's notification within 10 business days.

* * * * *

(iv) An agency may issue a sole source award against a Multiple Award Contract that has been set aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) BD Program Participants or reserved solely for 8(a) Program Participants if the required dollar thresholds for sole source awards are met. Where an agency seeks to award an order on a sole source basis (i.e., to one particular 8(a) contract holder without competition among all 8(a) contract holders), the agency must offer, and SBA must accept, the order into the 8(a) program on behalf of the identified 8(a) contract holder.

(A) To be eligible for the award of a sole source order, a concern must be a current Participant in the 8(a) BD program at the time of award of the order, qualify as small for the size standard corresponding to the NAICS code assigned to the order on the date the order is offered to the 8(a) BD program, and be in compliance with any applicable competitive business mix target established or remedial measure imposed by § 124.509. Where the intended sole source recipient is a joint venture, the 8(a) managing partner to the joint venture is the concern whose eligibility is considered.

(B) Where an agency seeks to issue a sole source order to a joint venture, the two-year restriction for joint venture awards set forth in § 121.103(h) does not apply and SBA will not review and approve the joint venture agreement as set forth in § 124.513(e)(1).

(2) * * *

(ii) The order must be either an 8(a) sole source award or be competed exclusively among only the 8(a) awardees of the underlying multiple award contract. Where an agency seeks to issue an 8(a) competitive order under a multiple award contract that was awarded under full and open competition or as a small business set-aside, all eligible 8(a) BD Participants who are contract holders of the underlying multiple award contract must have the opportunity to compete for the order. Where an agency seeks to issue an 8(a) competitive order under the Federal Supply Schedule, an agency can utilize the procedures set forth in FAR subpart 8.4 (48 CFR part 8, subpart 8.4) to award to an eligible 8(a) BD Participant. Where an agency seeks to issue an 8(a) sole source order under a multiple award contract that was awarded under full and open competition or as a small business set-aside, the identified 8(a) Participant that is a contract holder of the underlying multiple award contract must be an eligible Participant on the date of the issuance of the order

* * * * *

37. Amend § 124.504 by:

a. In paragraph (d)(1) introductory text:

i. Revising the second sentence;

ii. Adding a sentence between the second and third sentences; and

c. In the fourth sentence, removing the word “notify” adding in its place “coordinate with”; and

d. Revising paragraph (d)(3).

The addition and revisions read as follows:

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract, and when can a requirement be released from the 8(a) BD program?

* * * * *

(d) * * *

(1) * * * Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency must coordinate with the SBA District Office servicing the 8(a) incumbent firm and the SBA Procurement Center Representative assigned to the contracting activity initiating a non-8(a) procurement action that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new. Such notification must identify the scope and dollar value of any work previously performed through another 8(a) contract and the scope and dollar value of the contract determined to be new. * * *

* * * * *

(3) SBA may release a requirement under this paragraph only where the procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside or otherwise identifies a procurement strategy that would emphasize or target small business participation.

* * * * *

38. Amend § 124.506 by revising paragraph (b)(3) and by adding two sentences at the end of paragraph (d) to read as follows:

§ 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?

* * * * *

(b) * * *

(3) There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts. However, a current procurement requirement may not be removed from competition and awarded to a tribally-owned, ANC-owned or NHO-owned concern on a sole source basis (i.e., a procuring agency may not evidence its intent to

fulfill a requirement as a competitive 8(a) procurement, through the issuance of a competitive 8(a) solicitation or otherwise, cancel the solicitation or change its public intent, and then procure the requirement as a sole source 8(a) procurement to an entity-owned Participant). A follow-on requirement to one that was previously awarded as a competitive 8(a) procurement may be offered, accepted and awarded on a sole source basis to a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts.

* * * * *

(d) * * * The AA/BD may also accept a requirement that exceeds the applicable competitive threshold amount for a sole source 8(a) award if he or she determines that a FAR exception (48 CFR 6.302) to full and open competition exists (e.g., unusual and compelling urgency). An agency may not award an 8(a) sole source contract under this paragraph for an amount exceeding $25,000,000, or $100,000,000 for an agency of the Department of Defense, unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under FAR § 19.808-1 or DFAR § 219.808-1(a).

39. Amend § 124.509 by revising paragraph (c)(1) and adding paragraphs (d)(1)(i) and (ii) to read as follows:

§ 124.509 What are non-8(a) business activity targets?

* * * * *

(c) * * *

(1) As part of its annual review after being admitted to the 8(a) BD program, a Participant must provide to SBA within 30 days from the end of its program year:

(i) Annual financial statements with a breakdown of 8(a) and non-8(a) revenue in accord with § 124.602;

(ii) An annual report of all non-8(a) contracts, options, and modifications affecting price executed during the program year; and

(ii) An estimate of 8(a) and non-8(a) revenue derived during the program year, which may be obtained from monthly, quarterly or semi-annual interim financial statements or otherwise.

* * * * *

(d) * * *

(1) * * *

(i) SBA will determine whether the Participant made good faith efforts to attain the targeted non-8(a) revenues during the just completed program year. A Participant may establish that it made good faith efforts by demonstrating to SBA that:

(A) It submitted offers for one or more non-8(a) procurements which, if awarded to the Participant during its just completed program year, would have given the Participant sufficient revenues to achieve the applicable non-8(a) business activity target during that same program year. In such a case, the Participant must provide copies of offers submitted in response to solicitations and documentary evidence of its projected revenues under these missed contract opportunities; or

(B) Individual extenuating circumstances adversely impacted its efforts to obtain non-8(a) revenues, including but not limited to a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, or having one or more prime contractors award less work to the Participant than originally contemplated. Where available, supporting information and documentation must be included to show how such extenuating circumstances specifically prevented the Participant from attaining its targeted non-8(a) revenues during the just completed program year.

(ii) The Participant bears the burden of establishing that it made good faith efforts to meet its non-8(a) business activity target. SBA's determination as to whether a Participant made good faith efforts is final and no appeal may be taken with respect to that decision.

* * * * *

40. Amend § 124.513 by adding paragraphs (a)(3) and (4) to read as follows:

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

(a) * * *

(3) As long as a joint venture qualifies as small under the size standard corresponding to the NAICS code assigned to a specific contract or order (*see* §124.513(b)), it will be eligible for award based on the status of its 8(a) managing venturer.

(4) A Program Participant cannot be a joint venture partner on more than one joint venture that submits an offer for a specific 8(a) contract or for an 8(a) order under a multiple award contract that is not itself an 8(a) contract.

* * * * *

41. Amend § 124.515 by revising paragraphs (a)(1) and (c) and removing the last sentence of paragraph (d) to read as follows:

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

(a) * * *

(1) An 8(a) contract or order, whether in the base or an option year, must be terminated for the convenience of the Government if one or more of the individuals upon whom eligibility for the 8(a) BD program was based relinquishes or enters into any agreement to relinquish ownership or control of the Participant such that the Participant would no longer be controlled or at least 51% owned by disadvantaged individuals.

* * * * *

(c) The 8(a) contractor must request a waiver in writing prior to the change of ownership and control except in the case of death or incapacity. A request for waiver due to incapacity or death must be submitted within 60 calendar days after such occurrence.

(1) A request for a waiver to the termination for convenience requirement must be sent to the AA/BD.

(2) The Participant seeking to change ownership or control must specify the grounds upon which it requests a waiver and must demonstrate that the proposed transaction would meet such grounds.

(3) If a Participant seeks a waiver based on the impairment of the agency's objectives under paragraph (b)(4) of this section, it must identify and provide a certification from the procuring agency relating to each 8(a) contract for which a waiver is sought.

(4) SBA will process a request for waiver within 90 days of receipt of a complete waiver package by the AA/BD.

* * * * *

42. Amend §124.521 by revising paragraph (e)(2) to read as follows:

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

* * * * *

(e) * * *

(2) For the purposes of 8(a) contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must verify in SAM.gov (or successor system) whether a business concern continues to be an eligible 8(a) Participant 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. Where a concern fails to qualify or will no longer qualify as an eligible 8(a) Participant at any point during the 120 days prior to the end of the fifth year of the contract, the option shall not be exercised.

* * * * *

§ 124.603 [Amended]

43. Amend § 124.603 by removing the words “graduates or is terminated from the program” and adding in their place the words “leaves the 8(a) BD program (either through the expiration of the firm’s program term, graduation, or termination)”.

44. Add § 124.1002 to read as follows:

§ 124.1002 Reviews and protests of SDB status.

(a) SBA may initiate the review of SDB status on any firm that has represented itself to be an SDB on a prime contract (for goaling purposes or otherwise) or subcontract to a federal prime contract whenever SBA receives credible information calling into question the SDB status of the firm.

(b) Requests for an SBA review of SDB status may be forwarded to the Small Business Administration, Associate Administrator for Business Development (AA/BD), 409 Third Street SW., Washington, DC 20416.

(c) The contracting officer or the SBA may protest the SDB status of a proposed subcontractor or subcontract awardee. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.

(1) SBA will request relevant information from the protested concern pertaining to: (i) the social and economic disadvantage of the individual(s) claiming to own and control the protested concern; (ii) the ownership and control of the protested concern; and (iii) the size of the protested concern.

(2) The concern whose disadvantaged status is under consideration has the burden of establishing that it qualifies as an SDB.

(3) Where SBA requests specific information and the concern does not submit it, SBA may draw adverse inferences against the concern.

(4) SBA will base its SDB determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(d) Where SBA determines that a subcontractor does not qualify as an SDB, the prime contractor must not include subcontracts to that subcontractor as subcontracts to an SDB in its subcontracting reports, starting from the time that the protest was decided.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

45. 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, 657(b), 657(f), 657r, and 657s.

46. Amend § 125.1 by:

a. Revising the definitions of "Consolidation of contract requirements, consolidated contract, or consolidated requirement", and "Contract bundling, bundled requirement, bundled contract, or bundling";

b. In the definition of "Cost of materials" removing the words "commercial items" and adding in their place the words "commercial products";

c. Adding definitions of "Small business concerns owned and controlled by socially and economically disadvantaged individuals" and "Socially and economically disadvantaged individuals"; and

d. b. Revising the definition of "Substantial bundling".

The revisions and additions to read as follows:

§ 125.1 What definitions are important to SBA's Government Contracting Programs?

* * * * *

Consolidation of contract requirements, consolidated contract, or consolidated requirement means a solicitation for a single contract, a Multiple Award Contract, or Blanket Purchase Agreement to:

(1) Satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract or agreement for which the

offers are solicited, the total cost of which exceeds $2 million (including options), regardless of whether new work is added to the solicitation for the contract or agreement; or

(2) Satisfy requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

* * * * *

Contract bundling, bundled requirement, bundled contract, or bundling means the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract, a Multiple Award Contract, or Blanket Purchase Agreement that is likely to be unsuitable for award to a small business concern (but may be suitable for award to a small business with a Small Business Teaming Arrangement), regardless of whether new work is added to the solicitation for the contract or agreement, due to:

(1) The diversity, size, or specialized nature of the elements of the performance specified;

(2) The aggregate dollar value of the anticipated award;

(3) The geographical dispersion of the contract performance sites; or

(4) Any combination of the factors described in paragraphs (1), (2), and (3) of this definition.

* * * * *

Small business concern owned and controlled by socially and economically disadvantaged individuals means, for both SBA's subcontracting assistance program in 15 U.S.C. 637(d) and for the goals described in 15 U.S.C. 644(g), a small business concern unconditionally and directly owned by and controlled by one or more socially and economically disadvantaged individuals.

Socially and economically disadvantaged individuals, for both SBA's subcontracting assistance program in 15 U.S.C. 637(d) and for the goals described in 15 U.S.C. 644(g), means:

(1) Individuals who meet the criteria for social disadvantage in § 124.103(a) through (c) of this chapter and the criteria for economic disadvantage in § 124.104(a) and (c) of this chapter;

(2) Indian tribes and Alaska Native Corporations that satisfy the ownership, control, and disadvantage criteria in § 124.109 of this chapter;

(3) Native Hawaiian Organizations that satisfy the ownership, control, and disadvantage criteria in § 124.110 of this chapter; or

(4) Community Development Corporations that satisfy the ownership and control criteria in § 124.111 of this chapter.

* * * * *

Substantial bundling means any bundling that meets or exceeds the following dollar amounts (if the acquisition strategy contemplates multiple award contracts, orders placed under unrestricted multiple award contracts, or a Blanket Purchase Agreement issued against a GSA Schedule contract or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts, orders, or Blanket Purchase Agreement, including options):

(1) $8.0 million or more for the Department of Defense;

(2) $6.0 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(3) $2.5 million or more for all other agencies.

* * * * *

47. Amend § 125.2 by adding a new sentence after the second sentence in paragraph (d)(2)(ii), and revising paragraph (d)(3)(i) to read as follows;

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

* * * * *

(d) * * *

(2) * * *

(ii) * * * This analysis must include quantification of the reduction or increase in price of the proposed bundled strategy as compared to the cumulative value of the separate contracts. * * *

* * * * *

(3) * * *

(i) The analysis for bundled requirements set forth in paragraphs (d)(2)(i) and (ii) of this section;

48. Amend § 125.3 by:

a. Revising paragraph (a)(1)(i)(B);

b. Removing the words "bank fees;" from paragraph (a)(1)(iii);

c. Removing the words "commercial item" in paragraph (c)(1)(i) and adding in their place the words "commercial product or commercial service";

d. Revising paragraph (c)(1)(iv);

e. Revising the first sentence of paragraph (c)(1)(viii);

f. Removing the words "commercial items" in paragraph (c)(1)(x) and adding in their place the words "commercial products or commercial services"; and

g. Revising paragraph (c)(2).

The revisions read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

(a) * * *

(1) * * *

(i) * * *

(B) Purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor, or a joint venture in which the contractor is one of the joint venturers, are not included in the subcontracting base. Subcontracts by first-tier affiliates, and

subcontracts by a joint venture in which the prime contractor is one of the joint venturers, shall be treated as subcontracts of the prime.

* * * * *

(c) * * *

(1) * * *

(iv) When developing an individual subcontracting plan (also called individual contract plan), the contractor must determine whether to include indirect costs in its subcontracting goals. A prime contractor must include indirect costs in its subcontracting goals if the contract exceeds $7.5 million. Below $7.5 million, a prime contractor may include indirect costs in its subcontracting plan at its option. If indirect costs are included in the goals, these costs must be included in the Individual Subcontract Report (ISR) in www.esrs.gov (eSRS) or Subcontract Reports for Individual Contracts (the paper SF-294, if authorized). Contractors may use a pro rata formula to allocate indirect costs to covered individual contracts, if the indirect costs are not already allocable to specific contracts. Regardless of whether the contractor has included indirect costs in the subcontracting plan, indirect costs must be included on a prorated basis in the Summary Subcontracting Report (SSR) in the eSRS system. A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its subcontracting goals and in its SSR;

* * * * *

(viii) The contractor must provide pre-award written notification to unsuccessful small business offerors on all competitive subcontracts over the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101). * * *

* * * * *

(2) A commercial plan, also referred to as an annual plan or company-wide plan, is the preferred type of subcontracting plan for contractors furnishing commercial products and commercial services. A commercial plan covers the offeror's fiscal year and applies to all of the

commercial products and commercial services sold by either the entire company or a portion thereof (e.g., division, plant, or product line). Once approved, the plan remains in effect during the federal fiscal year for all Federal Government contracts in effect during that period. The contracting officer of the agency that originally approved the commercial plan will exercise the functions of the contracting officer on behalf of all agencies that award contracts covered by the plan.

* * * * *

49. Amend § 125.6 by:

a. In paragraph (c) in the second sentence:

i. Removing the reference to "§ 121.103(h)(4)" and adding in its place a reference to "§ 121.103(h)(3)";

ii. Adding a "."after the words "shall be considered subcontracted" and before the words "SBA will also";

b. Revising the first sentence of paragraph (d) introductory text and adding a new second sentence;

c. Redesignating paragraphs (e), (f) and (g) as paragraphs (f), (g) and (h), respectively; and

d. Adding a new paragraph (e).

The revision and additions to read as follows:

§ 125.6 What are the prime contractor's limitations on subcontracting?

* * * * *

(d) *Determining compliance with applicable limitation on subcontracting.* The period of time used to determine compliance for a total or partial set-aside contract will generally be the base term and then each subsequent option period. However, for a multi-agency set aside contract where more than one agency can issue orders under the contract, the ordering agency must use the period of performance for each order to determine compliance. * * *

(e) *Past Performance Evaluation*. Where an agency determines that a contractor has not met the applicable limitation on subcontracting requirement at the conclusion of contract performance, the agency must notify the business concern and give it the opportunity to explain any extenuating or mitigating circumstances that negatively impacted its ability to do so.

(1) Where a small business does not provide any extenuating or mitigating circumstances or the agency determines that the concern's failure to meet the applicable limitation on subcontracting requirement was not beyond the concern's control, the agency may not give a satisfactory or higher past performance rating for the appropriate factor or subfactor in accordance with FAR 42.1503.

(2) Where a contracting officer determines that extenuating circumstances warrant a satisfactory/positive past performance evaluation for the appropriate evaluation factor or subfactor and the individual at least one level above the contracting officer concurs with that determination, a satisfactory or higher past performance rating may be given.

(i) Extenuating or mitigating circumstances that could lead to a satisfactory/positive rating include, but are not limited to, unforeseen labor shortages, modifications to the contract's scope of work which were requested or directed by the Government, emergency or rapid response requirements that demand immediate subcontracting actions by the prime small business concern, unexpected changes to a subcontractor's designation as a similarly situated entity (as defined in § 125.1), differing site or environmental conditions which arose during the course of performance, force majeure events, and the contractor's good faith reliance upon a similarly situated subcontractor's representation of size or relevant socioeconomic status.

(ii) An agency cannot rely on any circumstances that were within the contractor's control, or those which could have been mitigated without imposing an undue cost or burden on the contractor.

* * * * *

50. Amend §125.8 by:

a. Removing the reference to "§ 121.103(h)(3)" in paragraph (a) and adding in its place a reference to "§ 121.103(h)(4)";

b. Revising paragraph (b)(2) introductory text;

c. Adding two sentences at the end of paragraph (b)(2)(ii)(A);

d. Removing the reference to "paragraph (d)" in paragraph (b)(2)(vii) wherever it appears and adding in its place a reference to "paragraph (c)"; and

e. Revising paragraph (h)(2).

The revisions and addition 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?

* * * * *

(b) * * *

(2) Every joint venture agreement to perform a contract set aside or reserved for small business between a protégé small business and its SBA-approved mentor authorized by § 125.9 must contain a provision:

(ii) * * *

(A) * * * The joint venture agreement may not give to a non-managing venturer negative control over activities of the joint venture, unless those provisions would otherwise be commercially customary for a joint venture agreement for a government contract outside of SBA's programs. A non-managing venturer's approval may be required in, among other things, determining what contract opportunities the joint venture should seek and initiating litigation on behalf of the joint venture.

* * * * *

(iv) Stating that the small business participant(s) must receive profits from the joint venture commensurate with the work performed by them, or a percentage agreed to by the parties to the joint venture whereby the small business participant(s) receive profits from the joint

venture that exceed the percentage commensurate with the work performed by them, and that at the conclusion of the joint venture contract(s) and/or the termination of the joint venture, any funds remaining in the joint venture bank account shall be distributed according to the percentage of ownership;

* * * * *

(h) * * *

(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, and upon request by SBA or the relevant contracting officer prior to contract completion, the small business partner to the joint venture must submit a report to the relevant contracting officer and to 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.

* * * * *

51. Amend § 125.9 by:

a. Revising paragraph (b)(3)(ii);

b. Redesignating paragraphs (e)(1)(ii) and (iii) as paragraphs (e)(1)(iii) and (iv), respectively;

c. Adding a new paragraph (e)(1)(ii); and

d. Adding paragraph (e)(6)(iv).

The revision and addition to read as follows:

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

* * * * *

(b) * * *

(3) * * *

(ii) A mentor (including in the aggregate a parent company and all of its subsidiaries) generally cannot have more than three protégés at one time.

(A) The first two mentor-protégé relationships approved by SBA between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico do not count against the limit of three proteges that a mentor can have at one time.

(B) Where a mentor purchases another business entity that is also an SBA-approved mentor of one or more protégé small business concerns and the purchasing mentor commits to honoring the obligations under the seller's mentor-protégé agreement(s), that entity may have more than three protégés (i.e., those of the purchased concern in addition to those of its own). In such a case, the entity could not add another protégé until it fell below three in total.

* * * * *

(e) * * *

(1) * * *

(ii) Identify the specific entity or entities that will provide assistance to or participate in joint ventures with the protégé where the mentor is a parent or subsidiary concern;

* * * * *

(6) * * *

(iv) Instead of having a six-year mentor-protégé relationship with two separate mentors, a protégé may elect to extend or renew a mentor-protégé relationship with the same mentor for a second six-year term. In order for SBA to approve an extension or renewal of a mentor-protégé relationship with the same mentor, the mentor must commit to providing additional business development assistance to the protégé.

* * * * *

PART 126—HUBZONE PROGRAM

52. 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.

53. Amend § 126.200 by revising paragraph (b)

§ 126.200 What requirements must a concern meet to be eligible as a certified HUBZone small business concern?

* * * * *

(b) *Size.* (1) In order to be eligible for HUBZone certification and remain eligible as a certified HUBZone small business concern, a concern, together with its affiliates, must qualify as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its profile in the System for Award Management (SAM.gov).

(2) In order to be eligible for a HUBZone contract, a certified HUBZone small business concern must qualify as small under the size standard corresponding to the NAICS code assigned to the HUBZone contract.

(3) If the concern is a small agricultural cooperative, in determining size, the small agricultural cooperative is treated as a "business concern" and its member shareholders are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

§ 126.203 [Removed and Reserved]

54. Remove and reserve § 126.203.

55. Amend § 126.306 by adding paragraphs (b)(1) and (b)(2) to read as follows:

§ 126.306 How will SBA process an application for HUBZone certification?

* * * * *

(b) * * *

(1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the HUBZone eligibility requirements, SBA will decline the concern's application.

(2) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause

SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.

* * * * *

56. Amend § 126.503 by revising paragraph (a)(2), and adding paragraphs (c) and (d) to read as follows:

§ 126.503 What happens if SBA is unable to verify a HUBZone small business concern's eligibility or determines that a concern is no longer eligible for the program?

(a) * * *

(2) *SBA's decision.* SBA will determine whether the HUBZone small business concern remains eligible for the program within 90 calendar days after receiving all requested information, when practicable. The D/HUB will provide written notice to the concern stating the basis for the determination.

(i) If SBA finds that the concern is not eligible, the D/HUB will decertify the concern and remove its designation as a certified HUBZone small business concern in DSBS and the System for Award Management (or successor system) within four business days of the determination.

(ii) If SBA finds that the concern is eligible, the concern will continue to be designated as a certified HUBZone small business concern in DSBS (or successor system).

* * * * *

(c) *Decertification due to submission of false information.* If SBA discovers that a certified HUBZone small business concern or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.

(d) *Effect of decertification.* Once SBA has decertified a concern, the concern cannot submit an offer or quote as a HUBZone small business concern. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C.

645(d). If the concern has already certified as a HUBZone small business on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of the adverse eligibility determination. A contracting officer shall not award a HUBZone contract to a concern that the D/HUB has determined is not an eligible HUBZone small business concern for the procurement in question.

57. Amend § 126.601 by revising paragraph (d) and adding paragraph (e) to read as follows:

§ 126.601 What additional requirements must a certified HUBZone small business concern meet to submit an offer on a HUBZone contract?

* * * * *

(d) Where a subcontractor that is not a certified HUBZone small business will perform the primary and vital requirements of a HUBZone contract, or where a HUBZone prime contractor is unduly reliant on one or more small businesses that are not HUBZone-certified to perform the HUBZone contract, the prime contractor is not eligible for award of that HUBZone contract.

(1) When the subcontractor qualifies as small for the size standard assigned to the procurement, this issue may be grounds for a HUBZone status protest, as described in §126.801. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at § 121.103(h)(3) of this chapter.

(2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime HUBZone contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not HUBZone-certified, where the prime contractor can demonstrate that it, together with any subcontractors that are certified HUBZone small business concerns, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

(3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

(e) For two-step procurements (including architect-engineering and design-build procurements) to be awarded as HUBZone contracts, a concern must be a certified HUBZone small business concern as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

58. Add § 126.609 to read as follows:

§ 126.609 Can a HUBZone competition be limited or authorize preferences to small business concerns having additional socioeconomic certifications?

A procuring activity cannot restrict a HUBZone competition (for either a contract or order) to require SBA socioeconomic certifications other than HUBZone certification (i.e., a competition cannot be limited only to business concerns that are both HUBZone and 8(a), HUBZone and WOSB, or HUBZone and SDVO) or give evaluation preferences to firms having one or more other certifications.

59. Amend § 126.616 by revising paragraph (a) 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?

(a) *General*. A certified HUBZone small business concern may enter into a joint venture agreement with one or more other small business concerns, or with an SBA-approved mentor authorized by §125.9 of this chapter, for the purpose of submitting an offer for a HUBZone contract.

(1) The joint venture itself need not be a certified HUBZone small business concern, but the joint venture should be designated as a HUBZone joint venture in SAM (or successor system) with the HUBZone-certified joint venture partner identified.

(2) A certified HUBZone small business concern cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for certified HUBZone small business concerns.

* * * * *

§ 126.618 [Amended]

60. Amend §126.618 in paragraph (c)(2) by removing the reference to "§ 121.103(h)(4)" and adding in its place a reference to "§ 121.103(h)(3)".

61. Amend § 126.801 by revising paragraphs (b), (d) introductory text, (d)(1) and (2), and (e) to read as follows:

§ 126.801 How does an interested party file a HUBZone status protest?

* * * * *

(b) *Format and specificity*. (1) Protests must be in writing and must state all specific grounds as to why the protestor believes the protested concern should not qualify as a certified HUBZone small business concern. Specifically, a protestor must explain why:

(i) The protested concern did not meet the HUBZone eligibility requirements set forth in §126.200;

(ii) The protested joint venture does not meet the requirements set forth in § 126.616;

(iii) The protested concern, as a HUBZone prime contractor, is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract; and/or

(iv) The protested concern, on the anniversary date of its initial HUBZone certification, failed to attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract.

(2) Specificity requires more than conclusions of ineligibility. A protest merely asserting that the protested concern did not qualify as a HUBZone small business concern, or that it did

not meet the principal office and/or 35% residency requirements, without setting forth specific facts or allegations, is insufficient and will be dismissed.

(3) For a protest filed against a HUBZone joint venture, the protest must state all specific grounds as to why:

(i) The HUBZone small business partner to the joint venture did not meet the HUBZone eligibility requirements set forth in §126.200 at the time the concern applied for certification or on the anniversary of such certification; and/or

(ii) The protested HUBZone joint venture does not meet the requirements set forth in §126.616.

(4) For a protest alleging that the prime contractor has an ostensible subcontractor, the protest must state all specific grounds as to why:

(i) The protested concern is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or

(ii) One or more subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract.

(5) For a protest alleging that the protested concern failed to attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract, the protest must state all specific grounds explaining why the protester believes that at least 20% of the protested firm's employees do not reside in a HUBZone.

* * * * *

(d) *Timeliness*. A protest challenging the HUBZone status of an apparent successful offeror on a HUBZone contract must be timely, or it will be dismissed.

(1) For negotiated acquisitions, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(i) Except for an order or Blanket Purchase Agreement issued under a Federal Supply Schedule contract, for an order or Agreement that is set-aside for certified HUBZone small business concerns under a multiple award contract that was not itself set aside or reserved for certified HUBZone small business concerns, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

(ii) Where a contracting officer has required offerors for a specific order under a multiple award HUBZone contract to recertify their HUBZone status, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order.

(2) For sealed bid acquisitions:

(i) An interested party must submit its protest by close of business on the fifth business day after bid opening, or where the identified low bidder is determined to be ineligible for award, by close of business on the fifth business day after the contracting officer has notified interested parties of the identity of that low bidder, or

(ii) If the price evaluation preference was not applied at the time of bid opening, an interested party must submit its protest by close of business on the fifth business day after the date of identification of the apparent successful low bidder

* * * * *

(e) *Referral to SBA.* The contracting officer must forward to SBA any non-premature HUBZone status protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send the protest, along with a referral letter, to the D/HUB by email to hzprotests@sba.gov.

(1) The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including the following:

(i) The solicitation number;

(ii) The name, address, telephone number, email address, and facsimile number of the contracting officer;

(iii) The type of HUBZone contract at issue (*i.e.,* HUBZone set-aside; HUBZone sole source; full and open competition with a HUBZone price evaluation preference applied; reserve for HUBZone small business concerns under a Multiple Award Contract; or order set-aside for HUBZone small business concerns against a Multiple Award Contract);

(iv) If the procurement was conducted using full and open competition with a HUBZone price evaluation preference, whether the protester's opportunity for award was affected by the preference;

(v) If the procurement was a HUBZone set-aside, whether the protester submitted an offer;

(vi) Whether the protested concern was the apparent successful offeror;

(vii) Whether the procurement was conducted using sealed bid or negotiated procedures;

(viii) If the procurement was conducted using sealed bid procedures, the bid opening date;

(ix) The date the protester was notified of the apparent successful offeror;

(x) The date the protest was submitted to the contracting officer;

(xi) The date the protested concern submitted its initial offer or bid to the contracting activity; and

(xii) Whether a contract has been awarded, and if applicable, the date of contract award and contract number.

(2) Where a protestor alleges that a certified HUBZone small business concern is unduly reliant on one or more subcontractors that are not certified HUBZone small business concerns or a subcontractor that is not a certified HUBZone small business concern will perform primary and vital requirements of the contract, the D/HUB will refer the matter to the Government

Contracting Area Office serving the geographic area in which the principal office of the certified HUBZone small business concern is located for a determination as to whether the ostensible subcontractor rule has been met.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

62. 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.

63. Amend § 127.102 by revising the definition of "WOSB" to read as follows:

§ 127.102 What are the definitions of the terms used in this part?

* * * * *

Women-Owned Small Business (WOSB) means a concern that qualifies as small pursuant to part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile, and that is at least 51 percent owned and controlled by one or more women who are citizens in accordance with §§ 127.200, 127.201 and 127.202. This definition applies to any certification as to a concern's status as a WOSB, not solely to those certifications relating to a WOSB contract.

* * * * *

64. Amend § 127.200 by revising paragraphs (a)(1) and (b)(1) to read as follows:

§ 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

(a) * * *

(1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile; and

* * * * *

(b) * * *

(1) A small business as defined in part 121 of this chapter for the size standard corresponding to any NAICS code listed in its SAM profile; and

* * * * *

65. Amend § 127.201 by revising the first sentence of paragraph (b) to read as follows:

§ 127.201 What are the requirements for ownership of an EDWOSB and WOSB?

* * * * *

(b) * * * To be considered unconditional, the ownership must not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another (other than after death or incapacity). * * *

* * * * *

66. Amend § 127.202 by revising paragraph (c) to read as follows:

§ 127.202 What are the requirements for control of an EDWOSB or WOSB?

* * * * *

(c) *Limitation on outside employment.* The woman or economically-disadvantaged woman who holds the highest officer position of the business concern may not engage in outside employment that prevent her from devoting sufficient time and attention to the business concern to control its management and daily operations. Where a woman or economically disadvantaged woman claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, there is a rebuttable presumption that she does not control the business concern. In such a case, the woman must provide evidence that she has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management and administration of the business.

* * * * *

67. Amend § 127.304 by adding paragraphs (c)(1), (c)(2), (g)(1), and (g)(2) to read as follows:

§ 127.304 How is an application for certification processed?

* * * * *

(c) * * *

(1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the WOSB or EDWOSB eligibility requirements, SBA will decline the concern's application.

(2) If, during the processing of an application, SBA determines that an applicant or its representative has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.

* * * * *

(g) * * *

(1) If SBA denies a business concern's application for WOSB certification based on lack of ownership or lack of control by women, within two days of SBA's denial, the applicant concern must update its WOSB self-certification status in the System for Award Management (or any successor system) to reflect that the concern is not an eligible WOSB.

(2) If a business concern fails to update its WOSB self-certification status in the System for Award Management (or any successor system), SBA will make such update within two days of the business's failure to do so.

* * * * *

68. Revise § 127.400 to read as follows:

§ 127.400 How does a concern maintain its WOSB or EDWOSB certification?

Any concern seeking to remain a certified WOSB or EDWOSB must undergo a program examination every three years.

(a) SBA or a third-party certifier will conduct a program examination three years after the concern's initial WOSB or EDWOSB certification (whether by SBA or a third-party certifier) or three years after the date of the concern's last program examination, whichever date is later.

Example to paragraph (a). Concern A is certified by SBA to be eligible for the WOSB Program on March 31, 2023. Concern A is considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through March 30, 2026. On April 22, 2025, after Concern A is identified as the apparent successful offeror on a WOSB set-aside contract, its status as an eligible WOSB is protested. On May 15, 2025, Concern A receives a positive determination from SBA confirming that it is an eligible WOSB. Concern A's new certification date is May 15, 2025. Concern A is now considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through May 14, 2028.

(b) The concern must either request a program examination from SBA or notify SBA that it has requested a program examination from a third-party certifier no later than 30 days prior to its certification anniversary. Failure to do so will result in the concern being decertified.

Example to paragraph (b). Concern B is certified by a third-party certifier to be eligible for the WOSB Program on July 20, 2023. Concern B is considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2026. Concern B must request a program examination from SBA or notify SBA that it has requested a program examination from a third-party certifier, by June 20, 2026, to continue participating in the WOSB Program after July 19, 2026.

69. Amend § 127.405 by redesignating paragraph (c) as paragraph (f), and by adding new paragraphs (c), (d) and (e) to read as follows:

§ 127.405 What happens if SBA determines that the concern is no longer eligible for the program?

* * * * *

(c) *Decertification in response to adverse protest decision.* SBA will decertify a concern found to be ineligible during a WOSB/EDWOSB status protest.

(d) *Decertification due to submission of false information.* If SBA discovers that a WOSB or EDWOSB or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.

(e) *Effect of decertification.* Once SBA has decertified a concern, the concern cannot self-certify as a WOSB or EDWOSB, as applicable, for any WOSB or EDWOSB contract. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as a WOSB or EDWOSB on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of its decertification.

(1) Not later than two days after the date on which SBA decertifies a business concern, such concern must update its WOSB/EDWOSB status in the System for Award Management (or any successor system).

(2) If a business concern fails to update its WOSB/EDWOSB status in the System for Award Management (or any successor system) in response to decertification, SBA will make such update within two days of the business's failure to do so.

* * * * *

70. Amend § 127.503 by redesignating paragraphs (e), (f) and (g) as paragraphs (f), (g), and (h), respectively, and by adding a new paragraph (e) to read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?

* * * * *

(e) *Competitions requiring or favoring additional socioeconomic certifications.* A procuring activity cannot restrict a WOSB or EDWOSB competition (for either a contract or order) to require SBA socioeconomic certifications other than WOSB/EDWOSB certification (i.e., a competition cannot be limited only to business concerns that are both WOSB/EDWOSB and 8(a), WOSB/EDWOSB and HUBZone, or WOSB/EDWOSB and SDVO) or give evaluation preferences to firms having one or more other certifications.

* * * * *

71. Amend § 127.504 by

a. In paragraph (g)(1) removing the reference to "§ 121.103(h)(2)" and adding in its place a reference to "§ 121.103(h)(3)";

b. Revising paragraph (g)(2), and

c. Adding paragraph (g)(3).

The addition and revision read as follows:

§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?

* * * * *

(g) * * *

(2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime WOSB or EDWOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified WOSBs or EDWOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified WOSBs or EDWOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

(3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

* * * * *

72. Amend § 127.506 by adding paragraph (a)(3) to read as follows:

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

* * * * *

(a) * * *

(3) A WOSB or EDWOSB cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for WOSBs or EDWOSBs.

* * * * *

73. Amend § 127.603 by adding a sentence to the end of paragraph (c)(2) and revising paragraph (d) to read as follows:

§ 127.603 What are the requirements for filing an EDWOSB or WOSB status protest?

* * * * *

(c) * * *

(2) * * * Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th business day after the contracting officer has notified interested parties of the identity of that low bidder.

* * * * *

(d) *Referral to SBA.* The contracting officer must forward to SBA any WOSB or EDWOSB status protest received, notwithstanding whether he or she believes it is premature, sufficiently specific, or timely. The contracting officer must send all WOSB and EDWOSB status protests, along with a referral letter and documents, directly to the Director for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, or by fax to (202) 205-6390, Attn: Women-Owned Small Business Status Protest.

(1) The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the contracting officer; whether the protestor submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the contracting officer; when the protestor received notification about the apparent successful offeror, if applicable; and whether a contract has been awarded.

(2) Where a protestor alleges that a WOSB/EDWOSB is unduly reliant on one or more subcontractors that are not WOSBs/EDWOSBs or a subcontractor that is not a WOSB/EDWOSB will perform primary and vital requirements of the contract, the D/GC or designee will refer the matter to the Government Contracting Area Office serving the geographic area in which the principal office of the SDVO SBC is located for a determination as to whether the ostensible subcontractor rule has been met.

(3) The D/GC or designee will decide the merits of EDWOSB or WOSB status protests.

PART 128— VETERAN SMALL BUSINESS CERTIFICATION PROGRAM

74. The authority citation for part 128 continues to read as follows:

Authority: 15 U.S.C. 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f–1.

§ 128.201 [Amended]

75. Amend § 128.201 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

§ 128.203 [Amended]

76. In § 128.203 amend paragraph (i) by removing the words “outside obligations” wherever they appear and adding in their place the words “outside employment”.

77. Amend § 128.302 by adding paragraphs (d)(1), (d)(2), (f)(1), and (f)(2) to read as follows:

§ 128.302 How does SBA process applications for certification?

* * * * *

(d) * * *

(1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the VOSB or SDVOSB eligibility requirements, SBA will decline the concern's application.

(2) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.

* * * * *

(f) * * *

(1) If SBA denies a business concern's application for VOSB or SDVOSB certification, within two days of SBA's denial becoming a final agency decision, the applicant concern must update its VOSB or SDVOSB self-certification status in the System for Award Management (or any successor system) to reflect that the concern is not an eligible VOSB or SDVOSB.

(i) If an applicant appeals the D/GC's denial decision to SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter and OHA affirms the ineligibility determination, the two-day requirement applies immediately upon OHA's final decision.

(ii) If an applicant does not appeal the D/GC's denial decision to OHA, the two-day requirement begins 10 business days after receipt of the D/GC's denial.

(2) If a business concern fails to update its VOSB or SDVOSB self-certification status in the System for Award Management (or any successor system) after a final SBA decision, SBA will make such update within two days of the business's failure to do so.

78. Amend § 128.310 by redesignating paragraphs (d) and (e) as paragraphs (e) and (f) respectively, and by adding a new paragraph (d) to read as follows:

§ 128.310 What are the procedures for decertification?

* * * * *

(d) *Decertification due to submission of false information.* If SBA discovers that a VOSB/SDVOSB or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.

* * * * *

79. Amend § 128.401 by revising paragraph (g)(2) and adding paragraph (g)(3) to read as follows:

§ 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?

* * * * *

(g) * * *

(2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime VOSB or SDVOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified VOSBs or SDVOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified VOSBs or SDVOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

(3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

* * * * *

80. Amend § 128.402 by revising paragraph (a)(3) to read as follows:

§ 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?

* * * * *

(a) * * *

(3) A VOSB or SDVOSB cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for VOSBs or SDVOSBs.

* * * * *

81. Amend § 128.404 by revising paragraph (d) to read as follows:

§ 128.404 When may a contracting officer set aside a procurement for VOSBs or SDVOSBs?

* * * * *

(d) *Prohibition on competitions requiring or favoring additional socioeconomic certifications.* A procuring activity cannot restrict an SDVOSB competition (for either a contract or order) to require certifications other than SDVOSB certification (*i.e.,* a competition cannot be limited only to business concerns that are both SDVOSB and 8(a), SDVOSB and HUBZone, or SDVOSB and WOSB) or give evaluation preferences to firms having one or more other certifications.

82. Amend § 128.500 by adding paragraph (d) to read as follows:

§ 128.500 What are the requirements for filing a VOSB or SDVOSB status protest?

* * * * *

(d) A concern found not to qualify as a VOSB or SDVOSB in a status protest may not submit an offer on a future VOSB or SDVOSB procurement until the protested concern reapplies to the Veteran Small Business Certification Program and has been designated by SBA as a VOSB or SDVOSB into the certification database. If a concern found to be ineligible submits an offer, it may be in violation of criminal laws, including section 16(d) of the Small Business Act,

15 U.S.C. 645(d). If the concern has already certified itself as a VOSB or SDVOSB on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of the adverse determination.

(1) Not later than two days after SBA's final determination finding a concern ineligible as a VOSB or SDVOSB, such concern must update its VOSB or SDVOSB status in the System for Award Management (or any successor system).

(2) If a business concern fails to update its VOSB or SDVOSB status in the System for Award Management (or any successor system) in response to decertification, SBA will make such update within two days of the business's failure to do so.

Isabella Casillas Guzman,
Administrator

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