



SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245-AI09

Government Contracting: Subcontracting Program

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to revise its Small Business Subcontracting Program regulations to encourage faster payments to small business subcontractors and streamline the reporting process for prime contracts. This proposed rule will require prime contractors notify contracting officers in writing when it fails to make full or timely payments to the subcontractor within 30 days past due; require prime contractors cooperate with contracting officers to correct/mitigate this failure until payment is made in full to the subcontractor; and allow contracting officers to modify a prime contractor's past performance for failure to make full or timely payments.

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

ADDRESSES: You may submit comments, identified by RIN 3245-AI09, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov> and follow the instructions for submitting comments.
- *Email:* Kunmi Ageh, Procurement Policy Analyst (Attorney), Office of Policy Planning and Liaison, Small Business Administration, at Kunmi.Ageh@sba.gov.

SBA will post all comments on <https://www.regulations.gov>.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted on <https://www.regulations.gov>. If you wish to submit confidential business information

(CBI) as defined in the User Notice at <https://www.regulations.gov>, please submit the comments to Kunmi Ageh and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential.

FOR FURTHER INFORMATION CONTACT: Kunmi Ageh, Procurement Policy Analyst (Attorney), Office of Policy Planning and Liaison, Small Business Administration, at Kunmi.Ageh@sba.gov, 202-374-8454.

Electronic copies of this Federal Register are available at <https://www.regulations.gov>. The docket is available at <https://www.regulations.gov>, the Federal eRulemaking Portal. A “100-word summary” is also available on <https://www.regulations.gov>. For additional information on submitting items to, or accessing items in, the docket, please refer to the **ADDRESSES** section of this NPRM.

SUPPLEMENTARY INFORMATION:

Background Information

The SBA proposes to revise its Small Business Subcontracting Program regulations in 13 CFR 125.3 in response to changes made in section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year 2024, Public Law 118-31. Section 862 made changes to section 8(d)(13) of the Small Business Act, 15 U.S.C. 637(d)(13)(B)(i), by amending the time in which a prime contractor must notify the contracting officer in writing if, upon completion of the responsibilities of the small business subcontractor, payment to the subcontractor is past due under the terms of the subcontract by 30 days. This means a prime contractor must notify a contracting officer in writing when it failed to make fully or timely payments to a subcontractor within 30 days past the payment due date. Section 862 also requires that the prime contractor cooperate (act or work together) with the contracting officer to correct and mitigate the failure to make a full or timely payment to a subcontractor. The prime contractor has the duty to cooperate with the contracting officer until the subcontractor receives full payment, is made whole or the contracting officer’s determination is no longer effective, regardless of performance or status of

the contract in question. Lastly, a contracting officer has the option to include the failure to make full and timely payments in the prime contractor's past performance rating before or after close-out of the covered contract.

SBA intends to simplify the subcontracting reporting process by proposing additional changes to the Subcontracting Program. This proposed rule will allow contractors the option to base their commercial subcontracting plans on the Federal Government's fiscal year (FY), as well as allow prime contractors the option to base a subcontractor's size status on its primary NAICS code for subcontracts, but only limited to subcontracts under commercial subcontracting plans, subcontracts under the Micro-Purchase Threshold (MPT), and for indirect costs subcontracts in instances where the subcontract does not result from a solicitation with a NAICS code. This proposed rule also intends to explain how to calculate an agency's allocation on the Commercial Summary Subcontract Reports (SSRs) and provide a clear due date for when to submit Commercial SSRs. SBA proposes to clarify which agencies should receive Individual Subcontract Reports (ISRs) or SSRs, provide the deadline for submissions of ISRs or SSRs, and list the individuals with the authority to sign SSRs.

With these revisions, SBA plans to simplify the subcontract reporting process and address common concerns with subcontract reporting.

Severability

SBA anticipates for the provisions of this proposed rule, if finalized, to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance.

Section-by-Section Analysis

Section 125.3(a)(1)(i)(B)

SBA proposes to add language to § 125.3(a)(1)(i)(B) that the subcontracting plan must be submitted by the entity awarded the contract, which must reflect all subcontracting to be performed by itself and its affiliates. With this amendment, SBA proposes to clarify that this section also applies to prime contractors that are considered a joint venture. SBA will eliminate the issue where two other than small business concerns submit an offer as a joint venture and use individual subcontracting plans to fulfill the subcontracting plan requirement, whereas instead, the subcontracting plan should name the joint venture offeror.

Section 125.3(a)(1)(iii)

SBA proposes to add text to § 125.3(a)(1)(iii) to clarify that utilities purchased from a municipality or solely authorized by that municipality to provide services in a particular geographic region should not be included in a subcontracting base.

Section 125.3(b)(3)(ii)

SBA proposes to add language to § 125.3(b)(3)(ii) to include the Dynamic Small Business Search (DSBS) to the list of tools for conducting market research. DSBS is a research tool meant to help contractors identify small business concerns capable of performing all or part of the contract as a subcontractor. The addition of DSBS will promote practicable subcontracting opportunities. Therefore, in addition to System for Award Management (SAM.gov) and SBA's SUBNet, SBA proposes to add DSBS to the list of tools for conducting market research to assist contractors in locating small business concerns.

Section 125.3(c)(1)(v)

Currently, § 125.3(c)(1)(v) requires the contractor to assign a NAICS code that best describes the nature of the subcontract, and its corresponding size standard, to each subcontract and to each solicitation if a solicitation is utilized. Further, a contractor may rely on a subcontractor's electronic representations and certifications, if the solicitation for the subcontract contains a clause that requires the subcontractor verify, by the submission of its offer, that the

size or socioeconomic representations and certifications are current, accurate, and complete as of the date of the offer for the subcontract.

SBA proposes to add language to § 125.3(c)(1)(v) that a subcontractor's primary NAICS code may be used as its size classification for all subcontracts under commercial subcontracting plans, for subcontracts under the Micro-Purchase Threshold (MPT), and for the indirect costs of subcontracts. The prime can only use the primary NAICS code for classifying the subcontractor where the subcontract does not result from a solicitation with a NAICS code. If the prime contractor issues a solicitation for a subcontract that has a NAICS code, then that prime contractor must use the size representation for the NAICS code in that solicitation, rather than the primary NAICS code for the subcontractor. This will ensure all responses to the solicitation for the subcontract are assessed against the same NAICS code and corresponding size standard. SBA has noticed contractor challenges to determine the size of subcontractors for indirect costs and accurately counting all indirect costs in the "other than small" category. Thus, SBA intends to increase the correct size classification for subcontractors by providing an alternate method to classify their suppliers. This change simplifies prime contractor's ability to identify the size status of a subcontractor for indirect costs (for companies with all plan types), for subcontracts issued under commercial subcontracting plans, and for subcontracts under the MPT.

A contractor cannot require a subcontractor to register in SAM.gov to identify a potential subcontractor's size and socio-economic status; however, Contractors can determine a subcontractor's size and socioeconomic status for their primary NAICS code through written size representations or electronic representations. For HUBZone small businesses and service-disabled veteran-owned small businesses (SDVOSBs), SBA requires the contractor or subcontractor be registered in DSBS, SAM.gov, or successor system, prior to submitting a certification application to SBA. For a contractor to verify the status of a HUBZone or SDVOSB subcontractor, it must verify the status of the concern in DSBS. Any contractor or subcontractor that does not submit a certification application for SDVOSBs status to SBA by

December 22, 2024, cannot self-certify for a Federal prime or subcontract that counts towards SDVOSB goaling purposes or SDVOSB subcontracting goals under 13 CFR 128.200(c)(2). If the contractor chooses to register in SAM.gov, the contractor's primary NAICS is indicated in the Assertions, Service Classifications, portion of a contractor's SAM profile. Subcontracts are still required to include a clause in the solicitation or subcontract that require subcontractors verify by submission of the offer or acceptance that the subcontractor's size and socioeconomic representations and certifications in SAM (or in the contractor's electronic database) are current, accurate and complete as of the date of the offer for the subcontract (or, if an offer is not a part of the procurement process, as of the date of award).

Finally, SBA proposes to clarify that the size certification and recertification requirements of 13 CFR 121.404(g) do not apply to subcontracts. However, if there is a merger or acquisition that causes the reissuance of the subcontract, this is considered a new subcontract.

Section 125.3(c)(1)(vi)

SBA proposes four revisions to § 125.3(c)(1)(vi). First, SBA plans to amend this section to clarify what reports must be submitted for orders against multi-agency indefinite delivery, indefinite quantity (IDIQ) contracts. Unlike Commercial Plans under FAR 52-219-9(l)(2)(i)(e), contractors cannot allocate a percentage of work in the SSR to more than one executive agency when submitting reports. An individual SSR is directed to a single agency. Thus, SBA proposes a separate SSR should be submitted to the ordering agency when orders are placed under multi-agency multiple award contracts. This will ensure a separate SSR is submitted for each ordering agency to capture subcontracts awarded during the fiscal year for that agency's order, so the ordering agency receives credit in accordance with 13 CFR 125.3(h)(3). Further, this SSR need only reflect subcontract awards that result from that agency's orders. Any dollar value subcontract should be included in the ISR (or SF 294, if applicable) and SSR reports.

Contractors with individual subcontracting plans must submit ISRs during contract performance

as required under this provision. Although uncommon, if the agency that issued the underlying contract does not award any orders, then the contractor must still submit an SSR with zero dollars. For example, XYZ Company has a contract with U.S. General Services Administration (GSA), under the Federal Supply Schedule (FSS), that contains an individual subcontracting plan. The FSS allows other agencies to place an order under this contract. The U.S. Department of Veterans Affairs (VA) places an order against the FSS with XYZ Company. XYZ Company must submit two SSRs. One to VA, reflecting a subcontracting that occurred during the reporting period pertaining to its order; and the other to GSA, reflecting no subcontracting because GSA did not place any orders itself. If the contractor has another prime or subcontract with the VA, that contractor would combine all its subcontracting under VA into one SSR.

Second, this rule proposes the contractor submit its SSR within 45 days after the end of the Government's fiscal year (e.g., by November 14th for the September 30th reporting period). This mirrors the recently proposed change in 13 CFR 125.3(d)(2), which would extend the due dates for subcontracting reports by 15 days, from 30 days to 45 days.

Third, SBA proposes to amend this section to clarify that SSRs should be submitted to the executive agency level unless otherwise directed by the agency. SBA proposes to define Executive agency as an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101 (as defined in FAR 2.101). For example, XYZ Company submits SSRs to Centers for Disease Control and Prevention, Centers for Medicare and Medicaid Services, and Food and Drug Administration - all lower-level agencies that fall under the U.S. Department of Health and Human Services (HHS). Here, XYZ Company should have submitted only one SSR to HHS, the executive agency. Contractors may continue to file commercial SSRs at the awarding level.

Lastly, SBA proposes to amend this section to increase individuals who may sign the SSR. Specifically, the contractor's President (or equivalent at education institutions), CEO, Vice President, General Manager, or most Senior Executive for Government Procurement may sign the SSR. Currently, the contractor's President is the only individual that may sign the SSR. This is an issue because the contractor's President may not be available for signature or may not have subject matter knowledge. Thus, SBA intends to ease the SSRs process by allowing signatures from individuals who have knowledge of the content and are readily available to sign the reports in lieu of the CEO.

Section 125.3(c)(1)(xiii)(C)

SBA proposes to add a definition of contract completion in accordance with physically completed contracts under FAR 4.804-4. More specifically, under FAR 4.804-4, a contract is considered physically complete when the contractor has performed all services and/or provided all required deliveries, and the Government has accepted the services and/or accepted the supplies. In the instance of rental, use, or storage agreements, contract completion occurs when the Government has provided the contractor a notice of complete contract termination or the contract period has expired.

Under the past performance ratings program, the prime contractor must rate the first-tier small business subcontractor using the five-scale ratings system found in FAR 42.1503 (48 CFR 42.1503). The prime contractor must provide an exceptional, very good, satisfactory, marginal, or unsatisfactory rating to the first-tier small business subcontractor. In turn, subcontractors who intend to provide this rating when making an offer for a prime contract must include the following evaluation factors: (1) technical; (2) cost control; (3) schedule/timeliness; (4) management or business relations; and (5) other (as applicable).

Thus, § 125.3(c)(1)(xiii)(C) allows a first-tier subcontractor to request a subcontractor's past performance rating from the prime contractor within 30 calendar days of completion of the

prime contractor's contract with the Government. This clarifies the time a contract is considered complete, which thereby starts the "30 calendar day" window for a first-tier subcontractor to request a performance rating from the prime contractor.

Section 125.3(c)(2)

SBA proposes to amend § 125.3(c)(2) to set forth the rules for commercial subcontracting plans. First, SBA proposes to provide contractors the option to base their commercial subcontracting plans on the Federal Government's fiscal year. Currently, § 125.3(c)(2) only permits subcontractors to base their commercial subcontracting plans on their individual fiscal year. This revision permits contractors to base their commercial subcontracting plans on the Federal Government's fiscal year, if desired, so the subcontracting plan can match the SSR reporting period.

Second, SBA proposes to amend § 125.3(c)(2) to clarify how to calculate an agency's allocation on the Commercial SSR and provide a clear due date for submission of the Commercial SSR. The agency allocation percentage on the SSR is the percentage of revenue during the Government's fiscal year attributable to each Federal agency, when compared to the contractor's total revenue earned during the Government fiscal year. It should be noted that the contractor's total revenue, including its Federal and non-Federal revenue, is used in the denominator. All subcontracting with any Federal agency should be included even if the contractor does not have a subcontracting plan with the agency; and the executive level of the agency should be selected unless otherwise directed by the agency.

Third, SBA proposes to amend § 125.3(c)(2) to permit the use of a subcontractor's primary NAICS as the size of the subcontractor under a commercial subcontracting plan. This change also applies to indirect costs subcontracts, and subcontracts below the Micro-Purchase Threshold (MPT).

Section 125.3(c)(5)

Per the requirements of section 862 of the NDAA for FY2024, SBA proposes to revise the timeframe in § 125.3(c)(5) in which a prime contractor must notify the contracting officer in writing, if upon completion of the responsibilities of the small business subcontractor, that payment to the subcontractor will be untimely under the terms of the subcontract. Previously, a prime contractor was required to notify the contracting officer in writing if payment was more than “90” days past due. Under this revision, a prime contractor must notify the contracting officer in writing when the payment to a small business subcontractor is more than “30” days past due under the terms of the subcontract.

Section 125.3(c)(6)

SBA proposes to add text to § 125.3(c)(6) that states a contractor has met its subcontracting goal when it has met or exceeded its percentage goal in its subcontracting plan – whether the goals are based on total contract value or total subcontracting. This change clarifies how contracting officers look to a contractor’s percentage goal to determine whether that contractor has met its subcontracting goal. Specifically, a prime contractor’s subcontracting plan must include a statement of total dollars planned to be subcontracted to small and disadvantaged businesses under FAR 19.704(a)(2). This allocated percentage of the total subcontract dollars is considered the percentage goal for the subcontracting plan. Thus, if the contractor fails to meet its percentage goal, the contractor is required to provide the contracting officer a written explanation why it failed to meet its planned small business subcontracting goals.

Section 125.3(d)(3)(i)

SBA proposes to revise the language in § 125.3(d)(3)(i) by replacing “large” with “other than small” with the intent to clarify that application of this section includes, but is not limited to, businesses, organizations, public utilities, and State and local governments. The current language includes the term “large” business, which could be interpreted to exclude municipalities; for example, State and local governments, non-profit organizations, and public

utilities. Revising this rule will clarify the inclusion of all types of concerns, such as State and local governments, and other organizations that are not small business concerns.

Section 125.3(d)(5)

Consistent with the requirements of section 862 of the NDAA for FY2024, SBA proposes to revise the timeframe of § 125.3(d)(5) from “90” days to “30” days. Under this revision, a contracting officer must evaluate a prime contractor’s written explanation for an untimely payment to a subcontractor that is more than “30” days past due under the terms of the subcontract. The contracting officer may also consider that information when rating the contractor for past performance purposes. SBA proposes to mirror the mandatory statutory changes in § 125.3(c)(5) by amending the timeframe for the contracting officer’s evaluation from “90” to “30” days for consistency.

Section 125.3(d)(7) through (8)

SBA proposes to add new paragraph § 125.3(d)(7) to implement the requirements of section 862 of the NDAA for FY 2024. Specifically, this section allows the contracting officer to enter and modify the prime contractor’s past performance information when there is an unjustified failure to make a full or timely payment to a subcontractor subject to this section before or after close-out of the contract.

This section further stipulates that once the contracting officer makes the determination that there was an unjustified failure by the prime contractor to make a full or timely payment to a subcontractor under this section, then the prime contractor must cooperate with the contracting officer to correct and mitigate the unjustified failure. During this process, the contracting officer consults with the Director of Small Business Programs or the Director of Small and Disadvantaged Business Utilization acting or other representatives of the Federal Government to ensure compliance with small business goals. The prime contractor has a duty to cooperate until the subcontractor is made whole or the contracting officer’s determination is no longer effective, regardless of performance or close-out status of the subject contract.

SBA intends to remove § 125.3(d)(8) entirely because when the contract is awarded, the original subcontracting plan will include all options; therefore, this provision is unnecessary.

As a result of removing § 125.3(d)(8) and adding new paragraph § 125.3(d)(7), SBA proposes to redesignate the current § 125.3(d)(7) as § 125.3(d)(8).

Sections 125.3(e)(1) through (e)(5)

Similar to amendments made in § 125.3(d)(3)(i), SBA proposes to revise the language in § 125.3(e)(1) through (5) by revising “large” to “other than small” with the intent to clarify that application of this section includes, but is not limited to, businesses, organizations, public utilities, and State and local governments.

Section 125.3(e)(3)

In addition to revising “large” to “other than small” in § 125.3(e)(3), SBA proposes to add DSBS as an alternative market research tool for prime contractors to assist in identifying small business concerns that can perform all or part of the work as a subcontractor. This section currently omits DSBS as a market research tool, thus SBA intends to ensure this database is listed as one of the key market research alternatives available to contractors in addition to the currently listed tools, SAM, SUBnet and Business Matchmaking events.

Section 125.3(f)(1)

First, SBA proposes to revise § 125.3(f)(1) by removing the language “on site” because virtual meetings and calls are more common and widely accessible. Next, SBA proposes to remove the “six to eight months” for a follow-up review and replace that language with “within a year”. This revision will clarify that SBA or the agency conducting the review has at least a year to conduct a follow-up compliance review to ensure the contractor has implemented all corrective actions. Lastly, SBA proposes to include the language “the corrective actions” after “implemented”. This revision clarifies that contractors are required to complete any corrective

actions by the time of its follow-up review. Overall, this provides additional time to complete this segment of contract performance.

Section 125.3(f)(4)

SBA proposes to amend the timeframe from “30” days to within “45” days of receipt of the official compliance report. This provides a contractor that receives a marginal or unsatisfactory rating additional time to provide a written corrective action plan to SBA, or to both SBA and the agency that conducted the compliance review (if the agency conducting the review has an agreement with SBA).

Section 125.3(h)(2)

SBA proposes to revise the language in § 125.3(h)(2) to include the text “when order-level goals were required” and the text “on the underlying contract’s ISR report.” Specifically, this revision clarifies the time a contractor is required to submit small business subcontracting accomplishments, which is when order-level goals are required; and the correct agency to submit this information, which is the contracting agency on the underlying contract’s ISR report. Summarily, SBA intends to update the requirements so contractors are aware that the order-level achievements must be reported on the underlying contract’s ISR report when order-level goals are required.

Second, SBA proposes to add the language “[t]he order's subcontracting only needs to be included on the ISR’s order-level report from the inception of the order until the order is completed, and on the ISR designated as ‘final’.” This specifies the length of time an order level subcontracting must be included on the ISR’s order-level report.

Compliance with Executive Orders 12866, 12988, 13132, 13175, 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 rulemaking is significant regulatory action for the purposes of Executive Order 12866.

SBA's Regulatory Impact Analysis.

1. *Regulatory Impact Analysis: Is there a need for the regulatory action?*

This action proposes to implement a statutory requirement —the NDAA FY24— as well as simplify the subcontracting reporting process by proposing additional changes to the Subcontracting Program. The proposed rule provides an offeror with the option to base its commercial subcontracting plans on its fiscal year or the Federal Government's fiscal year; and allows for the size status of the subcontractor to be based on its primary NAICS code for commercial subcontracting plans, indirect costs subcontracts, and contracts under the MPT. The proposed rule defines executive agency and contract completion. It clarifies how to calculate the agency allocation on the Commercial SSR; when the higher tier contractors must review the lower tier ISR; and submission of SSRs for orders under multi-agency IDIQ contracts.

2. *What is the baseline, and the incremental benefits and costs of this regulatory action?*

There are three provisions associated with incremental benefits or incremental costs. SBA has determined that the remaining changes clarify or improve existing policies.

First, NDAA FY 2024 amends section 8(d)(13) of the Small Business Act to encourage faster payments to small business subcontractors. Prime contractors are required to notify contracting officers of its failure to make full or timely payments to the subcontractor within 30 days. The prime contractor must cooperate with the contracting officer until full and timely payments are made or the contracting officer's determinations are no longer effective. The contracting officer may consider the prime contractor's

failure to make a full or timely payment to a subcontractor in past performance. The existing baseline without implementing the change provides prime contractors 90 days to notify a contracting officer of late payments without any effect to past performance or incentive to cooperate with the contracting officer to resolve the failure to make timely payments. As a result, subcontractors may not receive full payments until after performance and contract completion. The most significant benefits of this proposed rule will ensure subcontractors receive timely payments and incentivize the prime contractor to cooperate with contracting officers regarding full payments to subcontractors.

Second, § 125.3(c)(1)(vi) allows a contractor's CEO, president, vice president, general manager, or most senior executive for government procurement to sign the SSRs. The current baseline only allows the CEO/President to sign the SSR. As a result, submissions of SSRs take additional time, subject to the availability and subject-matter knowledge of the CEO/President. This proposed change will benefit the process by allowing additional individuals within a firm to sign the SSRs report. SBA believes this will create more efficiency in the SSR reporting process.

Lastly, § 123.3(c)(1)(vi) would require prime contractors submit separate summary subcontracting reports (SSRs) for each ordering agency against each multi-agency indefinite delivery, indefinite quantity (IDIQ) contract. The existing baseline without implementing the change only requires prime contractors submit one SSR report to the IDIQ agency. As a result, the ordering agency may not receive proper credit towards its subcontracting goals.

The proposed change will benefit program participants by ensuring each ordering agency receives credit as required under 13 CFR 125.3(h)(3). Contractors are already required to submit SSRs to the agency that awarded the IDIQ contract, and the data should already exist. Thus, the only cost associated with the proposed change would be

the cost to complete additional SSR reports and organize existing ordering data by agency. It is difficult to calculate the cost associated with submitting SSRs. To determine a cost 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 a contractor currently spends approximately three hours to submit an SSR, the equivalent to an individual subcontracting report (ISR). That equates to approximately \$132.46 per hour, which is the mean hourly wage of \$66.23 plus 100 percent for overhead and benefits for Management Occupation (see Management Occupations (bls.gov), retrieved September 4, 2024). In FY20, 4,389 contractors submitted an ISR. SBA estimates a 5% increase, which is an approximate increase of 220 reports submitted annually. Thus, the aggregate cost of this proposed change amounts to \$87,424 annually. This proposed rule also intends to concurrently provide 15 additional days to submit SSRs under § 125.3(d)(2). Thus, SBA believes the additional time allocated in this rulemaking will resolve any undue burden, given the data for SSRs already exist.

3. What alternatives have been considered?

The alternative to the proposed rule would be to keep SBA's processes and procedures as currently stated in the Code of Federal Regulations. However, because the proposed rule intends to simplify the subcontracting reporting process, SBA does not believe this alternative will benefit the Subcontracting Program.

Additionally, this rulemaking implements section 862 of NDAA FY24. There is no alternative to implementing this statutory requirement.

This Executive order 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 considers these requirements in developing this rulemaking as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 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 System for Award Management (SAM.gov) and the Electronic Subcontracting Reporting System (eSRS). This proposed rule does not attempt to quantify anticipated present and future costs, and so the agency expects minimal impact.

2. 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?

The notice of proposed rulemaking will have a 60-day comment period and will be posted on www.regulations.gov to allow the public to comment meaningfully on its provisions.

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

Yes, the notice of proposed rulemaking implements changes; provides offerors with the option to submit their commercial subcontracting plans using either the Government's fiscal year or their fiscal year; allows a subcontractor's size status to be based on its primary NAICS code for commercial subcontracting plans, indirect costs subcontracts, and contracts under the MPT only in instances where the subcontract does not result from a solicitation with a NAICS code; and provides other clarifications.

Executive Order 12988

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

Executive Order 13175

This rulemaking does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this rulemaking 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 layers of government. Therefore, SBA has determined that this rulemaking has no federalism implications warranting preparation of a federalism assessment.

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

The notice of proposed rulemaking would make changes and clarifications to SBA's subcontracting regulation. Specifically, this rulemaking will require contractors submit a separate SSR for each ordering agency to capture subcontracts awarded during the fiscal year for that agency's order(s), so the ordering agency receives credit in accordance with 13 CFR 125.3(h)(3). This collection of information may require submission or retention of documents; however, SBA believes that this impact will be minimal. Contractors are already required to submit SSRs to the agency that awarded the IDIQ contract, so the data should already exist in the contractor's ordinary course of business recordkeeping.

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

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address 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 proposed rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns but would not affect "small organizations" or "small governmental jurisdictions" because those programs generally apply only to "business concerns" as defined by SBA regulations, in other words, to small businesses organized for profit. "Small organizations" or "small governmental jurisdictions" are non-profits or governmental entities and do not generally qualify as "business concerns" within the meaning of SBA's regulations.

There are approximately 350,000 concerns registered as small business concerns in the System for Award Management (SAM) that could potentially be impacted by the implementation of section 862. However, SBA cannot say with any certainty how many will be impacted because we do not know how many of these concerns participate in Government contracting as

subcontractors. A firm is required to register in SAM in order to participate in Federal contracting as a prime contractor, but not for purposes of subcontracting. The data does not allow SBA to estimate the cost of the proposed rule on small business concerns.

In sum, the proposed amendments would not have a disparate impact on small businesses and would increase their opportunities to participate in Federal Government contracting as subcontractors without imposing any additional costs. For the reasons discussed, SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small business concerns.

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

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

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

2. Amend § 125.3 by:

- a. Revising paragraphs (a)(1)(i)(B), (a)(1)(iii), (b)(3)(ii), (c)(1)(v) and (vi), (c)(1)(xiii)(C), (c)(2), (5) and (6), (d)(3)(i), (d)(5);
- b. Removing paragraph (d)(8);
- c. Redesignating paragraph (d)(7) as paragraph (d)(8);
- d. Adding new paragraph (d)(7); and
- e. Revising paragraphs (e)(1) through (5), (f)(1) and (4) and (h)(2).

The revisions and addition 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 contractor. The subcontracting plan must be submitted by the entity awarded the contract, which reflects subcontracting done by itself, its affiliates and if a joint venture, its joint venture partners.

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(iii) The following should not be included in the subcontracting base: internally generated costs such as salaries and wages; employee insurance; other employee benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; fines; claims; and dues; Original Equipment Manufacturer relationships during warranty periods (negotiated up front with product); utilities and other services purchased from a municipality or solely authorized by the municipality to provide services in a particular geographic region such as electricity, water, natural gas and sewer; and philanthropic contributions. Utility companies may be eligible for additional exclusions unique to their industry, which may be approved by the contracting officer on a case-by-case basis. Exclusions from the subcontracting base include but are not limited to those listed in this section.

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(b) * * *

(3) * * *

(ii) Conducting market research to identify small business subcontractors and suppliers through all reasonable means, such as performing online searches via the System for Award Management (SAM) (or any successor system), the Dynamic Small Business Search (DSBS), posting Notices of Sources Sought and/or Requests for Proposal on SBA's SUBNet, participating in Business Matchmaking events, and attending pre-bid conferences;

* * * * *

(c) * * *

(1) * * *

(v) The contractor must assign to each subcontract, and to each solicitation, if a solicitation is utilized, the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see § 121.401 of this chapter). A formal solicitation is not required for each subcontract, but the contractor must provide some form of written notice of the NAICS code and size standard assigned to potential offerors prior to acceptance and award of the subcontract. The prime contractor (or subcontractor) may rely on a subcontractor's electronic representations and certifications, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are current, accurate, and complete as of the date of the offer for the subcontract. Where the subcontract does not result from a solicitation with a NAICS code, a prime contractor may use a subcontractor's primary NAICS for size classification, only for indirect costs (in all plan types), for subcontracts issued under commercial subcontracting plans, and for subcontracts below the Micro-Purchase Threshold (MPT) as defined in FAR 2.101. If relying upon an electronic size representation, the subcontract must still include a clause in the solicitation or subcontract which provides that the subcontractor verifies by submission of the offer, or acceptance of the subcontract if an offer is not part of the procurement process, that the size or socioeconomic representations and certifications in SAM (or in the

contractor's electronic database) are current, accurate and complete as of the date of the offer for the subcontract (or as of the date of award is if an offer is not a part of the procurement process). The size certification and recertification requirements of § 121.404(g) of this chapter do not apply to subcontracts. However, if there is a merger or acquisition that causes the reissuance of the subcontract, this is considered a new subcontract. Electronic submission may include any method acceptable to the prime contractor (or subcontractor) including, but not limited to, size or socioeconomic representations and certifications made in SAM (or any successor system). With the exception of service-disabled veteran-owned small business and HUBZone, prime contractor (or subcontractor) may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract.

(vi) The contractor must submit timely and accurate ISRs and SSRs in eSRS (or any successor system), or if applicable, submit a timely SF 294, Subcontracting Report for Individual Contract, such as when a particular procurement cannot be entered into eSRS. A "final" ISR must be submitted within 45 days of contract completion. A contract should be considered complete in accordance with FAR 4.804-4. For orders placed under multi-agency IDIQ contracting vehicles that contain an individual subcontracting plan, a separate SSR should be submitted for each ordering agency capturing subcontracts awarded during the fiscal year for that agency's orders. An SSR must also be submitted to the agency with the underlying contract even if no subcontracting occurred with this agency; this SSR reflects only subcontract awards as a result of orders from that agency, if any. SSRs should be submitted to the executive agency level unless otherwise directed by the agency. Commercial SSRs may be submitted to the lower-level awarding agency. Any dollar value of subcontract should be included in the ISR and SSR reports. Executive agency under this paragraph (c)(1)(vi) means an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101 (FAR 2.101). This is the highest hierarchical agency level such as "Department

of the Interior.” For the SSRs, the contractor’s President, CEO, Vice President, General Manager, or most Senior Executive for Government Procurement may sign the report. When a report is rejected by the contracting officer, the contractor must make the necessary corrections and resubmit the report within 30 days of receiving the notice of rejection.

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(xiii) * * *

(C) A first-tier small business subcontractor must make the request for a performance rating from the prime contractor within 30 calendar days after the completion of the period of performance for the prime contractor’s contract with the Government. A contract should be considered complete in accordance with FAR 4.804-4. The prime contractor and the first-tier small business subcontractor may negotiate a later deadline for the request for a performance rating, but in no case can the prime contractor impose a deadline earlier than 30 calendar days after the completion of the period of performance for the prime contractor’s contract with the Government.

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(2) A commercial subcontracting plan covers the offeror’s fiscal year or the Federal Government’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 fiscal year for all Federal Government contracts in effect during that period. The contracting officer of the agency that originally approved the commercial subcontracting plan will exercise the functions of the contracting officer on behalf of all agencies that award contracts covered by the plan. The percentage allocation on the Commercial SSR should include all subcontracting as a prime contractor or a subcontractor with any Federal agency, even if the contractor does not have a contract or a subcontracting plan with the agency; the executive level of the agency should be selected unless otherwise directed by the agency; and the agency allocation should be each Executive Agency’s percentage of revenue

when compared to the contractor's total revenue for the Government's fiscal year. Unless the subcontract results from a solicitation with a NAICS code, a subcontractor may use its primary NAICS code for its size classification for commercial subcontracting plans. The contractor shall submit an SSR annually. SSRs are due within 45 days after the end of the Government's fiscal year.

* * * * *

(5) A prime contractor shall notify the contracting officer in writing if upon completion of the responsibilities of the small business subcontractor (i.e., the subcontractor is entitled to payment under the terms of the subcontract), the prime contractor pays a reduced price to a small business subcontractor for goods and services provided for the contract or the payment to a small business subcontractor is more than 30 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor. "Reduced price" means a price that is less than the price agreed upon in a written, binding contractual document. The prime contractor shall include the reason for the reduction in payment to or failure to pay a small business subcontractor in any written notice.

(6) If at the conclusion of a contract the prime contractor did not meet all of the small business subcontracting goals in the subcontracting plan, the prime contractor shall provide the contracting officer with a written explanation as to why it did not meet the goals of the plan so that contracting officer can evaluate whether the prime contractor acted in good faith as set forth in paragraph (d)(3) of this section. A contractor has met its goal when it has met or exceeded its percentage goal.

* * * * *

(d) * * *

(3) * * *

(i) Evidence that an other than small business prime contractor has made a good faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

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(5) Evaluating the prime contractor's written explanation concerning its payment of a reduced price to a small business subcontractor for goods and services upon completion of the responsibilities of the subcontractor or its payment to a subcontractor more than 30 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor, and considering that information when rating the contractor for past performance purposes.

* * * * *

(7) Entering or modifying the prime contractor's past performance information when there is an unjustified failure to make a full or timely payment to a subcontractor subject to this section before or after close-out of the contract. If the contracting officer makes a determination that there was an unjustified failure by the prime contract to make a full or timely payment to a subcontractor under this section, then the prime contractor must cooperate with the contracting officer, who consults with the Director of Small Business Programs or the Director of Small and Disadvantaged Business Utilization acting, to correct and mitigate the unjustified failure. The prime contractor must cooperate with the contracting officer until payment is made in full to the subcontractor or the contracting officer's determination is no longer effective, before or after the closeout of the contract.

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(e) * * *

(1) Facilitating the matching of other than small prime contractors with small business concerns;

(2) Counseling other than small business contractors on their responsibilities to maximize subcontracting opportunities for small business concerns;

(3) Instructing other than small prime contractors on identifying small business concerns by means of SAM (or any successor system), DSBS, SUBNet, Business Matchmaking events, and other resources and tools;

(4) Counseling small business concerns on how to market themselves to other than small prime contractors;

(5) Maintaining a portfolio of other than small prime contractors and conducting Subcontracting Orientation and Assistance Reviews (SOARs). SOARs are conducted for the purpose of assisting prime contractors in understanding and complying with their small business subcontracting responsibilities, including developing subcontracting goals that reflect maximum practicable opportunity for small business; maintaining acceptable books and records; and periodically submitting reports to the Federal Government; and

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(f) * * *

(1) A prime contractor's performance under its subcontracting plan is evaluated by means of compliance reviews and follow-up reviews, as a supplement to evaluations performed by the contracting agency, either on a contract-by-contract basis or, in the case of contractors having multiple contracts, on an aggregate basis. A compliance review is a surveillance review that determines a contractor's achievements in meeting the goals and other elements in its subcontracting plan for both open contracts and contracts completed during the previous 12 months. A follow-up review is done after a compliance review, generally within a year of SBA's receipt of the contractor's Corrective Action Plan, to determine if the contractor has implemented the corrective actions.

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(4) Any contractor that receives a marginal or unsatisfactory rating must provide a written corrective action plan to SBA, or to both SBA and the agency that conducted the compliance review if the agency conducting the review has an agreement with SBA, within 45 days of its receipt of the official compliance report.

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(h) * * *

(2) When order-level goals were required, contractors shall submit small business subcontracting accomplishments for individual orders to the contracting agency on the underlying contract's ISR report. The order-level goals only need to be included on the ISR's order-level report from the inception of the order until the order is completed, and on the ISR designated as final.

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Isabella Casillas Guzman,
Administrator.

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