SMALL BUSINESS ADMINISTRATION

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

RIN 3245–AH70

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

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: This proposed rule would make 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 proposes to make 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 proposed rule would also 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, include blanket purchase agreements in the list of contracting vehicles that are covered by the definitions of consolidation and bundling, and more clearly specify the requirements relating to waivers of the nonmanufacturer rule.

DATES: Comments must be received on or before November 8, 2022.

ADDRESSES: You may submit comments, identified by RIN 3245–AH70, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* and follow the instructions for submitting comments.
- *Mail (for paper, disk, or CD–ROM submissions):* Mark Hagedorn, Attorney Advisor, Office of General Counsel, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

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 Mark Hagedorn 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: Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–7625; *mark.hagedorn@sba.gov.*

SUPPLEMENTARY INFORMATION: SBA proposes to make 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. SBA also proposes to make 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 proposed rule would also make several other revisions to incorporate changes to SBA's other government contracting programs to implement a statutory amendment from the National Defense Authorization Act for Fiscal Year 2022.

Section-by-Section Analysis

Section 121.103(h)

Section 121.103(h) sets forth the rules pertaining to affiliation through joint ventures. This rule first proposes to take some of the language currently contained in the introductory text and add it to a new § 121.103(h)(1) for ease of use. SBA believes that the current introductory text is overly complex and separating some of the requirements into a separate paragraphs will be easier to understand and use. In adding a new § 121.103(h)(1), the proposed rule would redesignate paragraphs (h)(1), (2), (3), and (4) as paragraphs (h)(2), (3), (4), and (5), respectively, and would adjust cross references contained in § 121.103(h) in §§ 121.404(d) and (g)(5), 125.6(c), 125.8(a), 125.18(f)(1), 126.601(d)(1), and 126.618(c)(2).

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. Although SBA's current policy is to allow 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), SBA continues to receive questions as to whether orders beyond the two-year period are permissible. To clear up any confusion, the proposed rule would add a sentence to the introductory text of § 121.103(h) to capture SBA's current policy. SBA notes that current policy also allows for award of contracts beyond the two-year period if the offer, including price, was submitted prior to the end of the two-year period. Because there does not appear to be any confusion regarding that policy, this proposed rule does not change or amend that policy in any way.

The proposed rule would also revise Example 2 to paragraph (h) introductory text. SBA's joint venture rule previously prohibited a joint venture from receiving more than three contracts over a two-year period. SBA amended that rule to allow a joint venture to seek and be awarded an unlimited number of contracts over the two-year period. *See* 85 FR 66146, 66179 (Oct. 16, 2020). Unfortunately, when SBA amended the regulatory text to paragraph (h) it did not also amend the language in Example 2 to paragraph (h). Example 2 to paragraph (h) introductory text gave an illustration of a joint venture receiving two contracts during a two-year period and not submitting offers for any additional contracts. Because the example illustrated a situation with only two contracts, some were confused as to whether the example was applying the old three contracts over two years rule instead of the amended unlimited contracts over two years. That was not SBA's intent. This proposed rule would adjust the language in the example to specifically recognize that a joint venture can receive more than three contracts over a two-year period.

The proposed rule would also 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 would clarify 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 reason for this requirement is to allow SBA and procuring agencies to track the work done by each partner to the joint venture and to ensure that the lead small business partner upon whom eligibility for the contract is based (*e.g.,* the 8(a) partner in a joint venture for an 8(a) contract between an 8(a) protégé and its large business mentor) is actually performing a significant portion of the contract and benefitting from that performance. As SBA has previously explained, if a joint venture were permitted to be populated, employees from a large business mentor could be hired by the joint venture, perform the contract, return to the large business after contract performance, and leave the small protégé firm with few or no benefits or business development from that contract. The proposed rule would clarify, however, 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 clarifies that SBA will aggregate the revenues or employees of all partners to the joint venture.

In addition, this proposed rule would revise the ostensible subcontractor rule in redesignated § 121.103(h)(3). The proposed rule would first divide the current text contained in § 121.103(h)(2) into § 121.103(h)(3) introductory text and § 121.103(h)(3)(i) for ease of use. SBA also proposes to clarify how the ostensible subcontractor rule should apply to general construction contracts. General construction types of contracts regularly involve subcontractors with specialized experience in the specialty construction trades. The primary role of a prime contractor in a general construction project is to 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 further proposes to revise the ostensible subcontractor rule to comport with recent decisions of SBA's Office of Hearings and Appeals (OHA). In *Size Appeal of DoverStaffing, Inc.,* SBA No. SIZ–5300 (2011), 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 proposes 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. As with the existing rule, SBA still would consider all aspects of the prime contractor's relationship with the subcontractor and would not limit its inquiry to the enumerated *DoverStaffing* 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. SBA seeks comment on these proposed changes to the ostensible subcontracting rule.

Finally, the proposed rule would revise 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. Although SBA believes that is the intent of the current regulation, the proposed rule specifically incorporates that intent into redesignated § 121.103(h)(4).

Section 121.103(i)

The proposed rule would 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 (85 FR 66146 (Oct. 16, 2020)). The proposed rule merely adds back into the regulations the provision that was inadvertently removed.

Section 121.404

SBA proposes 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. As stated in the existing regulation, this size determination applies to the contract. However, SBA never intended that orders issued pursuant to that contract follow the same rule. SBA is aware of some confusion on that point. Accordingly, the proposed clarification would make clear that orders issued pursuant to such a multiple award contract that do not include price are treated similarly to orders under multiple award contracts generally. SBA believes there is no justification for exempting orders issued on these

contracts differently, simply because the contract did not require price with initial offer. Thus, the proposed rule would specifically add that size for set-aside orders will be determined in accordance with paragraph (a)(1)(i)(A) or (B) or (a)(1)(ii)(A) or (B), as appropriate.

SBA also proposes 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 would add language to clarify SBA's current intent.

The proposed rule would also clarify the recertification requirements set forth in § 121.404(g) for joint ventures. Specifically, the proposed rule would add a new § 121.404(g)(6) which would 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 would also clarify 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.

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

Section 121.404(a)(1)(i)(B) and (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). There has been some confusion as to whether a concern must qualify as small at the time of the offer of the order or whether size relates back to the award of the underlying 8(a) multiple award contract. Because size is something SBA looks at in making an eligibility determination in accepting a sole source offering, SBA intended that 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). SBA believes that the regulations are not clear on this point, and as such this proposed rule would amend §§ 121.404(a)(1)(i)(B) and (a)(1)(ii)(B), 124.501(h), and 124.502(a) to clarify that position.

Section 121.411(c)

The proposed rule would correct 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 would add the over the simplified acquisition threshold condition to § 121.411(c) and adjust the language in § 125.3(c)(1)(viii) to make the two provisions consistent.

Section 121.507

SBA is seeking comments on a proposed amendment to its Small Business Timber Set-Aside Program regulations. 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 their control.

Several timber industry stakeholders have petitioned SBA to allow a waiver of the 30% requirement in limited circumstances such as natural disasters, national emergencies, or other attenuating circumstances. SBA is proposing an amendment to § 121.507 to add paragraph (d), which would allow the Director of Government Contracting 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 seeks 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.

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 would clarify that when an SBIR/STTR offeror is determined to be a joint venturer with its ostensible subcontractor, all rules applicable to joint ventures would apply. This means that SBA will apply § 121.702(a)(1)(iii) or (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.

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 would remove any confusion and provide more consistent implementation of the size protest procedures. As such, this rule proposes to adopt 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. The proposed rule would make these 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. This rule proposes to provide 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 would also authorize 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.

Sections 121.1004(a)(ii), 125.28(d)(2), 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. A few firms have questioned whether such a protest should be deemed timely because the regulations speak only to filing a protest within five days of bid opening. Because a protest by SBA is always timely, when timeliness has been questioned in these circumstances, and the protest is sufficiently specific, SBA has adopted the protest as its own and processed it accordingly. To eliminate this needless additional step where timeliness is questioned, the proposed rule would specifically provide 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.

SBA proposes to make this change in § 121.1004(a)(ii) for size protests, in § 125.28(d)(2) for protests relating to SDVO status, 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.

Section 121.1004

The proposed rule would add a new § 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 provides additional clarity to § 121.1004(e), which specifies that premature protests will be dismissed.

Where an agency decides to reevaluate offers as a corrective action in response to a GAO protest, the proposed rule would add 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, they will again have the opportunity to protest the size of the apparent successful offeror within five business days after such notification.

Section 121.1009

Section 121.1009 details the procedures SBA's Government Contracting Area Offices use in making formal size determinations. Section 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. 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 Government Accountability Office (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 would incorporate 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 Area Office will recommence the size determination process and issue a

formal size determination within 15 business days of the GAO decision, if possible.

Sections 121.1009(g)(5), 125.30(g)(4), 126.503(a)(2), and 127.405(d)

Section 863 of the National Defense Authorization Act for Fiscal Year 2022 (NDAA FY22), Public 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 statue 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 would implement 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 would 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 would require SBA to make such a change within four business days.

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 § 121.1204 identifies the procedures for requesting and granting waivers.

The proposed rule seeks 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 would clarify that for a multiple item procurement, a contracting officer must specifically identify each item for which a waiver is sought. The proposed rule would also provide that 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.

This rule also proposes to add a provision that would prohibit 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). 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. 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. As an alternative, SBA is 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. SBA seeks comments on both approaches.

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 wavier decision 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 to apply to 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 would specifically incorporate this policy into a new § 121.1204(b)(5).

Although SBA believes that there is no current ambiguity, the proposed rule would also add 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 would add this language nevertheless to dispel any possible misunderstanding.

Finally, the proposed rule would clarify 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.

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 would update the reference to 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 North American Classification System (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 would make 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 would provide 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.

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 would change the words physical handicap to identifiable disability.

Section 124.104

Section 124.104 specifies the rules pertaining to whether an individual may be considered economically disadvantaged. Section 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 would change 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.

The proposed rule would also delete 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. Section 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 adds 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.

Section 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. 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. In order 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 would clarify that a change of ownership could apply to a former Participant as well as to a current Participant.

Section 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. In order 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 would provide 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.

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 section 8(a)(7)(A) of the Small Business Act, 15 U.S.C. 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 would add language clarifying that intent.

Section 124.108

Section 124.108 establishes other eligibility requirements that pertain to firms applying to and participating in the 8(a) BD program. Section 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 would clarify 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 would be eligible for the program.

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. This rule proposes two changes with respect to that provision. First, 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. As such, SBA proposes to amend this provision to clarify that it is intended to apply only to concerns owned by Federally recognized tribes. 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 proposes to add language allowing tribally-owned concerns organized under tribal law to waive sovereign immunity in any similar documents authorized under tribal law.

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 would add 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.

Section 124.110

The proposed rule would add 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 would clarify 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 makes that requirement explicit in the regulations.

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 (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 (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 would identify these four threshold issues that must be addressed before an application will be reviewed.

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 would remove § 124.302(b)(5), as not consistent with the statutory oversight responsibilities. SBA also believes that the requirements for graduation are adequately set forth in § 124.302(a)(1) of SBA's regulations and requests comments on whether the entire § 124.302(b) can be eliminated as unnecessary.

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). This proposed rule would clarify that 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 would merely prioritize 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 would provide 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.

Section 124.403

Section 124.403 sets forth the requirements relating to business plans. Section 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 clarifies that a Participant must submit

a new or modified business plan only if its business plan has changed from the previous year.

Sections 124.501, 125.22(d), 126.609, and 127.503(e)

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 section 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 would merely add a sentence to § 124.501(b) to clarify SBA's current position that would prohibit a contracting activity from restricting an 8(a) competition to Participants that are also certified HUBZone small businesses, certified WOSBs or eligible SDVO small businesses. SBA also proposes 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.

SBA also proposes 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.

The proposed rule would also revise the introductory text to § 124.501(g). The revised language would first require 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 section 19.805–2 of the Federal Acquisition Regulation (FAR), title 48 of the Code of Federal Regulations, and is something that should occur routinely, but believes that highlighting this in SBA's regulations would be helpful. SBA also proposes 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 seeks 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.

Finally, the proposed rule would also make 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. 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, with employees expected to telework on a significant basis due to the COVID–19 pandemic, 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 at this time. SBA Policy Notice 6000–819056 (August 25, 2021). Due to the lingering effects of the COVID–19 pandemic, the SBA Administrator has determined that requiring a bona fide place of business in a particular location continues to be impracticable and has extended the moratorium on the requirement through September 30, 2023. Once SBA determines that it is no longer impracticable to require a bona fide place of business, SBA will again require a Participant to have a bona fide place of business in a particular geographic location with respect to all construction requirements offered to the 8(a) program. As such, SBA seeks to clarify several components of the bona fide place of business requirement in this proposed rule.

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 have sought clarification of SBA's intent. The proposed rule clarifies SBA's intent.

The proposed rule would also clarify 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 would also provide 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. The proposed rule would also clarify 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 would provide 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 would clarify any confusion that currently exists. For a single award 8(a) construction contract requiring work in multiple locations, the proposed rule would provide 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 would require a Participant to have a bona fide place of business in any location where work is to be performed.

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 Simplified Acquisition Threshold (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 working days unless the agency grants an extension. This proposed rule would clarify that the ten-day acceptance timeframe under § 124.503(a) applies only to 8(a) offers made outside the 8(a) Partnership Agreement authority.

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 would merely clarify that requirement in SBA's regulations.

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 clarifies that this ten-day time period is intended to be ten business days.

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 would amend § 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.

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 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, this proposed rule clarifies 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 clarifies 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.

In addition, the proposed rule further clarifies 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 restriction in § 121.103(h) stems from SBA's belief that a joint venture should not be an on-going entity, but something with limited scope and limited duration. Thus, SBA has limited the duration that a joint venture can submit offers for the award of contracts to two years from the date of its first contract award. However, that two-year restriction does not apply to orders issued under an already awarded contract. The proposed rule would specifically clarify 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 would provide 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.

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 proposed rule would amend §§ 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. This proposed rule would clarify 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.

SBA proposes to clarify § 124.503(i)(2)(ii) by noting that an agency may award 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 where the identified 8(a) Participant is a contract holder of the multiple award contract. It was not SBA's intent to prohibit agencies from entering 8(a) sole source orders in this context. Such orders 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. Additionally, clarification of this flexibility 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. Of course, a procuring agency must offer and SBA must accept the requirement sought to be fulfilled as an 8(a) sole source order before the order can be issued.

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 would amend § 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 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 would clarify that release may occur whenever a procuring agency identifies a procurement strategy that would emphasize or target small business participation.

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) currently provides 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 adds language clarifying that intent.

However, as identified above, SBA is concerned about the business development aspects of the program for an incumbent Participant. In other words, where a Participant was previously awarded a competitive 8(a) contract, is still an eligible Participant at the completion of the contract, and is hoping to compete again for the follow-on procurement to the contract it previously performed, SBA may take that into account in its decision whether to accept a follow-on procurement on a sole source basis on behalf of an entity-owned Participant if the contract is critical to the incumbent Participant's overall business development. SBA requests 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.

Section 124.506(d)

The proposed rule clarifies SBA's rules pertaining to the award of sole source 8(a) contracts to individually-owned 8(a) Participants. The proposed rule would add 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 a FAR 6.302 exception to full and open competition exists. For example, if a procuring agency has determined that there exists an unusual and compelling urgency and has identified an individually-owned 8(a) Participant that is capable of fulfilling its needs, it 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. The Agency would be free to use its FAR 6.302 authority 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 would also clarify 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 adds language to clarify what SBA believes the current requirement is and does so in order to avoid any confusion.

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 what ''good faith efforts'' means in this context. This proposed rule seeks to provide guidance. The proposed regulatory language is how SBA has been interpreting good faith efforts since the good faith efforts change was effective. The proposed rule would provide 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 would also identify 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.

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. Although this rule proposes no specific changes as to the revenue information provided to SBA, SBA specifically requests comments as to how firms believe it would be easiest for them to meet the program year information requirements. One approach that SBA is considering is 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. SBA recognizes that this approach would exclude revenues derived during the final weeks or months leading up to a Participant's program anniversary date. However, SBA believes that this approach 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.

Sections 124.513(a), 125.18(b), 126.616(a)(2), and 127.506(a)(3)

The proposed rule would add 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 would apply 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 adds 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).

SBA specifically requests 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.

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 it. 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. This proposed rule would revise § 124.515(c) for clarity. Specifically, it would break one longer paragraph into several smaller paragraphs and would clarify 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.

Currently, a Participant (or former Participant that is still performing an 8(a) contract) must submit 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. In order to streamline the process, SBA is also considering changing where requests for waivers must be initiated from the servicing district office to the AA/BD, and requests comments on whether that would be beneficial.

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. This rule proposes to require more precise benefits back to the Native community.

Specifically, SBA is proposing 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. Each entity would decide how best to serve and meet the needs of its community, though SBA would expect some commitment in areas relating to health, education, housing, infrastructure, cultural preservation, and economic development, as appropriate. SBA requests comments on whether this Community Benefits Plan should be its own, separate plan or be included in the business plan submission and updates required as part of the annual review process. Further, SBA requests comment on the period the Community Benefits Plan should cover.

SBA understands the dual purposes of the entity-owned component of the 8(a) BD program: to develop viable small business concerns while at the same time creating opportunities to provide significant benefits to the native or disadvantaged communities that they serve. SBA seeks to ensure that both of those purposes are advanced and requests comments on how best that can be accomplished. Specifically, SBA seeks comments as to whether specific monetary targets should be established for providing support to the native or disadvantaged communities, and if that amount should change based upon the length of time an entity owns business concerns participating in the 8(a) BD program and depending upon the number of Participants an entity owns that are operating in the program. In addition, SBA requests comments as to whether there should be consequences to an entity or an entity-owned Participant that does not meet or does not make good faith efforts to meet the commitments that it made in its initial application to provide benefits to its native or underserved community.

Section 124.604 requires each entity-owned Participant to submit information relating to the benefits that the entity has provided to the Native or underserved community as part of its annual review submissions. The SBA collects this information and provides summary level reporting as part of SBA's Annual 408 Report to the Congress as required by section 408 of the Business Opportunity Development Reform Act of 1988, Public Law 100–656 (codified at section 7(j)(16) of the Small Business Act, 15 U.S.C. 636(j)(16)). For more transparent reporting, the proposed rule would provide that each entity-owned Participant must 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, whether the benefits provided meet the benefits target set forth in its Community Benefits Plan, and how the benefits provided directly impacted the native or underserved community.

SBA specifically asks for comments on how best to implement proposed changes for benefits reporting.

Section 124.1002

Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Public Law 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 Small Disadvantaged Business (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 U.S.C. 2323) was unconstitutional. *Rothe Dev. Corp.* v. *DoD,* 545 F.3d 1023. This effectively eliminated the SDB Program.

In response, the FAR Council changed the SBA protest process for SDBs in the FAR to a ''review'' process in a final rule effective October 2014 (79 FR 61746). The FAR Council stated that its changes to the SDB program were based on the Federal Circuit's decision in the *Rothe* case. 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 would add 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 copies similar authority contained in section 19.305 of the Federal Acquisition Regulation, title 48 of the Code of Federal Regulations. Under proposed § 124.1002, SBA could 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, the proposed rule would allow the contracting officer or the SBA to protest

the SDB status of a proposed subcontractor or subcontract awardee. Finally, where SBA determines that a subcontractor does not qualify as an SDB, the proposed rule would require prime contractors to 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 proposed rule would disallow SDB subcontracting credit only prospectively from the point of an adverse SDB determination.

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

SBA proposes 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 Federal Acquisition Regulation (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 is proposing to amend its regulations to adopt these changes when SBA's regulation is referring to a commercial product, a commercial service, or both. Specifically, SBA is amending the definition for ''cost of materials'' in 125.1 to refer only to commercial products. Further, SBA proposes to amend § 125.3(c)(1)(i) and (x) and (c)(2) to update the references to both commercial products and commercial services.

Section 125.1

The proposed rule would add 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 seeks to implement consistency among SBA's programs and would refer to requirements set forth in part 124 for 8(a) eligibility. SBA believes that this change is also needed to 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 proposes 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). SBA requests comments as to whether this should apply to both types of BPAs, FSS, and FAR 13.303, and whether it should apply to both single-award and multiple-award BPAs. Generally, a consolidated requirement is one that consolidates two or more previous requirements 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 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.

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. To eliminate any confusion, the proposed rule clarifies 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.''

Section 125.2

Section 125.2 sets forth guidance as to SBA's and procuring agencies' responsibilities when providing contracting assistance to small businesses. Section 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 section 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 § 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 proposes 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 contact 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.

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. Section 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 has added clarifying language to that effect.

SBA also proposes 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 does not believe bank fees should be excluded from the subcontracting base.

In addition, SBA proposes 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 believes 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.

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 would clarify § 125.6(d) accordingly.

SBA is proposing 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 would provide 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. Of course, if a small business were found to be in non-compliance during the performance of the contract and took steps to come into compliance before completion of the contract, the contractor's final rating for conformance to requirements could be satisfactory. The proposed rule would not alter the contracting officer's discretion to require contractors to demonstrate compliance with the limitations on subcontracting where the contracting officer deems it to be appropriate; it merely would provide consequences (*i.e.,* negative past performance evaluation) where the contracting officer determined that a contractor did not meet the limitation on subcontracting requirement at the conclusion of contract performance. SBA believes 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. Some have argued that there should be extenuating circumstances under which a contracting officer should still be able to give a satisfactory/positive past performance evaluation to a contractor that the contractor officer determined did not meet the applicable limitation on subcontracting requirement. SBA believes that any such discretion, if ultimately authorized, should be very limited in scope. Again, SBA believes that it is important to have consequences for small business concerns that do not meet the applicable limitation on subcontracting. SBA wants small businesses to take those requirements seriously and strive to achieve them. Nevertheless, SBA requests comments as to whether the regulations should allow a contracting officer to give a satisfactory/positive past performance evaluation to a contractor that the contractor officer determined did not meet the applicable limitation on subcontracting requirement, and, if so, under what limited circumstances should that discretion be authorized.

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 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 would add language to § 125.9(b)(3)(ii) to recognize this exemption. Specifically, the proposed rule would add 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.

The proposed rule would also amend § 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 would provide that all entities intended to participate in the mentor-protégé relationship should be identified in the mentor-protégé agreement itself.

Sections 126.306(b) and 127.304(c)

Sections 126.306 and 127.304 set forth the procedures by which SBA processes applications for the HUBZone and WOSB programs, respectively. This proposed rule would add 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, this proposed rule would add 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.

Sections 125.28(e), 126.801(e)(2), and 127.603(d)(2)

For purposes of SDVO, HUBZone and WOSB/EDWOSB contracts, the SDVO/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 SDVO program (in §§ 125.18(f) and 125.29(c)), 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 SDVO/HUBZone/WOSB/EDWOSB status protest where an interested party believes that will occur. The proposed rule would add a paragraph to each of the SDVO/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 SDVO/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 SDVO status protests and 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 would add clarifying language in §§ 125.28(e) (for SDVO), 126.801(e)(2) (for HUBZone), and 127.603(d) (for WOSB/EDWOSB).

Section 126.503(c)

The proposed rule would § 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 proposes to add this provision to eliminate any doubt.

Section 126.601(d)

The proposed rule would amend § 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.

Section 126.616(a)(1)

The proposed rule would amend § 126.616(a) to clarify that a HUBZone joint venture should be registered in the System for Award Management (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 is proposing to amend § 126.616(a) by adding a new paragraph (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.

Section 126.801

The proposed rule would amend § 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 would amend § 126.801(d)(1), addressing timeliness for HUBZone protests.

The proposed rule would add a new paragraph (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 would add a new paragraph (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.

Section 127.102

SBA proposes 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 clarifies that intent.

Section 127.200

Section 127.200 specifies the requirements a concern must meet to qualify as an EDWOSB or WOSB. In order to qualify as an EDWOSB, an entity must be a small business. Section 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. In terms of demonstrating that an applicant for either WOSB or EDWOSB certification qualifies as a small business, the proposed rule would provide that the applicant must demonstrate 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. In order 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. SBA believes that 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. As such, SBA believes that requiring an applicant to demonstrate that it qualifies as small for any industry under which it currently conducts business is more appropriate than requiring it to demonstrate that it qualifies as small under its primary industry classification. Finally, SBA believes that 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 is also proposing that a VOSB or SDVOSB must be small under the size standard corresponding to any NAICS code under which it currently conducts business activities in a separate rulemaking.

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 would clarify 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. This change would make the WOSB unconditional ownership requirement the same as that for eligibility for the 8(a) BD program.

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. Taking the two provisions together, a woman or economically-disadvantaged woman can 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. SBA is charged with determining whether a business concern is owned and controlled by one or more women or economically-disadvantaged women. 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 how many hours she devotes to the business.

This rule proposes to revise the limitations on outside activities. Per § 127.202(a), a woman or economically-disadvantaged woman must demonstrate that she controls the long-term planning and daily operations of the business. The proposed rule would continue to provide that a woman or economically-disadvantaged woman cannot engage in outside activities that prevent her from devoting sufficient time and attention to the business concern to control its management and daily operations. Where a woman claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, the proposed rule would impose a rebuttable presumption that she does not control the business concern. This is not meant to imply that a specific individual must be present at the business premises all hours that the business is open, particularly if the business is open more than a normal workday (*e.g.,* where the business is open 24 hours and has multiple shifts). In such instances the woman would merely be required to 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.

Section 127.400

Section 127.400 describes how a concern maintains its certification as a WOSB or EDWOSB. This rule proposes 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 would also amend the examples to § 127.400 to reflect the proposed change and provide additional clarity to small businesses.

SBA believes small businesses will further benefit from the proposed change because it will align the WOSB Program regulations with the continuing eligibility requirements for veteran-owned small business concerns outlined in 13 CFR 128.306. The WOSB Program permits veteran owned-certified small business concerns to submit evidence of their veteran-owned certification, along with documentation demonstrating that the firms are 51% owned and controlled by one or more women, to support their applications for WOSB Program certification. Going forward, the reverse will also be true. SBA believes that when there is reciprocity between programs, small businesses benefit from as much consistency as practicable. Regulatory alignment reduces confusion, ambiguity, and administrative burden for firms that are eligible for more than one program.

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) anticipates that this proposed rule will be 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 proposes to implement a statutory enactment—the NDAA FY22—as well as codify a federal court decision into regulation, and revise 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 created 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. What is the baseline, and the incremental benefits and costs of this regulatory action?

SBA has determined that this proposed rule includes eight proposals that are associated with incremental benefits or incremental costs. Outside of the following eight proposals, the other changes would 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 Small Business Concern (SBC) protests, HUBZone protests, or WOSB Program protests.*

SBA would amend §§ 125.30(g)(4) and 127.405(c) to provide that a firm found ineligible through a final 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.

The change extends the requirement to the SDVO SBC and WOSB programs. SBA has determined that this proposed change would impose costs on the business associated with its notification of contracting agencies of the adverse decision. The number of adverse protest decisions in the SDVOSBC and 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 proposes to amend § 121.1203 to restrict the grant of individual (*i.e.,* contract-specific) nonmanufacturer rule waivers to contracts with durations of five years or less. In the prior fiscal year, SBA granted 24 individual waivers each year 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 would 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 proposes to amend § 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. SBA would 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 proposed 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.*

Section 124.108(e) of the proposed rule states 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 obligation in those cases is $10,000. Therefore, this proposed change results in an estimated annual benefit to future 8(a) applications of $20,000, from an

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

[2] From 20 minutes of time saved by 420 applicants valued at the median 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.

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 would amend § 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 Federal Deposit Insurance Corporation (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 would be additional dollars subcontracted to small business. Assuming that the total level of small-business subcontracting stays consistent at 32%, contractors would 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 would be $228,000 annually.

The proposed rule would pose 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 would 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) would require contractors with individual subcontracting plans to report indirect costs in their individual subcontracting reports (ISRs). Contractors already are required to report indirect costs in their summary subcontracting reports (SSRs). Thus, the only cost associated with the proposed change would 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, SBA estimates the cost to be $50 per contractor with an ISR.[3] In FY20, 4,389 contractors submitted an ISR. Thus, the aggregate cost of this proposed change amounts to $220,000 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.

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.*

SBA proposes to require that, where a contracting officer determines that at the conclusion of contract performance a small business contractor fails to satisfy the limitations on subcontracting for a particular contract, 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. 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] This number is based on results from OMB's ICR Agency Submission, available at View Information Collection Request (ICR) Package (*reginfo.gov*). Retrieved April 12, 2022.

3. What are the alternatives to this rule?

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 so much of this proposed 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 proposed rule already have been applied at the case level but are not widely known. This proposed rule makes those clarifications known to the public.

Additionally, this proposed 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 proposed 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 proposed rule will not have substantial, direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA has determined that this proposed 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 proposed 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?

The proposed rule 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. SBA has also discussed some of the proposals in this 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 proposed 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 proposed 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 proposed rule is not anticipated to be 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. The proposed rule would 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 proposed 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 proposed rule relates to various small entities. The number of entities affected by the proposed 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 proposed 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 proposed rule's changes, such as that to documentation for retirement plans, reduce reporting requirements for small entities that are Participants. Additionally, the proposed rule's clarification of practices and interpretations decreases uncertainty for Participants. Therefore, SBA does not believe the proposed rule would have a disparate impact on small entities or would impose any additional significant costs on them. For the reasons discussed, SBA certifies that this proposed 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.

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 121, 124, 125, 126, and 127 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 (4) as paragraphs (h)(2) through (5), respectively;
■ c. Adding a new paragraph (h)(1);
■ d. Revising newly redesignated paragraphs (h)(3) and (4); and
■ e. Adding paragraph (i).

The revisions and additions 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 not 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, 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 on the subcontractor's experience because it lacks relevance experience of its own.

(ii) In a general construction contract, the primary and vital requirements of the contract are the management and oversight of the project, not the actual construction or specialty trade 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 joint venture employees. 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.

Example 1 to paragraph (h)(4). Joint Venture AB is awarded a contract for $10M. The joint venture will perform 50% of the work, with A performing $2M (40% of the 50%, or 20% of the total value of the contract) and B performing $3M (60% of the 50% or 30% of the total value of the contract). Since A will perform 40% of the work done by the joint venture, its share of the revenues for the entire contract is 40%, which means that the receipts from the contract awarded to Joint Venture AB that must be included in A's receipts for size purposes are $4M. A must add $4M to its receipts for size purposes, unless its receipts already account for the $4M in transactions between A and Joint Venture AB.

* * * * *

(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.

■ 3. Amend § 121.404 by:

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

■ b. Removing the reference ''§ 121.103(h)(2)'' in paragraph (d) and adding in its place ''§ 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 ''§ 121.103(h)(4)'' in paragraph (g)(5) and adding in its place ''§ 121.103(h)(3)''; and

■ e. Adding paragraph (g)(6).

The revisions and addition 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) of this chapter 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) of this chapter 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) *Multiple award contract where price not required.* 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 paragraph (a)(1)(i)(A) or (B) or (a)(1)(ii)(A) or (B) of this section, 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) of this section, 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)).

* * * * *

■ 4. 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) *Notice of awardee.* 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.

* * * * *

■ 5. Amend § 121.507 by adding paragraph (d) 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 (D/GC) may waive one or more of the requirements set forth in paragraphs (a)(3) and (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 D/GC and contain facts, arguments, and any appropriate supporting documentation as to why a waiver should be granted.

■ 6. Amend § 121.702 in paragraph (c)(7) by revising the first sentence and adding a sentence following the first sentence 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. * * *

* * * * *

■ 6. Amend § 121.1001 by revising paragraphs (a)(6)(i), (a)(8)(i), (a)(9)(i), (b)(2)(ii) introductory text, and (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 8(a) contract awards 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.

* * * * *

■ 7. Amend § 121.1004 by:

■ a. Revising paragraph (a)(1);

■ b. Adding the words ''without a reserve'' at the end of paragraph (a)(2)(iii); and

■ c. Adding paragraphs (f) and (g).

The revision and addition 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) *GAO corrective action.* SBA will 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 protest before the Government Accountability Office (GAO). 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.

■ 8. Amend § 121.1009 by revising paragraphs (a)(1) and (3) and (g)(5) 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:

(i) If no protest is pending before GAO, the SBA Area Office will issue a formal size determination within 15 business days, if possible;

(ii) If a protest is pending before GAO, the SBA Area Office will place the size determination case in suspense. Once GAO issues a decision, the SBA 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.

* * * * *

(3) 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.

* * * * *

■ 9. Amend § 121.1203 by:
■ a. Redesignating paragraph (d) as paragraph (g);
■ b. Adding a new paragraph (d) and paragraphs (e) and (f); and
■ c. In newly redesignated paragraph (g)(2), removing ''(d)(1)'' and adding ''(g)(1)'' in its place.

The additions read as follows:

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

* * * * *

(d) *Applicability of individual waiver.* 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) *Long term contracts.* SBA will not grant an individual waiver in connection with a long-term contract (*i.e.,* a contract with a duration of longer than five years, including options).

(f) *Multiple item procurements.* 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's waiver applies only to the specific item(s) identified, not to the entire contract.

* * * * *

■ 10. Amend § 121.1204 by:
■ a. Revising paragraphs (b)(1)(i) and (ii);
■ b. Adding a sentence after the first sentence in paragraph (b)(1)(iii);
■ c. Redesignating paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4), respectively;
■ d. Adding a new paragraph (b)(2);
■ e. Revising newly redesignated paragraph (b)(4); and
■ f. Adding paragraph (b)(5).

The revisions and additions 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]

■ 11. 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

■ 12. 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.

■ 13. 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 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 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 Associate Administrator for Business Development (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]

■ 14. Amend § 124.103 by removing the words ''physical handicap'' in paragraph (c)(2)(i) and adding in their place the words ''identifiable disability''.
■ 15. 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 reads 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.

* * * * *

■ 16. Amend § 124.105 by:
■ a. Revising paragraphs (h)(2) and (i)(1); and
■ b. Adding a sentence after the first sentence in paragraph (i)(2).

The revisions and addition 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. * * *

* * * * *

■ 17. 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.

* * * * *

■ 18. Amend § 124.108 by adding a 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.

■ 19. Amend § 124.109 by revising the second sentence of paragraph (c)(1) and 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

* * * * *

■ 20. Amend § 124.110 by:
■ a. Adding paragraph (d)(3);
■ b. Redesignating paragraphs (e) through (h) as paragraphs (f) through (i), respectively; and
■ c. Adding a new paragraph (e).

The additions 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, 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. 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, board members, and/or leaders 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 (§ 124.106(a)) 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]

■ 21. Amend § 124.111 by removing the words ''SIC code'' in paragraph (d) introductory text and adding in their place the words ''NAICS code.''

■ 22. 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 Division of Program Certification and Eligibility (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 of this chapter 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 (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 a complete application package 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.

* * * * *

■ 23. Amend § 124.302 by:

■ a. Revising paragraph (b)(4);

■ b. Removing paragraph (b)(5); and

■ c. Redesignating paragraphs (b)(6) and (7) as paragraphs (b)(5) and (6), respectively.

The revision reads as follows:

§ 124.302 What is graduation and what is early graduation?

* * * * *

(b) * * *

(4) Current ability to obtain bonding, where applicable;

* * * * *

§ 124.303 [Amended]

■ 24. Amend § 124.303 by removing ''§ 124.507'' in paragraph (a)(15) and adding in its place ''§ 124.509.''

■ 25. Amend § 124.304 by:

■ a. Revising paragraph (b); and

■ b. Removing ''§ 124.1010'' in paragraph (f)(3) and adding in its place ''§ 124.1002''.

The revision reads as 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.

* * * * *

■ 26. Amend § 124.402 by adding a sentence to 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.

* * * * *

■ 27. Amend § 124.403 by:

■ a. Adding two sentences after the first sentence in paragraph (a); and

■ b. Removing ''§ 124.507'' in paragraph (c)(1) and adding in its place ''§ 124.509''.

The addition reads 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. A Participant must submit a new or modified business plan only if its business plan has changed from the previous year. * * *

* * * * *

■ 28. Amend § 124.501 by:

■ a. Revising paragraph (b), the introductory text to paragraph (g), the first sentence of paragraph (h), and the introductory text to paragraph (k);

■ b. Redesignating paragraph (k)(4) and (5) as paragraphs (k)(7) and (8), respectively; and

■ c. Adding new paragraphs (k)(4) and (5) and paragraphs (k)(6) and (9).

The revisions and additions 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 limitations on subcontracting (§ 124.510) and/or non-manufacturer rule (§ 121.406(b)) 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 women-owned small business (WOSB), or 8(a) and service-disabled veteran-owned (SDVO) small business).

* * * * *

(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, 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.

(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 is 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 be performed.

* * * * *

■ 29. 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 (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.

* * * * *

■ 30. Amend § 124.503 by:

■ a. Revising the introductory text to paragraph (a) and paragraphs (a)(4)(ii) and (a)(5);

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

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

The revisions and additions 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 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 SBA prior to issuing the order that it intends to procure such specified work through an order under an 8(a) Multiple Award 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.

* * * * *

(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) of this chapter 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;

* * * * *

■ 31. Amend § 124.504 by:

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

■ i. Removing the word ''notify'' and adding in its place ''coordinate with'' wherever it appears;

■ ii. Removing the word ''SBA'' in the second sentence of paragraph (d)(1) introductory text and adding in its place the words ''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''; and

■ iii. Adding a sentence following the second; and

■ b. Revising paragraph (d)(3).

The addition and revision 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) * * * 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 (d) 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.

* * * * *

■ 32. Amend § 124.506 by revising paragraph (b)(3) and adding two sentences to 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 (d) 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 the Defense Federal Acquisition Regulation Supplement (DFARS) at 48 CFR 219.808–1(a).

■ 33. Amend § 124.509 by adding paragraphs (d)(1)(i) and (ii) to read as follows:

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

* * * * *

(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, would have given the Participant sufficient revenues to achieve the applicable non-8(a) business activity target during its just completed 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.

* * * * *

■ 34. Amend § 124.513 by adding paragraph (a)(3) to read as follows:

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

(a) * * *

(3) 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.

* * * * *

■ 35. Amend § 124.515 by revising paragraph (c) 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?

* * * * *

(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) 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.

(2) 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.

* * * * *

■ 36. 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]

■ 37. 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)''.

■ 38. Revise § 124.604 to read as follows:

§ 124.604 Report of benefits for firms owned by Tribes, ANCs, NHOs, and CDCs.

(a) Each entity having one or more Participants in the 8(a) BD program must establish a Community Benefits Plan that outlines the anticipated approach it expects to deliver to strengthen its Native or underserved community.

(b) As part of its annual review submission (*see* § 124.602), each Participant owned by a Tribe, ANC, NHO, or CDC must 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, whether the benefits provided meet the benefits target set forth in its Community Benefits Plan, and how the benefits provided directly impacted the native or underserved community. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO, or CDC to the affected community.

■ 39. 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

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

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

■ 41. Amend § 125.1 by:

■ a. Revising the definition of ''Contract bundling, bundled requirement, bundled contract, or bundling'';
■ b. Removing the words ''commercial items'' from the definition of ''Cost of materials'' 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'' in alphabetical order; and
■ d. Revising the definition of ''Substantial bundling''.

The revisions and additions read as follows:

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

* * * * *

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) 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 concerns 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.

■ 42. Amend § 125.2 by adding a sentence after the second sentence in paragraph (d)(2)(ii) introductory text 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;

* * * * *

■ 43. 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) and the first sentence of paragraph (c)(1)(viii);
■ e. Removing the words ''commercial items'' in paragraph (c)(1)(x) and adding in their place the words ''commercial products or commercial services''; and
■ f. 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 or sales to a corporation, company, joint venture, or subdivision that is an affiliate of the prime contractor or subcontractor are not included in the subcontracting base. Subcontracts by first-tier affiliates 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 include indirect costs in its subcontracting 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). These costs must also 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.

* * * * *

■ 44. Amend § 125.6 by:

■ a. Removing ''§ 121.103(h)(4)'' in paragraph (c) and adding in its place ''§ 121.103(h)(3)'';

■ b. In paragraph (d) introductory text:

■ i. Revising the first sentence; and

■ ii. Adding a sentence after the first sentence;

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

■ d. Adding a new paragraph (e).

The revision and additions read as follows:

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

* * * * *

(d) * * * 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 a contracting officer determines that a contractor has not met the applicable limitation on subcontracting requirement at the conclusion of contract performance, the contracting officer may not give a satisfactory or higher past performance rating for the appropriate factor or subfactor in accordance with the FAR at 48 CFR 42.1503.

* * * * *

§ 125.8 [Amended]

■ 45. Amend § 125.8 by:

■ a. Removing ''§ 121.103(h)(3)'' in paragraph (a) and adding in its place ''§ 121.103(h)(4)''; and

■ b. Removing ''paragraph (d)'' in paragraph (b)(2)(vii) wherever it appears and adding in its place ''paragraph (c)''.

■ 46. 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; and

■ c. Adding a new paragraph (e)(1)(ii).

The revision and addition 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 protégés 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. 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;

* * * * *

■ 47. Amend § 125.18 by:

■ a. Adding a sentence to the end of paragraph (b) introductory text; and

■ b. Removing ''§ 121.103(h)(4)'' in paragraph (f)(1) and adding in its place ''§ 121.103(h)(3)''.

The addition reads as follows:

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

* * * * *

(b) * * * ASDVO SBC cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract set-aside or reserved for SDVOs.

* * * * *

■ 48. Amend § 125.22 by adding paragraph (d) to read as follows:

§ 125.22 When may a contracting officer set-aside a procurement for SDVO SBCs?

* * * * *

(d) *Restricting competition.* A procuring activity cannot restrict an SDVO SBC competition (for either a contract or order) to require SBA socioeconomic certifications other than SDVO SBC certification (*i.e.,* a competition cannot be limited only to business concerns that are both SDVO SBC and 8(a), SDVO SBC and HUBZone, or SDVO SBC and WOSB).

■ 49. Amend § 125.28 by adding a sentence to the end of paragraph (d)(2) and revising paragraph (e) to read as follows:

§ 125.28 What are the requirements for filing a service-disabled veteran-owned status protest?

* * * * *

(d) * * *

(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.

* * * * *

(e) *Referral to SBA.* The contracting officer must forward to SBA any non-premature SDVO status protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send all protests, along with a referral letter, directly to the Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416 or by fax to (202) 205–6390, marked Attn: Service-Disabled Veteran 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 contract was sole source or set-aside; whether the protester submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer (*i.e.,* made the self-representation that it was a SDVO SBC); 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 protester received notification about the apparent successful offeror, if applicable; and whether a contract has been awarded.

(2) Where a protestor alleges that an SDVO SBC is unduly reliant on one or more subcontractors that are not SDVO SBCs or a subcontractor that is not an SDVO SBC 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.

■ 50. Amend § 125.30 by revising paragraph (g)(4) to read as follows:

§ 125.30 How will SBA process an SDVO protest?

* * * * *

(g) * * *

(4) A concern found to be ineligible may not submit an offer as an SDVO SBC on a future procurement unless it demonstrates to SBA's satisfaction that it has overcome the reasons for its ineligibility set forth in the protest (*e.g.,* it changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8) and SBA issues a decision to this effect. 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 an SDVO SBC on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of the adverse SDVO SBC determination.

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

(ii) If a business concern fails to update its SDVO SBC 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.

PART 126—HUBZONE PROGRAM

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

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a; Pub. L. 111–240, 124 Stat. 2504.

■ 52. Amend § 126.306 by adding paragraphs (b)(1) and (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.

* * * * *

■ 53. 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 (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, after admission to the HUBZone program, SBA discovers that false information has been knowingly submitted by a certified HUBZone small business concern, SBA will propose the firm for decertification pursuant to the procedures described in paragraph (a) of this section.

(d) *Effect of decertification.* Once SBA has decertified a concern, the concern cannot self-certify 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.

■ 54. Amend § 126.601 by revising paragraph (d) 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) SBA will find that a prime HUBZone contractor is performing the primary and vital requirements of a 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.

■ 55. Add § 126.609 to read as follows:

§ 126.609 Can a HUBZone competition be limited 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).

■ 56. 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 set-aside or reserved for certified HUBZone small business concerns.

* * * * *

§ 126.618 [Amended]

■ 57. Amend § 126.618 by removing ''§ 121.103(h)(4)'' in paragraph (c)(2) and adding in its place ''§ 121.103(h)(3)''.

■ 58. Amend § 126.801 by:

■ a. Revising paragraph (b);

■ b. Adding paragraph (d) introductory text; and

■ c. Revising paragraphs (d)(1) and (2) and (e).

The revisions and additions 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 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 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 at the time of its initial certification or its most recent annual recertification, without setting forth specific facts or allegations, is insufficient and will be dismissed.

(3) A protest asserting that a concern was not in compliance with the HUBZone principal office and/or 35% HUBZone residency requirements at the time of offer or award will be dismissed.

(4) 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.

(5) 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.

(6) 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 the protested firm did not have at least 20% of its employees residing in a HUBZone on the anniversary of its HUBZone certification.

* * * * *

(d) * * * 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 contact, 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

■ 59. 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.

■ 60. Amend § 127.102 by removing the definition of ''WOSB'' and adding the definition of ''Women-Owned Small Business (WOSB)'' in alphabetical order 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 is small pursuant to part 121 of this chapter, 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.

* * * * *

■ 61. 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 as defined in part 121 of this chapter for the size standard corresponding to any NAICS code under which it currently conducts business activities; and

* * * * *

(b) * * *

(1) A small business as defined in part 121 of this chapter for the size standard corresponding to any NAICS code under which it currently conducts business activities; and

* * * * *

■ 62. Amend § 127.202 by revising the first sentence of paragraph (b) and paragraph (c) 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). * * *

(c) *Limitation on outside obligations.* The woman or economically-disadvantaged woman who holds the highest officer position of the business concern may not engage in outside obligations 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.

* * * * *

■ 63. 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 obligations.* The woman or economically-disadvantaged woman who holds the highest officer position of the business concern may not engage in outside obligations 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.

* * * * *

■ 64. Amend § 127.304 by adding paragraphs (c)(1) and (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 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.

* * * * *

■ 65. 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 1 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 1 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.

■ 66. Amend § 127.405 by redesignating paragraph (c) as paragraph (e) and adding paragraph (c) and paragraph (d) 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) *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.

* * * * *

■ 67. Amend § 127.503 by redesignating paragraphs (e) through (g) as paragraphs (f) through (h), respectively, and 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 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 service-disabled veteran owned (SDVO)).

* * * * *

§ 127.504 [Amended]

■ 68. Amend § 127.504 by removing ''§ 121.103(h)(2)'' in paragraph (g)(1) and adding in its place ''§ 121.103(h)(3)''.

■ 69. 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 set-aside or reserved for WOSBs or EDWOSBs.

* * * * *

■ 70. 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 small business concern (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.

Isabella Casillas Guzman,

Administrator.

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