

**SMALL BUSINESS ADMINISTRATION****13 CFR Parts 121, 124, and 134****Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals****AGENCY:** Small Business Administration.**ACTION:** Proposed rule.

**SUMMARY:** In response to President Clinton's government-wide regulatory reform initiative and the Department of Justice's review of Federal procurement affirmative action programs, the Small Business Administration (SBA) proposes to amend both the eligibility requirements for, and contractual assistance provisions within, the SBA's 8(a) Business Development (8(a) BD) program. The proposed rule would change the name of the program from the Minority Small Business and Capital Ownership Development program to the 8(a) BD program to better reflect the purpose of the program. This rule is designed to streamline the operation of the 8(a) BD program, to ease certain restrictions perceived to be burdensome on Program Participants, to clarify certain eligibility requirements, and to delete obsolete regulations.

**DATES:** Comments must be submitted on or before October 14, 1997.

**ADDRESSES:** Written comments should be addressed to William Fisher, Acting Associate Administrator for Minority Enterprise Development, U.S. Small Business Administration, 409 3rd Street, SW., Suite 13, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:**

Arthur E. Collins, Jr., Assistant Administrator for Program Development, Office of Minority Enterprise Development, at (202) 205-6410.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton issued a Memorandum to federal agencies, directing them to simplify their regulations. In response to this directive, SBA completed a page-by-page, line-by-line review of all of its then existing regulations to determine which might be revised or eliminated. Revisions to 13 CFR Part 124 awaited a review of all Federal procurement affirmative action programs by the Department of Justice (DOJ). On May 23, 1996, DOJ published in the **Federal Register** a comprehensive proposal for tailoring affirmative action programs in the Federal procurement arena (see 61 FR 26042), and on May 9, 1997 the Department of Defense, the General

Services Administration, and the National Aeronautics and Space Administration proposed amendments to the federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business (SDB) concerns. In response to and in conjunction with the DOJ and FAR reform proposals, SBA proposes specific amendments to 13 CFR Part 124, its regulations governing the 8(a) Business Development (8(a) BD) program which is authorized by sections 7(j)(10) and 8(a) of the Small Business Act, 15 U.S.C. 636(j)(10), 637(a) (contained in subpart A of part 124), and those relating to the certification and protest of small disadvantaged businesses (subpart B of part 124). For the most part, SBA's proposed changes in response to the DOJ and FAR proposals are contained in subpart B of part 124. At the same time, SBA also proposes to streamline the entire Part 124, and to make several substantive changes in part A of the 8(a) BD regulations where needed. SBA also proposes to make changes to SBA's size regulations (part 121) to permit size protests and appeals of Standard Industrial Classification (SIC) code designations in connection with 8(a) competitive procurements, and to exclude certain joint venture arrangements from SBA's affiliation rules. These latter changes should increase the potential pool of small businesses available to compete for particular procurements. SBA believes that this change should encourage contracting officers to consider small business contractors more closely before determining a procurement strategy. Finally, this proposed rule would transfer the procedures relating to certain statutorily authorized appeals in the 8(a) program from part 124 to part 134 of 13 CFR.

In response to the DOJ review of Federal affirmative action procurement programs, this rule would develop standards and procedures by which a firm can apply to be recognized as a small disadvantaged business (SDB). Under the proposal, private sector organizations or business concerns (called Private Certifiers when approved by SBA) would determine whether a firm is owned and controlled by specified individuals claiming to be disadvantaged. Use of the term "Private Certifier" is not meant to exclude state agencies from applying for and receiving Private Certifier status. Once a firm receives a determination that it is owned and controlled by the individual(s) claiming to be disadvantaged from a Private Certifier (or from SBA if a Private Certifier is not

reasonably available), it would be required to submit evidence of that determination to the appropriate procuring agency, or to SBA if the agency has an agreement with SBA, for a disadvantaged status determination and SDB certification. Individuals that are members of designated groups would be presumed to be socially and economically disadvantaged. Other individuals would be required to submit a narrative statement identifying personally how their entry into or advancement in the business world has been impaired because of their individual social disadvantage, and how their ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. These standards and procedures would be completely separate from the 8(a) BD requirements and contained in an entirely rewritten subpart B to part 124. The rule would develop procedures for placing firms on and removing them from an SBA-maintained on-line register of certified SDBs. It would also provide regulatory authority for SBA, in its discretion, to limit 8(a) BD program entry, accelerate program graduation, and limit the numbers of 8(a) contracts available as a means of responding to benchmark achievements in particular industries.

The proposed rule is also designed to streamline the operation of the 8(a) BD program, to ease certain restrictions perceived to be burdensome on Participants, to amend certain eligibility procedures, and to delete obsolete regulations. SBA considered the need for each section of its current regulations in developing this proposal. Any regulatory provisions that SBA deemed duplicative are proposed to be removed, while those that appeared wordy or unclearly written have been rewritten in this proposed rule. The proposed rule also reorganizes the regulations into identifiable substantive areas for ease of use and clarity. The proposed unnumbered substantive category headings within subpart A of part 124 would be: Provisions of General Applicability; Eligibility Requirements for Participation in the Minority Enterprise Development Program; Applying to the 8(a) BD Program; Exiting the 8(a) BD Program; Business Development; Contractual Assistance; Miscellaneous Reporting Requirements; and Management and Technical Assistance Program. The proposed rule would also change all references to SBA's Office of Minority Small Business and Capital Ownership Development (MSB&COD) to the Office of 8(a) Business Development to

emphasize that individuals participating in the program need not be members of minority groups and the stress the importance of assisting participating firms in their overall business development.

SBA has attempted to rewrite the regulations in plain English wherever possible. To this end, SBA has written proposed section headings in question format for ease of use, and has tried to eliminate all unnecessary verbiage from the regulations.

This proposed rule would amend eligibility procedures for admission to the 8(a) BD program and also amend contractual assistance provisions within the 8(a) BD program. Of particular note, this rule would liberalize the standard of review for non-group members seeking disadvantaged status from a clear and convincing evidence test to a preponderance of the evidence standard, eliminate the requirement that a Participant must have specified SIC codes approved by SBA in its business plan in order to be eligible for 8(a) contracts, establish consistent remedial measures for firms that do not meet their competitive business mix targets, ease certain joint venture restrictions, and establish a mentor/protege program for developing 8(a) Participants.

This rule would clarify that 8(a) BD eligibility decisions are based on the facts before the Associate Administrator for 8(a) Business Development (AA/8(a)BD) at the time of his/her eligibility decision. The rule would specify that actual control of the applicant concern must be in the hands of one or more socially and economically disadvantaged individuals at the time the appropriate field office of the Division of Program Certification and Eligibility (DPCE) determines that an application for the 8(a) BD program is complete. Potential control or the power of disadvantaged individuals to change the applicant concern's Board of Directors or other aspects of control so that the applicant concern could be controlled by disadvantaged individuals, no matter how easily exercised, would not satisfy the requirement that the applicant be actually controlled by disadvantaged individuals at the time the DPCE field office determines an application to be complete. SBA believes that potential abuses would be greatly lessened by the clarifications made in this rule.

This proposed rule would also make changes, as needed, in various other eligibility and 8(a) contracting requirements. These changes are identified below in the section by section analysis of this proposed rule. Further, several typographical errors or

inadvertent omissions would be corrected by this proposed rule. Finally, several obsolete references would be eliminated.

SBA invites comments on the proposed rule, and on any additional ways to improve the 8(a) BD program.

#### Section By Section Analysis

The following is a section by section analysis of each provision of SBA's regulations that would be affected by this proposed rule:

Section 121.103 would be amended so that certain joint venture arrangements would be excluded from the normal affiliation rules. The purpose of the proposal is to encourage contracting officers to use small business contractors to a greater extent. With the consolidation of procurements becoming an increasing reality, some contracting officers may feel that requirements are too big for small business to perform successfully. The proposed rule would permit two or more small business concerns to joint venture for a particular procurement and be considered a small business concern so long as each concern individually was small. In other words, the joint venture would receive an exclusion from the normal affiliation rules. SBA would not apply the exclusion to all procurements, but, rather, only to higher dollar value procurements where the likelihood that individual small business concerns can successfully offer on and perform the requirement is reduced. A large business could not, however, split into two smaller business entities under the same control in order to joint venture for a particular procurement reserved for small business.

Specifically, under the proposal, a joint venture of two or more business concerns could submit an offer as a small business for a non-8(a) federal procurement without regard to affiliation based on the joint venture arrangement so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract where the procurement exceeded a specified dollar amount. For a procurement having a revenue-based size standard, the affiliation exclusion would apply if the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract. For a procurement having an employee-based size standard, the affiliation exclusion would apply if the procurement exceeds \$10 million. This same rule would apply to competitive 8(a) procurements, with two additional requirements. Pursuant to proposed § 124.512(b), in order to receive the

exclusion from affiliation, there must be at least one 8(a) concern to the joint venture which is smaller than one half the size standard corresponding to the SIC code assigned to the procurement, and at least 51% of the work under the joint venture must be done by one or more of these smaller 8(a) firms.

The proposed rule also would amend the size regulations to permit firms approved by SBA under § 124.519 to be a mentor and protege to submit an offer as a joint venture and be considered a small business, provided the protege qualifies as small for the size standard corresponding to the procurement.

Sections 121.1001(a) and 121.1103(a) would be amended to permit size protests and appeals of Standard Industrial Classification code designations, respectively, in connection with competitive 8(a) procurements. SBA believes that competitive 8(a) procurements should as closely parallel normal Government contracting procedures as possible. Size protests and SIC appeals would still not be available for sole source 8(a) contracts.

Section 124.1 would be amended to delete unnecessary and duplicative language.

Section 124.1(b) would be deleted as a separate subsection. The substance of paragraph (b)(1) would be transferred to § 124.501.

Present § 124.2 would be deleted as unnecessary, administrative material.

Present § 124.3 would be deleted as unnecessary, administrative material.

Present § 124.4 would be deleted as obsolete since the Commission on Minority Business Development completed its task and no longer exists.

Section 124.5 would be deleted as unnecessary since proposed § 124.108(a) would provide for a review of an individual's character.

Section 124.6 would be deleted and the substance of paragraph (b) transferred to part 121 of this title for misrepresentations relating to size status, and § 124.501(i) for those relating to disadvantaged status.

Section 124.7 would be eliminated as duplicative of Part 103 of this title and Subpart 3.4 of the Federal Acquisition Regulation (FAR), Title 48 of the Code of Federal Regulations.

Section 124.100 would be redesignated as § 124.3. Those definitions that SBA deemed to be unnecessary or obsolete due to other changes in the proposed rule would be eliminated from this section. Also, the definition of "Unconditional ownership" in present § 124.100 would be amended. The revised definition would explain that a disadvantaged

owner may use his or her ownership interest (e.g., stock) in an applicant or Participant concern as collateral for financing during the normal course of business without affecting his or her "unconditional" ownership in such concern, provided that complete control of the ownership interest remains with the disadvantaged owner absent any default in fulfilling the terms of the financing. However, events of default must be defined in commercially reasonable ways. Events of default beyond those that are deemed commercially reasonable could lead to a conclusion that unconditional ownership is not in the hands of the disadvantaged owner. This clarification is not intended to require a concern to obtain financing through a financial institution or to preclude, for example, seller-financed transactions. It is intended only to permit financing terms that are reasonable within the marketplace. This change is essential to ensure that applicants and Participant concerns have the flexibility they need to raise necessary capital. The requirement that disadvantaged owners "unconditionally" own and control an applicant or Participant concern would thus be clarified so as to not restrict a firm's ability to raise capital under normal commercial terms and conditions to assist it in becoming viable.

Present § 124.100 would be amended further to correct a typographical error in the definition of "Primary industry classification."

Section 124.101 would be amended by rewording it for clarity, by transferring the requirement for written eligibility decisions to new § 124.204(d), and by deleting paragraph (c), which is generally contained in redesignated § 124.112(c). The provisions relating to reconsiderations would be written more plainly. An applicant denied 8(a) BD admission based solely on reasons of social disadvantage, economic disadvantage, ownership or control would still have the right to appeal to SBA's Office of Hearings and Appeals (OHA), and all applicants would continue to have the right to reapply in 12 months from the Agency's final decision denying program admission.

The portion of § 124.101(a) concerning reconsideration and that concerning appeal rights is duplicative of language currently contained in §§ 124.206(c) (1) and (2), respectively. SBA believes that it is not needed in both places. In this rule, reconsiderations would appear only in proposed § 124.205, while appeal rights would appear only in proposed § 124.206. The first sentence of current

§ 124.101(b) would be transferred to proposed § 124.112, and the remainder of this paragraph would be deleted as obsolete.

Sections 124.102 (a) and (b) would be amended by eliminating obsolete references. The proposed rule would further amend § 124.102 by transferring the substance of paragraph (c) to proposed § 124.112 and by transferring the substance of paragraph (d) to proposed § 124.501(h).

Section 124.103 would be amended by redesignating it as § 124.105 and by adding a new paragraph (a) that would require direct ownership of 8(a) BD applicants or Participants by disadvantaged *individuals*. This statutory requirement is currently set forth in § 124.109, but SBA believes that it should be added to this section for clarification purposes. SBA, however, recognizes the existence of current trust and estate planning techniques, such as living trusts, and invites comments on whether and, if so, how its ownership rules can be liberalized to permit trust-owned concerns in the 8(a) BD program in limited instances without violating the statutory requirement that 8(a) BD concerns be owned by individuals, and also without permitting abuses in the program.

Present §§ 124.103 (a) and (b) would be redesignated to become §§ 124.105 (b) and (d). A new paragraph (c) would be added for limited liability companies. Present §§ 124.103 (c) and (d) would be consolidated into proposed § 124.105(e).

Pursuant to proposed §§ 124.105 (g) and (h), SBA would aggregate the ownership interests of a business concern and its principal(s) in determining whether a non-disadvantaged individual or business concern exceeds the 10 percent equity ownership limitations (or, in the case of a former Participant, the 20 percent equity ownership limitations) established by present §§ 124.103 and 124.104.

Proposed § 124.105(i) would make clear that a 8(a) BD concern may substitute one disadvantaged individual for another without invoking the termination for convenience/waiver provision of present § 124.317 (redesignated as § 124.514 in the proposed rule) with respect to any 8(a) contracts that it has been awarded. Provided program eligibility is maintained and SBA approves a substitution of one disadvantaged individual for another, performance of 8(a) contracts already received could continue without seeking a waiver under present § 124.317. SBA believes that the statutory termination for

convenience/waiver provision did not intend to prohibit the performance of an 8(a) contract by the Participant concern that initially received it simply where there has been one or more approved changes of particular individuals upon whom eligibility of the concern was based. This change is necessary to apprise procuring agencies and Participant concerns that termination of 8(a) contracts is not required in such instances.

This proposed rule would also add a new § 124.105(k), requiring that SBA consider applicable state community property laws on the respective ownership interests in an applicant concern or a Participant. This revision would not be a change in current SBA policy.

Section 124.104 would become proposed § 124.106 and its introductory text would be amended to clarify that the applicant concern must be actually controlled and managed by a disadvantaged individual. The unexercised right of the disadvantaged individual to bring about a change in the control or management of the applicant concern is not adequate to satisfy this requirement.

Proposed § 124.106(a) would be reorganized for greater clarity and easier use. Of particular note, § 124.106(a) would be amended to specify that one or more disadvantaged individuals who are determined to manage the applicant or Participant concern must devote full-time to the business during normal business hours. This means that a disadvantaged individual must be physically located at the offices of the applicant or Participant concern during most normal business hours, or devoting his or her full time efforts to the business away from its offices through marketing and outreach. The term "normal business hours" is intended to mean that the applicant or Participant concern be open during the normal 40 hour work week of most business concerns. Thus, an applicant would not meet this requirement if its disadvantaged owner was present at the applicant's offices only at night or on the weekends and worked outside the applicant during its normal business hours. This rule does not imply that business activities of the applicant or Participant concern could not be conducted by such individual(s) outside the offices of the applicant or Participant concern, nor does it prohibit a disadvantaged individual from establishing a Participant concern at his/her home. Although this proposed revision does not mean that the disadvantaged individual who manages the applicant or Participant concern

cannot leave the concern's premises to conduct business, it does mean that one or more disadvantaged owners must devote full-time to the business of the applicant or Participant concern. Under this proposed amendment, SBA would not permit an individual to be physically located at a job which is separate and distinct from the applicant or Participant concern during normal business hours and claim that he or she is managing the applicant or Participant concern from that location.

In addition, proposed § 124.106 would eliminate the requirement that the disadvantaged owner(s) have, in every instance, the technical expertise in the primary business classification of the applicant or Participant. The rule would simply require that disadvantaged managers must demonstrate that they have managerial experience to an extent and complexity necessary to run the applicant or Participant. SBA believes that sufficient management experience may be enough to overcome certain technical deficiencies in a manager.

The proposed rule would add a new paragraph (b) clarifying the control requirements for a partnership. The rule would require that one or more disadvantaged individuals must serve as general partners, with control over all partnership decisions. A partnership in which no disadvantaged individual is a general partner would be ineligible for 8(a) BD participation. The proposed rule would add a new paragraph (c) for limited liability companies.

Redesignated § 124.106(d) would be amended along the lines set forth above for proposed § 124.101. This amended paragraph would specify that the Board of Directors must actually be controlled by disadvantaged individuals. The ability of a disadvantaged individual to control the Board of Directors indirectly through his or her right to vote his or her stock (i.e., the power to remove and replace directors) would not be sufficient to establish control of the Board of Directors if non-disadvantaged individuals on the Board of Directors could control, or assert negative control on, the Board as currently structured at the time of the application for admission to the 8(a) BD program. Further, a quorum would require the presence of disadvantaged individual(s) upon whom eligibility is based, and could not be established to permit non-disadvantaged Directors to control the Board of Directors. This paragraph would also provide that non-voting, advisory or honorary Directors as well as Executive Committees may be appointed so long as they do not possess negative control over the Board or have

the power to independently exercise the authority of the Board between Board meetings. Similarly, a separate board of advisors, particularly in the context of tribally-owned applicants and Participant concerns, could be established provided such board of advisors could not actually run the day-to-day operations of, or possess negative control over, the applicant or Participant business concern.

The proposed rule would revise redesignated § 124.106(e) (present § 124.104(c)) to clarify that principals of corporations or partners in a partnership are encompassed within the term "former employer." Although a corporation or a partnership may technically be the former employer of a disadvantaged individual, a principal or partner (general or limited) with greater than a 20% interest would be treated as though he or she were the actual employer given their potential to exert considerable influence over the individual upon whom 8(a) BD eligibility is based.

The requirements pertaining to social disadvantage would be moved from present § 124.105 to proposed § 124.103. Paragraph (b) would be amended to clarify that the presumption of social disadvantage for members of designated groups is a rebuttable presumption. In addition, redesignated § 124.103(c) (present § 124.105(c)) would be amended to require an individual who is not a member of a designated socially disadvantaged group to establish his or her social disadvantage by a preponderance of evidence presented in the 8(a) BD application. This is a change from the current regulation which requires that an individual who is not a member of a designated group establish his or her social disadvantage on the basis of clear and convincing evidence.

SBA asks for comments on how better to define specific designated groups other than by requiring "origins from" specific countries. The rule makes clear that ancestral country of birth alone is not sufficient to make that country an individual's country of origin for membership in a designated group, but SBA believes a heritage or cultural requirement may be preferable to the "origins" requirement. SBA also specifically seeks comments regarding how an individual who is a member of a designated group can overcome his or her social disadvantage. The proposed rule states that the presumption of social disadvantage may be overcome with significant, credible evidence to the contrary, and SBA seeks comments on its application.

Proposed § 124.103(c)(2)(ii) would require that the social disadvantage experienced by a non-group member be "longstanding." This clarification would not change the substance of SBA's practice in this area.

Proposed § 124.103(c)(2)(iii) (present § 124.105(c)(1)(v)) would be amended to clarify that, in evaluating whether an individual's social disadvantage has had a negative impact on his or her entry into and/or advancement in the business world, SBA will entertain any relevant evidence, but would always consider the experiences of the individual, where applicable, in education, employment and business history. The failure to establish such disadvantage in any one or even two areas (i.e., education, employment, or business history) would not prevent an individual from meeting this requirement of negative impact as long as the totality of the circumstances experienced by the individual demonstrate such disadvantage.

The proposed rule would move the economic disadvantage requirements from § 124.106 to proposed § 124.104. Under the proposed rule, in evaluating whether an individual is economically disadvantaged, SBA would focus solely on the personal financial condition of the individual. Factors in the current regulation pertaining to the financial condition of the applicant concern and the applicant concern's access to credit and capital would be eliminated as separate requirements. The financial condition of the applicant concern would be considered, but only in evaluating the individual's access to credit and capital. The authorizing legislation for the 8(a) BD program specifies that Participants must be owned and controlled by socially and economically disadvantaged individuals. It requires SBA to consider how the ability of socially disadvantaged individuals to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, but directs SBA to consider factors such as total assets and net worth in assessing the degree of diminished capital and credit opportunities. See 15 U.S.C. 637(a)(6)(A). The proposed rule would clarify that these factors would continue to be the focus of SBA's analysis of economic disadvantage.

The proposed rule would retain the current net worth limitations of \$250,000 for initial 8(a) BD eligibility, \$750,000 for continued 8(a) BD eligibility, and \$750,000 for SDB eligibility. The proposed regulation would further clarify that a contingent

liability does not reduce an individual's net worth.

The proposed rule would provide that assets transferred by an individual claiming disadvantaged status to any immediate family member within two years prior to the date of application to the 8(a) BD program would be presumed to be the property of the individual claiming disadvantaged status. Currently, property or assets transferred by an individual claiming disadvantaged status to a spouse within two years of the date of 8(a) BD application is presumed to be the property of the transferor, but current regulations are silent as to property or assets transferred to children or other close family members. Several applicants may have circumvented eligibility requirements by such transfers. SBA believes that it should restrict this practice, lest it allow firms into the 8(a) BD program that should be considered ineligible.

The proposed rule would require an individual claiming disadvantaged status to disclose to SBA all transfers of funds or other assets to any immediate family member and to a trust the beneficiary of which is one or more immediate family members for purposes of continued program eligibility. At the time of the Participant's annual review, each individual claiming disadvantage status would have to certify that he or she made no transfers of assets to immediate family members within two years, or that he or she made no transfers to immediate family members within two years except as described on an attached sheet. Any transfers within two years would be attributed to the transferor in determining his or her continued economic disadvantage. SBA is considering extending this requirement beyond immediate family members so that any transfers for less than fair market value (e.g., gifts to charities) would be attributable to the transferor.

Proposed § 124.107 would clarify the potential for success requirements, without changing them substantively. Discussion of an applicant concern's access to credit and capital, currently handled under economic disadvantage in § 124.106(a)(2)(iii), would be moved to proposed § 124.107(c), and several other paragraphs would be revised for clarity and ease of use.

Section 124.108 would be amended for clarity. Proposed § 124.108(a)(4) would make an applicant to the 8(a) BD program ineligible for program participation if the proprietor, a partner, a director, officer or a holder of at least 10 percent of the stock, or a key employee, is currently incarcerated, on

parole or on probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity. This provision parallels a similar provision in Part 120 of SBA's regulations, dealing with ineligibility for SBA financial assistance. It would also now include a new paragraph (c) that states that any wholesaler that applies for 8(a) BD participation need not demonstrate that it can supply the product of a small business manufacturer. Although SBA's nonmanufacturer rule generally requires a regular dealer or wholesaler to supply the product of a small business in order to be considered small for a specific 8(a) or small business set aside procurement), the 8(a) BD program should not be viewed solely as a contracting program. There is other business development assistance available to Participants which should not be foreclosed because of the nonmanufacturer rule. Moreover, the availability of small business manufactured products can change significantly over a Participant's program term. Wholesaler applicants to the 8(a) BD program should be aware, however, that they must meet the requirements of the nonmanufacturer rule in order to be awarded specific 8(a) contracts.

In addition, a new § 124.108(d) would be added that would authorize SBA, in its discretion, to reject an application if the applicant's primary industry classification falls within an industry where actual participation by disadvantaged businesses in Government contracting in a particular industry exceeds the benchmark limitations established under the DOJ proposal by the Department of Commerce for that industry. SBA would consider the developmental needs of the firm, as well as contracting opportunities outside its primary SIC code. A firm whose application was rejected on this basis could resubmit its application earlier than the normal 12 month waiting period whenever the benchmark was adjusted or a determination made that the benchmark was no longer exceeded. Similar language regarding the achievement of benchmarks in a particular industry would also be added to new §§ 124.302(c) and 124.403(c) to permit SBA to accelerate graduation, and would be added to § 124.504(d) to permit SBA not to accept an 8(a) offering in an industry in which the benchmark is achieved.

The proposed rule would delete current § 124.109. Some of these provisions are duplicative of other sections of part 124, or part 121, or the

Federal Acquisition Regulation. A few have been incorporated elsewhere in this proposed rule. The rule also proposes to delete franchisees as businesses that are ineligible (i.e., making them eligible) for 8(a) BD participation.

Current section 124.110 would be clarified, streamlined, and redesignated as proposed § 124.2.

Proposed § 124.112(c) repeats the current provision (current § 124.111(d)) that SBA will review a Participant's eligibility upon receipt of information that the Participant no longer meets continued 8(a) eligibility requirements. The proposed rule requires that the information received be "specific" and "credible." Under the proposed rule, sufficient reasons for SBA to conclude that a Participant is no longer economically disadvantaged include, but are not limited to, demonstrated access to a significant new source of capital or loans, an unusually large amount of funds or other assets withdrawn from the concern by its owners, or substantial personal assets, income or net worth of any disadvantaged owner. The term "excessive withdrawals" is defined elsewhere in the proposed regulation at § 124.303(a)(13). SBA asks for comments on how better to clarify a "demonstrated access to a significant new source of capital or loans."

Proposed § 124.112 would also add needed enforcement mechanisms to the existing regulation discouraging excessive withdrawals from Participants by their owners or managers. Certain Participants have suggested that, if net worth continues to increase, large withdrawals should be allowed as not detrimental to attainment of their business objectives. SBA disagrees, and believes this restriction is necessary to safeguard the development of Participant concerns toward economic viability. Participants will increase their net worth more and will achieve greater success if they avoid excessive withdrawals by their owners and managers.

Section 124.112, redesignated as proposed § 124.109, eliminates the present paragraph (c)(2)(iv) which previously allowed a Participant owned by an Indian tribe to joint venture with a large concern to perform an 8(a) contract. The statutory authority for this provision has expired. Proposed § 124.109 also would delete other obsolete and duplicative provisions. Additionally, it would eliminate the requirement that a tribally-owned or ANC-owned concern demonstrate that the primary economic benefits of the concern accrue to the tribe or ANC by

being located on tribally-owned or ANC-owned land or otherwise. SBA has previously interpreted the requirement as not applying to ANC-owned concerns, but believes that it should also not apply to tribally-owned concerns. In other ways the proposed rule would treat tribes and ANCs and their 8(a) entities more similar. Tribes and ANCs would be restricted from qualifying a new 8(a) concern possessing the same primary SIC as another 8(a) concern only if the other concern has been operating in the 8(a) program within the previous two years. Finally, it would more narrowly focus management restrictions on tribally-owned concerns to enhance development opportunities.

Section 124.113, redesignated as § 124.110, would add an exclusion from affiliation for concerns owned by a Native Hawaiian Organization, prohibit a Native Hawaiian Organization from owning more than one current or former Participant having the same primary industry classification, and exclude from the one-time individual eligibility requirement any individual who merely manages a concern owned by a Native Hawaiian Organization. These changes would achieve consistency with restrictions on other non-individual owners.

The proposed rule would redesignate § 124.114 as § 124.111. Equating CDCs with Indian tribes, the proposed rule would permit concerns that are at least 51% owned by a wholly owned business entity of a CDC to be eligible for 8(a) BD participation.

It would amend § 124.201 by deleting the last sentence of this section which became obsolete when waivers to the two year in business rule were statutorily required, and amend section 124.202 to revise obsolete language and clarify its meaning. It would transfer § 124.203 to the sections pertaining to business development, redesignating it as proposed § 124.401.

It would delete § 124.204 as duplicative of language in other sections of part 124, and redesignate § 124.205 as § 124.203.

Section 124.206, redesignated as proposed § 124.204, would delete duplicative language from paragraph (a), which is contained in proposed § 124.206, and add new proposed §§ 124.204 (b) and (c). For further clarity, this section would delete obsolete and duplicative language in current §§ 124.206 (b) and (c), and redesignate current § 124.206(c)(4) as a separate proposed § 124.207.

Proposed § 124.204(b) would further clarify that the AA/8(a)BD's decision to approve or decline an application for

8(a) BD program participation would be based on whether the applicant concern complied with each of SBA's eligibility criteria at the time the concern's application for admission to the 8(a) BD program is deemed to be complete by the DPCE field office. A change in circumstances submitted by an applicant concern subsequent to the date that an application is deemed to be complete by the DPCE field office would not be considered, unless it causes a loss of eligibility. The structure of the concern, including all necessary corporate or other organizational formalities, would have to be in place prior to the DPCE field office's processing of an application. A disadvantaged individual's ability to immediately change the applicant's structure or cause a change in its control so that actual control of the concern is in the hands of disadvantaged individuals and/or other eligibility criteria are met would not satisfy the requirement that they be met at the time of the completed application. The rule would specify, however, that SBA, in its sole discretion, could request clarification of information contained in the application at any stage in the application process. SBA would obviously consider any information submitted in response to a request by SBA.

The decision of the AA/8(a)BD to approve or decline an application for 8(a) BD program admission would then be based on whether the application, as clarified by any information submitted in response to a request by SBA, demonstrates that the applicant concern complies with each of SBA's eligibility criteria. While SBA would be able to request and consider additional information in processing an 8(a) BD application, SBA would not consider information volunteered by an applicant concern after it submits its application. This clarification is needed to streamline the application process and ensure that SBA meets its statutorily imposed time limitation for processing applications.

The proposed rule would redesignate § 124.207 as § 124.301, amend redesignated § 124.302 by revising obsolete references, and specifically authorize a Participant to voluntarily "graduate" prior to the expiration of its program term.

The examples of what constitutes "good cause" for terminating a Participant from the 8(a) BD program would be amended from current § 124.209(a) in proposed § 124.303. Several examples of good cause previously listed for terminating a Participant would be dropped in the

proposed rule and a few new examples would be added. As before, the examples of "good cause" are illustrative only. SBA's decision to drop several examples of good cause should in no way be read to infer that SBA no longer considers those situations as valid reasons for termination. That is not SBA's intent. The proposed rule would also define what constitutes an "excessive" withdrawal for purposes of determining whether termination is warranted.

The procedures for graduation and termination currently contained in §§ 124.208 and 124.209 would be combined into proposed § 124.304 to eliminate unnecessary duplication and clarify confusing language. The term graduation previously used in the regulations would be changed to "early graduation." Through the years, many people have used the terms "graduation," "graduation date," and "graduated 8(a) firm" to describe the situation where a Participant has exited the 8(a) BD program through nothing more than the expiration of its program term. This proposed rule would recognize the use of the term *graduation* in this context, and would refer to graduation prior to the expiration of a firm's program term under proposed §§ 124.302 and 124.304 as "early graduation."

Where an SBA district office initiates early graduation or termination by sending a Notification of Early Graduation or Termination to the concern, the allowable response time would be reduced from 45 days to 30 days after service of the Notification (the date that it is mailed, FAXed or hand delivered to the concern). SBA would then review any information submitted by the concern. If the Assistant Administrator of the DPCE decides that early graduation or termination is not appropriate, he or she will notify the concern. If it appears appropriate, the Assistant Administrator will forward that recommendation to the AA/8(a)BD for a final decision. SBA will not take early graduation lightly, but will initiate it in appropriate circumstances. As part of the early graduation process, SBA will also attempt to reduce any adverse impact on the Participant's business development.

Current section 124.210 would be eliminated as a separate section setting forth all appeal rights to SBA's Office of Hearings and Appeals for the 8(a) BD program. Appeal rights for denials of 8(a) BD eligibility would be contained in proposed § 124.206, while the appeal rights for early graduation, termination, suspension, or denial of a request for waiver under current § 124.317 would

be contained in the proposed sections dealing with those substantive areas. A minor revision would be made to the first sentence of paragraph (b), and a new second sentence added to clarify that an OHA decision is the final Agency decision. The remainder of paragraph (b) and paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) would be moved from part 124 to a new subpart C of part 134 of this chapter.

Current section 124.211 would be redesignated as proposed § 124.305. Redesignated § 124.305 would be amended to revise obsolete references, and reorganized to transfer procedural rights for OHA appeals to part 134 of this title. The period to file an appeal would be extended from 30 to 45 days to be consistent with part 134. SBA is also considering "suspension" as a tool where ownership or control changes and a Participant seeks approval of its changed ownership or control. Where ownership or control of a Participant changed prior to SBA's approval, and the Participant seeks SBA's approval after the fact, SBA would suspend the Participant pending SBA's resolution of the request to change its ownership or control.

The proposed rule would separate general business development provisions and those dealing with contractual assistance into two distinct substantive categories. Thus, the provisions currently contained in §§ 124.300–124.321 would be separated into Business Development (proposed §§ 124.401–124.405) and Contractual Assistance (proposed §§ 124.501–124.519). Most of these provisions would be reorganized and/or clarified under the proposed rule.

Section 124.300 would be deleted from the final rule as unnecessary.

Section 124.301 (proposed § 124.402) would be divided into more subheadings for ease of use. It would eliminate the requirement that a Participant must have specified SIC codes in its approved business plan (other than the entry requirement that an applicant must identify its primary SIC code for initial size eligibility), and no longer treat a concern as ineligible for any 8(a) contracting opportunity for which a contracting officer has assigned a SIC code not in its approved business plan. SBA believes that a Participant should not be denied the opportunity to receive and perform an 8(a) contract where a procuring agency determines the firm to be capable to perform the requirement, simply because the firm does not have a particular SIC code in its approved 8(a) business plan. This also eliminates the need for a Participant to go through a sometimes

lengthy and burdensome process seeking to add additional SIC codes to its business plan after being admitted to the 8(a) BD program. While an applicant would still be required to give a detailed description of the products it produces and services it performs, SBA would not prohibit the award of an 8(a) contract solely because a product or service is not so identified. In such a case, the Participant would still have to demonstrate its capability and other aspects of responsibility to perform the contract in question. As long as that burden is met, the Participant could be awarded the subcontract. Identifying SIC codes, however, may be beneficial to a concern because it will help SBA in providing business development assistance.

An applicant must still identify its primary industry classification. This identification is needed in order to permit SBA to determine initial size eligibility. The requirement to submit an annual capability statement would be moved from the miscellaneous reporting requirements provision of current § 124.501 to be included within the requirement defining how a business plan is updated (proposed § 124.403). That part of current § 124.501(a) addressing what SBA does with capability statements would be moved to proposed § 124.501(e) of this proposed rule.

Section 124.303 (proposed section 124.404) would be revised by eliminating obsolete references to the dates certain Participants were admitted to the program or received their first 8(a) contract. Those provisions were relevant to the length of 8(a) BD participation at the time Public Law 100–656 was enacted, but are not relevant today. The section would also be rewritten for clarity.

The reserved sections 124.304 and 124.305 would be eliminated in this proposed rule.

Section 124.306, financial assistance for skills training, would be eliminated from the regulations in the proposed rule because SBA has not received funding from Congress for this program.

The proposed rule would add a new section 124.405, detailing how a Participant may obtain Federal Government surplus property. The authority for Participants to receive Federal surplus property was created in Public Law 100–656. Section 301(b) of the Business Opportunity Development Act of 1988, Pub. L. 100–656, 102 Stat. 3853, amended the Small Business Act by adding a new section 7(j)(13)(F), 15 U.S.C. 636(j)(13)(F), which authorizes the transfer of surplus property owned by the Federal Government to

Participants under certain conditions. This proposed rule would implement that authority in regulation form for the first time.

The proposed rule would detail the procedures for, and conditions upon which, the transfer of Federal Government surplus property could be made to Participants. Such transfers would be made from the U.S. General Services Administration (GSA) through State Agencies for Surplus Property (SASPs) to eligible Participants. Transfers to SASPs from GSA would be made in accordance with the procedures set forth in 41 CFR Part 101–44. Although the statutory language of section 7(j)(13)(F) of the Small Business Act, 15 U.S.C. 636(j)(13)(F), authorizes that "such property \* \* \* be transferred to program participants on a priority basis," the proposed rule would permit Participants to participate in the surplus property distribution program administered by the SASPs to the same extent as, but with no special priority over, other authorized donees. See 41 CFR Subpart 101–44.2. The Participant would have to certify in writing that it is eligible to receive the property and that it will use the property only for normal business activities. The Participant would have to agree to a fair market value assigned to the acquired property, and if the firm were to sell the property before one year after exiting the program, it would have to repay to the Federal Government the agreed upon fair market value of the property, or the sales price, whichever was greater.

The proposed rule would detail the eligibility requirements a Participant must meet to obtain Federal surplus property. Generally, a Participant would be able to receive surplus property if it is in good standing with the 8(a) BD Program as of the date it is to receive the property. The firm would have to be in compliance with all reporting requirements imposed by program management, and must not have been debarred or suspended from receiving contracts. The firm also could not be the subject of any termination or early graduation proceedings. Finally, the firm would have to qualify as a small business for at least one product or service identified in its business plan that it produces or performs.

Proposed §§ 124.501–124.517 would contain most of the substance currently in §§ 124.307–124.321, but in a revised organizational structure for easier use. Proposed §§ 124.518 and 124.519 would be new provisions.

Section 124.307 (proposed section 124.501) would be redrafted for clarity and revised by adding a provision



encouraging Participants to self-market their capabilities to increase their chances of receiving 8(a) sole source contracts. SBA believes that it is vital that Participants realize the importance of self-marketing to their development in the 8(a) BD program. This revised section would also recognize that SBA may delegate its 8(a) contract execution function to procuring agency contracting officers where appropriate. It is SBA's intent to enter into a Memorandum of Understanding (MOU) with each procuring agency or activity that wishes to receive a delegation of SBA's 8(a) contract execution and review functions. SBA has a model MOU that would be modified according to the particular circumstances of each agency or activity. It would only be the rare case where SBA would not approve an MOU signed by an agency or activity. SBA would, however, have the authority to rescind the delegation where it saw fit. This would include cases where an agency or activity failed to report all 8(a) contract awards, modifications, and options to SBA in a timely manner.

The proposed rule would clarify the requirements relating to offers and acceptances of procurements for the 8(a) BD program. Currently, both the offer and acceptance processes are contained in § 124.308. The proposed rule would separate the offering provisions from the procedures relating to SBA's acceptance of a procurement into proposed §§ 124.502 and 124.503, respectively.

Section 124.308(c) (proposed § 124.502(b)) would specify the SBA locations to which contracting officers must offer requirements to the 8(a) BD program. This clarification is needed in light of other recent changes made by SBA in eliminating local and national buy requirements. Under the proposed rule, all requirements that are offered to the 8(a) BD program as competitive procurements and those sole source requirements that are offered to the program without nominating a specific Participant (i.e., open requirements) would be offered to the SBA district office serving the geographical area in which the offering procuring agency is located. The only exception to this provision would be in the case of a construction requirement where the work to be performed is in a different location than that of the procuring agency. In such a case, an offering must be made to the SBA district office serving the geographical area in which the work is to be performed. Sole source requirements that are offered to the 8(a) BD program on behalf of a specific Participant would be offered to the SBA district office serving the geographical

area in which the principal place of business of the Participant is located.

SBA's verification of the SIC code assigned to a particular 8(a) contract would be moved from § 124.308(b)(1)–(2) (where it was part of the "requirement identification" process) to proposed § 124.503(b) (where it is clearly identified as a step in SBA's acceptance of a procurement for the 8(a) BD program).

The proposed rule would amend the provision dealing with formal technical evaluations (proposed § 124.503(e)). Specifically, SBA would exclude Brooks Act procedures applying to architect-engineer services (as set forth in FAR subpart 36.6) from the general requirement that SBA will not authorize formal technical evaluations for sole source 8(a) requirements. In practice SBA has recognized the Brooks Act procedures, but believes that a specific provision in the regulations would clarify its policy in this regard.

The proposed rule would add a new provision pertaining to Basic Ordering Agreements (BOAs) as a method of contracting under the 8(a) program (proposed § 124.503(g)). Under SBA's current regulations, SBA believes that BOAs could be used to circumvent the statutory requirement that 8(a) procurements with an anticipated award value in excess of \$3 million or \$5 million be competed among eligible Participants. Each order issued under a BOA, and not the BOA itself, is a contracting action. A procuring agency could issue a series of \$2–3 million task orders under a BOA without ever competing the basic procurement requirement. SBA believes that this is contrary to Congressional intent. As such, under the proposed rule, SBA would not accept any task order for award as an 8(a) contract if that task order added to the total task orders issued to date would exceed the applicable competitive threshold amount, unless the BOA itself was awarded on the basis of competition among eligible Participants. SBA would also determine eligibility for an order under a BOA at the time of the issuance of the order. This would require a concern to remain a small business at the time the order is to be issued and would prohibit orders from being issued to concerns whose program terms have expired or who have otherwise exited the 8(a) BD program.

Proposed § 124.504 would clarify the circumstances limiting SBA's ability to accept a procurement for award as an 8(a) contract. Existing §§ 124.309 (a) and (b) would be combined into one paragraph (proposed § 124.504(a)). The proposed rule would add a new

provision (proposed § 124.504(b)) that would prohibit a procuring agency from initiating the competitive process for an 8(a) requirement prior to obtaining SBA's acceptance of the requirement for the 8(a) BD program. Any competition so held would not be considered an 8(a) competition. If a procuring agency still wanted to fulfill its requirement through the 8(a) BD program, the requirement would have to be offered to and accepted by SBA for the 8(a) BD program, and the procuring agency would have to use applicable 8(a) competitive procedures after the acceptance. A new solicitation would have to be issued, and new offers submitted and evaluated.

The proposed rule would broaden the concept of adverse impact (current § 124.309(c); proposed § 124.504(c)), finding that "adverse impact" could be found to exist where several requirements currently being performed by different small business concerns are consolidated into one larger requirement which could be considered "new" under SBA's regulations due to the magnitude of the consolidated requirement. This rule would permit SBA to find adverse impact whenever at least one of the small business concerns losing work that is to be consolidated meets the presumption of adverse impact. The proposed rule would also add objective criteria for determining whether a requirement is new. Under the proposal, the expansion or modification of an existing requirement would be considered a "new" requirement where the price (adjusted for inflation) increases by more than 25% or where significant additional capabilities are added to the requirement.

Proposed § 124.504(e) would clarify the limited instances where SBA may reject the offer of a repetitive 8(a) acquisition to give a Participant that is leaving or has left the 8(a) BD program the opportunity to compete for the requirement outside the 8(a) BD program. The proposal would require the applicable (former) Participant to qualify as a small business concern for the requirement now offered to the 8(a) BD program before SBA considers releasing the requirement from the 8(a) BD program.

The proposed rule would eliminate section 124.310 as unnecessary or duplicative. Debarment and suspension is adequately covered in the FAR. Current § 124.314 (proposed § 124.509), deals with the required percentages of work that a Participant must perform on any 8(a) contract and need not be duplicated in this section.



Current section 124.311 would be separated into two sections: proposed § 124.506, regarding the dollar thresholds above which procurements accepted for 8(a) award must be competed among eligible Participants, and proposed § 124.507, describing the procedures that apply to competitive 8(a) procurements. Proposed § 124.506 would eliminate unnecessary language, but leave most of the substance of current §§ 124.311 (a)–(e) unchanged. It would clarify that there is no order of precedence between accepting requirements for competition and accepting requirements for sole source award above the applicable threshold amounts for a tribally-owned or ANC-owned concern. Current § 124.311(d) permits SBA to accept a contract opportunity above the applicable competitive threshold amount for a sole source 8(a) award where SBA determines that only one eligible Participant in the 8(a) BD portfolio is capable of performing the requirement at a fair price. The proposed rule would eliminate this authority. SBA believes that such a requirement should either be awarded under the sole source authority of the FAR, if applicable, or competed as a small business set aside requirement or as an SDB set-aside contract, where appropriate.

Proposed § 124.507 would set forth the procedures applicable to competitive 8(a) procurements. This proposed section would clarify how SBA determines whether an apparent successful offeror in an 8(a) competition is eligible to receive the award. SBA believes that the eligibility process will be much easier to follow and understand under this proposal. The proposal would also clarify which Participants engaged in construction may submit offers in response to competitive 8(a) construction requirements. The proposed rule would limit eligibility to those Participants located within the geographical boundaries of one or more SBA district offices (looking first to the district office serving the area in which the work is to be performed). Any concern with a bona fide place of business in the applicable geographic area would be eligible for the procurement. In order to be considered a *bona fide* place of business, the Participant would have to regularly maintain an office which employs at least one full-time individual within that geographical boundary. Construction trailers or other temporary construction sites would not qualify as *bona fide* places of business under the regulation, nor would merely occupying a government-furnished office to

oversee the performance of a specific contract qualify as having a bona fide place of business within that geographic location. The term is meant to extend beyond one or more individual contracts. SBA specifically requests comments on how best to define “bona fide place of business,” and how eligibility for 8(a) construction procurements should be limited.

Proposed § 124.507(b)(5) would add the Certificate of Competency (COC) procedures to competitive 8(a) procurements. Where a procuring agency contracting officer finds the apparent successful offeror for a competitive 8(a) procurement not to be responsible to perform the contract, he or she would be required to refer the Participant to SBA for a possible COC under the procedures set forth in § 125.5 of this chapter. SBA seeks to make competitive 8(a) procurements as similar as possible to non-8(a) Government contracting procedures. COC procedures would not, however, be available for sole source 8(a) procurements. In most cases, the procuring agency would have selected the Participant for the sole source contract by assessing the firm's capabilities prior to offering the procurement to SBA. It is unlikely that the procuring agency would select a Participant, go through negotiations with the firm, and then find the firm not to be responsible. If that does happen, or if the procuring agency determines that a firm nominated by SBA for an open requirement cannot perform the contract, SBA would review the situation to determine whether it agrees with the procuring agency. If SBA agrees, it can nominate another Participant to perform the contract, if one exists that is found to be eligible and responsible for the requirement, or it can permit the agency to withdraw the requirement from the 8(a) program if an eligible and responsible Participant is not found. If SBA does not agree, it can appeal the procuring agency's decision to the head of the procuring agency pursuant to § 124.505.

Proposed § 124.507(d) (current § 124.311(i)) would clarify SBA's implementation of § 8(a)(1)(C) of the Small Business Act, 15 U.S.C. § 637(a)(1)(C), which authorizes competitive 8(a) awards in limited circumstances to firms which have completed their terms of participation in the 8(a) BD program. Of particular note, eligibility would be determined as of the initial date specified for the receipt of offers set forth in the solicitation without regard to extensions of time through amendments to the solicitation. The only legislative history

to the statutory provision authorizing competitive 8(a) awards to firms which have completed their terms of participation in the 8(a) BD program indicates that Congress did not want Participants to go through the expense of submitting offers for competitive 8(a) procurement requirements only to be told that they were ineligible for such requirements months later at the time of award. See 136 Cong. Rec. S17645, S17648 (daily ed. October 27, 1990) (statement of Sen. Bumpers). In addition, Congress was concerned that competition among firms in the later stages of program participation would be discouraged if firms felt that they could be deemed ineligible after going through the expense of preparing an offer for a competitive 8(a) procurement requirement. *Id.*

The proposed amendment would be consistent with these Congressional purposes. The date for determining eligibility is firmly established and cannot change during the procurement process. With such a date certain, firms know up front if their program term will expire prior to that specified date. Offers cannot be prepared amid uncertainty that the date for determining eligibility could be changed. As such, firms are not dissuaded from participating in 8(a) competitive procurements during the later stages of their participation terms.

Proposed § 124.508 would contain the requirements relating to competitive business mix targets. The proposed rule would eliminate obsolete language contained in current § 124.312 regarding modified business activity targets. It would also tighten the language throughout the section, eliminating unnecessary wording where appropriate.

Proposed § 124.508(d) would revise SBA's policy on imposing remedial measures on Participants that fail to meet their applicable competitive business mix targets. Recent audits and reports have revealed that SBA needs to do a better job of encouraging firms to develop in ways that will ensure their success in the competitive marketplace after program completion. Too many firms are not meeting competitive business mix targets during the transitional stage of program participation.

If a Participant fails to meet its competitive business mix target during any year in the transitional stage, it would be ineligible for sole source 8(a) contracts during the succeeding program year unless the Participant corrects the situation. A Participant that fails to meet its applicable competitive business mix target during the transitional stage of program

participation may attempt to meet the competitive business mix target as part of the normal annual review process, or it may elect to submit quarterly information regarding its non-8(a) revenue and contract awards in an attempt to comply with the competitive business mix requirements prior to its annual review. Where the Participant elects to submit information to SBA, SBA would monitor the Participant's revenues quarterly to determine whether the Participant has come into compliance. At its 3-month or 6-month review, a Participant would be required to demonstrate that it has received non-8(a) revenue and/or new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its competitive business mix target for the just completed program year in order to again be eligible to receive 8(a) sole source contracts for the remainder of the program year. Compliance with the competitive business mix target for that program year would again be determined at the end of the program year. If the firm did not meet that target, it would again be ineligible for 8(a) sole source contracts in the succeeding program year unless and until it came into compliance during the succeeding program year. In order for a Participant to come into compliance with the competitive business mix target during the last six months of the current program year (i.e., at either the nine-month or one year review), it would be required to demonstrate that it has achieved its competitive business mix target as of that point in the current program year. At the 9-month or one-year review, SBA would look at all revenues received during that program year (including options and modifications) to determine whether the firm has achieved the competitive business mix target for that year. If it has, it would again be eligible for 8(a) sole source contracts; if it has not, it would remain ineligible for 8(a) sole source contracts. Additional remedial measures would continue to be authorized where appropriate, including program termination where the Participant makes no good faith efforts to obtain non-8(a) revenues.

Current section 124.313 would be eliminated as unnecessary.

Proposed § 124.509 would incorporate the substantive provisions currently contained in § 124.314, but would cross reference the performance of work requirements contained in § 125.6 of this chapter. Proposed § 124.510 would do the same for those requirements currently contained in § 124.315. Again,

clarification would be made wherever appropriate.

Proposed § 124.511 would authorize SBA to delegate all responsibilities for administering an 8(a) contract to the appropriate procuring agency contracting officer except for the approval of novation agreements. It would eliminate the reference to advance payments contained in current § 124.316. It clarifies that a procuring agency may execute an in-scope 8(a) modification without SBA's signature.

Proposed § 124.512 would set forth the requirements for entering into a joint venture agreement to perform an 8(a) contract. SBA proposes several changes to this section from the provisions currently contained in § 124.321. Proposed § 124.512(a)(2) would require that a Participant seeking to joint venture with another firm bring something of value to the joint venture arrangement other than its status as an 8(a) concern. While the regulation would continue to state that a joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, it would specify for the first time that where SBA concludes that the 8(a) concern brings very little to the joint venture relationship except its 8(a) status, SBA will not approve the joint venture relationship. An 8(a) concern may lack the necessary management, technical and financial capacity to perform a contract the size of the joint venture contract on its own, but it cannot be totally reliant on its proposed joint venture partner. The purpose of permitting joint ventures is to enable an 8(a) firm to gain experience and know-how so that it can become self-reliant in the future. If the 8(a) concern will not be developing its own capabilities in any meaningful way, the joint venture will not be approved. It is also SBA's intent to delegate the approval of joint venture relationships from the AA/8(a) to the local SBA district offices.

As described above for amendments to the size regulations, the proposed rule would permit joint ventures for competitive 8(a) procurements between two or more small businesses (at least one of which is an 8(a) Participant whose size is smaller than one half the size standard corresponding to the SIC code assigned to the procurement—an eligible 8(a) Participant) so long as each small business is individually small. One of the eligible 8(a) Participants must be the lead entity in the joint venture, and the eligible 8(a) Participants combined must perform the applicable percentage of work required by proposed § 124.509.

Joint ventures for sole source 8(a) procurements and competitive 8(a) procurements that do not exceed one half the size standard corresponding to the SIC code assigned to the procurement would continue to be authorized under current requirements, unless a mentor/protege relationship exists, as discussed below. The joint venture partners would be considered affiliates, and their revenues or employees aggregated in determining whether the joint venture qualifies as small.

The rule would also move certain requirements contained in "Other requirements" of current § 124.321(d) to provisions that must be contained in the joint venture agreement itself.

The proposed rule would transfer current § 124.321(i) concerning joint ventures for Small Disadvantaged Business (SDB) set-asides and evaluation preferences to proposed § 124.1002(f) of subpart B of these regulations. SBA believes that moving SDB joint ventures into the subpart dealing with SDB protests and appeals makes more sense organizationally.

Proposed § 124.513 would contain the provisions currently contained in § 124.318, but eliminate duplicative language.

The provisions of § 124.317 requiring an 8(a) contract to be performed by the Participant that was initially awarded it, and requiring the contract to be terminated for convenience if there is a change in the ownership or control of the concern, would be incorporated into proposed § 124.514, with minor clarifications. The proposed rule would specify that only physical or mental incapacity (and not factors like criminal incarceration or bankruptcy) could justify a waiver of the termination for convenience requirement imposed by this section. In addition, this section would make clear that the concern requesting a waiver must demonstrate that it has met the grounds upon which the waiver is being sought. The Agency need not consider and dismiss every possible basis for waiver. Finally, with respect to determining whether a Participant seeking to acquire ownership or control in another Participant is "otherwise eligible" to receive the award directly, the proposed rule would require SBA to consider whether prior to the transaction the acquiring Participant is eligible for and responsible with respect to each contract to be transferred. For example, were a concern with ten employees seeking to acquire a concern with 150 employees, responsibility would be considered prior to the transaction (i.e., could the ten-employee concern

perform the transferring contracts without the resources of the 150-employee concern).

The proposed rule would add a new paragraph 124.517(c), clarifying that SBA may substitute one Participant for another (with the consent of the procuring agency) where the first concern cannot complete performance of an 8(a) contract, without seeking the approval of the Administrator under § 124.317. The original 8(a) concern would be liable for any reprocurement costs, as is now the case.

The proposed rule would separate current § 124.320 into two sections: One dealing with SBA appeals of the terms and conditions of a particular 8(a) contract or of a procuring agency decision not to reserve a requirement for the 8(a) BD program (proposed § 124.505); and one concerning contract disputes arising between a Participant and a procuring agency after the award of an 8(a) contract (proposed § 124.515). Both are clarified for easier use.

Proposed § 124.505 would specify that SBA may appeal to the head of the procuring agency a contracting officer's decision to reject a specific Participant for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) BD program. This basis for appeal has been used many times in practice. SBA believes that it should be added to the regulation to apprise all contracting officers of its existence.

Proposed § 124.515 would improve the language of current § 124.320(a), eliminating unnecessary references to advance payments, business development expense, and surety bond waivers (all three of which the proposed rule would also eliminate).

The proposed rule would add a third appeal-related section, pertaining to the ability of another party to question the eligibility of a Participant for award of an 8(a) contract (proposed § 124.516). No party may challenge the eligibility of a Participant for a specific sole source or competitive 8(a) requirement at SBA or any other administrative forum. The authority to determine eligibility for an 8(a) contract is exclusively SBA's. Much of this provision is currently contained in § 124.311(g) for competitive 8(a) requirements, but no such specific language was set forth for sole source 8(a) requirements. Prior to the enactment of Public Law 100-656, there were no 8(a) competitive requirements, and it was clear that a determination concerning a Participant's eligibility for specific 8(a) contract awards was exclusively within the jurisdiction of SBA's Office of 8(a)BD. After the enactment of Public Law 100-656, SBA's regulations were amended to

specify that eligibility protests would not be authorized for competitive 8(a) procurements. This notified interested parties that SBA intended to make eligibility for competitive 8(a) procurements consistent with SBA's longstanding practice with regard to sole source 8(a) procurements (that is, that the Office of 8(a)BD (Minority Small Business and Capital Ownership Development (MSB&COD) at that time) would retain exclusive authority for determining eligibility for any 8(a) contract). The current regulations contain specific language regarding protest restrictions for competitive 8(a) procurements, but not for sole source procurements. This proposed rule would clarify that these restrictions were always meant to apply to both sole source and competitive 8(a) procurements. The regulatory language appearing in § 124.311(g) would be moved into this new provision and would be expanded to apply to sole source 8(a) procurements as well. Paragraph 124.311(g) would be deleted as unnecessary.

SBA has historically included a Participant's size as part of a concern's eligibility that cannot be protested. This proposed rule would amend that policy with respect to competitive 8(a) contracts. Another offeror for a competitive 8(a) contract would be able to protest the size status of the apparent successful offeror in accord with part 121 of this chapter. In addition, the proposed rule would authorize appeals of SIC code designations in connection with 8(a) competitive requirements. The policy for size protests and SIC appeals would, however, remain unchanged for sole source 8(a) contracts (i.e., size protests would not be authorized for sole source 8(a) contracts; SIC appeals would not be permitted for sole source contracts, except by the AA/8(a)BD). In connection with a sole source 8(a) contract, any party may submit evidence to SBA to explain why it believes another SIC code should be assigned to the procurement. SBA will consider such information and will seek a SIC code change if it believes that the SIC code assigned by the procuring agency is unreasonable.

SBA is currently examining ways to further address the perceived problem of concentration of 8(a) contracts. Concerns about contract concentration have been cited by several SBA oversight entities, including the General Accounting Office, SBA's Office of Inspector General, and the U.S. Senate and House of Representatives Committees on Small Business. SBA believes that it has addressed this issue, in part, by removing the indefinite

delivery, indefinite quantity exception to competition (see 60 FR 29969, 29971-72 and 29976), and by limiting sole source 8(a) awards as described below in proposed § 124.518. Although not part of this rulemaking, SBA wishes to solicit comments on how best to achieve a broader distribution of 8(a) contracts beyond these proposals.

Proposed section 124.518 would authorize most Participants (other than firms owned by an Indian tribe or an ANC) to receive any combination of 8(a) sole source and 8(a) competitive contracts up to a specified dollar amount. Once that dollar amount of 8(a) contracts is reached, the firm would not be eligible to receive any more 8(a) sole source contracts, but could remain eligible for competitive 8(a) awards. For a firm having a revenue-based primary SIC code at time of program entry, the limit above which it could no longer receive sole source 8(a) contracts would be set at five times the size standard corresponding to that SIC code or \$100,000,000, whichever is less. For a firm having an employee-based primary SIC code at time of program entry, the limit above which it could no longer receive sole source 8(a) contracts would be set at \$100,000,000. Under the proposed rule, SBA would not consider 8(a) contracts awarded under \$100,000 in determining whether a Participant has reached its limit.

This change is designed to promote the equitable distribution of 8(a) contracts to an increased number of 8(a) Participants and to foster 8(a) business development on a wider scale. Smaller developing 8(a) Participants should have an increased opportunity of receiving sole source 8(a) contracts. SBA does not view this change as a penalty for those firms reaching the dollar limit. They will still be eligible for competitive 8(a) awards. SBA's mission is to advance the development of Participants so that they can be viable businesses after graduation from the 8(a) BD program. After a certain amount of contract support within the 8(a) sheltered market, sole source 8(a) awards may be counterproductive to a firm's development because they do not prepare a firm for the competitive marketplace after graduation. A firm that has received five times its applicable size standard or \$100,000,000 in 8(a) contracts, whichever is applicable, should not need the business development tool of additional sole source contracts, and should spend more resources refining its competitive skills. SBA asks for comments on whether the restriction should apply to competitive as well as sole source 8(a) contracts once the

specified level of 8(a) contract dollars has been reached.

Proposed section 124.519 would establish a mentor/protege program. As proposed, firms that have graduated from the 8(a) BD program and those that are in the transitional stage of program participation may be approved as mentors for particular developing 8(a) Participants. This could include businesses that have grown to be other than small. The idea is to link firms that have gone through the 8(a) program with developing 8(a) firms so that the more mature firms can impart their knowledge and practical experience from their own program participation to the developing firms. Although the proposed rule limits mentors to current or former 8(a) Participants, SBA seeks comments on whether other firms should be mentors. If mentors are limited to current and former 8(a) Participants, SBA desires comments as to whether former Participants should be permitted where their ownership or control has changed since they were in the 8(a) program. SBA also seeks comments regarding whether a mentor should be able to be a large business, or whether mentors should be limited to firms that are small in their primary industry category (whether or not they would qualify as small under the protégé's primary SIC code, or under a particular contract for which the mentor and protégé seek to perform as a joint venture). Finally, SBA requests comments on appropriate safeguards SBA should impose on mentors to ensure that mentors do not unjustly benefit from the 8(a) BD program. SBA recognizes that some commenters may oppose any mentor/protege program as a method of extending 8(a) participation for firms that have graduated from the program, or of providing program benefits to non-disadvantaged firms (if SBA were to allow mentors to be other than current and former 8(a) Participants). SBA believes, however, that such a program will provide substantial benefits for developing 8(a) Participants, and that the assistance received through the program will enhance their ability to be viable businesses after they leave the 8(a) BD program.

The advantages to a protege firm in terms of management and technical assistance, knowledge of the procurement process, and personal relationships can be substantial. In order to encourage mentors to participate, the proposed rule would permit a mentor and protege to joint venture as a small business for various government procurement opportunities, including procurements less than half

the size standard corresponding to the assigned SIC code and 8(a) sole source contracts, provided the protege qualifies as small for the procurement (and has not reached the limit described above in proposed § 124.518). The mentor/protege relationship would extend beyond the 8(a) BD program, and would encourage mentors and proteges to submit offers as joint ventures for non-8(a) competitive contracts as well. Because SBA would waive the affiliation requirements for a mentor/protege joint venture, more contracts may become available for small businesses that are 8(a) Participants. The regulation would also permit a mentor firm to own up to 33% in the protege firm to assist the protege firm raise needed capital. A protege firm could also qualify for other assistance as a small business, including SBA financial assistance, notwithstanding the mentor/protege relationship.

A mentor would have to possess good character and be operating profitably. A mentor could have no more than one protege at a time. SBA does not believe that proteges would be adequately served were one firm able to mentor more than one Participant at a time. In addition, were a mentor able to have more than one protege at a time, the perception could exist that the mentor is "chasing" many different 8(a) contracts through its various proteges. For a mentor that has left the 8(a) program or has grown large, there would be a concern that such a mentor was unjustly benefitting from the 8(a) program. In order to be recognized as mentors/proteges, the AA/8(a)BD would have to approve a written agreement between the mentor and protege firms under which the mentor commits to provide management and/or technical assistance to the protege firm for at least one year.

The proposed rule would eliminate current § 124.401 dealing with advance payments. Funding for advance payments does not exist.

The proposed rule would also eliminate current § 124.402, concerning business development expense (BDE). References to it are obsolete.

Proposed §§ 124.601–124.603 would set forth reporting requirements not contained elsewhere in the regulations. These requirements are largely unchanged from the current regulations. However, in keeping with President Clinton's request that Federal agencies reduce reporting requirements wherever feasible, proposed § 124.601 would reduce from twice a year to once a year the number of times a Participant must submit a report to SBA regarding its agents and other representatives.

Sections 124.701–124.704 of the proposed rule would reduce and clarify the provisions for its 7(j) management and technical assistance program (currently contained in §§ 124.403 and 124.404).

Subpart B, Eligibility, Certification, and Protests relating to Federal Small Disadvantaged Business Programs, is an entirely new subpart and is proposed in response to the DOJ's review on Federal affirmative action procurement programs. Current subpart B, dealing with SDB protests would be incorporated into the revised subpart. The subpart would be expanded to include procedures by which Private Certifiers will determine whether a firm is owned and controlled by one or more individuals claiming disadvantaged status, procedures by which a procuring agency or SBA (if the procuring agency has an agreement with SBA) will certify businesses as SDBs for purposes of all Federal procurement programs, and provisions defining how firms will be added to and deleted from an SBA-maintained on line register of SDBs.

The proposed rule would add a clarifying provision that potential for success would not be considered in determining the disadvantaged status of a concern for purposes other than the 8(a) BD program. Potential for success goes to the developmental purposes of the 8(a) BD program, and should not be a criterion in determining disadvantaged status for other programs. The proposed rule would add a provision to the section regarding who can protest the disadvantaged status in an SDB set-aside or evaluation procurement. It would not permit a firm that had previously been found not to be disadvantaged for a specific SDB set-aside to then protest the disadvantaged status of an apparent successful offeror.

Proposed § 124.1008(c)(2) would provide that the burden is on the firm seeking an SDB certification to demonstrate that those individuals claiming disadvantaged status own and control the concern. Similarly, proposed § 124.1020(c) would provide that the burden is on the protested concern to demonstrate its disadvantaged status. The protested concern must submit all information it deems relevant to such a determination. A protested concern cannot challenge a disadvantaged status determination by claiming that it did not submit a specific piece of information because SBA did not request it.

Proposed new subpart D of part 134 would contain the rules of procedure applying to appeals of denials of 8(a) BD program admission based solely on a negative finding(s) of social

disadvantage, economic disadvantage, ownership or control pursuant to § 124.206; early graduation pursuant to §§ 124.302 and 124.304; termination pursuant to §§ 124.303 and 124.304; and denials of requests to issue a waiver of the performance of work/termination for convenience requirements pursuant to § 124.514. The substance of these provisions was previously contained in § 124.210. This proposed rule transfers them to part 134 so that all procedures relating to appeals before OHA are contained in one part of SBA's regulations. Proposed § 134.406(d) clarifies that where SBA files its answer to the appeal petition after the date specified in § 134.206, the Administrative Law Judge may ignore the answer and base his or her decision solely on a review of the administrative record. All the Administrative Law Judge has the authority to do is to determine whether the Agency's decision is arbitrary or capricious. In order to do so, he or she must review the administrative record.

**Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)**

SBA certifies that this proposed rule would not be considered a significant rule within the meaning of Executive Order 12866, but may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq.

**Regulatory Flexibility Analysis**

We do not know the extent to which this proposed rule would have a significant economic impact on a substantial number of small businesses but are interested in receiving comments from the public on what they believe the impact of this regulation will be.

**Summary of the Proposed Rule**

The SBA's proposed rule would improve and strengthen the 8(a) program. The rule changes would also respond to the challenges posed by the findings in the *Adarand v. Peña* court case and improve the success rates for firms after participation in the 8(a) program. We believe this to be the appropriate regulatory alternative to meet the judicial requirements applicable to the agency.

The proposed 8(a) rule changes fall under four major categories. They are: (1) Equitable distribution of 8(a) contracts; (2) small business affiliation rule revisions; (3) a new 8(a) mentor-

protege program; and (4) SBA's responsibilities for implementing the Small Disadvantaged Business (SDB) contracting program authorized by the Federal Acquisition Streamlining Act and developed during the U.S. Department of Justice's post-*Adarand* affirmative action review and recommendations.

The proposed 8(a) regulations would make changes to the existing regulations designed to distribute 8(a) contracts more equitably and encourage participating 8(a) firms to compete more effectively for contracts. The regulation would enhance the ability of 8(a) firms and other small businesses to obtain larger prime contracts that would be normally out of the reach of individual small businesses. Also, by establishing an 8(a) mentor-protege program, SBA would allow participants in the 8(a) program to tap into the expertise and capital of 8(a) graduates or more advanced participating firms. Lastly, the proposed 8(a) regulations would provide the guidelines needed to conform SBA's rules and procedures to the Department of Justice's post-*Adarand* guidelines, including SBA's responsibility to certify participating SDB firms and maintain and provide oversight for a national network of private sector SDB certifiers.

This proposal applies to all current and eligible participants in the SBA 8(a) program and all eligible small disadvantaged businesses (SDBs) that seek to do business with the federal government as contractors.

**Current Program Participants**

At present, there are approximately 5,800 SBA certified 8(a) firms. Based on information from the SBA PASS system, there are approximately 34,000 minority or SDB firms seeking contracts with the federal government. All 8(a) firms meet the eligibility requirements of an SDB firm and are included in the 34,000 number. Pursuant to PASS, there are an additional 37,000 non-minority women-owned firms and 3,000 non-minority disabled veteran-owned firms seeking contracts with the federal government. Any or all of these additional 40,000 firms could also seek SDB certification through SBA under SBA's new subpart B of part 124.

In FY '96, 8(a) firms received \$6.3 billion in federal contracts and SDBs about \$10.3 billion. The \$10.3 billion in contracts to SDBs represents about 5 percent of all federal contract dollars spent in FY '96. In addition, the federal contract dollars that went to SDBs is about 25 percent of all federal receipts that went to small businesses for the same period.

It is believed that this rule will benefit eligible 8(a) and SDB firms because it simplifies and clearly defines eligibility requirements, especially for SDBs; streamlines the operation of the 8(a) program; increases partnering opportunities by easing affiliation rules; and, improves business assistance provided by the SBA. It is estimated that, under this proposal, the number of certified 8(a) programs will increase by 10 percent and the number of SDBs seeking federal contracts will increase by 20 to 30 percent.

**Universe of Potential Program Applicants**

The last official U.S. Census Statistics on women and minority-owned firms are for 1992; these data were released in 1996. In 1992, there were 2.0 million total minority-owned firms. Of these, 312 thousand (15.6 percent) had employees. If the growth in minority firms between 1992 and 1997 is the same as it was between 1987 and 1992—a conservative assumption—then an estimate of total minority firms would be 3.3 million in 1997 and perhaps half a million with employees. For the most part, only firms with employees would be affected by this proposal. The latter, of course, are only educated assumptions based upon extrapolations.

An estimate of the racial composition of minority owned firms with employees would be: Black (32 percent), Hispanic (38 percent), and the cluster of Asian-American/Pacific Islanders/Native Americans, and Alaska Natives (30 percent).

By gender, 63 percent of minority owned firms in 1992 were likely to be owned by men; 37 percent were owned by women. For minority firms with employees, about 71 percent of the minority owned firms were likely to be owned by men; 29 percent were likely to be owned by women.

Including regular C corporations, women owned 6,407 million firms in 1992. Of these 1,25 million firms (19.4 percent) had employees. Based on estimates by the National Association of Women Business Owners, there are nearly 8.0 million women-owned firms in 1996, we can extrapolate that there were about 1.55 million women-owned firms with employees in 1996.

With this large pool of businesses which may at some point apply to the SBA's programs, we can anticipate that the number of 8(a) participants and SDBs will increase, but cannot estimate the magnitude of the increase or its effect on firms that have or may obtain contracts in the future. We believe that the impact of these regulatory changes will be beneficial to small business and,

again, would be interested in receiving any information that would shed additional light on the specific impact of these proposed regulations.

The rule is not, however, likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy.

For purposes of the Paperwork Reduction Act of 1995 (Pub. L. 104-13), SBA certifies that this proposed rule, if adopted in final form, would contain no new reporting or recordkeeping requirements. Although the proposed rule would require small disadvantaged business concerns to submit evidence that they are owned and controlled by one or more disadvantaged individuals to private certifiers, and representations of group membership or evidence of disadvantaged status to SBA, in order to become certified as an SDB, the information sought is the same as that currently required for participation in SBA's 8(a) program. In addition, once certified, this rule would not require SDB concerns to report any other information to SBA or to maintain additional records.

For purposes of Executive Order 12612, SBA certifies that this rule would not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in Section 2 of that Order.

## List of Subjects in 13 CFR

### Part 121

Government procurement, Government property, Grant programs-business, Individuals with disabilities, Loan programs-business, Small businesses.

### Part 124

Government procurement; Minority businesses; Tribally-owned concerns; Hawaiian natives; Reporting and record keeping requirements; Technical Assistance.

### Part 134

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

Accordingly, for the reasons set forth above, SBA hereby proposes to amend Title 13, Code of Federal Regulations (CFR), as follows:

## PART 121—[AMENDED]

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

**Authority:** 15 U.S.C. 632(a), 634(b)(6), 637(a) and 644(c); and Pub. L. 102-486, 106 Stat. 2776, 3133.

2. Section 121.103 is amended by redesignating paragraphs (f)(3) and (f)(4) as paragraphs (f)(4) and (f)(5), respectively, by revising paragraph (f)(2) and by adding a new paragraph (f)(3) to read as follows:

### § 121.103 What is affiliation?

\* \* \* \* \*

(f) *Affiliation based on joint venture arrangements.* \* \* \*

(2) Except as provided in paragraph (f)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.

(3) *Joint venture exclusion from affiliation.* (i) A joint venture of two or more business concerns may submit an offer as a small business for a non-8(a) federal procurement without regard to affiliation based on the joint venture arrangement so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; or

(B) For a procurement having an employee-based size standard, the procurement exceeds \$10 million.

(ii) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation based on the joint venture arrangement so long as the requirements of § 124.512(b)(1) of this chapter are met.

(iii) Two firms approved by SBA to be a mentor and protege under § 124.519 of this chapter may joint venture as a small business for any government procurement, provided the protege qualifies as small for the size standard corresponding to the SIC code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in § 124.518 of this chapter.

\* \* \* \* \*

2a. Section 121.1001 is amended by redesignating paragraphs (a)(2) through (a)(5) as paragraphs (a)(3) through (a)(6), by adding the following new paragraph

(a)(2), and by revising paragraph (b)(2) to read as follows:

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

(a) *Size Status Protests.* \* \* \*

(2) For competitive 8(a) contracts, the following entities may protest:

(i) Any offeror;

(ii) The contracting officer; or

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring agency is located or the district office that services the apparent successful offeror, or the Associate Administrator for Minority Enterprise Development.

\* \* \* \* \*

(b) *Request for Size Determinations.*

\* \* \*

(2) For SBA's 8(a) BD program:

(i) Concerning initial or continued 8(a) BD eligibility, the following entities may request a formal size determination:

(A) The 8(a) BD applicant concern or Participant; or

(B) The Assistant Administrator of the Division of Program Certification and Eligibility or the Associate Administrator for 8(a)BD.

(ii) Concerning individual sole source 8(a) contract awards, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract;

(B) The SBA program official with authority to execute the 8(a) contract; or

(C) The SBA District Director in the district office that services the Participant, or the Associate Administrator for 8(a)BD.

\* \* \* \* \*

3. Section 121.1103 is amended by revising paragraph (a) to read as follows:

### § 121.1103 What are the procedures for appealing a SIC code designation?

(a) Generally, any interested party who has been adversely affected by a SIC code designation may appeal the designation to OHA. However, with respect to a particular sole source 8(a) contract, only the Associate Administrator for 8(a)BD may appeal.

\* \* \* \* \*

## PART 124—[AMENDED]

4. Part 124 is revised to read as follows:

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

### **Subpart A—8(a) Business Development**

#### **Provisions of General Applicability**

Sec.

- 124.1 What is the purpose of the 8(a) Business Development program?
- 124.2 What length of time may a business participate in the 8(a) BD program?
- 124.3 What definitions are important in the 8(a) BD program?

#### **Eligibility Requirements for Participation in the 8(a) Business Development Program**

- 124.101 What are the basic requirements a concern must meet for the 8(a) BD program?
- 124.102 What size business is eligible to participate in the 8(a) BD program?
- 124.103 Who is socially disadvantaged?
- 124.104 Who is economically disadvantaged?
- 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?
- 124.106 When do disadvantaged individuals control an applicant or Participant?
- 124.107 What is potential for success?
- 124.108 What other eligibility requirements apply for individuals or businesses?
- 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to the 8(a) BD program?
- 124.110 Do Native Hawaiian Organizations have any special rules for applying to the 8(a) BD program?
- 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to the 8(a) program?
- 124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

#### **Applying to the 8(a) BD Program**

- 124.201 May any business submit an application?
- 124.202 Where must an application be filed?
- 124.203 What must a concern submit to apply to the 8(a) BD program?
- 124.204 How does SBA process applications for 8(a) BD program admission?
- 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?
- 124.206 What appeal rights are available to an applicant that has been denied admission?
- 124.207 Can an applicant reapply for admission to the 8(a) BD program?

#### **Exiting the 8(a) BD Program**

- 124.301 What are the ways a business may leave the 8(a) BD program?
- 124.302 What is early graduation?
- 124.303 What is termination?
- 124.304 What are the procedures for early graduation and termination?

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

#### **Business Development**

- 124.401 Which SBA field office services a Participant?
- 124.402 How does a Participant develop a business plan?
- 124.403 How is a business plan updated and modified?
- 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?
- 124.405 How does a Participant obtain Federal Government surplus property?

#### **Contractual Assistance**

- 124.501 What general provisions apply to the award of 8(a) contracts?
- 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?
- 124.503 How does SBA accept a procurement for award through the 8(a) BD program?
- 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?
- 124.505 When will SBA appeal the terms and conditions of a particular 8(a) contract or a procuring agency decision not to reserve a procurement for the 8(a) BD program?
- 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?
- 124.507 What procedures apply to competitive 8(a) procurements?
- 124.508 What are competitive business mix targets?
- 124.509 What percentage of work must a Participant perform on an 8(a) contract?
- 124.510 How is fair market price determined for an 8(a) contract?
- 124.511 Delegation of contract administration to procuring agencies.
- 124.512 Under what circumstances can a joint venture be awarded an 8(a) contract?
- 124.513 Exercise of 8(a) options and modifications.
- 124.514 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?
- 124.515 Who decides contract disputes arising between a Participant and a procuring agency after the award of an 8(a) contract?
- 124.516 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?
- 124.517 How can an 8(a) contract be terminated before performance is completed?
- 124.518 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?
- 124.519 Mentor/Protege program.

#### **Miscellaneous Reporting Requirements**

- 124.601 What reports does SBA require on parties assisting Participants in obtaining federal contracts?

- 124.602 What kind of annual financial statement must a Participant submit to SBA?

- 124.603 What reports regarding the continued business operations of former Participants does SBA require?

#### **Management and Technical Assistance Program**

- 124.701 What is the purpose of the 7(j) management and technical assistance program?
- 124.702 What types of assistance are available through the 7(j) program?
- 124.703 Who is eligible to receive 7(j) assistance?
- 124.704 What additional management and technical assistance is reserved exclusively for concerns eligible to receive 8(a) contracts?

#### **Subpart B—Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs**

- 124.1001 General applicability.
- 124.1002 What is a Small Disadvantaged Business (SDB)?
- 124.1003 What is a Private Certifier?
- 124.1004 How does an organization or business concern become a Private Certifier?
- 124.1005 Can a Private Certifier charge a fee?
- 124.1006 Is there a list of Private Certifiers?
- 124.1007 How long may an organization or business concern be Private Certifier?
- 124.1008 How does a firm become certified as a SDB?
- 124.1009 How does a firm appeal a decision of a Private Certifier?
- 124.1010 Can a firm represent itself to be an SDB if it is not on the list of qualified SDBs?
- 124.1011 What is a misrepresentation of disadvantaged status?
- 124.1012 Can a firm reapply for SDB certification?
- 124.1013 Is there a list of certified SDBs?
- 124.1014 What is the effect of receiving an SDB certification?
- 124.1015 Who may protest the disadvantaged status of a concern?
- 124.1016 When will SBA not decide an SDB protest?
- 124.1017 Who decides disadvantaged status protests?
- 124.1018 What submission procedures apply to disadvantaged status protests?
- 124.1019 What format or degree of specificity does SBA require to consider an SDB protest?
- 124.1020 What will SBA do when it receives an SDB protest?
- 124.1021 How does SBA make disadvantaged status determinations?
- 124.1022 Appeals of disadvantaged status determinations.

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



## Subpart A—8(a) Business Development

### Provisions of General Applicability

#### § 124.1 What is the purpose of the 8(a) Business Development program?

Sections 8(a) and 7(j) of the Small Business Act authorize a Minority Small Business and Capital Ownership Development program (designated the 8(a) Business Development or “8(a) BD” program for purposes of the regulations in this part). The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development.

#### § 124.2 What length of time may a business participate in the 8(a) BD program?

A Participant receives a program term of nine years from the date of SBA’s approval letter certifying the concern’s admission to the program. A firm that completes its nine year term of participation in the 8(a) BD program is deemed to graduate from the program. The nine year program term may be shortened only by termination, early graduation or voluntary withdrawal as provided for in this part.

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

*Alaska Native* means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen who a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

*Alaska Native Corporation or ANC* means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.)

*Bona fide place of business*, for purposes of 8(a) construction procurements, means that a Participant regularly maintains an office which employs at least one full-time individual within the appropriate geographical boundary. The term does not include construction trailers or other temporary construction sites.

*Community Development Corporation or CDC* means a nonprofit organization responsible to residents of the area it

serves which has received financial assistance under 42 U.S.C. 9805 *et seq.* *Concern* is defined in part 121 of this title.

*Days* means calendar days unless otherwise specified.

*Immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-son, step-daughter, step-brother, step-sister, half-brother, and half-sister.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern.”

*Native Hawaiian* means any individual whose ancestors were natives prior to 1778, of the area which now comprises the State of Hawaii.

*Native Hawaiian Organization* means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

*Negative control* is defined in part 121 of this title.

*Nondisadvantaged individual* means any individual who does not claim disadvantaged status, does not qualify as disadvantaged, or upon whose disadvantaged status an applicant or Participant does not rely in qualifying for 8(a) BD program participation.

*Participant* means a small business concern admitted to participate in the 8(a) BD program.

*Primary industry classification* means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The SIC code designations are described in the Standard Industrial Classification Manual published by the U.S. Office of Management and Budget.

*Principal place of business* means the business location at which the individuals who manage the concern’s day-to-day operations spend most working hours and where top management’s business records are kept. If different, SBA may determine the principal place of business for program purposes.

*Program year* means a 12-month period of an 8(a) BD Participant’s program participation. The first program year begins on the date that the concern is certified to participate in the 8(a) BD program and ends one year later. Each subsequent program year begins on the Participant’s anniversary of program certification and runs for one 12-month period.

*Same or similar line of business* means business activities within the same two-digit “Major Group” of the SIC Manual as the primary industry classification of the applicant or Participant. The phrase “same business area” is synonymous with this definition.

*Self-marketing* of a requirement occurs when a Participant identifies a requirement that has not been committed to the 8(a) BD program and, through its marketing efforts, causes the procuring agency to offer that specific requirement to the 8(a) BD program on the Participant’s behalf. A firm which identifies and markets a requirement which is subsequently offered to the 8(a) BD program as an open requirement or on behalf of another Participant has not “self-marketed” the requirement within the meaning of this part.

*Tribally-owned concern* means any concern at least 51 percent owned by an Indian tribe as defined in this section.

*Unconditional ownership* means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

### Eligibility Requirements for Participation in the 8(a) Business Development Program

#### § 124.101 What are the basic requirements a concern must meet for the 8(a) BD program?

Generally, a concern meets the basic requirements for admission to the 8(a) BD program if it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States, and which demonstrates potential for success.

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

(a) An applicant concern must qualify as a small business concern as defined in part 121 of this title. The applicable size standard is the one for its primary industry classification. The rules for calculating the size of a tribally-owned concern, a concern owned by an Alaska Native Corporation, a concern owned by a Native Hawaiian Organization, or a concern owned by a Community Development Corporation are additionally affected by §§ 124.109, 124.110, and 124.111, respectively.

(b) If 8(a) BD program officials determine that a concern may not qualify as small, they may deny an application for 8(a) BD program admission or may request a formal size determination under part 121 of this title.

(c) A concern whose application is denied due to size by 8(a) BD program officials may request a formal size determination under part 121 of this title. A favorable determination will enable the firm to submit a new 8(a) BD application without waiting one year.

**§ 124.103 Who is socially disadvantaged?**

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.

(b) *Members of designated groups.* (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of

origin for purposes of being included within a designated group.

(2) An individual must demonstrate identification by others as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with significant, credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for 8(a) BD (AA/8(a)BD) for consideration.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence.

(2) Evidence of individual social disadvantage must include the following elements:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) Personal experiences of social disadvantage, not merely membership in a non-designated group which might be socially disadvantaged, but has not been so designated by SBA. The experiences must have been in American society, not in other countries, and must have been substantial, chronic, and longstanding; and

(iii) Negative impact on entry into or advancement in the business world because of the disadvantage. SBA will consider any relevant evidence in assessing this element. In every case, however, SBA will consider education, employment and business history to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(A) *Education.* SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and

conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channelled the individual into nonprofessional or non-business fields.

(C) *Business history.* SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(d) *Socially disadvantaged group inclusion.* (1) *General.* Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon an adequate preliminary showing that the group has suffered such prejudice or bias, SBA will publish a notice in the **Federal Register** that it has received and is considering such a request, and that it will consider public comments.

(2) *Standards to be applied.* In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA must determine:

(i) Whether the group has suffered prejudice, bias, or discriminatory practices;

(ii) Whether those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

(3) *Procedure.* The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.

(4) *Decision.* SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the **Federal Register**. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

**§ 124.104 Who is economically disadvantaged?**

(a) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(b) *Submission of narrative and financial information.* (1) Each individual claiming economic disadvantage must describe it in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(c) *Factors to be considered.* In considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. SBA will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that SBA compares include total assets, net sales, pre tax profit, sales/working capital ratio, and net worth.

(1) *Assets.* Assets which an individual claiming disadvantaged status has transferred within two years of the application to an immediate family member, or to a trust the beneficiary of which is an immediate family member, for less than fair market value will be attributed to the individual claiming disadvantaged status.

(2) *Net worth.* For initial 8(a) BD eligibility, the net worth of an individual claiming disadvantage must be less than \$250,000. For continued 8(a) BD eligibility after admission to the program, net worth must be less than \$750,000. In determining such net worth, SBA will exclude the ownership interest in the applicant or Participant and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive

withdrawals from the applicant or Participant). Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(i) A contingent liability does not reduce an individual's net worth.

(ii) The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and an interest in a settlement trust.

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

An applicant or Participant must be at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs). See § 124.3 for definition of unconditional ownership; and §§ 124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, and CDCs.

(a) *Ownership must be direct.* Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or Participant owned principally by another business entity or by a trust (including employee stock ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals does not meet this requirement.

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. The ownership must be reflected in the concern's partnership agreement.

(c) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(e) *Stock options' effect on ownership.* In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by disadvantaged individuals. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-disadvantaged individuals will be treated as exercised, except for any ownership interests which are held by investment companies licensed under the Small Business Investment Act of 1958.

(f) *Dividends and distributions.* One or more disadvantaged individuals must be entitled to receive:

(1) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;

(2) 100 percent of the unencumbered value of each share of stock owned in the event that the stock is sold; and

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation.

(g) *Ownership of another Participant.* The individuals determined to be disadvantaged for purposes of one Participant, their immediate family members, and the Participant itself, may not hold, in the aggregate, more than a 10 percent equity ownership interest in any other single Participant.

(h) *Ownership restrictions for non-disadvantaged individuals and concerns.* (1) A non-disadvantaged individual (in the aggregate with all immediate family members) or a non-Participant concern that is a general partner or stockholder of at least 10 percent in one Participant may not own more than 10 percent in another Participant. This restriction does not apply to financial institutions licensed or chartered by Federal, state or local government, including investment companies which are licensed under the Small Business Investment Act of 1958.

(2) A non-Participant concern in the same or similar line of business may not own more than 10 percent in a Participant, except that a former Participant or a principal of 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 same or similar line of business.

(i) *Change of ownership.* A Participant may change its ownership so long as one or more disadvantaged individuals would own and control it after the change and it obtains the prior written approval of SBA.

(1) The 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 § 124.514, as long as it receives SBA's approval prior to the change.

(2) Where the previous owner held less than a 10 percent interest in the concern, or the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, prior approval is not required, but the concern must notify SBA within 60 days.

(3) Continued participation of the Participant with new ownership and the award of any new 8(a) contracts requires SBA's determination that all eligibility requirements are met by the concern and the new owners.

(4) The Participant's program term is in no way extended by the change in ownership.

(j) *Public offering.* A Participant's request for SBA's approval for the issuance of a public offering will be treated as a request for a change of ownership. Such request will cause SBA to examine the concern's continued need for access to the business development resources of the 8(a) BD program.

(k) *Community property laws given effect.* In determining ownership interests when an owner resides in any of the community property states or territories of the United States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin), SBA considers applicable state community property laws. If only one spouse claims disadvantaged status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws. A transfer or relinquishment of interest by the non-disadvantaged

spouse may be necessary in some cases to establish eligibility.

**§ 124.106 When do disadvantaged individuals control an applicant or Participant?**

SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals, except for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, or Community Development Corporations (CDCs). (See §§ 124.109, 124.110, and 124.111, respectively, for the requirements for concerns owned by Indian tribes or ANCs, for concerns owned by Native Hawaiian Organizations, and for CDC-owned concerns). Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. Control is not the same as ownership, although both may reside in the same person. A disadvantaged owner's unexercised right to cause a change in the control or management of the applicant concern does not constitute disadvantaged control and management, regardless of how quickly or easily the right could be exercised.

(a)(1) An applicant or Participant must be managed on a full-time basis by one or more disadvantaged individuals who possess requisite management capabilities.

(2) A disadvantaged full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant.

(3) One or more disadvantaged individuals who manage the applicant or Participant must devote full-time to the business during normal working hours.

(4) Any disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the objectives of its business development plan.

(b) In the case of a partnership, one or more disadvantaged individuals must serve as general partners, with control over all partnership decisions. A partnership in which no disadvantaged individual is a general partner will be ineligible for participation.

(c) In the case of a limited liability company, one or more disadvantaged individuals must serve as management members, with control over all decisions of the limited liability company.

(d) Disadvantaged individuals must control the Board of Directors of a corporate applicant or Participant, either through a majority of voting directors or through weighted voting.

(1) The powers to appoint, remove and replace directors (e.g., through ownership of voting stock) is not sufficient to satisfy the requirement that one or more disadvantaged individuals actually control the Board of Directors.

(2) Non-voting, advisory, or honorary Directors may be appointed.

(3) Any Executive Committee of Directors must be controlled by disadvantaged directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(4) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(5) Provisions for the establishment of a quorum cannot permit non-disadvantaged Directors to control the Board of Directors.

(e) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. No such non-disadvantaged individual or immediate family member may:

(1) Exercise actual control or have the power to control the applicant or Participant;

(2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AA/8(a)BD that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or Participant and such relationship is in the best interests of the 8(a) BD firm; or

(3) Receive compensation from the applicant or Participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The highest ranking officer may elect to take a lower salary than a non-disadvantaged individual only upon demonstrating that it helps the concern and upon obtaining the prior

written consent of the AA/8(a)BD or designee).

(f) Non-disadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) Non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals to effectively block actions proposed by the disadvantaged individuals.

(2) A non-disadvantaged individual or entity provides critical financial or bonding support to the applicant or Participant which directly or indirectly allows the non-disadvantaged individual to significantly influence business decisions of the Participant.

(3) A non-disadvantaged individual or entity controls the applicant or Participant or an individual disadvantaged owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a nondisadvantaged individual or entity the power to control a firm.

(4) Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or Participant cannot exercise independent business judgment without great economic risk.

#### **§ 124.107 What is potential for success?**

The applicant concern must possess reasonable prospects for success in competing in the private sector. To do so, it must be in business 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.

(a) Income tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification.

(b)(1) SBA may waive the two years in business requirement if each of the following five conditions are met:

(i) The individual or individuals upon whom eligibility is based have substantial business management experience;

(ii) The applicant has demonstrated technical experience to carry out its business plan with a substantial likelihood for success.

(iii) The applicant has adequate capital to sustain its operations and carry out its business plan;

(iv) The applicant has a record of successful performance on contracts

from governmental or nongovernmental sources in its primary industry category; and

(v) The applicant has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and any other requirements needed to perform contracts.

(2) The concern seeking a waiver under this paragraph (b) must provide information on governmental and nongovernmental contracts in progress and completed (including letters of reference) in order to establish successful contract performance, and must demonstrate how it otherwise meets the five conditions for waiver. SBA considers an applicant's performance on both government and private sector contracts in determining whether the firm has an overall successful performance record. If, however, the applicant has performed only government contracts or only private sector contracts, SBA will review its performance on those contracts alone to determine whether the applicant possesses a record of successful performance.

(c) In assessing potential for success for all concerns, SBA considers the concern's access to credit and capital, including, but not limited to, access to long-term financing, access to working capital financing, equipment trade credit, access to raw materials and supplier trade credit, and bonding capability.

(d) In assessing potential for success, SBA will also consider the technical and managerial experience of the applicant concern's managers, the operating history of the concern, the concern's record of performance on previous Federal and private sector contracts in the primary industry in which the concern is seeking 8(a) BD certification, and its financial capacity. The applicant concern as a whole must demonstrate both technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations.

(e) The Participant or individuals employed by the Participant must hold all requisite licenses if the concern is engaged in an industry requiring professional licensing (e.g., public accountancy, law, professional engineering).

(f) An applicant will not be denied admission into the 8(a) BD program due solely to a determination that potential 8(a) contract opportunities are unavailable to assist in the development of the concern unless:

(1) The Government has not previously procured and is unlikely to

procure the types of products or services offered by the concern; or

(2) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Participants providing the same or similar items or services.

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

(a) *Good character.* The applicant or Participant and all its principals must have good character.

(1) If, during the processing of an application, adverse information is obtained from the applicant or a credible source regarding possible criminal conduct by the applicant or any of its principals, no further action will be taken on the application until SBA's Inspector General has collected relevant information and has advised the AA/8(a)BD of his or her findings. The AA/8(a)BD will consider those findings when evaluating the application.

(2) Violations of any of SBA's regulations may result in denial of participation in the 8(a) BD program. The AA/8(a)BD will consider the nature and severity of the violation in making an eligibility determination.

(3) Debarred or suspended concerns or concerns owned by debarred or suspended persons are ineligible for admission to the 8(a) BD program.

(4) An applicant is ineligible for admission to the 8(a) BD program if a proprietor, partner, limited liability member, director, officer, or holder of at least 10 percent of the stock, or another person (including a key manager) with significant authority over the concern is currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity.

(5) If, during the processing of an application, SBA determines that an applicant has 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. If SBA determines that such false information has been submitted after a firm is admitted to the 8(a) BD program, SBA will initiate termination proceedings and suspend the firm under §§ 124.304 and 124.305. Whenever SBA determines that the applicant submitted false information, the matter will be referred

to SBA's Office of Inspector General for review.

(b) *One-time eligibility.* Once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) BD program, neither the concern nor that individual will be eligible again.

(1) An individual who claims disadvantage and completes the appropriate SBA forms to qualify an applicant has participated in the 8(a) BD program if SBA approves the application.

(2) Use of eligibility will take effect on the date of the concern's approval into the program.

(3) An individual who uses his/her one-time eligibility to qualify a concern for the 8(a) BD program will be considered a non-disadvantaged individual for ownership or control purposes of another applicant or Participant. The criteria restricting participation by non-disadvantaged individuals will apply to such an individual. See §§ 124.105 and 124.106.

(4) When at least 50% of the assets or liabilities of a concern are the same as those of one or more former Participants, it will not be eligible for participation.

(5) Participants which change their form of business organization and transfer their assets and liabilities to the new organization may do so without affecting the eligibility of the new organization provided the previous business is dissolved and all other eligibility criteria are met. In such a case, the new organization may complete the remaining program term of the previous organization. A request for a change in business form will be treated as a change of ownership under § 124.105(i).

(c) *Wholesalers.* An applicant concern seeking admission to the 8(a) BD program as a wholesaler need not demonstrate that it is capable of meeting the requirements of the nonmanufacturer rule for its primary industry classification.

(d) *Achievement of benchmarks.* Where actual participation by disadvantaged businesses in a particular industry exceeds the benchmark limitations established by the Department of Commerce, in consultation with the General Services Administration and the SBA, for that industry, SBA, in its discretion, may decide not to accept an application for 8(a) BD participation from a concern whose primary industry classification falls within that industry.

(e) *Multiple concerns for immediate family members.* Immediate family members may not each use their

individual disadvantaged status to qualify more than one business concern for 8(a) BD program participation if the concerns are in the same or similar line of business. When the concerns are in separate lines of business, each concern must establish that it is separately owned, managed and controlled.

(f) *Brokers.* Brokers are ineligible to participate in the 8(a) BD program. A broker is a concern that adds no value to an item being supplied to a procuring activity.

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

(a) *Special rules for ANC's.* Small business concerns owned and controlled by ANC's are eligible for participation in the 8(a) program, subject to the same conditions that apply to tribally-owned concerns, as described in paragraphs (b) and (c) of this section, except that the following provisions and exceptions apply only to ANC-owned concerns:

(1) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of an ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).

(2) An ANC that meets the requirements set forth in paragraph (a)(1) of this section is deemed economically disadvantaged under 43 U.S.C. 1626(e), and need not establish economic disadvantage as required by paragraph (b)(2) of this section.

(3) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by an ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC where both the majority of stock or other ownership interest and total voting power are held by the ANC and holders of its settlement common stock.

(4) The Alaska Native Claims Settlement Act provides that a concern which is majority owned by an ANC shall be deemed to be both owned and controlled by Alaska Natives and an economically disadvantaged business. Therefore, an individual responsible for control and management of an ANC-owned applicant or Participant need not establish personal social and economic disadvantage.

(5) Paragraphs (b)(3) (i), (ii) and (iv) of this section are not generally applicable to an ANC, provided its status as an

ANC is clearly shown in its articles of incorporation.

(6) Paragraph (c)(1) of this section is not applicable to an ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a "sue and be sued" clause.

(b) *Tribal eligibility.* In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section. Thereafter, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically required to do so by the AA/8(a)BD or designee. Each tribally-owned concern seeking to be certified for 8(a) BD participation must comply with the provisions of paragraph (c) of this section.

(1) *Social disadvantage.* An Indian tribe as defined in § 124.3 is considered to be socially disadvantaged.

(2) *Economic disadvantage.* In order to be eligible to participate in the 8(a) BD program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital.
- (vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

(3) *Forms and documents required to be submitted.* Except as otherwise provided in this section, the Indian tribe generally must submit the forms and documents required of 8(a) BD applicants as well as the following material:

- (i) A copy of all governing documents such as the tribe's constitution or business charter.
- (ii) Evidence of its recognition as a tribe eligible for the special programs

and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) *Business eligibility.* In order to be eligible to participate in the 8(a) BD program, a concern which is owned by an eligible Indian tribe (or wholly owned business entities of such tribe) must meet the conditions set forth in paragraphs (c)(1) through (c)(7) of this section.

(1) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation, partnership agreement or limited liability company articles of organization 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. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(2) *Size.* (i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Government procurement in part 121 of this title. The particular size standard to be applied shall be based on the primary industry classification of the applicant concern.

(ii) A tribally-owned Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

(iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business

concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(3) *Ownership.* For corporate entities, a tribe must 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, a tribe must own at least a 51 percent interest. A tribe cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary Standard Industry Classification code as the applicant. The restrictions of § 124.105(h) do not apply to tribes; they do, however, apply to non-disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

(4) *Control and management.* (i) The management and daily business operations of a tribally-owned concern must be controlled by the tribe, through one or more disadvantaged individual members who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows:

(A) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or

(B) Management may be provided by non-tribal members if SBA determines that such management is required to assist the concern's development, that the tribe will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how disadvantaged tribal members will develop managerial skills sufficient to manage the concern or similar tribally-owned concerns in the future.

(ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

(5) *Individual eligibility limitation.* SBA does not deem an individual involved in the management or daily business operations of a tribally-owned

concern to have used his or her individual eligibility within the meaning of § 124.108(b).

(6) *Potential for success.* (i) A tribally-owned applicant concern must be 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, or demonstrate potential for success as set forth in paragraph (c)(6)(ii) of this section.

(ii) In determining whether a tribally-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operation of the concern;

(B) The financial capacity of the concern; and

(C) The concern's record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

(7) *Other eligibility criteria.* (i) As with other 8(a) applicants, a tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other program participants providing the same or similar items or services.

(ii) Except for the tribe itself, the concern's officers, directors, and 20% or more shareholders must demonstrate good character. See § 124.108(a).

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

(a) Concerns owned by economically disadvantaged Native Hawaiian Organizations as defined in § 124.3 are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.101 through 124.108 and § 124.112(a) to the extent that they are not inconsistent with this section.



(b) A concern owned by a Native Hawaiian Organization must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. Ownership by the Native Hawaiian Organization will not, by itself, cause affiliation with the Native Hawaiian Organization or with other entities owned by the Native Hawaiian Organization. However, affiliation with the Native Hawaiian Organization or with other entities owned by the Native Hawaiian Organization may be caused by circumstances other than common ownership.

(c) A Native Hawaiian Organization cannot own more than one current or former Participant having the same primary industry classification.

(d) SBA does not deem an individual involved in the management or daily business operations of a Participant owned by a Native Hawaiian Organization to have used his or her individual eligibility within the meaning of § 124.108(b).

(e)(1) An applicant concern owned by a Native Hawaiian Organization must be 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, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

(2) In determining whether a concern owned by a Native Hawaiian Organization has the potential for success, SBA will look at a number of factors including, but not limited to:

- (i) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operation of the concern;
- (ii) The financial capacity of the concern; and
- (iii) The concern's record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

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

(a) Concerns owned at least 51 percent by CDCs (or a wholly owned business entity of a CDC) are eligible for participation in the 8(a) BD program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. These concerns must meet all eligibility criteria set forth in § 124.101

through § 124.108 and § 124.112(a) to the extent that they are not inconsistent with this section.

(b) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) is considered to be controlled by such CDC and eligible for participation in the 8(a) BD program, provided it meets all eligibility criteria set forth or referred to in this section and its management and daily business operations are conducted by one or more individuals determined to have managerial experience of an extent and complexity needed to run the concern.

(c) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. Ownership by the CDC will not, by itself, cause affiliation with the CDC or with other CDC-owned entities. However, affiliation with the CDC or other CDC-owned entities may arise due to circumstances other than common CDC ownership.

(d) A CDC cannot own more than one current or former Participant having the same primary industry classification.

(e) SBA does not deem an individual involved in the management or daily business operations of a CDC-owned concern to have used his or her individual eligibility within the meaning of § 124.108(b).

(f)(1) A CDC-owned applicant concern must be 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, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

(2) In determining whether a CDC-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

- (i) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operation of the concern;
- (ii) The financial capacity of the concern; and
- (iii) The concern's record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

(g) A CDC-owned applicant and all of its principals must have good character as set forth in § 124.108(a).

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

(a) *Standards.* In order for a concern to remain eligible for 8(a) BD program participation, it must continue to meet all eligibility criteria contained in § 124.101 through § 124.108. For continued economic disadvantage, transfers of assets by an individual claiming disadvantaged status to an immediate family member, or to a trust the beneficiary of which is an immediate family member, for less than fair market value will be attributed to the individual claiming disadvantaged status for a period of two years after the transfer. Any concern that fails to meet the eligibility requirements after being admitted to the program will be subject to termination or early graduation under §§ 124.302 through 124.304, as appropriate.

(b) *Submissions supporting continued eligibility.* As part of an annual review, each Participant must annually submit to the servicing district office the following:

(1) A certification that it meets the 8(a) BD program eligibility requirements as set forth in § 124.101 through § 124.108 and paragraph (a) of this section;

(2) Personal financial information for each disadvantaged owner;

(3) A certification from each individual claiming disadvantaged status regarding the transfer of assets to any immediate family member, or to a trust the beneficiary of which is an immediate family member, within two years of the date of the annual review. The individual must certify that he or she has not transferred assets or that he or she has not transferred assets except to the extent described in an attachment to the certification.

(4) A record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the Participant to each of its owners, officers or directors, or to any person or entity affiliated with such individuals; and

(5) Such other information as SBA may deem necessary. For other required annual submissions, see § 124.601 through § 124.603.

(c) *Eligibility reviews.* (1) Upon receipt of specific and credible information alleging that a Participant no longer meets the eligibility requirements for continued program eligibility, SBA will review the concern's eligibility for continued participation in the program.

(2) Sufficient reasons for SBA to conclude that a 8(a) BD Participant is no longer economically disadvantaged include, but are not limited to,

demonstrated access to a significant new source of capital or loans, an unusually large amount of funds or other assets withdrawn from the concern by its owners, or substantial personal assets, income or net worth of any disadvantaged owner.

(3) If SBA determines that funds or other assets have been withdrawn to the detriment of the achievement of the targets, objectives and goals of the Participant's business plan, or to the detriment of its overall business development, SBA may initiate a termination proceeding under §§ 124.303 and 124.304, or require an appropriate reinvestment of funds or other assets, as well as any other actions SBA deems necessary to counteract the detrimental effects of the withdrawals, as a condition of the Participant maintaining program eligibility. The fact that a concern's net worth has increased despite withdrawals that are deemed excessive will not preclude SBA from determining that such withdrawals were detrimental to the attainment of the concern's business objectives or to its overall business development.

#### **Applying to the 8(a) BD Program**

##### **§ 124.201 May any business submit an application?**

Any concern or any individual on behalf of a business has the right to apply for 8(a) BD program participation whether or not there is an appearance of eligibility.

##### **§ 124.202 Where must an application be filed?**

An application for 8(a) BD program admission must be filed in the SBA Division of Program Certification and Eligibility (DPCE) field office serving the territory in which the principal place of business is located. The SBA district office will provide an applicant concern with information regarding the 8(a) BD program and with all required application forms.

##### **§ 124.203 What must a concern submit to apply to the 8(a) BD program?**

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments will include, but not be limited to, financial statements, Federal personal and business tax returns, and personal history statements. The application package may be in the form of an electronic application.

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

(a) The AA/8(a)BD is authorized to approve or decline applications for admission to the 8(a) BD program. The DPCE will receive, review and evaluate all 8(a) BD applications except those from ANC-owned applicants. The SBA's Anchorage District Office will receive those applications and review them for completeness before sending them to the AA/8(a)BD for further processing. The field DPCE office 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. SBA will process an application for 8(a) BD program participation within 90 days of receipt of a complete application package by the field DPCE office. Incomplete application packages will not be processed.

(b) An applicant concern's eligibility will be based on circumstances existing on the date of application except as provided in paragraph (c) of this section. SBA, in its sole discretion, may request clarification of information contained in the application at any time in the application process.

(c) Changed circumstances for an applicant concern occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for decline. The applicant must inform SBA of any changed circumstances during its application review.

(d) The decision of the AA/8(a)BD to approve or deny an application will be in writing. A decision to deny admission will state the specific reasons for denial, and will inform the applicant of any appeal rights.

(e) If the AA/8(a)BD approves the application, the date of the approval letter is the date of program certification for purposes of determining the concern's program term. However, an applicant is not entitled to receive program benefits until SBA has approved the concern's business plan.

##### **§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?**

(a) An applicant may request the AA/8(a)BD to reconsider his or her initial decline decision. To do so, the applicant must ask for reconsideration by sending a certified letter, return receipt requested, to the regional office of the DPCE that originally processed its application. The applicant must submit its request for reconsideration within 45

days of receiving notice that its application was declined. The applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

(b) The AA/8(a)BD will issue a written decision within 45 days of the regional DPCE's receipt of the applicant's request. The AA/8(a)BD may either approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the AA/8(a)BD will explain why the applicant is not eligible for admission to the 8(a) BD program and give specific reasons for the decline.

(c) If the AA/8(a)BD declines the application solely on issues not raised in the initial decline, the applicant can ask for reconsideration as if it were an initial decline.

##### **§ 124.206 What appeal rights are available to an applicant that has been denied admission?**

(a) An applicant may appeal a denial of program admission if it is based solely on a negative finding of social disadvantage, economic disadvantage, ownership, control, or any combination of these four criteria. A denial decision that is based at least in part on the failure to meet any other eligibility criterion is not appealable and is the final Agency decision.

(b) The applicant may appeal an initial decision of the AA/8(a)BD without requesting reconsideration, or may appeal the decision of the AA/8(a)BD on reconsideration.

(c) The applicant may initiate an appeal by filing a petition in accordance with part 134 of this title with SBA's Office of Hearings and Appeals (OHA) within 45 days of the date of service (as defined in § 134.204) of the Agency decision.

(d) If an appeal is filed with OHA, the written decision of the Administrative Law Judge is the final Agency decision. If an appealable decision is not appealed, the decision of the AA/8(a)BD is the final Agency decision.

##### **§ 124.207 Can an applicant reapply for admission to the 8(a) BD program?**

A concern which has been declined for 8(a) BD program admission may submit a new application for admission to the program 12 months after the date of the final Agency decision to decline.

#### **Exiting the 8(a) BD Program**

##### **§ 124.301 What are the ways a business may leave the 8(a) BD program?**

A concern participating in the 8(a) BD program may leave the program by any of the following means:

(a) Voluntary early graduation or withdrawal;

(b) Expiration of the program term established pursuant to § 124.2;

(c) Early graduation pursuant to the provisions of §§ 124.302 and 124.304; or

(d) Termination pursuant to the provisions of §§ 124.303 and 124.304.

#### **§ 124.302 What is early graduation?**

(a) *General.* The Small Business Act authorizes SBA to graduate a firm from the 8(a) BD program prior to the expiration of its Program Term for two reasons:

(1) When a Participant is recognized as successfully completing the 8(a) BD program by substantially achieving the targets, objectives and goals set forth in its business plan prior to the expiration of its program term, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program; or

(2) When SBA determines that one or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.

(b) *Early graduation criteria.* In determining whether a Participant has substantially achieved the targets, objectives and goals of its business plan and in assessing the overall competitive strength and viability of a Participant, SBA considers the totality of circumstances, including the following factors:

(1) Degree of sustained profitability;

(2) Sales trends, including improved ratio of non-8(a) sales to 8(a) sales since program entry;

(3) Business net worth, financial ratios, working capital, capitalization, and access to credit and capital;

(4) Current ability to obtain bonding;

(5) A comparison of the Participant's business and financial profiles with profiles of non-8(a) BD businesses having the same primary four-digit SIC code as the Participant;

(6) Strength of management experience, capability, and expertise; and

(7) Ability to operate successfully without 8(a) contracts.

(c) *Benchmark achievement.* SBA may graduate a Participant prior to the expiration of its program term where the Participant has substantially achieved the targets, objectives and goals of its business plan as adjusted under § 124.403(c) because of benchmark achievement.

#### **§ 124.303 What is termination?**

(a) SBA may terminate the participation of a concern in the 8(a) BD program prior to the expiration of the

concern's Program Term for good cause. Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the concern's 8(a) BD application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or by other means.

(2) Failure by the concern to maintain its eligibility for program participation.

(3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals.

(4) Failure by the concern to obtain written approval from SBA for any changes in ownership, management or control pursuant to §§ 124.105 and 124.106.

(5) Failure by the concern to disclose to SBA the extent to which non-disadvantaged persons or firms participate in the management of the Participant business concern.

(6) Failure by one or more of the concern's principals to maintain good character.

(7) A pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(8) Cessation of business operations by the concern.

(9) Failure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.

(10) A pattern of inadequate performance by the concern of awarded section 8(a) contracts.

(11) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(12) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters.

(13) Excessive transfers of funds or other business assets hindering development of the concern, or excessive withdrawals from the concern for the personal benefit of any of its owners or any person or entity affiliated with the owners. Withdrawals are excessive if they exceed:

(i) \$150,000 for firms with sales up to \$1,000,000;

(ii) \$200,000 for firms with sales

between \$1,000,000 and \$2,000,000; and

(iii) \$300,000 for firms with sales over \$2,000,000.

(14) Unauthorized use of SBA direct or guaranty loan proceeds or violation of an SBA loan agreement.

(15) Submission on behalf of a Participant of false information to SBA, including false certification of compliance with non-8(a) business activity targets under § 124.508, where responsible officials of the 8(a) BD concern knew or should have known the submission to be false.

(16) Debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to 13 CFR part 145 or FAR subpart 9.4 (48 CFR part 9, subpart 9.4).

(17) Conduct by the concern, or any of its principals, indicating a lack of business integrity. Such conduct may be demonstrated by information in a criminal indictment, a criminal conviction, or a civil judgment.

(18) Suspension or revocation of any professional license required to run the business.

(19) Willful failure by the Participant business concern to comply with applicable labor standards and obligations.

(20) Material breach of any terms and conditions of the 8(a) BD Program Participation Agreement.

(21) Willful violation by a concern, or any of its principals, of any SBA regulation.

(b) The examples of good cause listed in paragraph (a) of this section are intended to be illustrative only. Other grounds for terminating a Participant from the 8(a) BD program for cause may exist and may be used by SBA.

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

(a) *General.* The same procedures apply to both early graduation and termination of Participants from the 8(a) BD program.

(b) *Letter of Intent to Terminate or Early Graduate.* 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 Early Graduate 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 of service of the letter to submit a written response to SBA. Service is defined in § 134.204.

(c) *Recommendation and decision.* Following the 30-day response period,

the Assistant Administrator, DPCE, will consider the proposed early graduation or termination and any information submitted in response by the concern. Upon determining that early graduation or termination is not warranted, the Assistant Administrator will notify the Participant in writing. If early graduation or termination appears warranted, the Assistant Administrator will make such a recommendation to the AA/8(a)BD, who will then make a decision whether to early graduate or terminate the concern.

(d) *Notice requirements.* Upon deciding that early graduation or termination is warranted, the AA/8(a)BD will issue a Notice of Early Graduation or Termination. The Notice will set forth the specific facts and reasons for the decision, and will advise the concern that it may appeal the decision in accordance with the provisions of part 134 of this title.

(e) *Appeal to Office of Hearings and Appeals.* Procedures governing appeals of early graduation or termination to SBA's OHA are set forth in part 134. If a Participant does not appeal a Notification of Early Graduation or Termination within 45 days of the date of service (as defined in § 134.204), the decision of the AA/8(a)BD is the final agency decision effective on the date the appeal right expired.

(f) *Effect of early graduation or termination.* After the effective date of early graduation or termination, a Participant is no longer eligible to receive any 8(a) BD program assistance. However, such concern is obligated to complete previously awarded 8(a) contracts, including any priced options which may be exercised.

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

(a) At any time after SBA issues a Letter of Intent to Terminate pursuant to § 124.304, the AA/8(a)BD may suspend 8(a) contract support and all other forms of 8(a) BD program assistance to that concern until the issue of the concern's termination from the program is finally decided. The AA/8(a)BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

(b) SBA will issue a Notice of Suspension to the Participant's last known address by certified mail, return receipt requested. Suspension is effective as of the date of the issuance of the Notice. The Notice will provide the following information:

- (1) The basis for the suspension;
- (2) A statement that the suspension will continue pending the completion of further investigation, a final program termination determination, or some other specified period of time;
- (3) A statement that awards of competitive and non-competitive 8(a) contracts, including those which have been "self-marketed" by a Participant, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or an authorized representative to be in the best interest of the Government to do so, and SBA adopts that determination;
- (4) A statement that the concern is obligated to complete previously awarded section 8(a) contracts;
- (5) A statement that the suspension is effective nationally throughout the SBA;
- (6) A statement that a request for a hearing on the suspension will be considered by an Administrative Law Judge at OHA, and granted or denied as a matter of discretion.

(7) A statement that the firm's participation in the program is suspended effective on the date the Notice is issued, and that the program term will resume only if the suspension is lifted or the firm is not terminated.

(c) The applicant concern may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this title with OHA within 45 days of the date of service (as defined in § 134.204) of a Notice of Suspension pursuant to paragraph (b) of this section. It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the Participant requests one, but authority to grant a hearing is within the discretion of the Administrative Law Judge in OHA. A suspension remains in effect pending the result of its appeal.

(d) SBA has the burden of showing that substantial evidence exists in support of at least one of the grounds for termination cited in the Letter of Intent to Terminate, and that protection of the Government's interest requires suspension before OHA makes a final determination regarding the termination.

(e) If there is a timely appeal, the decision of the Administrative Law Judge is the final Agency decision. If there is not a timely appeal, the decision

of the AA/8(a)BD is the final Agency decision.

(f) Upon the request of SBA, OHA may consolidate suspension and termination proceedings when the issues presented are identical.

(g) Any program suspension which occurs in accordance with this part will continue in effect until such time as the SBA lifts the suspension or the Participant's participation in the program is fully terminated. If the concern is ultimately not terminated from the 8(a) BD program, the suspension will be lifted and the length of the suspension will be added to the concern's program term.

(h) SBA does not recognize the concept of de facto suspension. Adding time to the end of a Participant's program term equal to the length of a suspension will occur only where a concern's program participation has been formally suspended in accordance with the procedures set forth in this section.

(i) A suspension from 8(a) BD participation under this section has no effect on a concern's eligibility for non-8(a) Government contracts. However, a debarment or suspension under the Federal Acquisition Regulation (48 CFR chapter 1) will disqualify a concern from receiving all Government contracts, including 8(a) contracts.

**Business Development**

**§ 124.401 Which SBA field office services a Participant?**

The SBA district office which serves the geographical territory where a Participant's principal place of business is located normally will service the concern during its participation in the 8(a) BD program.

**§ 124.402 How does a Participant develop a business plan?**

(a) *General.* In order to assist the SBA servicing office in determining the business development needs of its portfolio Participants, each Participant must develop a comprehensive business plan setting forth its business targets, objectives, and goals.

(b) *Submission of initial business plan.* Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. The Participant will not be eligible for 8(a) BD program benefits, including 8(a) contracts, until SBA approves its business plan.

(c) *Contents of business plan.* The business plan must contain at least the following:

- (1) A detailed description of any products currently being produced and any services currently being performed

by the concern, as well as any future plans to enter into one or more new markets;

(2) The applicant's designation of its primary industry classification, as defined in § 124.3;

(3) An analysis of market potential, competitive environment, and the concern's prospects for profitable operations during and after its participation in the 8(a) BD program;

(4) An analysis of the concern's strengths and weaknesses, with particular attention on ways to correct any financial, managerial, technical, or work force conditions which could impede the concern from receiving and performing non-8(a) contracts;

(5) Specific targets, objectives, and goals for the business development of the concern during the next two years;

(6) Estimates of both 8(a) and non-8(a) contract awards that will be needed to meet its targets, objectives and goals; and

(7) Such other information as SBA may require.

**§ 124.403 How is a business plan updated and modified?**

(a) *Annual review.* Each Participant must annually review its business plan with its assigned Business Opportunity Specialist (BOS), and modify the plan as appropriate. The Participant must submit a modified plan and updated information to its BOS within thirty (30) days after the close of each program year. It also must submit a capability statement describing its current contract performance capabilities as part of its updated business plan.

(b) *Contract forecast.* As part of the annual review of its business plan, each Participant must annually forecast in writing its needs for contract awards for the next program year. The forecast must include:

(1) The aggregate dollar value of 8(a) contracts to be sought, broken down by sole source and competitive opportunities where possible;

(2) The aggregate dollar value of non-8(a) contracts to be sought;

(3) The types of contract opportunities to be sought, identified by product or service; and

(4) Such other information as SBA may request to aid in providing effective business development assistance to the Participant.

(c) *Benchmark achievement.* Where actual participation by disadvantaged businesses in a particular industry exceeds the benchmark limitations established by the Department of Commerce, in consultation with the General Services Administration and the SBA, for that industry, SBA may

adjust the targets, objectives and goals contained in the business plans of Participants whose primary industry classification falls within that industry. Any adjustment will take into account projected decreases in 8(a) and SDB contracting opportunities.

(d) *Transition management strategy.* Beginning in the first year of the transitional stage of program participation, each Participant must annually submit a transition management strategy to be incorporated into its business plan. The transition management strategy must describe:

(1) How the Participant intends to meet the applicable non-8(a) business activity target imposed by § 124.508 during the transitional stage of participation; and

(2) The specific steps the Participant intends to take to continue its business growth and promote profitable business operations after the expiration of its program term.

**§ 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?**

(a) *General.* Participation in the 8(a) BD program is divided into two stages, a developmental stage and a transitional stage. The developmental stage will last four years, and the transitional stage will last five years, unless the concern has exited the program by one of the means set forth in § 124.301 prior to the expiration of its program term.

(b) *Developmental stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the developmental stage of program participation:

(1) Sole source and competitive 8(a) contract support;

(2) Financial assistance pursuant to § 120.385 of this title;

(3) The transfer of technology or surplus property owned by the United States pursuant to § 124.405; and

(4) Training to aid in developing business principles and strategies to enhance their ability to compete successfully for both 8(a) and non-8(a) contracts.

(c) *Transitional stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the transitional stage of program participation:

(1) The same assistance as that provided to Participants in the developmental stage;

(2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other

Participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements); and

(3) Training and technical assistance in transitional business planning.

**§ 124.405 How does a Participant obtain Federal Government surplus property?**

(a) *General.* (1) Surplus Federal Government property may be transferred to eligible Participants from State Agencies for Surplus Property (SASPs) in accordance with the procedures set forth in 41 CFR Part 101-44 and this section.

(2) The property which may be transferred to SASPs for further transfer to eligible Participants includes all personal property which has been determined to be "donable" as defined in 41 CFR 101-44.001-3.

(b) *Eligibility to receive Federal surplus property.* To be eligible to receive Federal surplus property, on the date of transfer a concern must:

(1) Be in the 8(a) BD program;

(2) Be in compliance with all program requirements, including any reporting requirements;

(3) Not be debarred, suspended or declared ineligible under part 9, subpart 9.4 of the Federal Acquisition Regulations, Title 48 of the Code of Federal Regulations;

(4) Not be under a pending 8(a) BD program suspension, termination or early graduation proceeding; and

(5) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) *Use of acquired surplus property.*

(1) Eligible Participants may acquire surplus Federal property from any SASP located in any State, provided the concern represents and agrees in writing:

(i) As to what the intended use of the surplus property is to be and that this use is consistent with the objectives of the concern's 8(a) business plan;

(ii) That it will use the property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the property to be acquired to any party other than the Federal Government during its term of participation in the 8(a) program and for one year after it leaves the program;

(iv) That, at its own expense, it will return the property to a SASP or transfer

it to another Participant if directed to do so by the SBA because it has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the property, it will be liable to the Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give SBA access to inspect the property and all records pertaining to it.

(2) A firm receiving surplus property pursuant to this section assumes all liability associated with or stemming from the use of the property.

(3) If the property is not placed in use for the purposes for which it was intended within one year of its receipt, SBA may direct the concern to deliver the property to another Participant or to the SASP from which it was acquired.

(4) Failure to comply with any of the commitments made under paragraph (c)(1) of this section constitutes a basis for termination from the 8(a) program.

(d) *Procedures for acquiring Federal Government surplus property.* (1) Participants may participate in the surplus property distribution program administered by the SASPs to the same extent, but with no special priority over, other authorized transferees. See 41 CFR subpart 101-44.2.

(2) Each Participant seeking to acquire Federal Government surplus property from a SASP must:

(i) Certify in writing to the SASP that it is eligible to receive the property pursuant to paragraph (b) of this section;

(ii) Make the written representations and agreement required by paragraph (c)(1) of this section; and

(iii) Identify to the SASP its servicing SBA field office.

(3) Upon receipt of the required certification, representations, agreement, and information set forth in paragraph (d)(2) of this section, the SASP must contact the appropriate SBA field office and obtain the SBA's verification that the concern seeking to acquire the surplus property is eligible, and that the identified use of the property is consistent with the concern's business activities. SASPs may not release property to a Participant without this verification.

(4) The SASP and the Participant must agree on and record the fair market value of the surplus property at the time of the transfer to the Participant. The SASP must provide to SBA a written record, including the agreed upon fair market value, of each transaction to a Participant when any property has been transferred.

(e) *Costs.* Participants acquiring surplus property from a SASP must pay a service fee to the SASP which is equal to the SASP's direct costs of locating, inspecting, and transporting the surplus property. If a Participant elects to incur the responsibility and the expense for transporting the acquired property, the concern may do so and no transportation costs will be charged by the SASP. In addition, the SASP may charge a reasonable fee to cover its costs of administering the program. In no instance will any SASP charge a Participant more for any service than their established fees charged to other transferees.

(f) *Title.* The title to surplus property acquired from a SASP will pass to the Participant when the Participant executes the applicable SASP distribution documents and takes possession of the property.

(g) *Compliance.* (1) SBA will periodically review whether Participants that have received surplus property have used and maintained the property as agreed. This review may include site visits to visually inspect the property to ensure that it is being used in a manner consistent with the terms of its transfer.

(2) Participants must provide SBA with access to all relevant records upon request.

(3) Where SBA receives credible information that transferred surplus property may have been disposed of or otherwise used in a manner that is not consistent with the terms of the transfer, SBA may investigate such claim to determine its validity.

(4) SBA may, either by itself or through a SASP, take any action to correct any noncompliance involving the use of transferred property still in possession of the Participant or to enforce any terms, conditions, reservations, or restrictions imposed on the property by the distribution document. Actions to enforce compliance, or which may be taken as a result of noncompliance, include the following:

(i) Requiring that the property be placed in proper use within a specified time;

(ii) Requiring that the property be transferred to another Participant having a need and use for the property, returned to the SASP serving the area where the property is located for distribution to another eligible transferee or to another SASP, or transferred through GSA to another Federal agency;

(iii) Recovery of the fair rental value of the property from the date of its receipt by the Participant; and

(iv) Initiation of proceedings to terminate the Participant from the 8(a) BD program.

(5) Where SBA finds that a recipient has sold or otherwise disposed of the acquired surplus property in violation of the agreement covering sale and disposal, the Participant is liable for the agreed upon fair market value of the property at the time of the transfer, or the sale price, whichever is greater. However, a Participant need not repay any amount where it can demonstrate to the SBA's satisfaction that the property is no longer useful for the purpose for which it was transferred and receives the SBA's prior written consent to transfer the property. For example, if a piece of equipment breaks down beyond repair, it may be disposed of without being subject to the repayment provision, so long as the concern receives the SBA's prior consent.

(6) Any funds received by the SBA in enforcement of this section will be remitted promptly to the Treasury of the United States as miscellaneous receipts.

#### Contractual Assistance

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

(a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal Government agencies, including contracts to furnish equipment, supplies, services, leased real property, or materials to the Government or to perform construction work for the Government, and to contract the performance of these contracts to qualified Participants. Where appropriate, SBA may delegate the contract execution function to procuring activities. In order to receive and retain a delegation of SBA's contract execution and review functions, a procuring activity must report all 8(a) contract awards, modifications, and options to SBA.

(b) 8(a) contracts may either be sole source awards or awards won through competition with other Participants.

(c) Admission into the 8(a) BD program does not guarantee that a Participant will receive 8(a) contracts.

(d) While a Participant's projected level of 8(a) contract support is required as part of its business plan as a planning and development tool, the proposed level contained in the business plan will not prevent contract awards above that level so long as:

(1) The Participant is competent and responsible to perform a particular 8(a) contract; and

(2) The Participant is in compliance with any applicable competitive

business mix target or remedial measure imposed by § 124.508.

(e) A requirement for possible award may be identified by SBA, a particular Participant or the procuring agency itself. SBA will submit the capability statements provided to SBA annually under § 124.403 to appropriate procuring agencies for the purpose of matching requirements with Participants.

(f) Participants should market their capabilities to appropriate procuring agencies to increase their prospects of receiving sole source 8(a) contracts.

(g) A concern must be a current Participant in the 8(a) BD program at the time of award, except as provided in § 124.507(d).

(h) A Participant must certify that it is a small business under the size standard corresponding to the SIC code assigned to each 8(a) contract. 8(a) BD program personnel will verify size prior to award of an 8(a) contract. If the Participant is not verified as small, it may request a formal size determination from the appropriate General Contracting Area Office under part 121 of this title.

(i) Any person or entity that misrepresents its status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" in order to obtain any 8(a) contracting opportunity will be subject to possible criminal, civil and administrative penalties, including those imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d).

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

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

(b) Contracting officers must submit offering letters to the following locations:

(1) For competitive 8(a) requirements and those sole source requirements for which no specific Participant is nominated (i.e., open requirements) other than construction requirements, to the SBA district office serving the geographical area in which the procuring agency is located;

(2) For competitive and open construction requirements, to the SBA district office serving the geographical area in which the work is to be performed;

(3) For sole source requirements offered on behalf of a specific Participant, to the SBA district office servicing that concern.

(c) An offering letter must contain the following information:

(1) A description of the work to be performed or items to be delivered and a copy of the statement of work, if available;

(2) The estimated period of performance;

(3) The SIC code that applies to the principal nature of the acquisition;

(4) The anticipated dollar value of the requirement, including options, if any;

(5) Any special restrictions or geographical limitations on the requirement;

(6) The location of the work to be performed for construction procurements;

(7) Any special capabilities or disciplines needed for contract performance;

(8) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials;

(9) The acquisition history, if any, of the requirement;

(10) The names and addresses of any small business contractors which have performed on this requirement during the previous 24 months;

(11) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business set-aside, as a small disadvantaged business set-aside, or as a competitive 8(a) procurement, and that no other public communication (such as a notice in the Commerce Business Daily) has been made showing the procuring agency's clear intent to use any of these means of procurement;

(12) Identification of any specific Participant that the procuring agency contracting officer nominates for award of a sole source 8(a) contract, if appropriate, including a brief justification for the nomination, such as one of the following:

(i) The Participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) BD program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent;

(13) Bonding requirements, if applicable;

(14) Identification of all Participants which have expressed an interest in being considered for the acquisition;

(15) Identification of all SBA field offices which have requested that the requirement be awarded through the 8(a) BD program;

(16) A request, if appropriate, that a requirement whose estimated contract value is under the applicable competitive threshold be awarded as an 8(a) competitive contract; and

(17) Any other information that the procuring agency deems relevant or which SBA requests.

**§ 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 agency'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 agency in writing within 10 working days of receipt of the written offering letter, unless SBA requests, and the procuring agency grants, an extension. SBA is not required to accept any particular procurement offered to the 8(a) BD program.

(1) Where SBA decides to accept an offering of a sole source 8(a) procurement, SBA will accept the offer both on behalf of the 8(a) BD program and in support of a specific Participant.

(2) Where SBA decides to accept an offering of a competitive 8(a) procurement, SBA will accept the offer on behalf of the 8(a) BD program.

(b) *Verification of SIC code.* As part of the acceptance process, SBA will verify the appropriateness of the SIC code designation assigned to the requirement by the procuring agency contracting officer.

(1) SBA will accept the SIC code assigned to the requirement by the procuring agency contracting officer as long as it is reasonable, even though other SIC codes may also be reasonable.

(2) If SBA and the procuring agency are unable to agree as to the proper SIC code designation for the requirement, SBA may either refuse to accept the requirement for the 8(a) BD program, appeal the contracting officer's determination to the head of the agency pursuant to § 124.505, or appeal the SIC code designation to OHA under part 134 of this title.

(c) *Sole source award where procuring agency nominates a specific Participant.* SBA will determine whether an appropriate match exists where the procuring agency identifies a particular Participant for a sole source award.

(1) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the Participant recommended by the procuring agency, provided that:

(i) The procurement is consistent with the Participant's business plan;

(ii) The Participant complies with its applicable competitive business mix target or any remedial measures imposed by § 124.508(e);



(iii) The Participant is small for the size standard corresponding to the SIC code assigned to the requirement by the procuring agency contracting officer; and

(iv) The Participant has submitted required financial statements to SBA.

(2) If an appropriate match exists, SBA will advise the procuring agency whether SBA will participate in contract negotiations and execution of award documents or whether SBA will authorize the procuring agency to negotiate and execute award directly with the identified Participant.

(3) If an appropriate match does not exist, SBA will notify the Participant and the procuring agency, and may then nominate an alternate Participant.

(d) *Open requirements.* When a procuring agency does not nominate a particular concern for performance of a sole source 8(a) contract (open requirement), the following additional procedures will apply:

(1) If the procurement is a construction requirement, SBA will examine the portfolio of Participants that have a bona fide place of business within the geographical boundaries served by the SBA district office where the work is to be performed to select a qualified Participant. If none is found to be qualified or a match for a concern in that district is determined to be impossible or inappropriate, SBA may nominate a Participant with a bona fide place of business within the geographical boundaries served by another district office within the same state, or may nominate a Participant having a bona fide place of business out of state but within a reasonable proximity to the work site. SBA's decision will ensure that the nominated Participant is close enough to the work site to keep costs of performance reasonable.

(2) If the procurement is not a construction requirement, SBA may select any eligible, responsible Participant nationally to perform the contract.

(3) In cases in which SBA selects a Participant for possible award from among two or more eligible and qualified Participants, the selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, and technical capability.

(4) To the maximum extent practicable, SBA will promote the equitable geographic distribution of 8(a) sole source contracts.

(e) *Formal technical evaluations.* Except for the procedures set forth in

subpart 36.6 of the Federal Acquisition Regulation (FAR) (48 CFR part 36, subpart 36.6) for architect-engineer services, SBA will not authorize formal technical evaluations for sole source 8(a) requirements. A procuring agency:

(1) Must request that a procurement be a competitive 8(a) award if it requires formal technical evaluations of more than one Participant for a requirement below the applicable competitive threshold amount; and

(2) May conduct informal assessments of several Participants' capabilities to perform a specific requirement, so long as the statement of work for the requirement is not released to any of the Participants being assessed.

(f) *Repetitive acquisitions.* A procuring agency contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award. This enables the SBA to:

(1) Evaluate whether the requirement should be a competitive 8(a) award;

(2) Assess a nominated firm's eligibility, whether or not it is the same firm that performed the previous contract; and

(3) Determine whether the requirement should continue under the 8(a) BD program.

(g) *Basic Ordering Agreements (BOAs).* A Basic Ordering Agreement (BOA) is not a contract under the FAR. See 48 CFR 16.703(a). Each order to be issued under the BOA is an individual contract. As such, the procuring agency must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself.

(1) SBA will not accept for award on a sole source basis any task order under a BOA that would cause the total dollar amount of task orders issued to exceed the applicable competitive threshold amount set forth in § 124.506(a).

(2) Where a procuring agency believes that task orders to be issued under a proposed BOA will exceed the applicable competitive threshold amount set forth in § 124.506(a), the procuring agency must offer the requirement to the program to be competed among eligible Participants.

(3) Once a concern's program term expires, the concern otherwise exits the 8(a) BD program, or becomes other than small for the SIC code assigned under the BOA, new orders will not be accepted for the concern.

**§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?**

SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (e) of this section exist.

(a) *Reservation as small business or SDB set-aside.* The procuring agency issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business or small disadvantaged business (SDB) set-aside prior to offering the requirement to SBA for award as an 8(a) contract. The AA/8(a)BD may permit the acceptance of the requirement, however, under extraordinary circumstances. *Example.* SBA may accept a requirement where a procuring agency made a decision to offer the requirement to the 8(a) BD program before the solicitation was sent out and the procuring agency acknowledges and documents that the solicitation was in error.

(b) *Competition prior to offer and acceptance.* The procuring agency competed a requirement among Participants prior to offering the requirement to SBA and receiving SBA's formal acceptance of the requirement.

(1) Any competition conducted without first obtaining SBA's formal acceptance of the procurement for the 8(a) BD program will not be considered an 8(a) competitive requirement.

(2) SBA may accept the requirement for the 8(a) BD program as a competitive 8(a) requirement, but only if the procuring agency agrees to resolicit the requirement using appropriate competitive 8(a) procedures.

(c) *Adverse impact.* SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) BD program, and does not apply to follow-on or renewal 8(a) acquisitions.

(1) In determining whether the acceptance of a requirement would have an adverse impact on an individual small business, SBA will consider all relevant factors.

(i) In connection with a specific small business, SBA presumes adverse impact to exist where:

(A) The small business concern has performed the specific requirement for at least 24 months;

(B) The small business is performing the requirement at the time it is offered to the 8(a) BD program, or its performance of the requirement ended within 30 days of the procuring agency's offer of the requirement to the 8(a) BD program; and

(C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates). For a multi-year requirement, the dollar value of the last 12 months of the requirement will be used to determine whether a small business would be adversely affected by SBA's acceptance.

(ii) Except as provided in paragraph (c)(2) of this section, adverse impact does not apply to "new" requirements. A new requirement is one which has not been previously procured by the relevant procuring agency.

(A) Where a requirement is new, no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) BD program will not adversely impact any small business.

(B) Construction contracts by their very nature (e.g., the one-time building of a specific structure) are new requirements.

(C) The expansion or modification of an existing requirement will be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional types of capabilities.

(D) SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD program.

(2) In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a "new" requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section.

(3) In determining whether the acceptance of a requirement would have an adverse impact on other small business programs, SBA will consider all relevant factors, including but not limited to, the number and value of contracts in the subject industry reserved for the 8(a) BD program as compared with other small business programs.

(d) *Benchmark achievement.* Where actual participation by disadvantaged businesses in a particular industry exceeds the benchmark limitations established by the Department of Commerce, in consultation with the General Services Administration and

the SBA, for that industry, SBA may elect not to accept a requirement offered to SBA for award as an 8(a) contract in that industry, considering the developmental needs of Participants and other anticipated contracting opportunities.

(e) *Release for non-8(a) competition.* In limited instances, SBA may decline to accept the offer of a follow-on or renewal 8(a) acquisition to give a concern previously awarded the contract that is leaving or has left the 8(a) BD program the opportunity to compete for the requirement outside the 8(a) BD program.

(1) SBA will consider release only where:

(i) The procurement awarded through the 8(a) BD program is being performed by either a Participant whose program term will expire prior to contract completion, or, by a former Participant whose program term expired within one year of the date of the offering letter;

(ii) The concern requests in writing that SBA decline to accept the offer prior to SBA's acceptance of the requirement for award as an 8(a) contract; and

(iii) The concern qualifies as a small business for the requirement now offered to the 8(a) BD program.

(2) In considering release, SBA will balance the importance of the requirement to the concern's business development needs against the business development needs of other Participants that are qualified to perform the requirement. This determination will include consideration of whether rejection of the requirement would seriously reduce the pool of similar types of contracts available for award as 8(a) contracts. SBA will seek the views of the procuring agency.

(3) If SBA declines to accept the offer and releases the requirement, it will recommend to the procuring agency that the requirement be procured as a small business or SDB set-aside.

**§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring agency decision not to reserve a requirement for the 8(a) BD program?**

(a) *What SBA may appeal.* The Administrator of SBA may appeal the following matters to the head of the procuring agency:

(1) A contracting officer's decision not to make a particular procurement available for award as an 8(a) contract;

(2) A contracting officer's decision to reject a specific Participant for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) BD program; and

(3) The terms and conditions of a proposed 8(a) contract, including the

procuring agency's SIC code designation and estimate of the fair market price.

(b) *Procedures for appeal.* (1) SBA must notify the contracting officer of the SBA Administrator's intent to appeal an adverse decision within 5 working days of SBA's receipt of the decision.

(2) Upon receipt of the notice of intent to appeal, the procuring agency must suspend further action regarding the procurement until the head of the procuring agency issues a written decision on the appeal, unless the head of the procuring agency makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a consideration of the appeal.

(3) The SBA Administrator must send a written appeal of the adverse decision to the head of the procuring agency within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn.

(4) The procuring agency head must specify in writing the reasons for a denial of an appeal brought by the Administrator under this section.

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

(a) *Competitive thresholds.* A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:

(1) There is a reasonable expectation that at least two eligible Participants will submit offers at a fair market price;

(2) The anticipated award price of the contract, including options, will exceed \$5,000,000 for contracts assigned manufacturing Standard Industrial Classification (SIC) codes and \$3,000,000 for all other contracts; and

(3) The requirement has not been accepted by SBA for award as a sole source 8(a) procurement on behalf of a tribally-owned or ANC-owned concern.

(i) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring agency estimate of the total value of the contract, including all options.

(ii) Where the estimate of the total value of a proposed 8(a) contract is less than the applicable competitive threshold amount and the requirement is accepted as a sole source requirement on that basis, award may be made even though the contract price arrived at through negotiations exceeds the competitive threshold, provided that the contract price is not more than ten percent greater than the competitive threshold amount. *Example.* If the anticipated award price for a

professional services requirement is determined to be \$2.7 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the contract price arrived at after negotiation is \$3.1 million.

(iii) A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount may not be divided into several separate procurement actions for lesser amounts in order to use 8(a) sole source procedures to award to a single contractor.

(b) *Exemption from competitive thresholds for Participants owned by Indian tribes.* SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement. 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, but a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole source basis.

(c) *Competition below thresholds.* The AA/8(a)BD, on a nondelegable basis, may approve a request from a procuring agency to compete a requirement that is below the applicable competitive threshold amount among eligible Participants.

(1) This authority will be used primarily when technical competitions are appropriate or when a large number of potential awardees exist.

(2) The AA/8(a)BD will consider whether the procuring agency has made and will continue to make available a significant number of its contracts to the 8(a) BD program on a noncompetitive basis.

(3) The AA/8(a)BD will deny a request if the procuring agency previously offered the requirement to the 8(a) BD program on a noncompetitive basis and the request is made following the inability of the procuring agency and the potential sole source awardee to reach an agreement on price or some other material term or condition.

(d) *Requirements above thresholds.* Except as set forth in paragraph (b) of this section, SBA will not accept a contract opportunity above the applicable competitive threshold amount as a sole source 8(a) requirement.

#### **§ 124.507 What procedures apply to competitive 8(a) procurements?**

(a) *FAR procedures.* Procuring agencies will conduct competitions among and evaluate offers received from Participants in accordance with the Federal Acquisition Regulation (48 CFR chapter 1).

(b) *Eligibility determination by SBA.* In either a negotiated or sealed bid competitive 8(a) acquisition, the procuring agency will request that the SBA district office servicing the apparent successful offeror determine that firm's eligibility for award.

(1) Within 5 working days after receipt of a procuring agency's request for an eligibility determination, SBA will determine whether the firm identified by the procuring agency is eligible for award.

(2) Eligibility is based on 8(a) BD program criteria, including whether the Participant is:

(i) A small business under the SIC code assigned to the requirement;

(ii) In compliance with any applicable competitive business mix target established or remedial measure imposed by § 124.508 that does not include the denial of future 8(a) contracts;

(iii) In the developmental stage of program participation if the solicitation restricts offerors to the developmental stage of participation; and

(iv) A concern with a bona fide place of business in the applicable geographic area if the procurement is for construction.

(3) If SBA determines that the apparent successful offeror is ineligible, SBA will notify the procuring agency. The procuring agency will then send to SBA the identity of the next highest evaluated firm for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.

(4) Except to the extent set forth in paragraph (d) of this section, SBA determines whether a Participant is eligible for a specific 8(a) competitive requirement as of the date that the Participant submitted its initial offer which includes price.

(5) If the procuring agency contracting officer believes that the apparent successful offeror is not responsible to perform the contract, he or she must refer the concern to SBA for a possible Certificate of Competency in accord with § 125.5 of this chapter.

(6) A competitive 8(a) contract will be executed using normal 8(a) award procedures (i.e., a prime contract between the procuring agency and SBA and a contract between SBA and the selected Participant).

(7) Paragraphs (b)(5) and (b)(6) of this section do not apply if SBA has delegated contract execution authority to the procuring agency.

(c) *Restricted competition.* (1) *Competition within stages of program participation.* SBA may accept a competitive 8(a) requirement that is limited to Participants in the developmental stage of program participation or limited to concerns in the transitional stage of program participation, or may accept a requirement to be competed among firms both in the developmental and transitional stages of program participation.

(2) *Construction competitions.* Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only those Participants with their principal places of business within the appropriate geographical boundaries are eligible to submit offers.

(3) *Competition for all non-construction requirements.* Except for construction requirements, all eligible Participants regardless of location may submit offers in response to competitive 8(a) solicitations. The only geographic restrictions pertaining to 8(a) competitive requirements, other than those for construction requirements, are any imposed by the solicitations themselves.

(d) *Award to firms whose program terms have expired.* A concern that has completed its term of participation in the 8(a) BD program may be awarded a competitive 8(a) contract if it was a Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if it continues to meet all other applicable eligibility criteria.

(1) Amendments to the solicitation extending the date for submissions of offers will be disregarded.

(2) For a negotiated procurement, a Participant may submit revised offers, including a best and final offer, and be awarded a competitive 8(a) contract if it was eligible as of the initial date specified for the receipt of offers in the solicitation, even though its program term may expire after that date.

(3) An 8(a) requirement for architect-engineer services with a value less than the competitive threshold amount and which uses the evaluation procedures prescribed by part 36, subpart 36.6 of

the Federal Acquisition Regulation (48 CFR chapter 1) will not be considered a competitive 8(a) requirement under this section for which a firm whose program term has expired may be eligible.

**§ 124.508 What are competitive business mix targets?**

(a) *General.* (1) To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after exiting the 8(a) BD program, Participants must make maximum efforts to obtain business outside the 8(a) BD program.

(2) During both the developmental and transitional stages of the 8(a) BD program, a Participant must make substantial and sustained efforts, including following a reasonable marketing strategy, to attain the targeted dollar levels of non-8(a) revenue established in its business plan. It must attempt to use the 8(a) BD program as a resource to strengthen the firm for economic viability when program benefits are no longer available.

(b) *Required non-8(a) business activity targets during transitional stage.* (1) *General.* During the transitional stage of the 8(a) BD program, a Participant must achieve certain targets of non-8(a) contract revenue. These targets are called non-8(a) business activity targets and are expressed as a percentage of total revenue. The targets reflect an increase in non-8(a) revenue over time.

(2) *Non-8(a) business activity targets.* Firms in the transitional stage of program participation must meet the following non-8(a) business activity targets during each year of program participation in the transitional stage:

| Participant's year in the transitional stage: | Percent <sup>1</sup> |
|---|----------------------|
| 1 .....                                       | 15                   |
| 2 .....                                       | 25                   |
| 3 .....                                       | 35                   |
| 4 .....                                       | 45                   |
| 5 .....                                       | 55                   |

<sup>1</sup>Competitive business mix targets (required minimum non-8(a) revenue as a percentage of total revenue)

(3) *Compliance with competitive business mix targets.* Compliance with the applicable competitive business mix target is measured at the end of any program year in the transitional stage of program participation based on the Participant's latest fiscal year-end total revenue (e.g., at the end of the first year in the transitional stage of program participation, non-8(a) revenue is compared to total revenue). Remedial measures, if appropriate, will be imposed during the subsequent program year (e.g., non-compliance with the

required business activity target in year one of the transitional stage of program participation would cause SBA to initiate remedial measures under paragraph (d) of this section for year two in the transitional stage).

(4) *Certification of compliance.* A Participant must certify that it complies with the applicable competitive business mix target or with the measures imposed by SBA under paragraph (d) of this section before it receives any 8(a) contract during the transitional stage of the 8(a) BD program.

(c) *Reporting and verification of business activity.* (1) Once admitted to the 8(a) BD program, a Participant must provide to SBA as part of its annual review:

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

(ii) An annual report within 30 days from the end of the program year of all non-8(a) contracts, options, and modifications affecting price executed during the program year.

(2) At the end of each year of participation in the transitional stage, the BOS assigned to work with the Participant will review the Participant's total revenues to determine whether the non-8(a) revenues have met the applicable target.

(d) *Consequences of not meeting competitive business mix targets.* (1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year will be ineligible for sole source 8(a) contracts in the current program year, unless and until the Participant corrects the situation as described in paragraph (d)(2) of this section.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA may increase its monitoring of the Participant's contracting activity during the ensuing program year. SBA will also notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its competitive business mix requirements as described in paragraphs (d)(2) (i) and (ii) of this section. In order for a Participant to come into compliance with the competitive business mix target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised competitive business mix target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (d)(2)(ii)(B) of this section, SBA will reinstate its ability to get sole source 8(a) contracts prior to its annual review.

(A) During the first six months of the current program year (i.e., at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its competitive business mix target for the just completed program year. For this purpose, SBA does not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards; or

(B) During the last six months of the current program year (i.e., at either the nine-month or one year review), it has achieved its competitive business mix target as of that point in the current program year.

*Example 1 to paragraph (d)(2).* Firm A had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum competitive business mix target of 25 percent. It had 8(a) revenues of \$8.5 million and non-8(a) revenues of \$1.5 million. Based on total revenues of \$10 million, Firm A should have had at least \$2.5 million in non-8(a) revenues. Thus, Firm A missed its target by \$1 million (its target (\$2.5 million) minus its actual non-8(a) revenues (\$1.5 million)). Because Firm A did not achieve its competitive business mix target, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling \$1 million (the amount by which it missed its target in year 2 of the transitional stage).

*Example 2 to paragraph (d)(2).* Firm B had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which \$8.5 million were 8(a) revenues and \$1.5 million were non-8(a) revenues. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program),

Firm B could not demonstrate that it had received at least \$1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the competitive business mix target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

(3) In determining whether a Participant achieved its required competitive business mix target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non-8(a) business at its nine-month review, SBA measures 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(4) As a condition of eligibility for new 8(a) contracts, SBA may also impose other requirements on a Participant that fails to achieve the competitive business mix targets. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation.

(5) SBA will initiate proceedings to terminate a Participant from the 8(a) BD program where the firm makes no good faith efforts to obtain non-8(a) revenues.

**§ 124.509 What percentage of work must a Participant perform on an 8(a) contract?**

(a) To assist the business development of Participants in the 8(a) BD program, an 8(a) contractor must perform certain percentages of work with its own employees. These percentages and the requirements relating to them are the same as those established for small business set-aside prime contractors, and are set forth in § 125.6 of this title.

(b) A Participant must certify in its offer that it will meet the applicable percentage of work requirement. SBA will determine compliance as of the date of best and final offers for a negotiated procurement, and as of the date of bid opening for sealed bid procurements.

(c) *Indefinite quantity contracts.* (1) In order to ensure that the required percentage of an indefinite quantity 8(a) award is performed by the Program Participant, at any point in time the Participant must have performed the required percentage of the total value of the contract to that date. For a service or supply contract, this does not mean that the Participant must perform 50

percent of each task order with its own force. But, rather, the Participant is required to perform 50 percent of the combined total of all task orders to date. The applicable SBA District Director or his/her designee may waive this requirement in writing where a large amount of contracting is essential in the early stages of performance before the work to be done by the Participant can be performed, provided that there are written assurances from both the Participant and the procuring agency that the contract will ultimately comply with the requirements of this section.

*Example.* If a Program Participant performed 90% of a \$100,000 task order on an indefinite quantity service contract with its own work force, it would have to perform only 10 percent of a second task order for \$100,000 because the concern would still have performed 50% of the combined total value of the contract to date (\$100,000 out of \$200,000).

(2) Where there is a guaranteed minimum condition in an indefinite quantity 8(a) award, the required performance of work percentage need not be met on the first task order. In such a case, however, the percentage of work that a Program Participant may further contract to other concerns on the first task order may not exceed 50 percent of the total guaranteed minimum dollar value to be provided by the contract. If the first task order exceeds 50 percent of the guaranteed minimum amount, the Participant may contract no more than 50 percent of the guaranteed amount. Once the guaranteed minimum amount is met, the general rule for indefinite quantity contracts set forth in paragraph (c)(1) of this section applies. *Example.* Where a contract guarantees a minimum of \$100,000 in professional services and the first task order is for \$60,000 in such services, the Program Participant may perform as little as \$10,000 of that order. In such a case, however, the Participant must perform all of the next task order(s) up to \$40,000 to ensure that it performs 50% of the \$100,000 guaranteed minimum (\$10,000 + \$40,000 = \$50,000, or 50% of \$100,000).

**§ 124.510 How is fair market price determined for an 8(a) contract?**

(a) The procuring agency determines what constitutes a "fair market price" for an 8(a) contract.

(1) The procuring agency must derive the estimate of a current fair market price for a new requirement, or a requirement that does not have a satisfactory procurement history, from a price or cost analysis. This analysis may take into account prevailing market

conditions, commercial prices for similar products or services, or data obtained from any other agency. The analysis must also consider any cost or pricing data that is timely submitted by the SBA.

(2) The procuring agency must base the estimate of a current fair market price for a requirement that has a satisfactory procurement history on recent award prices adjusted to ensure comparability. Adjustments will take into account differences in quantities, performance, times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be appropriate.

(b) Upon the request of SBA, a procuring agency will provide to SBA a written statement detailing the method used by the agency to estimate the current fair market price for the 8(a) requirement. This statement must be submitted within 10 working days of SBA's request. The procuring agency must identify the information, studies, analyses, and other data it used in making its estimate.

(c) The procuring agency's estimate of fair market price and any supporting data may not be disclosed by SBA to any Participant or potential contractor.

(d) The concern selected to perform an 8(a) contract may request SBA to protest the procuring agency's estimate of current fair market price to the Secretary of the Department or head of the agency in accordance with § 124.505.

**§ 124.511 Delegation of contract administration to procuring agencies.**

(a) SBA may delegate, by the use of special clauses in the 8(a) contract documents or by a separate agreement with the procuring agency, all responsibilities for administering an 8(a) contract to the procuring agency except the approval of novation agreements under 48 CFR 42.302(a)(25).

(b) Because of this delegation of contract administration, a contracting officer may execute any priced option or in scope modification without SBA's concurrence. The contracting officer must, however, notify SBA of all modifications and options exercised.

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

(a) *General.* (1) If approved by SBA, a Participant may enter into a joint venture agreement with another small business concern, whether or not an 8(a) Participant, for the purpose of performing a specific 8(a) contract.

(2) A joint venture agreement is permissible only where an 8(a) concern

lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. However, where SBA concludes that an 8(a) concern brings very little to the joint venture relationship except its 8(a) status, SBA will not approve the joint venture arrangement.

(b) *Size of concerns to an 8(a) joint venture.* (1) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(i) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract;

(ii) For a procurement having an employee-based size standard, the procurement exceeds \$10 million;

(iii) The size of at least one 8(a) Participant to the joint venture is less than one half the size standard corresponding to the SIC code assigned to the contract; and

(iv) The 8(a) Participant(s) identified in paragraph (b)(1)(iii) of this section must perform the applicable percentage of work required by § 124.509.

(2) Except as provided in § 124.519, for sole source and competitive 8(a) procurements that do not exceed the dollar levels identified in paragraph (b)(1) of this section, an 8(a) Participant entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code assigned to the 8(a) contract.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform an 8(a) contract, including those between mentors and proteges authorized by § 124.519, must contain a provision:

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

(2) Designating an 8(a) Participant as the lead entity of the joint venture, and an employee of the lead entity as the project manager responsible for performance of the 8(a) subcontract;

(3) Stating that not less than 51 percent of the net profits earned by the joint venture be distributed to the 8(a) Participant(s);

(4) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account from which all expenses incurred under the contract will be paid;

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

(6) Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the 8(a) contract;

(7) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the lead 8(a) concern, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(8) Requiring the final original records be retained by the lead 8(a) concern upon completion of the 8(a) contract performed by the joint venture;

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

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

(d) *Prior approval by SBA.* SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.

(e) *Contract execution.* Where SBA has approved a joint venture, the procuring agency will execute an 8(a) contract in the name of the 8(a) Participant(s), not the joint venture entity.

(f) *Obligation of performance.* All parties to the joint venture must sign such documents as are necessary to obligate themselves to ensure performance of the 8(a) contract.

(g) *Performance of work by 8(a) concern(s).* The 8(a) partner(s) to an eligible joint venture, and not the aggregate of all parties to the joint venture, must perform the percentages of work required by § 124.510. Employees furnished by the 8(a) Participant(s) or hired through normal employment channels by the joint venture are considered to be employees

of the 8(a) Participant(s) for this purpose.

(h) *Amendments to joint venture agreement.* All amendments to the joint venture agreement must be approved by SBA.

(i) *Inspection of records.* SBA may inspect the records of the joint venture without notice at any time deemed necessary.

#### **§ 124.513 Exercise of 8(a) options and modifications.**

(a) *Unpriced options.* The exercise of an unpriced option is considered to be a new contracting action.

(1) If a concern has exited the 8(a) BD program or is no longer small under the size standard corresponding to the SIC code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.

(2) If the concern is still a Participant and otherwise eligible for the requirement on a sole source basis, the procuring agency contracting officer may negotiate price and exercise the option provided the option, considered a new contracting action, meets all regulatory requirements, including SBA's acceptance of the requirement for the 8(a) BD program.

(3) If the estimated fair market price of the option exceeds the applicable threshold amount set forth in § 124.506, the requirement must be competed as a new contract among eligible Participants.

(b) *Priced options.* The procuring agency contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has exited the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

(c) *Modifications beyond the scope.* A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. It will be treated the same as an unpriced option as described in paragraph (a) of this section.

(d) *Modifications within the scope.* The procuring agency contracting officer may exercise a modification within the scope of the initial 8(a) contract whether the concern that received the award has exited the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

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

(a) An 8(a) contract must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.

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

(2) An 8(a) contract, whether in the base or an option year, must be terminated for the convenience of the Government if the contract is transferred or novated for any reason to another firm.

(3) The procuring agency may not assess repurchase costs or other damages against the Participant due solely to the provisions of this section.

(b) The SBA Administrator may waive the requirements of paragraphs (a)(1) and (a)(2) of this section if requested to do so by the 8(a) contractor when:

(1) It is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;

(2) Ownership and control of the concern that is performing the 8(a) contract will pass to another Participant, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract;

(3) Any individual upon whom eligibility was based is no longer able to exercise control of the concern due to physical or mental incapacity or death;

(4) The head of the procuring agency, or an official with delegated authority from the agency head, certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions; and

(5) It is necessary for the disadvantaged owners of the initial 8(a) awardee to relinquish ownership of a majority of the voting stock of the concern in order to raise equity capital, but only if —

(i) The concern has exited the 8(a) BD program;

(ii) The disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and

(iii) The disadvantaged owners will maintain control of the daily business operations of the concern.

(c) The 8(a) contractor must request a waiver in writing prior to the relinquishment 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 days after such occurrence. The Participant seeking to relinquish ownership or control must specify the grounds upon which it requests a waiver, and must demonstrate that the proposed transaction would meet such grounds.

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.507(b)(2) and deciding whether prior to the transaction the acquiring Participant is a responsible and eligible concern with respect to each contract to be transferred.

(e) Anyone other than a procuring agency head who submits a certification regarding the impairment of the agency's objectives under paragraph (b)(4) of this section, must also certify delegated authority to make the certification.

(f) A concern performing an 8(a) contract must notify the SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.

(g) The Administrator has discretion to decline a request for waiver even though legal authority exists to grant the waiver.

(h) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this title within 45 days of the date of service (as defined in § 134.204) of the Agency decision.

**§ 124.515 Who decides contract disputes arising between a Participant and a procuring agency after the award of an 8(a) contract?**

For purposes of the Disputes Clause of a specific 8(a) contract, the contracting officer is that of the procuring agency. A dispute arising between an 8(a) contractor and the procuring agency contracting officer will be decided by the procuring agency, and appeals may be taken by the 8(a) contractor without SBA involvement.

**§ 124.516 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?**

(a) The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

(b) The size status of the apparent successful offeror for a competitive 8(a) procurement may be protested pursuant to § 121.1001(a)(2) of this chapter. The size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.

(c) A Participant cannot appeal SBA's determination not to award it a specific 8(a) contract because the concern lacks an element of responsibility or is ineligible for the contract, other than the right set forth in § 124.501(h) to request a formal size determination where SBA cannot verify it to be small.

(d)(1) The SIC code assigned to a sole source 8(a) requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the AA/8(a)BD may appeal a SIC code designation with respect to a sole source 8(a) requirement.

(2) In connection with a competitive 8(a) procurement, any interested party who has been adversely affected by a SIC code designation may appeal the designation to SBA's OHA pursuant to § 121.1103 of this chapter.

(e) Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under § 124.112(c).

**§ 124.517 How can an 8(a) contract be terminated before performance is completed?**

(a) *Termination for default.* A decision to terminate a specific 8(a) contract for default can be made by the procuring agency contracting officer after consulting with SBA. The contracting officer must advise SBA of any intent to terminate an 8(a) contract for default in writing before doing so. SBA may provide to the Participant any program benefits reasonably available in order to assist it in avoiding termination for default. SBA will advise the contracting officer of this effort. Any procuring agency contracting officer who believes grounds for termination continue to exist may terminate the 8(a) contract for default, in accordance with the FAR (48 CFR chapter 1). SBA will have no liability for termination costs or reprourement costs.

(b) *Termination for convenience.* After consulting with SBA, the procuring agency contracting officer may terminate an 8(a) contract for convenience when it is in the best interests of the Government to do so. A termination for convenience is appropriate if any disadvantaged owner



of the Participant performing the contract relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, unless a waiver is granted pursuant to § 124.514.

(c) *Substitution of one 8(a) contractor for another.* Where a procuring agency contracting officer demonstrates to SBA that an 8(a) contract will otherwise be terminated for default, SBA may authorize another Participant to complete performance and, in conjunction with the procuring agency, permit novation of the contract without invoking the termination for convenience or waiver provisions of § 124.514.

**§ 124.518 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?**

(a) A Participant (other than one owned by an Indian tribe or an ANC) may not receive sole source 8(a) contract awards where it has received 8(a) contracts in excess of the dollar amount set forth in this section during its participation in the 8(a) BD program.

(1) For a firm having a revenue-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is five times the size standard corresponding to that SIC code or \$100,000,000, whichever is less.

(2) For a firm having an employee-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is \$100,000,000.

(3) SBA will not consider 8(a) contracts awarded under \$100,000 in determining whether a Participant has reached the limit identified in paragraphs (a)(1) and (a)(2) of this section.

(b) Once the limit is reached, a firm could not receive any more 8(a) sole source contracts, but could remain eligible for competitive 8(a) awards.

(c) The limitation set forth in paragraph (a) of this section will not apply for firms that are current Participants in the 8(a) BD program as of December 31, 1996.

(d) SBA includes the dollar value of 8(a) options and modifications in determining whether a Participant has reached the limit identified in paragraph (a) of this section. If an option is not exercised or the contract value is reduced by modification, SBA will deduct those values.

(e) A Participant's eligibility for a sole source award is measured as of the date of award without taking into account whether the value of that award will cause the limit to be exceeded.

**§ 124.519 Mentor/protege program.**

(a) *Who can be a mentor?* Concerns that have graduated from the 8(a) BD program and those that are in the transitional stage of program participation may mentor developing 8(a) Participants and receive benefits as set forth in this section. This could include businesses that have become large.

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

- (i) Possesses favorable financial health, including profitability for at least the last two years;
- (ii) Possesses good character; and
- (iii) Can impart value to a protege firm due to lessons learned and practical experience gained because of the 8(a) BD program.

(2) A mentor could have no more than one protege at a time.

(3) In order to demonstrate its favorable financial health, a firm seeking to be a mentor must submit its federal tax returns for the last two years to SBA for review.

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

(b) *Proteges.* (1) In order to be a protege firm, a Participant must:

- (i) Be in the developmental stage of program participation;
- (ii) Have never received an 8(a) contract; or
- (iii) Have a size that is less than half the size standard corresponding to its primary SIC code.

(2) Only firms that are in good standing in the 8(a) BD program (e.g., firms that do not have termination proceedings against them, and are up to date with all reporting requirements) may qualify as a protege.

(3) A protege firm can have only one mentor at a time.

(c) *Benefits.* (1) A mentor and protege can joint venture as a small business for any government procurement, including procurements less than half the size standard corresponding to the assigned SIC code and 8(a) sole source contracts, provided the protege qualifies as small for the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in § 124.518.

(2) Notwithstanding the requirements set forth in §§ 124.105(g) and (h), in order to raise capital for the protege firm, the mentor may own an equity interest of up to 33% in the protege firm.

(3) Notwithstanding the mentor/protege relationship, a protege firm may qualify for other assistance as a small

business, including SBA financial assistance.

(d) *Written agreement.* (1) The mentor and protege firms must enter a written agreement whereby the mentor commits to provide management and/or technical assistance to the protege firm for at least one year.

(2) The written agreement must be approved by the AA/8(a) BD.

(3) The protege firm must have the right to terminate the agreement with 30 days advance notice to the mentor and to SBA.

(4) Once approved, the protege must annually certify to SBA that there has been no change in the terms of the agreement.

**Miscellaneous Reporting Requirements**

**§ 124.601 What reports does SBA require on parties assisting Participants in obtaining federal contracts?**

(a) Each Participant must submit annually a written report to its assigned BOS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such participant in obtaining a Federal contract. The listing must indicate the amount of compensation paid and a description of the activities performed for such compensation.

(b) Failure to submit the report is good cause for the initiation of a termination proceeding pursuant to §§ 124.303 and 124.304.

**§ 124.602 What kind of annual financial statement must a Participant submit to SBA?**

(a) Participants with gross annual receipts of more than \$5,000,000 must submit to SBA audited annual financial statements prepared by a licensed independent public accountant within 120 days after the close of the concern's fiscal year.

(1) The servicing SBA District Director may waive the requirement for audited financial statements for good cause shown by the Participant.

(2) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following:

(i) The concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements;

(ii) The concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and

(iii) The concern has been a Participant less than 12 months.

(b) Participants with gross annual receipts between \$1,000,000 and \$5,000,000 must submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant within 90 days after the close of the concern's fiscal year.

(c) Participants with gross annual receipts of less than \$1,000,000 must submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor of the Participant, including signature and date, within 90 days after the close of the concern's fiscal year.

(d) Any audited or reviewed financial statements submitted to SBA pursuant to paragraphs (a) or (b) of this section must be prepared in accordance with Generally Accepted Accounting Principles.

(e) While financial statements need not be submitted until 90 or 120 days after the close of a Participant's fiscal year, depending on the receipts of the concern, a Participant seeking to be awarded an 8(a) contract between the close of its fiscal year and such 90 or 120-day time period must submit a final sales report signed by the CEO or President to SBA in order for SBA to determine the concern's eligibility for the 8(a) contract. This report must show a breakdown of 8(a) and non-8(a) sales.

(f) Notwithstanding the amount of a concern's gross annual receipts, SBA may require audited or reviewed statements whenever they are needed to obtain more complete information as to a concern's assets, liabilities, income or expenses, such as when the concern's capacity to perform a specific 8(a) contract must be determined, or when they are needed to determine continued program eligibility.

**§ 124.603 What reports regarding the continued business operations of former Participants does SBA require?**

Former Participants shall provide such information as SBA may request concerning such former Participant's continued business operations, contracts and financial condition for a period of three years following the date on which the concern exits the program. Failure to provide such information when requested will constitute a violation of this part, and may result in the nonexercise of options on or termination of contracts awarded through the 8(a) BD program, debarment, or other legal recourse.

**Management and Technical Assistance Program**

**§ 124.701 What is the purpose of the 7(j) management and technical assistance program?**

Section 7(j)(1) of the Small Business Act, 15 U.S.C. 636(j)(1), authorizes SBA to enter into grants, cooperative agreements, or contracts with public or private organizations to pay all or part of the cost of technical or management assistance for individuals or concerns eligible for assistance under sections 7(a)(11), 7(j)(10), or 8(a) of the Small Business Act.

**§ 124.702 What types of assistance are available through the 7(j) program?**

Through its private sector service providers, SBA may provide a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including:

(a) Counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and

(b) The identification and development of new business opportunities.

**§ 124.703 Who is eligible to receive 7(j) assistance?**

The following businesses are eligible to receive assistance from SBA through its service providers:

(a) Businesses which qualify as small within the meaning of size standards prescribed in 13 CFR part 121, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(b) Businesses eligible to receive 8(a) contracts.

**§ 124.704 What additional management and technical assistance is reserved exclusively for concerns eligible to receive 8(a) contracts?**

In addition to the management and technical assistance available under § 124.702, Section 7(j)(10) of the Small Business Act authorizes SBA to provide additional management and technical assistance through its service providers exclusively to small business concerns eligible to receive 8(a) contracts, including:

(a) Assistance to develop comprehensive business plans with specific business targets, objectives, and goals;

(b) Other nonfinancial services necessary for a Participant's growth and development, including loan packaging; and

(c) Assistance in obtaining equity and debt financing.

**Subpart B—Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs**

**§ 124.1001 General applicability.**

(a) This subpart defines a Small Disadvantaged Business (SDB). It also sets forth procedures by which a firm can apply to be recognized as an SDB, including procedures to be used by private sector entities approved by SBA for determining whether a particular concern is owned and controlled by one or more disadvantaged individuals. Finally, this subpart establishes procedures by which SBA determines whether a particular concern qualifies as an SDB in response to a protest challenging the firm's status as disadvantaged.

(b) Only small firms that have been found to be owned and controlled by disadvantaged individuals and appear on the SBA-maintained list of qualified SDBs are eligible to participate in Federal SDB set-aside, price evaluation adjustment, evaluation factor or subfactor, or monetary subcontracting incentive programs, or SBA's section 8(d) subcontracting program.

**§ 124.1002 What is a Small Disadvantaged Business (SDB)?**

(a) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, use the definitions of social and economic disadvantage and other eligibility requirements established in subpart A of this part, including the requirements placed on ownership and control and disadvantaged status, unless otherwise provided in this subpart. Qualified private certifiers must use those requirements applicable to ownership and control in determining whether a particular firm is actually owned and controlled by individuals claiming disadvantaged status.

(b) *SDB eligibility criteria.* A small disadvantaged business (SDB) is a concern:

(1) Which qualifies as small under part 121 of this title for the size standard corresponding to the applicable four digit Standard Industrial Classification (SIC) code.

(i) For purposes of SDB certification, the applicable SIC code is that which relates to the primary business activity of the concern;

(ii) For purposes of an SDB protest, the applicable SIC code is that assigned by the contracting officer to the procurement at issue;

(2) Which is at least 51 percent unconditionally owned by one or more

socially and economically disadvantaged individuals, as defined by §§ 124.103 and 124.104 and paragraph (c) of this section, an Indian tribe, an Alaska Native Corporation (ANC), a Native Hawaiian Organization, or a Community Development Corporation (CDC) (See ownership requirements set forth in § 124.105, and those in §§ 124.109, 124.110, and 124.111 pertaining to concerns owned by tribes and ANCs, Native Hawaiian Organizations, or CDCs, respectively);

(3) Whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals (See control requirements set forth in § 124.106; but see § 124.109(c)(4) for firms owned by Indian tribes or ANCs, and § 124.111(b) for firms owned by CDCs); and

(4) Which, for purposes of SDB set-asides and SDB evaluation adjustments relating to the Department of Defense, NASA and the Coast Guard only, has the majority of its earnings accruing directly to the socially and economically disadvantaged individuals.

(c) *Disadvantaged status.* In assessing the personal financial condition of an individual claiming economic disadvantage, the net worth must be less than \$750,000 after taking into account the applicable exclusions set forth in § 124.104(c)(2).

(d) *Additional eligibility criteria.* Each individual claiming disadvantaged status must be a citizen of the United States and possess good character. See § 124.108(a).

(e) *Potential for success not required.* The potential for success requirement set forth in § 124.107 does not apply.

(f) *Joint ventures.* Joint ventures are permitted for Small Disadvantaged Business (SDB) set-asides and SDB evaluation adjustments, provided that the requirements set forth in this paragraph are met.

(1) The disadvantaged participant to the joint venture must be a certified SDB and appear on the list of qualified SDBs;

(2) For purposes of this paragraph, the term joint venture means two or more concerns forming an association to engage in and carry out a single, specific business venture for joint profit. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible as an entity owned and controlled by one or more socially and economically disadvantaged individuals.

(3) A concern that is owned and controlled by one or more socially and economically disadvantaged individuals

entering into a joint venture agreement with one or more other business concerns is considered to be affiliated for size purposes with such other concern(s). The combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(4) The majority of the venture's earnings must accrue directly to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture.

(5) The percentage ownership involvement in a joint venture by disadvantaged individuals must be at least 51 percent.

*Example 1 to paragraph (b)(5).* Small business concern A is 100% owned by disadvantaged individuals. Small business concern B is 100% owned by nondisadvantaged individuals. The percentage involvement by concern A in a joint venture between A and B must be at least 51%.

*Example 2 to paragraph (b)(5).* Small business concern C is 51% owned by disadvantaged individuals. Small business concern D is 100% owned by nondisadvantaged individuals. Any joint venture between C and D would be ineligible because the amount of ownership involvement in such a joint venture by disadvantaged individuals would be less than 51%. Even a 90% involvement by concern C in a joint venture with D would mean an overall ownership involvement by disadvantaged individuals of only 45.9% (51% of 90), and an overall ownership involvement by nondisadvantaged individuals of 54.1% (10 + (49% of 90)).

(g) *Performance of work.* In order to be awarded a Federal contract reserved for SDB participation or through an SDB evaluation adjustment, a certified SDB must agree to perform certain percentages of work with its own employees. These percentages and the requirements relating to them are set forth in § 125.6 of this title.

#### **§ 124.1003 What is a Private Certifier?**

A Private Certifier is an organization or business concern approved by SBA to determine whether firms are owned and controlled by one or more individuals claiming disadvantaged status.

#### **§ 124.1004 How does an organization or business concern become a Private Certifier?**

(a) SBA may execute no-cost contracts with organizations or business concerns seeking to become Private Certifiers. Any such contract will include provisions for the oversight, monitoring, and evaluation of all certification activities by SBA.

(b) The organization or business concern must demonstrate a knowledge of SBA's regulations regarding ownership and control, as well as business organizations and the legal principles affecting their ownership and control generally, including stock issuances, voting rights, convertability of debt to equity, options, and powers and responsibilities of officers and directors, general and limited partners, and limited liability members.

(c) The organization or concern must also, along with its principals, demonstrate good character. Good character does not exist for these purposes if the organization or concern or any of its principals:

(1) Are debarred or suspended under any Federal procurement or non-procurement debarment and suspension regulations; or

(2) Have been indicted or convicted for any criminal offense or suffered a civil judgment indicating a lack of business integrity.

(d) As a condition of approval, SBA may require that the principals of the concern attend and pass a training session on SBA's rules and requirements.

(e) A Private Certifier must provide access to SBA of its books and records when requested, including records pertaining to its certification activities. SBA may review this information, as well as the decisions of a Private Certifier, in determining whether SBA will renew or extend the term of the Private Certifier, or terminate the Private Certifier for cause.

(f) Private Certifiers may not certify any company with which they have other business dealings.

#### **§ 124.1005 Can a Private Certifier charge a fee?**

A Private Certifier may charge a reasonable fee a firm in order to process the firm's determination of ownership and control.

#### **§ 124.1006 Is there a list of Private Certifiers?**

SBA maintains a list of approved Private Certifiers on the SBA's Home Page on the Internet. Any interested person may also obtain a copy of the list from the local SBA district office.

#### **§ 124.1007 How long may an organization or concern be a Private Certifier?**

(a) SBA's approval document will specify how long the organization or concern may act as a Private Certifier. If the approval is through a no cost contract, the contract will generally be for one year, with possible renewal or option years.

(b) SBA may terminate a contract with an organization or business concern to be a Private Certifier for the convenience of the Government at any time, and may terminate the contract for default where appropriate.

**§ 124.1008 How does a firm become certified as an SDB?**

Any firm may apply for certification as a federally recognized SDB. SBA's various district offices provide further information and required application forms to any firm interested in SDB certification. In order to become certified as an SDB, a firm must obtain a determination that it is owned and controlled by one or more individuals claiming to be disadvantaged from a Private Certifier (or from SBA if a Private Certifier is not reasonably available), and must submit evidence of that determination to SBA along with certifications or narratives regarding the disadvantaged status of those individuals as set forth in paragraph (e) of this section.

(a) *Determination regarding ownership and control.* A firm must first submit a completed application for a determination of ownership and control to an approved Private Certifier, or to SBA if a Private Certifier is not reasonably available.

(1) The firm must identify one or more individuals claiming disadvantaged status to the Private Certifier, which then will determine whether those individuals own and control the firm.

(2) Where no Private Certifier is reasonably available, the firm may submit its application for a determination of ownership and control to the Assistant Administrator, Division of Program Certification and Eligibility (DPCE), Office of Minority Enterprise Development, Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

(b) *Required forms.* A firm seeking a determination of its ownership and control must submit the following forms and documents to the Private Certifier (or to SBA where no Private Certifier is reasonably available): SBA Form 1010B, "Statement of Business Eligibility;" stock certificates; stock register; articles of incorporation, with amendments; current by-laws; resolutions affecting rights and responsibilities of officers and directors; voting agreements; partnership agreements; limited liability articles of organization; and any other relevant information regarding the concern's ownership and control.

(c) *Application processing.* (1) A Private Certifier must advise each applicant within 15 days after the

receipt of an application for an ownership and control determination whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required. The Private Certifier will process an application for an ownership and control determination within 30 days of receipt of a complete application package.

(2) The burden is on the applicant to demonstrate that those individuals claiming disadvantaged status own and control the concern.

(d) *Ownership and control decision.* The Private Certifier will issue a written decision as to whether the applicant is owned and controlled by the individuals identified as claiming disadvantaged status. If the Private Certifier finds that the applicant is not owned and controlled by the individuals claiming disadvantaged status, the decision will state the specific reasons for the finding, and inform the applicant of its right to appeal the decision to SBA pursuant to § 124.1009.

(e) *SDB certification.* Once a concern receives a decision finding that it is owned and controlled by those individuals claiming disadvantaged status (either through an initial determination or on appeal), the concern must apply to the appropriate office of the relevant procuring agency, or to SBA if the agency has entered into an agreement with SBA to have SBA make disadvantaged status determinations, for inclusion on the SBA-maintained list of qualified SDBs. A firm seeking inclusion on the list of qualified SDBs must represent that it is small for the size standard corresponding to the SIC code for its primary business activity.

(1) *Members of designated groups.* (i) Those individuals claiming disadvantaged status that are members of the same designated groups that are presumed to be socially disadvantaged for purposes of SBA's 8(a) BD program (see § 124.103(b)) are presumed to be socially and economically disadvantaged for purposes of SDB certification. These individuals must represent that they are members of one of the designated groups, that they are identified as a member of one of the designated groups, that they are socially and economically disadvantaged, and that they are citizens of the United States.

(ii) Provided that the ownership and control determination of the Private Certifier is not based to any extent on ownership and/or control by non-group members, the relevant procuring agency or SBA may accept these

representations as true and certify the firm as an SDB.

(2) *Individuals not members of designated groups.* (i) Each individual claiming disadvantaged status that is not a member of one of the designated groups must submit to SBA a statement identifying personally how his or her entry into or advancement in the business world has been impaired because of personally specific factors (see § 124.103(c)), and how his or her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities (see § 124.104).

(ii) If the relevant procuring agency or SBA determines that the individual(s) claiming disadvantage are disadvantaged, it will certify the firm as an SDB. If the relevant procuring agency or SBA determines that one or more of the individuals upon whose status the Private Certifier relied in making its ownership and control decision is not disadvantaged, it will reject the firm's application for SDB certification. The procuring agency or SBA will issue a written decision setting forth its reasons for decline.

(iii) A firm may appeal SBA's decision that one or more of the individuals claiming disadvantaged status is not disadvantaged to SBA's Office of Hearings and Appeals (OHA). OHA will determine whether SBA's decision was arbitrary, capricious, or contrary to law. OHA will issue a determination on appeal within 10 days, if possible.

(f) *Current 8(a) BD program participants.* Any firm that is currently a participant in SBA's 8(a) BD program need not apply to a Private Certifier for an ownership and control determination or to a procuring agency or SBA for a separate certification as an SDB. SBA will automatically include it on the list of qualified SDBs.

**§ 124.1009 How does a firm appeal a decision of a Private Certifier?**

(a) If a Private Certifier finds that a firm is not owned and controlled by the individual(s) claiming disadvantaged status, the firm may appeal that decision to OHA.

(b) Where an appeal is filed, the Private Certifier must submit the full record upon which its decision was based to OHA.

(c) OHA will perform a new ownership and control determination on the firm, without regard to the decision of the Private Certifier. OHA will issue a determination within 10 days, if possible.

(d) If OHA finds that the firm is owned and controlled by the

individual(s) claiming disadvantaged status, the firm may apply to SBA for inclusion on the list of qualified SDBs. If OHA finds that the firm is not owned and controlled by such individual(s), the administrative judge will state the reasons for that decision, which will be the final decision of the Agency.

**§ 124.1010 Can a firm represent itself to be an SDB if it is not on the list of qualified SDBs?**

A firm cannot represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal procurement program if it is not on the SBA-maintained list of qualified SDBs. A firm may, however, represent itself to be an SDB concern for general statistical purposes without regard to its inclusion on the SBA-maintained list of qualified SDBs.

**§ 124.1011 What is a misrepresentation of disadvantaged status?**

(a) A representation of disadvantaged status by any firm that SBA has found not to be owned and controlled by one or more disadvantaged individuals (either in connection with an SDB application or protest) will be deemed a misrepresentation of disadvantaged status, unless and until the firm reapplies for and obtains SDB certification.

(b) Any person or entity that misrepresents its status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" in order to obtain an 8(d) or SDB contracting opportunity for anyone will be subject to the penalties imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as well as any other penalty authorized by law.

**§ 124.1012 Can a firm reapply for SDB certification?**

(a) A concern which has been denied SDB certification may reapply for certification 12 months after the date of the final Agency decision to decline the application (either on appeal of an ownership and control determination, or a negative finding of disadvantaged status).

(b) A concern which received a decision that it was not owned and controlled by the individual(s) claiming disadvantaged status from an Private Certifier and does not appeal that decision to SBA may apply for a new ownership and control determination at any time.

**§ 124.1013 Is there a list of certified SDBs?**

(a) If a procuring agency certifies a firm to be an SDB, it must notify SBA of its certification. If SBA certifies a firm

to be an SDB or receives notification of a procuring agency certification, SBA will enter the name of the firm into an SBA-maintained central on-line register.

(b) The register of SDBs will contain the names of all firms that are currently certified to be SDBs, including the names of all firms currently participating in SBA's 8(a) BD program.

(c) On a continuing basis, SBA will delete from the on-line register those firms that have:

(1) Exited SBA's 8(a) BD program for any reason and have not otherwise received SDB certification;

(2) Been determined not to be disadvantaged in response to an SDB protest brought under § 124.1015; or

(3) Not received a renewed SDB certification after being on the register for three years (see § 124.1014(a)).

**§ 124.1014 What is the effect of receiving an SDB certification?**

(a) Once SBA certifies a firm to be an SDB by placing it on the list of qualified SDBs, the firm generally will be considered to be a disadvantaged business for a period of three years from the date of the certification.

(b) Once SBA certifies a firm to be an SDB by placing it on the list of qualified SDBs, the firm may represent itself as an SDB for purposes of Federal SDB set-aside, price evaluation adjustment, evaluation factor or subfactor, monetary subcontracting incentive programs, or section 8(d) subcontract, subject to the following provisions:

(1) In order to participate as an SDB, the firm must be listed on the SBA-maintained SDB register on the date of its representation.

(2) For purposes of a particular procurement, the firm must represent that it is both disadvantaged and small at the time it submits its initial offer including price (see part 121 of this title). At the same time, the firm must also represent that no material change has occurred in the disadvantaged ownership and control of the firm since its SDB certification, and specifically that the net worth of the disadvantaged individuals upon whom the SDB certification was based does not exceed \$750,000.

(c) A firm's status as "disadvantaged" or "small" may be protested pursuant to §§ 124.1015 through 124.1019 and §§ 121.1001 through 121.1005, respectively, despite the presence of the firm on the SDB register.

(d) A firm must submit a new application and receive a new certification in order to be recognized as an SDB after three years. If a firm does not submit a new application and receive a new certification, SBA will

remove its name from the SDB register three years after the date of the certification.

**§ 124.1015 Who may protest the disadvantaged status of a concern?**

(a)(1) In connection with a specific SDB set-aside or a requirement for which the apparent successful offeror has invoked an SDB evaluation adjustment, the following entities may protest the disadvantaged status of the apparent successful offeror:

(i) Any other concern which submitted an offer for that requirement, unless the contracting officer has found the concern to be non-responsive or outside the competitive range, or SBA has previously found the concern to be ineligible for the SDB set-aside requirement at issue;

(ii) The procuring agency contracting officer; or

(iii) The SBA.

(2) A protest may challenge whether the apparent successful offeror is owned and controlled by one or more disadvantaged individuals, including whether one or more of the individuals claiming disadvantaged status are in fact socially or economically disadvantaged.

(b) In connection with an 8(d) subcontract, or a requirement for which the apparent successful offeror received an evaluation adjustment for proposing one or more SDB subcontractors, the procuring agency contracting officer or SBA may protest the disadvantaged status of a proposed subcontractor. Other interested parties may submit information to the contracting officer or SBA in an effort to persuade the contracting officer or SBA to initiate a protest.

**§ 124.1016 When will SBA not decide an SDB protest?**

(a) SBA will not evaluate the disadvantaged status of any concern other than the apparent successful offeror.

(b) SBA will not normally consider a post award protest. SBA may consider a post award protest in its discretion where it determines that an SDB determination after award is meaningful (e.g., where the contracting officer agrees to terminate the contract if the protest is sustained).

(c) The protest must be timely (see § 124.1018(c)).

(d) The protest must have specificity (see § 124.1019).

**§ 124.1017 Who decides disadvantaged status protests?**

In response to a protest challenging the disadvantaged status of a concern, the SBA's Assistant Administrator of DPCE in the Office of 8(a)BD, or

designee, will determine whether the concern is disadvantaged.

**§ 124.1018 What submission procedures apply to disadvantaged status protests?**

(a) *General.* The protest procedures described in this section are separate and distinct from those governing size protests and appeals. All protests relating to whether a concern is a "small" business for purposes of any Federal program, including SDB set-asides and SDB evaluation adjustments, must be filed and processed pursuant to part 121 of this title.

(b) *Filing.* (1) All protests challenging the disadvantaged status of a concern with respect to a particular Federal procurement requirement must be submitted in writing to the procuring agency contracting officer, except in cases where the contracting officer or SBA initiates a protest.

(2) Any contracting officer who initiates a protest must submit the protest in writing to SBA in accord with paragraph (c) of this section.

(3) In cases where SBA initiates a protest, the protest must be submitted in writing to the Assistant Administrator of DPCE and notification provided in accord with § 124.1020.

(c) *Timeliness of protest.* (1) *SDB Set-Aside and SDB Evaluation Adjustment protests.* (i) *General.* In order for a protest to be timely, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the bid opening date for sealed bids, or after the receipt from the contracting officer of notification of the identity of the prospective awardee in negotiated acquisitions.

(ii) *Oral protests.* An oral protest relating to an SDB set-aside or SDB evaluation adjustment made to the contracting officer within the allotted 5-day period will be considered a timely protest only if the contracting officer receives a confirming letter postmarked, FAXed, or delivered no later than one calendar day after the date of such oral protest.

(iii) *Protests of contracting officers or SBA.* The time limitations in paragraph (c)(1)(i) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (c)(3) of this section.

(iv) *Untimely protests.* A protest received after the time limits set forth in this paragraph (c)(1) will be dismissed by SBA.

(2) *Section 8(d) protests.* In connection with an 8(d) subcontract, the contracting officer or SBA must submit

a protest to the Assistant Administrator of DPCE prior to the completion of performance by the intended 8(d) subcontractor.

(3) *Premature protests.* Protests in connection with any procurement which are submitted by any person, including the contracting officer, before bid opening or notification of intended award, whichever applies, will be considered premature, and will be returned to the protestor without action. A contracting officer that receives a premature protest must return it to the protestor without submitting it to the SBA.

(d) *Referral to SBA.* (1) Any contracting officer who receives a protest that is not premature must promptly forward it to the SBA's Assistant Administrator of DPCE, 409 3rd Street, SW, Washington, DC 20416.

(2) A contracting officer's referral of a protest to SBA must contain the following:

- (i) The written protest and any accompanying materials;
- (ii) The date on which the protest was received by the contracting officer;
- (iii) A copy of the protested concern's self-certification as an SDB, and the date of such self-certification; and
- (iv) The date of bid opening or the date on which notification of the apparent successful offeror was sent to all unsuccessful offerors, as applicable.

**§ 124.1019 What format or degree of specificity does SBA require to consider an SDB protest?**

(a) An SDB protest need not be in any specific format in order for SBA to consider it.

(b) A protest must be sufficiently specific to provide reasonable notice as to all grounds upon which the protested concern's disadvantaged status is challenged.

(1) A protest merely asserting that the protested concern is not disadvantaged, without setting forth specific facts or allegations is insufficient and will be dismissed.

(2) The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely.

(c) A dismissal of a protest by the Assistant Administrator of DPCE for lack of specificity or lack of timeliness may be appealed to SBA's AA/8(a)BD pursuant to § 124.1022.

**§ 124.1020 What will SBA do when it receives an SDB protest?**

(a) Upon receipt of a protest challenging the disadvantaged status of a concern, the Assistant Administrator

of DPCE will immediately notify the protestor and the contracting officer of the date the protest was received and whether it will be processed or dismissed for lack of timeliness or specificity.

(b) In cases where the protest is timely and sufficiently specific, the Assistant Administrator of DPCE will also immediately advise the protested concern of the protest and forward a copy of it to the protested concern.

(1) The Assistant Administrator of DPCE is authorized to ask the protested concern to provide any or all of the following information and documentation, completed so as to show the circumstances existing on the date of self-certification: SBA Form 1010A, "Statement of Personal Eligibility" for each individual claiming disadvantaged status; SBA Form 1010B, "Statement of Business Eligibility;" SBA Form 413, "Personal Financial Statement," for each individual claiming disadvantaged status; information as to whether the protested concern, or any of its owners, officers or directors, have applied for admission to or participated in the SBA's 8(a) BD program and if so, the name of the company which applied or participated and the date of the application or entry into the program; business tax returns for the last two completed fiscal years prior to the date of self-certification; personal tax returns for the last two years prior to the date of self-certification for all individuals claiming disadvantaged status, all officers, all directors and for any individual owning at least 10% of the business entity; annual business financial statements for the last two completed fiscal years prior to the date of self-certification; a current monthly or quarterly business financial statement no older than 90 days; articles of incorporation; corporate by-laws; partnership agreements; limited liability company articles of organization; and any other relevant information as to whether the protested concern is disadvantaged.

(2) SBA's disadvantaged status determination is not limited to consideration only of the issues raised in the protest. All applicable criteria may be considered.

(3) Unless the protest presents specific credible information which calls into question the veracity of application or other documents previously submitted to SBA by a current Participant in SBA's 8(a) BD program, SBA will allow the Participant to submit, in lieu of the information specified in paragraph (b)(1) of this section, a sworn affidavit or declaration that circumstances concerning the

ownership and control of the business and the disadvantaged status of its principals have not changed since its application or entry into the program or its most recent annual review, and a copy of its most recently completed annual review.

(i) If the ownership or control of the business or the disadvantaged status of any principals have changed, the protested concern must comply with paragraph (b)(1) of this section.

(ii) An affidavit or declaration may be allowed only if SBA admitted the protested concern to the 8(a) BD program, or conducted an annual review of the protested concern, during the 12-month period preceding the date on which SBA receives the protest, and if proceedings to suspend, terminate or early graduate the concern from the 8(a) BD program are not pending.

(c) Within 10 working days of the date that notification of the protest was received from the Assistant Administrator of DPCE, the protested concern must submit to the Assistant Administrator of DPCE, by personal delivery, FAX, or mail, the information and documentation requested pursuant to paragraph (b)(1) of this section or the affidavit permitted by paragraph (b)(2) of this section. Materials submitted must be received by the close of business on the 10th working day.

(1) SBA will consider only materials submitted timely, and the late or non-submission of materials needed to make a disadvantaged status determination may result in sustaining the protest.

(2) The burden is on the protested concern to demonstrate its disadvantaged status, whether or not it is currently shown on the list of qualified SDBs.

(3) The protested concern must timely submit to SBA any information it deems relevant to a determination of its disadvantaged status.

#### **§ 124.1021 How does SBA make disadvantaged status determinations?**

(a) *General.* The Assistant Administrator of DPCE will determine a protested concern's disadvantaged status within 15 working days after receipt of a protest. If the procuring agency contracting officer does not receive an SBA determination within 15 working days after the SBA's receipt of the protest, the contracting officer may presume that the challenged offeror is disadvantaged, unless the SBA requests and the contracting officer grants an extension to the 15-day response period.

(b) *Award after protest.* (1) After receiving a protest involving an offeror being considered for award, the

contracting officer shall not award the contract until:

(i) The SBA has made an SDB determination, or

(ii) 15 working days have expired since SBA's receipt of a protest and the contracting officer has not agreed to an extension of the 15-day response period.

(2) Notwithstanding paragraph (b)(1) of this section, the contracting officer may award a contract after the receipt of an SDB protest where he or she determines in writing that an award must be made to protect the public interest.

(c) *Withdrawal of protest.* If a protest is withdrawn, SBA will not complete a new disadvantaged status determination, and its previous SDB certification will stand.

(d) *Basis for determination.* (1) Except with respect to a concern which is a current Participant in SBA's 8(a) BD program and is authorized under § 124.1020(b)(3) to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination will be based on the protest record, including reasonable inferences therefrom, as supplied by the protestor, protested concern, SBA or others.

(2) SBA may in its discretion make a part of the protest record information already in its files, and information submitted by the protestor, the protested concern, the contracting officer, or other persons contacted for additional specific information.

(e) *Disadvantaged status.* In evaluating the social and economic disadvantage of individuals claiming disadvantaged status, SBA will consider the same information and factors set forth in §§ 124.103 and 124.104.

(f) *Disadvantaged status determination.* SBA will render a written determination including the basis for its findings and conclusions.

(g) *Notification of determination.* After making its disadvantaged status determination, the SBA will immediately notify the contracting officer, the protestor, and the protested concern of its determination. SBA will promptly provide by certified mail, return receipt requested, a copy of its written determination to the same entities, consistent with law.

(h) *Results of an SBA disadvantaged status determination.* A disadvantaged status determination becomes effective immediately.

(1) If the concern is found not to be disadvantaged, the determination remains in full force and effect unless reversed upon appeal by SBA's AA/8(a)BD pursuant to § 124.1022, or the concern is certified to be an SDB under § 124.1008. The concern is precluded

from applying for SDB certification for 12 months from the date of the final agency decision (whether by the Assistant Administrator of DPCE without an appeal, or by the AA/8(a)BD on appeal).

(2) If the concern is found to be disadvantaged, the determination remains in full force and effect unless and until reversed upon appeal by SBA's AA/8(a)BD pursuant to § 124.1022. A final agency decision (whether by the Assistant Administrator of DPCE without an appeal, or by the AA/8(a)BD on appeal) finding the protested concern to be an SDB remains in effect generally for three years from the date of the decision under the same conditions as if the concern had been granted SDB certification under § 124.1008.

#### **§ 124.1022 Appeals of disadvantaged status determinations.**

(a) *Who may appeal.* Appeals of protest determinations may be filed with the SBA's AA/8(a)BD by the protested concern, the protestor, or the contracting officer.

(b) *Timeliness of appeal.* An appeal must be in writing and must be received by the AA/8(a)BD no later than 5 working days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the five-day time period.

(c) *Notice of appeal.* Notice of the appeal must be provided by the party bringing an appeal to the procuring agency contracting officer and either the protested concern or original protestor, as appropriate.

(d) *Grounds for appeal.* SBA will re-examine a protest determination only if there was a clear and significant error in the processing of the protest, or if the Assistant Administrator of DPCE failed completely to consider a significant fact contained within the information supplied by the protestor or the protested concern. SBA will not consider protest determination appeals based on additional information or changed circumstances which were not disclosed at the time of the decision of the Assistant Administrator of DPCE, or which are based on disagreement with the findings and conclusions contained in the determination.

(e) *Contents of appeal.* No specific format is required for the appeal. However, the appeal must identify the protest determination which is appealed, and set forth a full and specific statement as to why the determination is erroneous under paragraph (c) of this section.

(f) *Completion of appeal after award.* An appeal may proceed to completion



even though an award of the SDB acquisition or other procurement requirement which prompted the protest has been made, if so desired by the protested concern, or where SBA determines that a decision on appeal is meaningful, such as where the contracting officer agrees:

(1) In the case where an award is made to a concern other than the protested concern, to terminate the contract and award to the protested concern if the appeal finds that the protested concern is disadvantaged; or

(2) In the case where an award is made to the protested concern, to terminate the contract if the appeal finds that the protested concern is not disadvantaged.

(g) The appeal will be decided by the AA/8(a)BD within 5 working days of its receipt, if practicable.

(h) The appeal decision will be based only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protestor, and the protested concern, consistent with law.

(i) The decision of the AA/8(a)BD is the final decision of the SBA.

#### **PART 134—[AMENDED]**

5. The authority citation for 13 CFR part 134 would continue to read as follows:

**Authority:** 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6) and 637(a).

6. Section 134.201 is amended by revising the second and third sentences to read as follows:

#### **§ 134.201 Scope of the rules in this subpart B.**

\* \* \* Specific procedural rules pertaining to 8(a) program appeals and to proceedings under the Program Fraud Civil Remedies Act are set forth, respectively in subpart D of this part and part 142 of this chapter. In the case of a conflict between a particular rule in this subpart and a rule of procedure pertaining to OHA appearing in another subpart of this part or another part of this chapter, the latter rule shall govern.

7. Section 134.202 is amended in paragraph (c) by removing the reference to "subpart D of this part" and inserting in its place the phrase "subpart E of this part," and in paragraph (d) by removing the phrase "§ 124.211" and inserting in its place the phrase "§ 124.305."

8. Section 134.206(a) is amended by removing the words "the service of" and inserting in their place the words "the filing of."

9. Section 134.211 is amended by adding the following new paragraph (d) at the end thereof.

#### **§ 134.211 Motions.**

\* \* \* \* \*

(d) *Stay.* A motion to dismiss stays the time to answer. The Judge will establish the time for serving and filing an answer in the order determining the motion to dismiss.

#### **§ 134.213 [Amended]**

10. Section 134.213(a) is amended by removing the second sentence.

#### **§ 134.222 [Amended]**

11. Section 134.222 is amended by removing the ";" and the word "or" at the end of paragraph (a)(2), by inserting a "." at the end of paragraph (a)(2), and by removing paragraph (a)(3).

12. Subpart D is redesignated as Subpart E, sections 134.401 through 134.418 are redesignated as sections 134.501 through 134.518, and the following new Subpart D is inserted:

#### **Subpart D—Rules of Practice for Appeals Under the 8(a) Program**

##### **§ 134.401 Scope of the rules in this subpart D.**

The rules of practice in this subpart D apply to all appeals to OHA from:

(a) Denials of 8(a) BD program admission based solely on a negative finding(s) of social disadvantage, economic disadvantage, ownership or control pursuant to § 124.206;

(b) Early graduation pursuant to §§ 124.302 and 124.304;

(c) Termination pursuant to §§ 124.303 and 124.304; and

(d) Denials of requests to issue a waiver pursuant to § 124.514.

##### **§ 134.402 Appeal petition.**

In addition to the requirements of § 134.203, an appeal petition must state, with specific reference to the determination and the record supporting such determination, the reasons why the determination is alleged to be arbitrary, capricious or contrary to law.

##### **§ 134.403 Service of appeal petition.**

(a) Concurrent with its filing with OHA, a concern must also serve SBA's AA/8(a)BD and SBA's Office of General Counsel with a copy of the petition, including attachments.

(b) In the context of appeals relating to denials of program admission pursuant to § 124.206 or denials of requests for waivers pursuant to § 124.514, service on the Office of General Counsel must be made to the SBA's Associate General Counsel for General Law. For appeals relating to early graduation pursuant to §§ 124.302 and 124.304 or termination pursuant to §§ 124.303 and 124.304, service on the Office of General Counsel must be made

to the Associate General Counsel for Litigation.

(c) Service should be addressed to the AA/8(a)BD and either Associate General Counsel at the Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

##### **§ 134.404 Decision by Administrative Law Judge.**

Appeal proceedings brought under this subpart will be conducted by an Administrative Law Judge.

##### **§ 134.405 Jurisdiction.**

(a) The Administrative Law Judge selected to preside over an appeal shall decline to accept jurisdiction over any matter if:

(1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of denials of 8(a) BD program admission based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control;

(2) The appeal is untimely filed under § 134.202 or is not otherwise filed in accordance with the requirements of this subpart or the requirements in subparts A and B of this part; or

(3) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(b) Once the Administrative Law Judge accepts jurisdiction over an appeal, subsequent initiation of an adjudication of the matter by a court of competent jurisdiction will not preclude the Administrative Law Judge from rendering a final decision on the matter.

##### **§ 134.406 Review of the administrative record.**

(a) Except as provided in § 134.407, any proceeding conducted under this subpart shall be decided solely on a review of the written administrative record.

(b) The Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is reasonable, the Administrative Law Judge must uphold it on appeal.

(c) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge. The administrative record, however, need not contain all documents pertaining to the appellant. For example, the administrative record in a termination proceeding need not include the

Participant's entire business plan file or documents pertaining to specific 8(a) contracts that are unrelated to the termination action.

(d) Where the Agency files its answer to the appeal petition after the date specified in § 134.206, the Administrative Law Judge may decline to consider the answer and base his or her decision solely on a review of the administrative record.

(e) The Administrative Law Judge may remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under § 124.514, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious or contrary to law. Such a remand will be for a period of 10 working days.

**§ 124.407 Evidence beyond the record and discovery.**

(a) The Administrative Law Judge may not admit evidence beyond the

written administrative record nor permit any form of discovery unless he or she first determines that the appellant, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit the Agency to respond in writing to any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the appellant has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the appellant.

**§ 134.408 Decision on appeal.**

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed. If the Administrative Law Judge does not issue a decision within 90 days after an appeal petition is filed, he or she must indicate the reason that the 90-day time limit has not been met in the decision, when issued.

(c) The Administrative Law Judge may re-examine an appeal decision if there is a clear showing of an error of fact or law material to the decision.

Dated: July 23, 1997,

**Aida Alvarez,**

*Administrator.*

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