Section D. Endorsement of Later ASME BPV or OM Codes That Are Considered Backfits

There are some circumstances when the NRC considers it appropriate to treat as a backfit the endorsement of a later ASME BPV or OM code—

(1) When the NRC endorses a later provision of the ASME BPV or OM code that takes a substantially different direction from the currently existing requirements, the action is treated as a backfit. An example was the NRC's initial endorsement of Subsections IWE and IWL of Section XI, which imposed containment inspection requirements on operating reactors for the first time. The final rule dated August 8, 1996 (61 FR 41303), incorporated by reference in § 50.55a the 1992 Edition with the 1992 Addenda of IWE and IWL of Section XI to require that containments be routinely inspected to detect defects that could compromise a containment's structural integrity. This action expanded the scope of § 50.55a to include components that were not considered by the existing regulations to be within the scope of ISI. Because those requirements involved a substantially different direction, they were treated as backfits, and justified under the standards of 10 CFR 50.109.

(2) When the NRC requires implementation of later ASME BPV or OM code provision on an expedited basis, the action is treated as a backfit. This applies when implementation is required sooner than it would be required if the NRC simply endorsed the Code without any expedited language. An example was the final rule dated September 22, 1999 (64 FR 51370), which incorporated by reference the 1989 Addenda through the 1996 Addenda of Section III and Section XI of the ASME BPV Code, and the 1995 Edition with the 1996 Addenda of the ASME OM Code. The final rule expedited the implementation of the 1995 Edition with the 1996 Addenda of Appendix VIII of Section XI of the ASME BPV Code for qualification of personnel and procedures for performing ultrasonic (UT) examinations. The expedited implementation of Appendix VIII was considered a backfit because licensees were required to implement the new requirements in Appendix VIII before the next 120-month ISI program inspection interval update. Another example was the final rule dated August 6, 1992 (57 FR 34666), which incorporated by reference in § 50.55a the 1986 Addenda through the 1989 Edition of Section III and Section XI of the ASME BPV Code. The final rule added a requirement to expedite the implementation of the revised reactor vessel shell weld examinations in the 1989 Edition of Section XI. Imposing these examinations was considered a backfit because licensees were required to implement the examinations before the next 120-month ISI program inspection interval update.

(3) When the NRC takes an exception to an ASME BPV or OM code provision and imposes a requirement that is substantially different from the current existing requirement as well as substantially different than the later code. An example of this is presented in the portion of the final rule dated September 19, 2002, in which the NRC adopted dissimilar metal piping weld UT examination coverage requirements from those in the ASME code.

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, and 134

RIN 3245–AE92

Small Business Size Regulations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Small Business Administration's (SBA's) small business size regulations and the regulations applying to appeals of size determinations. In particular, this rule amends the definitions of affiliation and employees. It also makes procedural and technical changes to cover programs such as the SBA's HUBZone Program and the government-wide Small Disadvantaged Business Program. Further, the rule codifies several long-standing precedents of the SBA's Office of Hearings and Appeals and clarifies the jurisdiction of that office.

DATES: *Effective Date:* The rule is effective on June 21, 2004. *Applicability Date:* These amendments apply to all solicitations issued on or after the effective date, as well as all applications for financial or other assistance pending as of or submitted to the SBA on or after the effective date.

FOR FURTHER INFORMATION CONTACT: Gary Jackson, Assistant Administrator, Office of Size Standards, (202) 205–6464 or *Gary.Jackson@sba.gov.*

SUPPLEMENTARY INFORMATION: On November 22, 2002, the U.S. Small Business Administration (SBA or Agency) published in the **Federal Register**, 67 FR 70339, a proposed rule to amend its regulations governing size. The SBA's size regulations (13 CFR part 121) are used to determine eligibility for all SBA and Federal programs that require an entity to be a small business concern (SBC).

In general, the SBA's size standards are based on either average annual receipts or number of employees, depending on the industry. When measuring a concern's size, the receipts or employees of affiliated concerns are included. This final rule modifies the definitions of affiliation and number of employees. In addition, the rule amends 13 CFR part 134 and clarifies the jurisdiction of the SBA's Office of Hearings and Appeals (OHA).

Section-by-Section Analysis of Comments

The SBA received two comments on its proposal to amend § 121.102 and add a new paragraph (d) that would recognize that there currently exists an internal Size Policy Board at the SBA responsible for making recommendations to the Administrator on size standards, other size eligibility requirements, and size protest procedures. One commenter concurred with the proposal to recognize the size policy board, while another commenter noted a typographical error in the paragraph numbering. Upon further deliberation, the SBA has decided not to adopt this rule as proposed. The SBA believes that the make-up and utilization of a Size Policy Board or other means to effect size policy is an internal matter, and need not be spelled out in the regulations. The SBA's current organizational structure ensures that size standard issues are considered by all appropriate officials in the Agency.

The SBA also proposed amending the definition of affiliation set forth at § 121.103. The proposed rule provided that control may be affirmative or negative, set forth an example of negative control, stated that control may be exercised indirectly through a third party, and stated that affiliation may be found under the totality of circumstances even though no single factor is sufficient to constitute affiliation. The SBA received several comments on these proposed changes, including comments supporting the incorporation of certain provisions previously contained in the regulations to provide clearer guidance regarding the application of the affiliation rules.

The SBA received one comment regarding § 121.103(a)(6), which provides that when determining the concern's size, the SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit. The commenter stated that this regulation, along with § 121.104(d), does not explain how to aggregate and then average the receipts or employees of a concern's affiliates. The commenter explained that there are three different ways to calculate an average and with each, a different answer is obtained.

In response to this comment, the SBA has amended § 121.104 (receipts) and § 121.106 (employees) to explain how to

calculate receipts and employees of affiliates. The amended language describes the SBA's historical practice of separately calculating the average annual receipts and average number employees for the business concerns and each affiliate and then aggregating them together. For example, a business concern with an average of 75 employees is added to the 20 employee average of an affiliate to arrive at an average number of employees of 95. This is not a change in policy, but merely more fully explains current policy.

The SBA also proposed amending § 121.103(b)(2) to clarify the exception to affiliation for Indian tribes, Alaska Native Corporations (ANCs), Community Development Corporations (CDCs) and Native Hawaiian Organizations (NHOs). The proposed rule specified that the exception applies whether the tribe, ANC, CDC or NHO owns the concern whose size is at issue directly, or through another entity, which is wholly-owned by the tribe, ANC, CDC or NHO. The proposed rule also provided that affiliation could not be found among several tribally, ANC, CDC or NHO-owned concerns based on common management.

The SBA received several comments on this proposed rule. Most supported the exception to affiliation when the subsidiary is wholly-owned by the tribe, ANC, CDC or NHO, or through another entity, because many tribes and ANCs have formed holding companies. However, some commenters requested a clarification of the meaning of wholly-owned because a literal interpretation would encompass any business that is 100% owned by a tribe, ANC, CDC or NHO. These commenters believe that for purposes of the 8(a) Business Development (BD) Program, ''wholly-owned'' refers only to holding companies. Thus, they recommended the SBA define the term ''holding company'' in its size regulations.

The SBA disagrees with these latter comments. For purposes of the 8(a) BD Program, ''wholly-owned'' does not refer only to holding companies. In addition, the SBA believes that the term ''wholly-owned'' is clear. It means 100% ownership.

Several commenters supported the proposed exception to affiliation for tribes, ANCs, CDCs and NHOs based on common management. However, each recommended that the SBA also include common contractual relationships between the tribe or ANC and its subsidiaries as an exception to affiliation. These commenters argued that tribes and ANCs provide support services to their subsidiaries and that these services are inherently part of their ownership and management responsibilities. The commenters suggested that the final rule specify that ''common administrative services'' should be permissible.

The SBA agrees with these comments. The Agency recognizes that it is common practice for tribes, ANCs, CDCs, and NHOs to own other concerns and for the tribal managers to manage these concerns. However, allowing the tribes, ANCs, CDCs, and NHOs to own, manage, and perform the common administrative services for the concern would create an unfair, competitive advantage unless fair and adequate consideration is given. Thus, the SBA amends its regulation to state that no affiliation is found as a result of the performance of common administrative services by a tribe, ANC, CDC, or NHO for one of its subsidiaries, so long as proper consideration is provided for these services.

The SBA stated in the proposed rule that although SBA will not find affiliation between tribes, ANCs, CDCs and NHOs and the business concerns they owned and control because of common management and ownership, ''affiliation may be found for other reasons.'' One commenter believed this statement is too confusing and is unclear as to which ''other reasons'' the SBA is referring. In response to this comment, the SBA notes that its regulations set forth numerous criteria to determine when the SBA may deem two or more business concerns affiliates. For example, the SBA may find affiliation based upon the totality of circumstances, the newly organized concern rule, or shared common facilities.

Numerous commenters believed that the SBA should make its size rules and 8(a) BD rules on affiliation with respect to Tribes and ANCs the same because the conflict between the two rules provides for inconsistent size determinations, which then have to be explained to contracting officers (COs) and potential teaming partners. Some commenters argued that the legislative history of the 8(a) BD Program supports this position. Others argued that the Alaskan Native Claims Settlement Act (ANCSA) entitles ANCs to all the benefits afforded disadvantaged and minority businesses, and this would apply to size matters, as well. The SBA disagrees with these comments. For either 8(a) BD program entry or 8(a) contract award, there is specific statutory language that generally provides that in determining the size of a concern owned by a tribe or ANC the firm's size will be determined independently without regard to its affiliation with the tribe or ANC, or any other business entity owned by the tribe or ANC. Thus, while there is specific statutory authority for a total exclusion from affiliation between a concern and the tribe or ANC that owns it for purposes of the 8(a) BD program, there is no such similar authority outside the 8(a) BD program. Congress specifically limited the full exclusion only to the 8(a) BD program.

In addition, the differing purposes of the SBA's size regulations and the regulations implementing the 8(a) BD program support distinct affiliation exclusions for 8(a) and non-8(a) contracting opportunities. The purpose of the SBA's size regulations in the context of Federal procurement is to provide a benefit to SBCs that will assist SBCs in receiving a fair proportion of Federal procurements. The purpose of the 8(a) BD Program is to promote business development of SBCs owned and controlled by socially and economically disadvantaged individuals or qualified entities (tribes, ANCs, NHOs and CDCs). The 8(a) BD program is intended to assist such firms toward economic viability so that they can compete with all other businesses, including SBCs that are not owned and controlled by socially and economically disadvantaged individuals and qualified entities. The final rule remains as proposed.

One commenter explained that this part of the proposed rule, if enacted as final, would reverse the result in Size Appeal of *HCI Construction,* Inc., SBA No. SIZ–4460 (2001). In *HCI Construction, Inc.,* SBA No. SIZ–4460, HCI was a tribal holding company that owned several companies. SBA found that HCI's subsidiaries were all affiliated and the exclusion for affiliation for tribally-owned business concerns did not apply because HCI was not a tribe. OHA stated that the appeal allegations raised a policy question calling for a change in the size regulations and were not a justiciable issue.

SBA concurs with the comment that the rule reverses the result in *HCI Construction, Inc.* That is SBA's intent. In the final rule, SBA has divided this section into two parts to make clear that business concerns owned by Indian tribes, ANCs, CDCs, and NHOs (including wholly owned entities of tribes, ANCs, CDCs and NHOs) are not considered to be affiliated with those entities or other concerns owned by those entities for size determination purposes; however, two or more concerns owned by such entities may be affiliated with each other on grounds other than common ownership,

common management, and common administrative services.

The proposed rule added language to § 121.103(b)(6) to clarify that the SBA may find affiliation with respect to approved mentor/protégé relationships for reasons other than the mentor/protégé relationship. One commenter thought the phrase ''other reasons'' was unclear. In response, the SBA notes that Federal Mentor/Protégé Programs allow mentors to provide specific assistance to the protégé and therefore place limits upon the mentor/protégé relationship. The SBA's size regulations set forth numerous criteria to determine when the SBA will deem two or more business concerns affiliates. These criteria, if outside of the mentor/protégé relationship, are the ''other reasons'' the SBA may determine that the two concerns engaged in a mentor/protégé relationship are affiliated. The SBA has implemented the final rule as proposed.

Two commenters believed that there should be an exclusion from affiliation for joint ventures with mentors/protégés and another SBC (for size and 8(a)). Specifically, these commenters recommend the SBA's size regulations state that a joint venture between an 8(a) protégé, a mentor and one or more other SBCs is permissible without subjecting the mentor and the other SBCs to an affiliation determination. The SBA does not agree with this suggestion because it would not serve the purpose of Federal mentor/protégé programs and it would create an unfair competitive advantage for such joint ventures.

The SBA received one comment on its proposal to amend § 121.103(c), which provided that where a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the SBA will deem the concern's Board and Chief Executive Officer (CEO) or President to have the power to control the concern in the absence of evidence to the contrary. In the absence of evidence to the contrary, the SBA will find control in such circumstances to rest with the Board of Directors and with the highest ranking officer of the concern (either its CEO or President) because control of the concern must rest somewhere. One commenter believed that the President/CEO should not be considered as controlling with the Board because the Board selects the President. The SBA notes that even when this is true, the President or CEO still exercises certain elements of control over the concern. Again, someone controls the concern. It is up to the concern itself or the relevant individuals themselves to provide evidence to the contrary that one or more individuals truly do not control the concern. SBA has implemented the final rule as proposed.

Section 121.103(d) discusses affiliation arising under stock options, convertible securities, and agreements to merge. The SBA gives present effect to all such arrangements in determining affiliation and proposed several exceptions to this ''present effect'' rule, which stem from OHA rulings. One commenter acknowledged support for this proposed rule, while another noted that the last three lines would be clearer if they read ''conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.'' The SBA concurs with this comment and the final regulation provides that options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect. The rule also makes clear that SBA will not give present effect to options, convertible securities or agreements in order to make a firm eligible as a small business. For example, a concern cannot claim that an individual owning 40% of the concern where that block is large as compared to all others should not be deemed to control the concern because an agreement exists to sell his 40% some unspecified time in the future.

Section 121.103(e) covers control through common management. The SBA proposed clarifying that affiliation arises when an officer, director, managing member, or partner controls two concerns. One commenter stated that the regulation is not clear and questions whether it reads that if an officer owns 51% of two concerns then there is affiliation or if the two concerns have a director in common then they are affiliated. The regulation provides that the SBA will find affiliation based upon common management when a manager controls more than one business concern. Thus, if one person is the President of two concerns, the concerns are affiliated based upon common management. If one person is simply on the Board of two business concerns, but does not control either or both concerns, there would be no finding of affiliation based upon common management. The SBA has implemented the final rule as proposed.

Others commented that the proposed regulation at § 121.103(e), dealing with common management, is in conflict with the 8(a) preclusion from outside employment found in 13 CFR 124.109. The SBA does not believe there is a conflict. The purpose of the size regulations is to determine whether a concern is small and the purpose of the 8(a) BD regulations is to determine eligibility for a business development program. The requirement that the disadvantaged individual upon whom 8(a) eligibility is based must devote full-time to his or her business is a requirement to ensure that the business development purposes of the 8(a) BD program are advanced. That provision has nothing to do with ownership in or membership on boards of directors of more than one concern for size affiliation purposes.

In its proposed regulation, the SBA added § 121.103(g), ''Affiliation based on the newly organized concern rule.'' This proposed section provided that affiliation may arise where former officers, directors, stockholders, managing members (in a limited liability corporation) or key employees of one concern organize a new concern in the same or related industry and serve as its officers, directors, stockholders, managing members or key employees, and the first concern will provide contractual, financial, or other assistance to the new concern. One commenter recommended defining the term ''key employee'' and suggested reviewing the SBA's former size regulations as reference. This commenter also believed that the proposed rule's preamble discussion of post-1996 OHA decisions should note that the newly organized concern rule was used as a factor in the totality of circumstances. The SBA concurs with these comments and has defined ''key employee'' to mean an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

One comment recommended noting in the preamble that with the return of the newly organized concern rule as an independent basis of affiliation, the totality of circumstances ground for affiliation would be rarely used. The SBA disagrees with this comment. The newly organized concern rule is one factor used when determining the totality of circumstances. The totality of circumstances can arise in many instances, aside from newly-organized concerns. The totality of circumstances is used when, absent a single factor sufficient by itself to constitute affiliation, connecting relationships between firms are so suggestive of dependence as to render them affiliated.

For example, the connecting relationships may include financial assistance, the sharing of office space and personnel, and a minority owner having the power to control a challenged firm.

The SBA proposed to redesignate the joint venture regulation currently at § 121.103(f) to § 121.103(h), clarify it, and define its key terms using definitions similar to those set forth in parts 9 and 19 of the Federal Acquisition Regulation (FAR), title 48 of the Code of Federal Regulations. The SBA stated in its preamble to the proposed rule that it was considering adopting a rule that would allow two or more SBCs to form a joint venture relationship that would go beyond a specific contract and still afford them the exclusion from affiliation (if the other requirements are met). In other words, the joint venture could be an ongoing relationship that would allow the concerns to seek out several different larger contract opportunities and still get an exclusion from affiliation without requiring the entities to form a separate joint venture for each contract opportunity. The SBA received several comments on its proposed rule regarding joint ventures.

One commenter expressed support for this clarification and the utilization of FAR definitions to have consistency with the FAR and the SBA's regulations, while others believed that the proposed definition is too narrow. Specifically, the latter commenters stated that joint ventures should not be limited to informal partnership structures but instead should include ongoing relationships, as well as corporations, limited liability corporations and other legally recognized types of entities. These commenters supported the SBA's proposal to permit two or more SBCs to form a joint venture that would last beyond a specific contract and still afford them the exclusion from affiliation because: (1) Many SBCs pursue multiple procurements together; (2) a single ongoing joint venture vehicle should facilitate faster approval by the SBA, if required; and (3) it will increase the ability of SBCs to pursue bundled contracts. However, commenters also believed that if the SBA does allow SBCs to enter into a joint venture for multiple contracts, then the Agency should limit the number of contracts or revenues or define at what point the two companies are affiliated. Otherwise, these joint ventures could create an unfair competitive advantage.

In response to these comments, the SBA first notes that joint ventures are not limited to informal partnership structures. The final rule clarifies that joint ventures may be in the form of a new legal entity (*e.g.*, a limited liability corporation) or may be informal arrangements so long as the agreement between the business concerns explains that it is a joint venture and meets the regulation's definition of joint venture. Second, the SBA believes that it is reasonable to allow SBCs to enter into a joint venture relationship on more than one contract and not be considered ''affiliates'' generally for purposes of size. However, the SBA also believes that it must limit the application of the exclusion from affiliations for SBCs that have engaged in a joint venture with each other to no more than three offers over a two year time frame. This limitation will allow SBCs to work together for larger procurements on more that one contract while still ensuring that the joint venture relationship remains limited in nature. In addition, the SBA notes that it limits the exclusion from affiliation for those joint ventures that carry out no more than three specific or limited-purpose business ventures. Thus, joint ventures which compete for limited-purpose contracts, such as encryption contracts, would be excluded from affiliation. However, joint ventures which compete for varying types of contracts, such as an encryption contract and then a computer supply contract or an engineering services contract, would not be excluded from an affiliation determination. The SBA has amended its regulation accordingly.

In addition, several commenters argued that there was a conflict between the proposed size rule regarding joint ventures and the 8(a) BD regulations and stated that allowing joint ventures for multiple contracts contradicts the 8(a) BD regulations on the issue. Specifically, 13 CFR 124.513(a) allows a joint venture for the purpose of performing a specific contract. The SBA concurs with this comment and has amended that regulation so that it is consistent with § 121.103(h).

One commenter believed that the SBA should amend the 8(a) BD regulations to conform to the size joint venture regulation such that there should no longer be a requirement for an 8(a) joint venture to have an 8(a) SBC as the managing venture, etc. The SBA notes that the purpose of the 8(a) BD joint venture requirements is to ensure compliance with the Small Business Act. With respect to the statutory requirement that all 8(a) BD contracts be performed by Participant concerns, the SBA interprets the acceptance of Participants into the program to extend to approved joint ventures in which the Participant is the lead joint venture partner. In other words, for purposes of contracting, admission into the program includes both a concern in its own capacity and any approved joint venture in which the concern is the lead entity. For contracting purposes, the SBA will consider the joint venture to be the Participant where the joint venture meets all applicable requirements and is approved by the SBA. Thus, the SBA believes that it is inappropriate and declines to change either the 8(a) BD joint venture regulations or the size regulations to conform to each other.

The proposed regulations also provided for an exception to affiliation for certain joint ventures so long as each concern is small under the size standard corresponding to the NAICS assigned to the contract. However, an existing regulation provides that for joint ventures between a protégé and its approved mentor, the SBA will deem the joint venture small if the protégé qualifies as small for the NAICS code assigned to the procurement. This is not a change in the SBA policy. Nonetheless, one commenter believes this existing regulation conflicts with the SBA's 8(a) BD regulations. The SBA concurs and notes that the proposed size regulation is consistent with the 8(a) BD regulations set forth in § 124.513(b)(3), which addresses the size of concerns to an 8(a) joint venture, including a joint venture between a mentor protégé. However, as noted by the commenter, the proposed size regulation and § 124.513(b)(3) are inconsistent with § 124.520(d)(1), which also addresses the size of mentors and their 8(a) BD protégés that enter into a joint venture for a contract. The SBA has determined that § 124.520(d)(1), which requires that both the mentor and protégé qualify as small for the procurement, contains an inadvertent error and has amended that regulation so that it is now consistent with § 124.513 and the size regulations.

Finally, one commenter stated that if this is issued as final, then former § 121.103(f)(3) becomes § 121.103(h)(3) and references to the former regulation must be changed in § 124.1002(f)(3) and § 125.6(g). The SBA concurs and has made those changes accordingly. In addition, SBA notes that § 125.6(g) states that when an offeror is exempt from affiliation under § 121.103(h)(3) the performance of work requirement set forth in this section applies to the cooperative effort of the team or joint venture. This implies that all the exclusions under § 121.103(f)(3) are included. However, one commenter believed that this would not apply when dealing with the Mentor/Protégé

Program. The SBA disagrees with this comment. Section 124.513(d) specifically provides that for any 8(a) contract, including those between mentors and protégés, the joint venture must perform the applicable percentage of work required by § 124.510, and the 8(a) partner to the joint venture must perform a significant portion of the contract.

The SBA proposed, at § 121.103(h)(4), that it would treat a contractor and its ostensible subcontractor as joint venturers and affiliates for size determination purposes and defined ostensible subcontractor. One commenter suggested separating out the ''ostensible subcontractor rule'' because the rule requires full affiliation treatment and forbids more favorable joint venture treatment. The same person also believed that the first sentence should omit the reference to ''joint venturers.'' This commenter also recommended refining the last sentence and suggested language. The SBA does not agree with this comment and does not believe it should separate the ostensible contractor rule from the joint venture paragraph. If the SBA considers the prime and its ostensible subcontractor as joint venturers, there may be instances where an exception to affiliation for the joint venture applies. For instance, if an ostensible subcontractor is an SBA-approved mentor to the prime contractor, the two firms would be treated as joint venturers, but the exclusion from affiliation would apply.

The SBA proposed several changes to § 121.104, which pertain to how the annual receipts of a concern are calculated. This modification would identify the items on a Federal tax return that are to be used to calculate receipts. Specifically, the SBA proposed substituting the phrases ''gross receipts,'' ''gross sales,'' and ''other income'' for ''total income'' and ''gross income.'' This change in terminology reflects the items on a Federal tax return that comprise all or part of total or gross income. In addition, the SBA proposed a revision to the definition of receipts to include interest, dividends, rents and royalties received by partnerships, S corporations, and sole proprietorships. For corporations, income from these sources is included in total income as reported on IRS Form 1120. However, for partnerships and S corporations, these items are reported separately from total income on Schedule K of IRS Form 1165 and 1120S, respectively, and on Schedule C or S of IRS Form 1040 for sole proprietorships. Business entities such as limited liability corporations can elect the tax entity (partnership, corporation, or disregarded entity) that best suits their need.

One commenter stated that the proposed definition of receipts is confusing because it does not specify with certainty all of the required items and the formulae the size specialist is to apply to them. For example, this commenter questioned whether gross receipts, gross sales, interest, dividends, royalties and other income are all to be combined and what other income is included. This commenter believes the proposed definition invites a challenged firm to present its own receipts theory; in contrast, the current definition operates mechanically from items easily found on tax returns.

At this time, the SBA has decided not to amend that part of § 121.104(a)(1). Although the SBA received only one comment on this definition, the comment suggested that the proposed rule was less clear than the current one. Therefore, the SBA feels it is necessary to further research the definition of ''receipts'' before implementing an amendment. It remains SBA's intent that amounts received from any source are to be counted in determining a firm's annual receipts. As noted in the proposed rule, this includes amounts received from gross sales, interest, dividends, rents, royalties and other income.

The SBA also proposed to expand its exclusion of receipts received by an agent for another. The proposed regulation set forth those agency-type business entities for which the SBA would exclude amounts collected for another, and permitted the SBA to exclude amounts for similar agent-type situations.

One commenter expressed concern with opening up the list of industries where ''agents'' may exclude receipts received in trust for another. Currently, the SBA makes changes in the list only after a detailed study of a particular industry and a notice and comment rulemaking. This commenter recommended retaining the current approach because of its certainty, uniformity and ease of application and stated that the proposed rule would invite all kinds of pass-through theories. Another commenter supported the proposed amendments as they relate to insurance agencies and financial businesses and supported not counting pass-through income as part of receipts. One commenter stated that the SBA does not expressly define ''received in trust,'' ''claim of right'' and ''asset base'' and each has a different meaning in different industries and contexts. As a result, this commenter believes that the proposed language creates confusion with respect to pass-throughs. In addition, the commenter recommended definitions for these terms.

The SBA has decided not to adopt the proposed language and to retain its current policy of specifically listing those agent-like industries in which certain receipts may be excluded in the calculation of average annual receipts. Although the SBA could develop definitions of certain terms and explain under what conditions it would allow such exclusions, they would remain general guidance in which businesses would not know with certainty how the SBA would ultimately decide. The proposed language could likely, and unnecessarily, invite challenges that raised specious ''pass-through'' theories that would have to be interpreted through a size protest or size appeal. The current policy of limiting these exclusions to specific industries represents a more workable and clearer policy for the public. Specific industries seeking to exclude ''pass-through'' amounts will continue to be required to address their concerns to SBA's Office of Size Standards. SBA will then continue to review such submissions and determine whether a further regulatory change regarding ''pass-through'' amounts is needed.

Finally, the SBA proposed a clarification to the definition of receipts, which stated that the only exclusions from the definition are those specifically provided for in the section and that all other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts. The SBA received several comments on this proposal.

One commenter believes that there is some confusion with respect to the phrase in current § 121.104 ''if also excluded from gross or total income on a consolidated return filed with the IRS.'' The proposed regulation deleted this parenthetical. Prior to the amendment in 1996, the SBA excluded interaffiliate transactions from an applicant firm's receipts without regard to whether the firm and its affiliates filed a consolidated tax return. The commenter questioned whether there is a return to the SBA's previous policy (pre-1996) of allowing exclusions for interaffiliate transactions even in situations where the business concern has not filed a consolidated return or whether the SBA simply does not feel the parenthetical is necessary because other areas of the current or proposed regulation address the situation. The commenter stated that it supported the position that no consolidated tax return

need be filed for the exclusion to apply because a parent company that subcontracts to a subsidiary does not always file a consolidated tax return. In addition, some affiliates do not qualify for a consolidated return. This commenter believes that the SBA should exclude all interaffiliate transactions.

In response to this comment, the SBA notes that it did intend to delete the parenthetical requiring the filing of a consolidated return in this instance. The SBA understands that not all firms file such consolidated returns, but that these amounts should nonetheless still be excluded. Whether a consolidated return is filed should have no bearing on whether properly documented interaffiliate transactions are excluded from annual receipts. To do otherwise would be to count such amounts twice.

The SBA received one comment supporting its clarification of § 121.104(b)(3), which describes the formula the SBA uses to determine annual receipts when the concern has a ''short year'' (as defined by the IRS) as one of the years within the period of measurement. The SBA has issued the final rule as proposed.

The SBA also proposed to revise Footnote 14 to the Table of Small Business Size Standards by NAICS Industry in § 121.201. Specifically, the proposed revisions to Footnote 14(b) added language to clarify that a Federal procurement involving a range of environmental services to restore a contaminated environment does not need to include remedial action as one of three activities to be classified under this size standard. One commenter supported the proposed language because they were aware of a situation where a SBC lost a contract as a result of a CO's belief that the larger size standard for Environmental Remediation Services required remedial action. However, the commenter favors even stronger language clarifying the intent of the footnote and recommended revising the footnote to state that ''although the general purpose of the procurement need not necessarily include remedial actions, such purpose must be to restore. * * *'' The commenter also recommended creating a separate NAICS code for environmental remediation.

The SBA agrees with this comment and has revised the proposed language as recommended to ensure a better understanding of the application of the environmental remediation services size standard. The recommended language by the commenter is consistent with the SBA's purpose of revising the footnote description. The U.S. Bureau of the Census (Census) evaluates requests to establish new industry categories under the NAICS. The SBA is beginning a review of the two size standards it has established under NAICS 562910. As part of that review, it will give consideration to advising Census on the issue, if appropriate.

The SBA also received a comment suggesting the Agency revise the ''note'' to sector 42 of the NAICS, which would incorrectly restate the nonmanufacturer rule of proposed 121.406. The note states the requirement that the concern have fewer than 500 employees but does not include the two other tests. The commenter therefore recommended that the SBA simply refer readers to § 121.406. The SBA disagrees. The comment under Sector 42 of § 121.201 sets forth the size standard for nonmanufacturers. The term ''nonmanufacturer'' is defined in § 121.406. There is no need to revise the comment in Sector 42 and refer readers to § 121.406.

The SBA has also added a note to Sector 92. Because of the emphasis on contracting out Government operational services, the SBA has experienced an increase in inquiries regarding the use of Public Administration NAICS codes to classify procurements and firms performing traditionally government-provided activities. The SBA has amended its Table of Size Standards to clarify that small business size standards are not assigned to codes under Public Administration, NAICS Sector 92. This sector consists of establishments in the public sector, *i.e.*, Federal, state, and local government agencies. The SBA establishes small business size standards to assist business concerns in the private sector, NAICS Sectors 11 through 81. The SBA's definition of a business concern, found in § 121.105, emphasizes that a business concern is an ''entity organized for profit * * * which makes a significant contribution to the U.S. economy through payment of taxes.'' By their nature, establishments in the Public Administration Sector are not organized for profit and are the administrators of public funding. Therefore, establishments in this sector do not meet the SBA's definition of a concern.

In addition, the NAICS manual stresses that ''the administration of governmental programs is classified in Sector 92, Public Administration, while the operation of that same government program is classified elsewhere in NAICS based on the activities performed.'' Concerns performing operational services for the administration of a government program are classified under the NAICS code based on the activities performed. Similarly, procurements for these types of services are classified under the NAICS code that best describes the activities to be performed. For example, the administration (oversight, funding, and policy) of Veterans' programs falls under NAICS code 923140, Administration of Veterans' Affairs. The operation and services for a Veterans Hospital are classified using NAICS codes under Subsector 622, Hospitals. The incorporation of this explanation on NAICS Sector 92 into the Table of Size Standards will assist Government officials in assigning the correct NAICS codes for various small business assistance programs.

The SBA proposed an amendment to § 121.401, covering what procurement programs are subject to size determinations, for plain language purposes. One commenter stated that the SBA should clarify that its regulations on size apply to all competitions in which SBCs are competing and not just set-asides. The SBA believes that this regulation is clear that the size rules apply to all procurement programs to which size status as a small business is required or advantageous, and that a further change is not needed. Another commenter stated that the regulations should address representations of small business size status in public announcements, the SBA's Pro-Net (which, effective January 2004, has been merged into the Central Contractor Registration and is referred to as the Dynamic Small Business Search), GSA Advantage, etc. The SBA does not have the jurisdiction to impose its size rules in public announcements. However, if a business concern improperly certifies its size in the Dynamic Small Business Search or GSA's Advantage, then the appropriate Federal agency may deem it a false statement. The SBA notes that the proposed rule would cover such instances. SBA had in fact removed firms from Pro-Net that it found to be other than small after performing a formal size determination.

Another commenter suggested adding a clarifying sentence distinguishing size determinations from protests. In response to this comment, the SBA notes that §§ 134.101 and 134.102 define size determination. In addition, part 134 also distinguishes appeals from size determinations. Therefore, it is unnecessary to repeat this information in part 121.

Section § 121.404 proposed additional exceptions to the general rule that the size status of a concern is determined as of the date the concern submits a

written self-certification that it is small to the procuring agency as part of its initial offer including price. Proposed § 121.404(a)(1) provided that a concern applying to be certified as a Participant in the SBA's 8(a) BD Program, as a small disadvantaged business (SDB), or as a HUBZone SBC must qualify as small as of the date of certification by the SBA. When requiring an 8(a) BD, SDB, or HUBZone applicant to be small for ''its primary industry classification,'' the concern's primary industry classification is determined by looking solely at the applicant concern (*i.e.*, by excluding its affiliates), but the size of the concern is determined by including the receipts or employees of all affiliates. One commenter stated that the ''exceptions for size determinations'' is confusing. The commenter asked the Agency to clarify that it determines size at the time of program admission for 8(a), SDB and the HUBZone Programs, and at time of contract offer for a contract. While that has always been SBA's position, SBA has clarified this provision.

In proposed § 121.404(a)(3), the SBA addressed size status for purposes of compliance with the nonmanufacturer and ostensible subcontractor rule. Several commenters stated that the use of the phrase ''best and final offer'' does not take sealed bids into consideration and recommended using the phrase ''as of the date of a bid or offer which, if accepted by the Government, would result in a contract.'' Another commenter stated that ''best and final offer'' should be ''final proposal revision.'' The SBA concurs and has amended the regulation to state '' * * * as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.'' The SBA notes that the phrase ''final proposal revision'' is utilized by the FAR now, rather than ''best and final offer.''

The SBA received several comments regarding proposed § 121.404(g), which specified that a concern that qualified as a small business at the time it receives a contract is considered to be a small business throughout the life of that contract. The SBA noted in the preamble that it was considering a rule that would permit a procuring agency to treat a concern as a SBC for no more than 5 years from the date of award.

Four commenters opposed any rule that would require an agency to consider a business small only for a period of 5 years. These commenters stated that agencies are contracting for longer periods and simply because a contract is lengthy does not mean the concern will grow large over the length of the contract. The length of the contract should not be a factor when the original competition was among SBCs.

Meanwhile, several commenters expressed a different view and stated that they do not support allowing a concern to be considered small ''throughout the life of the contract.'' These commenters support GSA's FAR deviation (GSA Acquisition Letter MV–03–01, dated February 21, 2003, and Supplemental Number 1, dated February 11, 2004) that requires businesses to re-certify their size status each time an option for performance in a new contract period is exercised. For example, if the concern is found to be other than small, the agency should be forced to count those contract dollars as an award to an other than small business. This may force agencies to re-solicit for a small business set aside rather than exercise the contract option.

SBA notes that the GSA FAR deviation applies only to awards under the Multiple Awards Schedule (MAS) Program. It has been the SBA's longstanding policy to allow a concern that qualified as a small business at the time it received a contract to be considered a small business throughout the life of that contract. At this time, the SBA is not addressing awards under the MAS program and is not changing its policy regarding other than multiple award contracts. As such, the SBA is implementing the rule as proposed. However, the SBA will continue to consider this issue, including all of the comments received and issues raised.

The SBA also received comments requesting that the Agency address how to treat the acquisition of a SBC by another concern during contract performance, especially since the awardee may then no longer be small. This includes instances where a contract is novated. The commenter believed that the SBA's regulations should require re-certification at the time the contract is novated pursuant to FAR 42.12 and that the SBA should consider re-certifications for other acquisitions, such as the acquisition of stock. The SBA concurs with this comment and has amended the size regulations to address novation of contracts at § 121.404(i), including novations that occur for multiple award schedule contracts. The amended regulations now state that the new entity must submit a written self-certification that it is small to the procuring agency so that the agency can count the award options, or orders issued pursuant to that contract, towards its small business goals.

The SBA proposed amendments to § 121.406, which, in general, address how a SBC qualifies to provide manufactured products under a small business set-aside or an 8(a) contract. One commenter recommended that the SBA add a paragraph clarifying that this rule and § 125.6 (limitations on subcontracting) do not apply to § 8(d) subcontracting. The SBA concurs and has added a sentence clarifying this issue.

Other commenters stated that they oppose the two-tiered size standard for nonmanufacturers—one for most procurements and another for procurements at or under the simplified acquisition threshold. These commenters believe that the two-tiered approach can result in confusion and suggest changing the regulation to provide that the rule does not have to be met if no bidder or offeror proposes to supply the end item of a small business manufacturer or processor. The commenters believe that this change would provide a preference for small business suppliers when no item manufactured by a small business is proposed. The SBA does not agree with this comment and notes that the nonmanufacturer rule is statutory and applies to all procurements above the simplified acquisition threshold unless the SBA grants a waiver. The SBA has promulgated the regulation as proposed.

In § 121.406(b)(1)(ii), the SBA proposed deleting the requirement that a nonmanufacturer must normally sell the items being supplied to the public. This rule was based on provisions of the Walsh-Healey Public Contracts Act, which permitted Federal acquisitions of supplies only from manufacturers or ''regular dealers.'' One of the requirements for being a regular dealer was to sell items to the general public. These provisions of the Walsh-Healey Act were repealed by the Federal Acquisition and Streamlining Act of 1994. The SBA believes that requiring a firm to sell to the general public is overly restrictive. Several commenters supported this amendment. However, some believed the rule should be limited to the defined sector of the small business community engaged in reselling. The SBA does not agree with this last comment because if the SBA limits application of the rule to only ''resellers,'' it will not be helping SBCs.

With proposed § 121.406(b)(2), the SBA explained how a reseller can qualify as an eligible small business manufacturer. According to the proposed regulation, if a firm adds something to an item that the manufacturer of that existing item does not provide, the SBA will consider the firm to be the manufacturer of the ultimate end item (*i.e.*, the item plus the

addition). The SBA received several comments on this proposed rule.

Several commenters stated that the explanation to this proposed regulation is confusing and inconsistent. The regulation states that the test is whether the modifications can be performed by and are available from the manufacturer of the existing end item. One commenter believed the examples provided in the preamble to the proposed rule were inconsistent with this definition. In one example, a SBC is considered the manufacturer because the safety switch it adds to a saw is a feature that the saw's manufacturer does not make or provide. In a second example, a concern is not a manufacturer because the video card it adds is one that the computer manufacturer could have installed. The commenter believed that whether the item is added or could be added are two different tests and the proposed rule is unclear as to whether both tests must be met. Similarly, another commenter believes that the original manufacturer could install any number of add-in peripherals but elects not to thereby allowing the SBC the option of adding it on. Thus, it should not be a factor in determining whether a concern is or is not considered a manufacturer. Rather, this commenter believed that the SBA should consider the following factors when determining whether the SBC is a reseller: (1) Whether the facility has true engineering capabilities; (2) whether the facility has the equipment to fabricate metal or plastic; (3) whether there is an assembly line operation; (4) whether there is a custom packaging and boxing operation; (5) whether the new name of the end product reflects the manufacturing changes; and (6) whether the company uses custom cases or bezels distinguishing it from the original. For example, this commenter believes that the SBA should consider a SBC that goes through the trouble of customizing logos, computer chassis, *etc.* and delivering a product under its own name a computer manufacturer.

One commenter believed that firms that provide computer and other information technology equipment should have a specific rule detailing when such a firm will be treated as the manufacturer of the end item being supplied. The commenter suggested looking at the percentage (by value) of components installed.

Finally, another commenter opposed the amendment because it could corrupt the current process. The simple process of setting up a bagging operation does not constitute manufacturing and unscrupulous operators could take advantage of this change.

SBA believes that its regulations are clear—a business concern will not be deemed the end item manufacturer if the modification can be performed by and is available from the manufacturer of an existing end item. In addition, SBA agrees with the comment that when determining who is a manufacturer, factors that characterize the operations of a manufacturer, as opposed to a reseller, should be considered. SBA is adding as part of its assessment of a manufacturer a concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties. Consideration of these factors is consistent with the current regulations, which require a concern, through its own facilities, to perform activities to produce an end item to be deemed a manufacturer. The additional language enables SBA to better distinguish activities that constitute manufacturing from activities that are incidental or of minor value.

SBA also agrees that the computer industry deserves special attention, as there has been confusion as to how much installation must be done before a firm will be considered a manufacturer of computers. The final rule provides that a firm must generally install components totaling at least 50% of the value of the end item in order to be considered the manufacturer. However, where a firm installs one or more components to an existing end item where those identical modifications cannot be performed by and are not available from the manufacturer of the existing end item, the general language of § 121.406(b)(2) may permit the firm to be considered the manufacturer in appropriate circumstances.

However, SBA notes that it is not making any changes in response to the comment regarding bagging operations. The issue raised by this comment pertains primarily to small business participation on commodity purchases. SBA plans to address that broader issue as part of a separate rulemaking action to be published in the near future.

With § 121.410, the SBA proposed an amendment to determining size for purposes of subcontracts. Specifically, the proposed rule eliminated the 500-employee size standard provision for subcontracts of less than $10,000 and required that the size standard of the NAICS industry that best matches the purpose of the subcontract be used. This change merely adopted the size standard policy now in effect for subcontracts of $10,000 or greater. The SBA received two comments on this proposal. Both supported the elimination of the 500-employee size standard for subcontracts, but recommended clarification that prime contractors can select the NAICS code for the subcontracts because many primes believe the NAICS code for the subcontract is the same as for the prime contract. The SBA concurs with this comment and has clarified the rule accordingly.

Proposed § 121.411(a) changed the reference to representations made in SBA's Procurement Automated Source System (PASS) to SBA's Procurement Marketing & Access Network (PRO-Net). This final rule makes a further change. PRO-Net has now become part of the Central Contractor Registration (CCR). Specifically, CCR's Dynamic Small Business Search provides the same representations as were contained in PRO-Net. As such, the final rule changes the reference from PASS to CCR.

With § 121.702(a), the SBA proposed recognizing that for purposes of the SBIR Program, the SBA permits a joint venture when each entity to the venture is at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States. The SBA received one comment on this rule, which noted a grammatical error. At this time, however, the SBA has decided not to implement the rule as proposed. The SBA published a proposed rule in the **Federal Register** on June 4, 2003, 68 FR 33412, which sought to amend the eligibility requirements of the SBIR Program. The SBA believes that any amendments to the eligibility requirements of the program should therefore be addressed as part of the finalization of that rule.

The SBA received one comment on when size determinations are made for purposes of the SBIR Program. The commenter stated that based upon a ruling by OHA, *Bend Research, Inc.,* SBA No. 4369 (July 29, 1999), size protests must be determined on the date of award of the Phase I or II SBIR funding agreement. However, many agencies are reluctant to issue a funding agreement to a concern if the concern may not be eligible for the program. The commenter believed that SBA should amend its regulation to state that SBA will allow size protests for Phase I or II SBIR awards in anticipation of the award. In other words, once the procuring agency has selected a business concern for an SBIR award, but prior to the actual issuance of the award, SBA will review the size of the concern in response to a protest to determine if it is actually eligible for that award.

SBA concurs with this comment and has amended the regulation accordingly. The final regulation provides that the size status of a concern for the purpose of a funding agreement under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards *or* on the date of the request for a size determination, if an award is pending.

The SBA proposed amending § 121.1001 entitled ''Who may initiate a size protest or request a formal size determination?'' The SBA received one comment supporting this proposal. The SBA has promulgated the final rule as proposed.

The SBA received several comments to § 121.1001(a)(7), which provided that ''For any unrestricted Government procurement in which status as a small business may be beneficial, including, but not limited to, the award of a contract to a small business where there are tie bids, the opportunity to seek a Certificate of Competency by a small business, and SDB or HUBZone price evaluation preferences, the following entities may protest in connection with a particular procurement: * * *'' According to the commenters, SBCs should be permitted to protest certifications by competitors in all contracts and not just those where a specific benefit is in question. Thus, for an unrestricted government procurement in which status as a SBC has been declared or represented by an awardee, any offeror can protest. These commenters point out that it is important to ensure that statistics reported on small business awards are accurate to determine if agencies are meeting their small business goals.

SBA concurs with this comment, and believes that size protests should be allowed on unrestricted procurements. Small business concerns competing on unrestricted procurements have certain benefits not available to other businesses, such as faster progress payments, an exemption from submitting a small business subcontracting plan on certain contracts, and an exemption from cost accounting standards. If a business concern represents itself as small, the SBA believes it should have the opportunity to accept a challenge to ensure that these benefits are limited to eligible small businesses. Allowing size protests on unrestricted solicitations will provide an incentive for businesses and contracting officers to more carefully review small business representations. SBA is also concerned with the quality and integrity of the data it relies upon in establishing and monitoring small business goals. This new policy partly addresses that issue. Section 121.1001(a)(7) is therefore revised to permit size protests challenging a firm's representation that it is a small business on any unrestricted contract.

One commenter noted that the SBA should add the AA for HUBZones to proposed § 121.1001(a)(7)(iii). The SBA is not adopting that proposal as part of this final rule because that change is being made as part of another rulemaking. SBA notes that it proposed such an amendment pursuant to a rule issued on January 28, 2002, 67 FR 3826, amending the HUBZone Program.

The SBA proposed a new § 121.1004(a)(4) to address instances where notification of contract award is posted on the Internet, as authorized under Simplified Acquisition Procedures (SAP). In such cases, the SBA proposed that a size protest must be made to the CO within five business days after the electronic posting. One commenter stated that the 5-day protest period should begin ''upon oral or electronic notification by the contracting officer or the date that the protester learns the identity of the apparent successful offeror via another means.'' This commenter believes that protesters sometimes learn about awards via an awardee's public announcement or through oral communications.

The SBA concurs and has added a new paragraph at § 121.1004(a)(5) that would provide that where no written notification is required, either prior to or at the time of award, a protest will be considered timely if filed within five days after receipt of verbal notification from the CO or other agency representative. For example, under SAP, there is no requirement for the CO to provide either pre-award or award notification to unsuccessful offerors. Consequently, the date of verbal notification or date of posting on the internet will be considered the start of the 5-day period allotted for a timely size protest.

The SBA proposes to amend § 121.1007 containing the requirement that a size protest must allege specific facts by restoring the six examples that were formerly found at § 121.1604(a) (1995). The SBA received one comment about these examples. One commenter noted that some of the examples used the term ''unspecific'' while the regulation itself uses the term ''non-specific'' and recommends changing the examples accordingly. The SBA concurs with this comment and has made the necessary changes.

The proposed rule amended § 121.1008(d) by adding a sentence requiring a concern whose size status is at issue to furnish information about its alleged affiliates to the SBA, notwithstanding any third party claims of privacy or confidentiality, because the SBA does not disclose information obtained in the course of a size determination except as permitted by Federal law. One commenter opposed any rule that would require a concern to provide information concerning an alleged third party affiliate because there is no means to force an alleged affiliated third party to produce the information. In addition, although the SBA does not ''disclose'' the information, it allegedly ''misplaces'' the information. The SBA notes that this rule codifies several OHA rulings and therefore remains as proposed. *See, e.g., Size Appeal of Donovan Travel, Inc., d/b/a Carlson Wagonlit Travel,* SBA No. SIZ–4270 (1997); *Size Appeal of Quantrad Sensor, Inc.,* SBA No. SIZ–4255 (1997).

With § 121.1103(b)(3), the SBA proposed a regulation explaining service of a NAICS appeal to the SBA. One commenter noted that the new requirement to serve NAICS code appeals to the Associate General Counsel for Procurement Law and the CO is inconsistent with existing § 134.305(c) which requires service to the CO only. The commenter recommends a conforming change to § 134.305(c). The SBA concurs and has made a corresponding change to § 134.305(c).

Part 134 contains rules of procedure governing cases before OHA, including size appeals and former SIC (now NAICS) code appeals. The SBA proposed several amendments to part 134, mainly to conform to the changes proposed for part 121. The proposed rule amended § 134.102(k) to authorize an affected party to appeal a determination by the SBA Government Contracting Area Office as to whether two or more concerns are affiliated for purposes of the SBA's financial assistance programs, or other programs for which an affiliation determination was requested. One commenter noted that the definition of size determination is inconsistent with the definition in § 134.101 and recommended conforming the revision to § 134.101. The SBA concurs and has made a corresponding change to § 134.101.

Application of the Final Rule

As indicated above, this final rule is effective 30 days after the date of publication in the **Federal Register**. The amendments apply to all solicitations issued on or after the effective date, as well as all applications for financial or other assistance pending as of or

submitted to the SBA on or after the effective date.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–602)

OMB has determined that this final rule does not constitute a ''significant regulatory action'' under Executive Order 12866. This rule clarifies the SBA's procedural and definitional size rules. As such, the rule has no effect on the amount or dollar value of any Federal contract requirements or of any financial assistance provided through the SBA. Therefore, the rule is not 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. In addition, the final rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of such recipients, nor raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, the SBA determines that this rule does not impose new reporting or record keeping requirements.

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

This regulation will not have substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA determines that this final rule has no federalism implications warranting preparation of a federalism assessment.

The SBA has determined that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. Although the rule amends several definitions concerning the size of a business concern, the majority of these amendments are clarification of current policy.

List of Subjects

13 CFR Part 121

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

13 CFR Part 124

Administrative practice and procedure, Government procurement, Small businesses, Minority businesses, Technical assistance.

13 CFR Part 125

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

13 CFR Part 134

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

■ For the reasons set forth in the preamble, amend parts 121, 124, 125, and 134 of title 13, Code of Federal Regulations, as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c) and 662(5) and sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188, Pub. L. 106–24, 113 Stat. 39.

■ 2. Amend § 121.103 by revising the section heading; revising paragraphs (a)(1), (3) and (4) and adding new paragraphs (a)(5) and (6); revising the title of paragraph (b); revising paragraph (b)(2); adding a new sentence to the end of paragraph (b)(6); revising paragraphs (c), (d), (e) and (f); redesignating revised paragraph (f) as paragraph (h); redesignating paragraph (g) as paragraph (i); and adding new paragraphs (f) and (g) to read as follows:

§ 121.103 How does SBA determine affiliation?

(a) *General Principles of Affiliation.* (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) * * *

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

(4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.

(5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(6) In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

(b) *Exceptions to affiliation coverage.* (1) * * *

(2)(i) Business concerns owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs) organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), Native Hawaiian Organizations (NHOs), Community Development Corporations (CDCs) authorized by 42 U.S.C. 9805, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered affiliates of such entities.

(ii) Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

* * * * *

(6) * * * Affiliation may be found for other reasons.

(c) *Affiliation based on stock ownership.* (1) A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern.

(2) If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to

control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

(3) If a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the concern's Board of Directors and CEO or President will be deemed to have the power to control the concern in the absence of evidence to the contrary.

(d) *Affiliation arising under stock options, convertible securities, and agreements to merge.* (1) In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(2) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered ''agreements in principle'' and are thus not given present effect.

(3) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(4) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

(e) *Affiliation based on common management.* Affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

(f) *Affiliation based on identity of interest.* Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

(g) *Affiliation based on the newly organized concern rule.* Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A ''key employee'' is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer. A joint venture may or may not be in the form of a separate legal entity. The joint venture is viewed as a business entity in determining power to control its management. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(4) of this section.

(1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Except as provided in paragraph (h)(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) *Exception to affiliation for certain joint ventures.* (i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (h) of this section so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(A) The procurement qualifies as a ''bundled'' requirement, at any dollar value, within the meaning of § 125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a ''bundled'' requirement within the meaning of § 125.2(d)(1)(i) of this chapter, and:

(1) For a procurement having a receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, 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 under paragraph (h) of this section so long as the requirements of § 124.513(b)(1) of this chapter are met.

(iii) Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

(4) A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a

proposal because it exceeds the applicable size standard for that solicitation.

(5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees.

■ 3. In § 121.104 redesignate (a)(3) as paragraph (e); revise paragraph (a); remove paragraph (c); redesignate paragraph (b) as (c); revise newly designated paragraph (c); add new paragraph (b); revise paragraph (d) to read as follows:

§ 121.104 How does SBA calculate annual receipts?

(a) *Receipts* means ''total income'' (or in the case of a sole proprietorship, ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

(b) *Completed fiscal year* means a taxable year including any short year. ''Taxable year'' and ''short year'' have the meanings attributed to them by the IRS.

(c) *Period of measurement.* (1) Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.

(2) Annual receipts of a concern which has been in business for less than three complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Where a concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

(d) *Annual receipts of affiliates.*

(1) The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.

(2) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(3) If the business concern or an affiliate has been in business for a period of less than three years, the receipts for the fiscal year with less than a 12 month period are annualized in accordance with paragraph (c)(2) of this section. Receipts are determined for the concern and its affiliates in accordance with paragraph (c) of this section even though this may result in using a different period of measurement to calculate an affiliate's annual receipts.

(4) The annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

(e) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

■ 4. Revise § 121.106(a) and (b)(4) to read as follows:

§ 121.106 How does SBA calculate number of employees?

(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

(b) * * *

(4)(i) The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(ii) The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

■ 5. Amend § 121.201 as follows:

■ a. In the table ''Small Business Size Standards by NAICS Industry,'' add the heading NAICS Subsector 92, ''Public Administration'' at the end of the table and footnote 19; and

■ b. Amend footnote 14, by revising paragraph (b) to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in million of dollars	Size standards in number of employees
*	* * * * * *		
Sector 92—Public Administration [19] (Small business size standards are not established for this sector. Establishments in the Public Administration sector are Federal, state, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments.)			
*	* * * * * *		

Footnotes

* * * * *

14. *NAICS 562910—Environmental Remediation Services:*

(a) * * *

(b) For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore or directly support the restoration of a contaminated environment (such as, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, remediation services, containment, removal of contaminated materials, storage of contaminated materials or security and site closeouts), although the general purpose of the procurement need not necessarily include remedial actions. Also, the procurement must be composed of activities in three or more separate industries with separate NAICS codes or, in some instances (*e.g.*, engineering), smaller sub-components of NAICS codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Specialty Trade Contractors; Engineering Services; Architectural Services; Management Consulting Services; Hazardous and Other Waste Collection; Remediation Services, Testing Laboratories; and Research and Development in the Physical, Engineering and Life Sciences. If any activity in the procurement can be identified with a separate NAICS code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

* * * * *

19. *NAICS Sector 92*—Small business size standards are not established for this sector. Establishments in the Public Administration sector are Federal, State, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments. Concerns performing operational services for the administration of a government program are classified under the NAICS private sector industry based on the activities performed. Similarly, procurements for these types of services are classified under the NAICS private sector industry that best describes the activities to be performed. For example, if a government agency issues a procurement for law enforcement services, the requirement would be classified using one of the NAICS industry codes under 56161, Investigation, Guard, and Armored Car Services.

■ 6. In § 121.301, revise paragraphs (a), (d)(1) and (e) to read as follows:

§ 121.301 What size standards are applicable to financial assistance programs?

(a) For Business Loans and Disaster Loans (other than physical disaster loans), an applicant business concern, including its affiliates, must not exceed the size standard for the industry in which the applicant is primarily engaged.

* * * * *

(d) * * *

(1) Any construction (general or special trade) concern or concern performing a contract for services is small if, together with its affiliates, its average annual receipts does not exceed $6.0 million.

* * * * *

(e) The applicable size standards for purposes of SBA's financial assistance programs, excluding the Surety Bond Guarantee assistance program, are increased by 25% whenever the applicant agrees to use all of the financial assistance within a labor surplus area. Labor surplus areas are listed monthly in the Department of Labor publication ''Area Trends in Employment and Unemployment.''

■ 7. Amend § 121.302 by revising paragraph (a), re-designating paragraph (d) as paragraph (e), revising newly designated paragraph (e), and adding the following new paragraph (d) to read as follows:

§ 121.302 When does SBA determine the size status of an applicant?

(a) The size status of an applicant for SBA financial assistance is determined as of the date the application for financial assistance is accepted for processing by SBA, except for applications under the Preferred Lenders Program (PLP), the Disaster Loan program, the SBIC program, and the New Markets Venture Capital (NMCV) program.

* * * * *

(d) For financial assistance from an SBIC licensee or an NMVC company, size is determined as of the date a concern's application is accepted for processing by the SBIC or the NMVC company.

(e) Changes in size after the applicable date when size is determined will not disqualify an applicant for assistance.

■ 8. Revise § 121.305 heading to read as follows:

§ 121.305 What size eligibility requirements exist for obtaining financial assistance relating to particular procurements?

* * * * *

■ 9. Revise § 121.401 to read as follows:

§ 121.401 What procurement programs are subject to size determinations?

The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, the Very Small Business program, SBA's 8(a) Business Development program, SBA's HUBZone program, the Small

Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

■ 10. Amend § 121.402 by revising the section heading and paragraph (a), and by adding a new sentence to the end of paragraph (b) to read as follows:

§ 121.402 What size standards are applicable to Federal Government Contracting programs?

(a) A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard.

(b) * * * Procurements for supplies must be classified under the appropriate manufacturing NAICS code, not under the wholesale trade NAICS code.

* * * * *

■ 11. Revise § 121.404 to read as follows:

§ 121.404 When does SBA determine the size status of a business concern?

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price. Where an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation.

(b) A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a small disadvantaged business (under part 124, subpart B, of this chapter), or as a HUBZone small business (under part 126 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and the date of certification by SBA.

(c) The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC.

(d) Size status for purposes of compliance with the nonmanufacturer rule set forth in § 121.406(b)(1) and the ostensible subcontractor rule set forth in § 121.103(h)(4) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

(e) For subcontracting purposes, a concern must qualify as small as of the date that it certifies that it is small for the subcontract. The applicable size standard is that which is set forth in § 121.410 and which is in effect at the time the concern self-certifies that it is small for the subcontract.

(f) For purposes of two-step sealed bidding under subpart 14.5 of the FAR, 48 CFR, a concern must qualify as small as of the date that it certifies that it is small as part of its step one proposal.

(g) A concern that qualified as a small business at the time it receives a contract is considered a small business throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business.

(h) A follow-on or renewal contract is a new contracting action. As such, size is determined as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price for the follow-on or renewal contract.

(i) At the time a novation or change-of-name agreement has been executed pursuant to FAR subpart 42.12, the new entity must submit a written self-certification that it is small to the procuring agency so that the agency can count the award, options, or orders issued pursuant to the contract towards its small business goals.

■ 12. Amend § 121.406 by revising the heading; by revising paragraph (b)(1)(ii); by revising the last sentence in paragraph (b)(2) introductory text; by redesignating paragraphs (b)(2)(i) and (b)(2)(ii) as paragraphs (b)(2)(i)(A) and (b)(2)(i)(B); by adding a new paragraph (b)(2)(i) introductory text; by removing the word ''and'' at the end of newly redesignated paragraph (b)(2)(i)(A); by removing the ''.'' and adding ''; and'' at the end of newly redesignated paragraph (b)(2)(i)(B); by adding a new paragraph (b)(2)(i)(C); by adding a new paragraph (b)(2)(ii); and by adding a new paragraph (e) to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products under small business set-aside or 8(a) contracts?

* * * * *

(b) *Nonmanufacturers.* (1) * * *

(ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied; and

* * * * *

(2) * * * Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item:

(i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

(A) * * *

(B) * * *

(C) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

* * * * *

(ii) Firms that provide computer and other information technology equipment primarily consisting of component parts (such as motherboards, video cards, network cards, memory, power supplies, storage devices, and similar items) who install components totaling less than 50% of the value of the end item are generally not considered the manufacturer of the end item.

* * * * *

(e) These requirements do not apply to small business concern subcontractors.

■ 13. In § 121.410, revise the introductory paragraph, and remove paragraphs (a), (b) and (c) to read as follows:

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

For subcontracting purposes pursuant to sections 8(d) of the Small Business Act, a concern is small for subcontracts which relate to Government procurements if it does not exceed the size standard for the NAICS code that the prime contractor believes best describes the product or service being acquired by the subcontract. However, subcontracts for engineering services awarded under the National Energy Policy Act of 1992 have the same size standard as Military and Aerospace Equipment and Military Weapons under NAICS 541213.

■ 14. In § 121.411(a), remove the words ''SBA's Procurement Automated Source System (PASS)'' and add, in its place, the words ''the Central Contractor Registration (CCR).''

■ 15. Revise the undesignated center heading before § 121.601 to read as follows:

Size Eligibility Requirements for the 8(a) Business Development Program

■ 16. Revise § 121.601 to read as follows:

§ 121.601 What is a small business for purposes of admission to SBA's 8(a) Business Development program?

An applicant must not exceed the size standard corresponding to its primary industry classification in order to qualify for admission to SBA's 8(a) Business Development Program.

§ 121.602 [Amended]

■ 17. In § 121.602 replace the acronym ''MED'' in the heading and the text with the phrase ''8(a) BD.''

§ 121.603 [Amended]

■ 18. In § 121.603 replace the acronym ''MED'' in the heading and in paragraphs (a), (b) and (d) with the phrase ''8(a) BD.''

§ 121.604 [Amended]

■ 19. In § 121.604 replace the acronym ''MED'' in the heading and the text with the phrase ''8(a) BD.''

■ 20. Revise § 121.704 to read as follows:

§ 121.704 When does SBA determine the size status of a business concern?

The size status of a concern for the purpose of a funding agreement under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards or on the date of the request for a size determination, if an award is pending.

■ 21. In § 121.705, revise paragraph (a) to read as follows:

§ 121.705 Must a business concern self-certify its size status?

(a) A firm must self-certify that it currently meets the eligibility requirements set forth in § 121.702 of this title or will meet those eligibility requirements on the date of award of a funding agreement for a Phase I or Phase II SBIR award.

* * * * *

■ 22. Amend § 121.1001 by revising paragraphs (a)(1) introductory text, (a)(1)(i), (a)(2)(i), (a)(5)(i) and (iii), (a)(6)(i), (a)(7) introductory text, and (b)(2)(ii)(B), and by adding new paragraphs (b)(1)(iii), (b)(7), (b)(8), and (b)(9) as follows:

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

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small business or a particular group of small business, the following entities may file a size protest in connection with a particular procurement, sale or order:

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

* * * * *

(2) * * *

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

* * * * *

(5) * * *

(i) Any offeror for the specific SDB requirement whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) * * *

(iii) The responsible SBA Area Director for Government Contracting, the SBA Associate Administrator for Government Contracting, or the SBA Associate Administrator for 8(a) Business Development;

(6) * * *

(i) Any concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size;

* * * * *

(7) For any unrestricted Government procurement in which a business concern has represented itself as a small business concern, the following entities may protest in connection with a particular procurement:

* * * * *

(b)(1) * * *

(iii) The SBA Associate Administrator for Investment or designee may request a formal size determination for any purpose relating to the SBIC program (*see* part 107 of this chapter) or the NMVC program (*see* part 108 of this chapter). A formal size determination includes a request to determine whether or not affiliation exists between two or more entities for any purpose relating to the SBIC program.

* * * * *

(2) * * *

(ii) * * *

(B) The SBA program official with authority to execute the 8(a) contract or, where applicable, the procuring activity contracting officer who has been delegated SBA's 8(a) contract execution functions; or

* * * * *

(7) In connection with initial or continued eligibility for the Small Disadvantaged Business (SDB) program, the following may request a formal size determination:

(i) The applicant or SDB concern; or

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

(8) In connection with initial or continued eligibility for the HUBZone program, the following may request a formal size determination:

(i) The applicant or HUBZone concern; or

(ii) The Associate Administrator for the HUBZone program, or designee.

(9) For purposes of validating that firms listed in the Central Contractor Registration database are small, the Government Contracting Area Director or the Associate Administrator for Government Contracting may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to determine size, and SBA will initiate the process to remove from the database the small business designation of any firm found to be other than small.

■ 23. In § 121.1004, add new paragraphs (a)(4) and (a)(5), and add a new sentence at the end of paragraph (b) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(4) *Electronic notification of award.* Where notification of award is made electronically, such as posting on the Internet under Simplified Acquisition Procedures, a protest must be received by the contracting officer before close of business on the fifth day, exclusive of Saturdays, Sundays, and legal holidays, after the electronic posting.

(5) *No notice of award.* Where there is no requirement for written pre-award notice or notice of award, or where the contracting officer has failed to provide written notification of award, the 5-day protest period will commence upon oral notification by the contracting officer or authorized representative or another means (such as public announcements or other oral communications) of the identity of the apparent successful offeror.

(b) * * * Notwithstanding paragraph (e), for purposes of the SBIR program the contracting officer and SBA may file a protest in anticipation of award.

* * * * *

■ 24. Revise the first sentence of § 121.1005 to read as follows:

§ 121.1005 How must a protest be filed with the contracting officer?

A protest must be delivered to the contracting officer by hand, telegram, mail, facsimile, Federal Express or other overnight delivery service, e-mail, or telephone. * * *

■ 25. In § 121.1007, add a new sentence at the end of paragraph (c) and the following examples after paragraph (c):

§ 121.1007 Must a protest of size status relate to a particular procurement and be specific?

* * * * *

(c) * * * The following are examples of allegation specificity:

Example 1: An allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 3: An allegation that concern X is affiliated with concern Y without setting forth any basis for the allegation is non-specific.

Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.

Example 5: An allegation that concern X has revenues in excess of $5 million (where $5 million is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is $5 million) because it received Government contracts in excess of $5 million last year is sufficiently specific.

■ 26. In § 121.1008, revise the heading and paragraphs (a) and (d) to read as follows:

§ 121.1008 What occurs after SBA receives a size protest or request for a formal size determination?

(a) When SBA receives a size protest, the SBA Area Director for Government Contracting, or designee, will notify the contracting officer, the protested concern, and the protestor that the protest has been received. If the protest pertains to a requirement involving SBA's HUBZone program, the Area Director will also notify the AA/HUB of the protest. If the protest pertains to a requirement involving SBA's SBIR Program, the Area Director will also notify the Assistant Administrator for Technology. If the protest involves the size status of a concern that SBA has certified as a small disadvantaged business (SDB) (*see* part 124, subpart B of this chapter) the Area Director will notify SBA's AA/8(a) BD. If the protest pertains to a requirement that has been reserved for competition among eligible 8(a) BD program participants, the Area Director will notify the SBA district office servicing the 8(a) concern whose size status has been protested. SBA will provide a copy of the protest to the protested concern together with SBA Form 355, Application for Small Business Size Determination, by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to complete the form and respond to the allegations in the protest.

* * * * *

(d) If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

■ 27. In § 121.1009, revise paragraphs (b) and (g) to read as follows:

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

* * * * *

(b) *Basis for determination.* The size determination will be based primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue. The determination, however, may also be based on grounds not raised in the protest or request for size determination. SBA may use other information and may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties.

* * * * *

(g) *Results of an SBA Size Determination.*

(1) A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed by OHA.

(2) A contracting officer may award a contract based on SBA's formal size determination.

(3) If the formal size determination is appealed to OHA, the OHA decision on appeal will apply to the pending procurement or sale if the decision is received before award. OHA decisions received after contract award will not apply to that procurement or sale, but will have future effect, unless the contracting officer agrees to apply the OHA decision to the procurement or sale.

(4) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

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

* * * * *

■ 28. Revise § 121.1101 to read as follows:

§ 121.1101 Are formal size determinations subject to appeal?

(a) Appeals from formal size determinations may be made to OHA. Unless an appeal is made to OHA, the size determination made by a SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency. The procedures for appealing a formal size determination to OHA are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a formal size determination may be sought in a court.

(b) OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific, such as compliance with the nonmanufacturer rule (*see* § 121.406(b)), or joint venture or ostensible subcontractor rule (*see* § 121.103(h)).

■ 29. Revise § 121.1103 to read as follows:

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

(a) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (*see*

part 124 of this chapter), only SBA's Associate Administrator for 8(a) Business Development may appeal the NAICS code designation.

(b) The contracting officer's determination of the applicable NAICS code is final unless appealed as follows:

(1) An appeal from a contracting officer's NAICS code designation and applicable size standard must be served and filed within 10 calendar days after the issuance of the initial solicitation. OHA will summarily dismiss an untimely NAICS code appeal.

(2)(i) The appeal petition must be in writing and must be sent to the Office of Hearings & Appeals, U.S. Small Business Administration, 409 3rd Street, SW., Suite 5900, Washington, DC 20416.

(ii) There is no required format for a NAICS code appeal, but an appeal must include the following information: the solicitation or contract number; the name, address, and telephone number of the contracting officer; a full and specific statement as to why the NAICS code designation is erroneous, and argument in support thereof; and the name, address and telephone number of the appellant or its attorney.

(3) The appellant must serve the appeal petition upon the contracting officer who assigned the NAICS code to the acquisition and SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 3rd Street, SW., Washington, DC 20416.

(4) Upon receipt of a NAICS code appeal, OHA will notify the contracting officer by notice and order of the date OHA received the appeal, the docket number, and the Judge assigned to the case. The contracting officer's response to the appeal must include argument and supporting evidence (*see* part 134, subpart C, of this chapter) and must be received by OHA within 10 calendar days from the date of the docketing notice and order, unless otherwise specified by the Judge. Upon receipt of OHA's docketing notice and order, the contracting officer must immediately send to OHA a copy of the solicitation relating to the NAICS code appeal.

(5) After close of the record, OHA will issue a decision and inform all interested parties, including the appellant and contracting officer. If OHA's decision is received by the contracting officer before the date offers are due, the solicitation must be amended if the contracting officer's designation of the NAICS code is reversed. If OHA's decision is received by the contracting officer after the due date of initial offers, the decision will not apply to the pending procurement, but will apply to future solicitations for the same products or services.

■ 30. Revise § 121.1205 to read as follows:

§ 121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers of the Nonmanufacturer Rule have been granted is maintained in SBA's Web site at *www.sba.gov/GC/approved.html.* A list of such waivers may also be obtained by contacting the Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or the nearest SBA Government Contracting Area Office.

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

■ 31. The authority citation for 13 CFR part 124 is revised to read as follows:

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.

■ 32. Revise § 124.513(a)(1) to read as follows:

§ 124.513 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 one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.

* * * * *

■ 33. Revise § 124.520(d)(1) to read as follows:

§ 124.520 Mentor/protégé program.

* * * * *

(d) *Benefits.* (1) A mentor and protégé may joint venture as a small business for any government procurement, including procurements with a dollar value less than half the size standard corresponding to the assigned NAICS code and 8(a) sole source contracts, provided the protégé qualifies as small for the procurement and, for purposes of 8(a) sole source requirements, the protégé has not reached the dollar limit set forth in § 124.519.

* * * * *

■ 34. Amend § 124.1002(f)(3), by removing ''13 CFR 121.103(f)(3)'' and by adding, in its place, ''13 CFR 121.103(h)(3)''.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 35. The authority citation for 13 CFR part 125 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 637 and 644; 31 U.S.C. 9701, 9702.

■ 36. Revise § 125.6(g) to read as follows:

§ 125.6 Prime contractor performance requirements (limitations on subcontracting).

* * * * *

(g) Where an offeror is exempt from affiliation under § 121.103(h)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the joint venture, not its individual members.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 37. The authority citation for 13 CFR part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 648(l), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

■ 38. Revise the definition of ''size determination'' in § 134.101 as follows:

§ 134.101 Definitions.

* * * * *

Size determination means a formal size determination made by an Area Office and includes decisions by Government Contracting Area Directors that determine whether two or more concerns are affiliated for purposes of SBA's financial assistance programs, or other programs for which an appropriate SBA official requested an affiliation determination.

■ 39. Revise § 134.102(k) to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(k) Appeals from size determinations and NAICS code designations under part 121 of this chapter. ''Size determinations'' include decisions by Government Contracting Area Directors that determine whether two or more concerns are affiliated for purposes of SBA's financial assistance programs, or other programs for which an appropriate SBA official requested an affiliation determination;

* * * * *

■ 40. Revise § 134.305(c) as follows:

§ 134.305 The appeal petition.

* * * * *

(c) *Service of NAICS appeals.* The appellant must serve the contracting officer who made the NAICS code designation and SBA's Office of General Counsel, Associate General Counsel for

Procurement Law, 409 3rd Street, SW., Washington, DC 20416.

* * * * *

■ 41. In § 134.314, revise the heading and add the following sentence at the end to read as follows:

§ 134.314 Standard of review and burden of proof.

* * * The appellant has the burden of proof, by a preponderance of the evidence, in both size and NAICS code appeals.

■ 42. Revise § 134.316(a) by adding the following sentence at the end to read as follows:

§ 134.316 The decision.

(a) * * * The Judge will not decide substantive issues raised for the first time on appeal, or which have been abandoned or become moot.

* * * * *

Dated: April 28, 2004.

Hector V. Barreto,

Administrator.

[FR Doc. 04–10066 Filed 5–20–04; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–237–AD; Amendment 39–13642; AD 2004–10–12]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–10–30 Airplane

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to a certain McDonnell Douglas Model DC–10–30 airplane, that requires an inspection of the power feeder cable assembly of the auxiliary power unit (APU) for chafing, correct type of clamps, and proper clamp installation; and corrective actions, if necessary. This action is necessary to prevent the loss of the APU generator due to chafing of the generator power feeder cables, and consequent electrical arcing and smoke/fire in the APU compartment. This action is intended to address the identified unsafe condition.

DATES: Effective June 25, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of June 25, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Natalie Phan-Tran, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5343; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to a certain McDonnell Douglas Model DC–10–30 airplane was published in the **Federal Register** on March 5, 2004 (69 FR 10366). That action proposed to require an inspection of the power feeder cable assembly of the auxiliary power unit (APU) for chafing, correct type of clamps, and proper clamp installation; and corrective actions, if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 1 Model DC–10–30 airplane, having fuselage number 0106, of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the required inspection on U.S. operators is estimated to be $65.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.