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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 121, 125, and 126

**RIN 3245–AE66**

### Small Business Size Regulations; Government Contracting Programs; HUBZone Program

**AGENCY:** Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the regulations governing the Historically Underutilized Business Zone (HUBZone) Program. In particular, this rule addresses statutory amendments made by the Small Business Reauthorization Act of 2000, clarifies several regulations, and makes some technical changes, including changes to Web site addresses. In addition, this rule amends those size and government contracting regulations that address subcontracting limitations.

**DATES:** This rule is effective June 23, 2004.

**FOR FURTHER INFORMATION CONTACT:** Michael McHale, Associate Administrator for the HUBZone Program, (202) 205–8885 or by e-mail, at *hubzone@sba.gov.*

**SUPPLEMENTARY INFORMATION:** On January 28, 2002, the U.S. Small Business Administration (SBA or Agency) published in the **Federal Register**, 67 FR 8739, a proposed rule to amend its regulations governing the HUBZone program. SBA had proposed regulations addressing amendments made to the HUBZone Act by the Small Business Reauthorization Act of 2000 (Reauthorization Act), Public Law 106–554. Specifically, the Reauthorization Act amended the eligibility requirements for small business concerns (SBCs) owned by Tribal Governments or Community Development Corporations (CDCs). Further, it amended the definition of HUBZone to include ''redesignated areas,'' and added definitions for the terms ''Indian Reservation'' and ''Alaska Native Corporation.'' This final rule addresses these statutory amendments, clarifies several regulations, and makes some technical changes, including changes to Web site addresses.

In addition, SBA has amended its regulations that address subcontracting limitations. Specifically, SBA has consolidated all of the subcontracting limitation requirements into one regulation, rather than have them scattered throughout SBA's chapter of the Code of Federal Regulations. In addition, SBA has clarified how to petition for changes in the subcontracting limitation requirements.

#### Discussion of Comments on the Proposed Rule

The comment period for the proposed rule closed on February 27, 2002. SBA extended the comment period because it believed that affected businesses needed more time to adequately respond. 67 FR 8739 (Feb. 26, 2002). The comment period was extended through March 29, 2002.

SBA received 977 comments on the proposed rule. The overwhelming majority of the comments addressed the issue of the relationship of the HUBZone Program to the 8(a) Business Development (8(a)BD) Program. This issue is discussed below. The majority of the other comments supported the proposed regulatory amendments. A few commenters recommended modifications to several of the proposed amendments. SBA considered all of the comments and recommendations in developing this final rule and the rule includes changes based on some of the comments received.

#### Section-by-Section Analysis of Comments

In § 121.406, SBA proposed amending paragraph (b), pertaining to the application of the nonmanufacturer rule. Specifically, SBA proposed permitting a nonmanufacturer to supply the product of any domestic business, small or large, and still be considered small with respect to any contract below the simplified acquisition threshold. This change corresponded to a similar proposed change made in this rule for the HUBZone Program in proposed § 126.601(e)(2) (discussed later in the preamble).

SBA received one comment on this proposed section. The commenter stated that this proposed section could dilute the impact small business programs have in fostering growth and opportunity for the small business sector. This commenter believed that SBA should research this issue further to determine the true impact of such a blanket waiver for small business programs. SBA has determined that this issue needs further evaluation. Consequently, SBA has decided not to amend the rule at this time.

SBA received one comment on the proposed amendments to § 125.6, which added the subcontracting limitations for qualified HUBZone SBCs (set forth in § 126.700) so that all such subcontracting limitations would be located in one place and easy for SBCs and contracting officials to locate. In addition, SBA proposed language explaining when it may use different subcontracting limitation percentages. The commenter stated that SBA should use the term ''will perform'' rather than ''spends'' when defining the subcontracting limitations for qualified HUBZone SBCs. In response, SBA notes that the statutory requirements for these limitations require that the qualified HUBZone SBC ''expend'' a certain percentage of the cost of contract performance or manufacturing costs on certain employees or in one or more HUBZones. Therefore, SBA adopts the rule as proposed. However, because of the change to § 126.700 discussed below, this rule changes the HUBZone prime contractor performance of work requirements for construction to clarify that it is the prime HUBZone contractor, and not the prime plus other HUBZone subcontractors, that must perform 15% (general construction) or 25% (special trade construction) of the contract.

SBA received one comment concerning the definition of ''AA/HUB'' set forth in § 126.103. This commenter stated that SBA should not define the ''AA/HUB'' to mean the ''Associate Administrator for HUBZone Empowerment Contracting'' because the program is titled the ''HUBZone Program'' and not the ''HUBZone Empowerment Contracting Program.'' SBA concurs and has not amended the current regulation, which defines ''AA/HUB'' to mean the Associate Administrator for the HUBZone Program.

One commenter recommended that SBA place a definition for ''ANCSA'' in § 126.103. This commenter believes that the term, which refers to the Alaska Native Claims Settlement Act, is used several times in the regulations and therefore a definition is needed to eliminate confusion. Also, the commenter recommended referring to ANCSA as the ''Alaska Native Claims Settlement Act, as amended'' because the act has been amended several times since its inception. SBA concurs with these recommendations and has made those changes in this regulation.

SBA received one comment on the definition of ''Community Development Corporation (CDC),'' set forth in § 126.103. This commenter stated that the definition of CDC should refer to ''part 1 of subchapter A of the Community Economic Development Act of 1981'' and not the open-ended reference proposed. SBA concurs and has amended the final regulation accordingly.

SBA received several comments on the proposed definition for the term ''employee.'' SBA proposed removing the current provision concerning ''full-time equivalents'' and allowing persons employed on a full-time or part-time basis to be considered employees of the concern. In addition, SBA proposed allowing leased or temporary employees to be counted as employees of the concern. The proposed definition also stated that volunteers would not be counted as an employee of a HUBZone SBC. The proposed rule defined a volunteer as a person who receives no compensation for work performed. With this definition, SBA intended that a person who receives food, housing, or other non-monetary compensation in exchange for work performed would generally not be considered a volunteer and could therefore be considered an employee of the HUBZone SBC. SBA reiterated that it would use the ''totality of circumstances'' to determine whether a person is an ''employee.''

SBA received several comments expressing concern over the proposed definition. One commenter believed the proposed rule could cause a large-scale shift of workers from full-time equivalents to leased or part-time status with reduced benefits. Another commenter believed that this change would weaken the nexus between participating firms and HUBZone areas. In addition, one commenter expressed concern that companies could intentionally exploit the change and hire temporary employees only to gain HUBZone certification or to receive HUBZone contracts. One commenter recommended that, to prevent such abuse, the definition of employee should include a requirement that a certain percentage of HUBZone employees must be paid the same as, or have the same job classifications as, non-HUBZone employees. Another commenter believed that an individual should be required to work a certain number of hours before he or she is counted as an employee for purposes of the 35%, reasoning that a concern could get around the 35% requirement by hiring various HUBZone residents to work one, two or some other number of minimum hours per week.

One commenter stated that using the totality of circumstances to determine whether part-time employees are bona fide employees and allowing non-monetary compensation to be acceptable are invitations to arbitrariness. Another commenter stated that the definition of volunteer was too narrow.

In comparison, several commenters believe that the proposed rule would create more job opportunities for HUBZone residents and agreed that leased and temporary employees represent a substantial portion of today's workforce. One commenter noted that several firms are using the current exemption for leased and temporary employees to qualify for the program by claiming only a few employees, when in reality they have many employees, all of whom are leased and very few of whom live in a HUBZone. One commenter agreed with the proposed rule, but suggested that SBA expand the definition to allow employees of co-employer arrangements to be treated as employees of a HUBZone SBC.

As a result of the numerous comments received and the issues raised, SBA has decided not to implement this aspect of the proposed rule. The Agency plans to issue an Advanced Notice of Proposed Rulemaking (ANPRM) in the near future so that it can further examine this issue and determine the best method for determining ''employees'' for HUBZone Program purposes.

SBA received one comment on the definition of ''HUBZone SBC.'' The commenter suggested that SBA clarify that Alaska Native Corporations (ANCs) or ANC-related entities must be small to be eligible for the program. SBA concurs and has amended the regulation accordingly.

SBA also received comments on the definition of ''Indian Reservation.'' One commenter was against any changes that would increase Native American lands for HUBZone participation. Other commenters expressed support for proposals that re-classified the guidelines for determining Native American lands. One commenter stated that the proposed regulations should include all formerly-held Indian land in Oklahoma and not just reservations. The commenter believed that this would benefit Oklahoma small businesses trying to participate in the HUBZone Program by expanding the areas classified as HUBZones. Another commenter recommended that SBA clarify the rule with respect to Indian Reservations in Oklahoma and not ''bury'' it deep within a subparagraph where it may be overlooked.

SBA has amended the definition of ''Indian Reservation'' so that the paragraph concerning Oklahoma does not appear ''buried'' in the definition. In addition, SBA notes that the definition of Indian reservation for purposes of the HUBZone Program is statutory. The regulation sets forth the statutory requirements. As stated in the preamble to the proposed regulation, essentially, the statutory definition of ''Indian Reservation'' for HUBZone Program purposes includes federally-recognized Indian reservations, Indian communities dependent on the Federal Government, and certain federal Indian allotments (parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians). Pursuant to a decision by the U.S. Supreme Court, *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the new statutory definition of ''Indian Reservation'' does not include lands transferred to Alaskan Natives pursuant to ANCSA. In the state of Oklahoma, an ''Indian Reservation'' includes a federally recognized Indian reservation and trust land. SBA has been and intends to continue working with the U.S. Department of the Interior, and specifically the Bureau of Indian Affairs, to appropriately identify these areas.

SBA received one comment suggesting that it cross-reference the ''attempt to maintain'' references in §§ 126.200, 126.601(c)(4), and 126.602 to the definition of the term set forth in § 126.103 because SBCs may not realize that the phrase has been defined in the regulations. SBA concurs and has made the changes in the final rule and has also added a reference to the term in § 126.401(b).

SBA received two comments concerning the eligibility, in general, of SBCs. Both comments concerned ownership of a HUBZone SBC by U.S. citizens. One commenter stated that the regulations should not preclude ownership by non-U.S. citizens. SBA notes that this is a statutory requirement and that the regulations follow the

statute. Another commenter favored allowing publicly held small businesses to participate in the HUBZone Program because it would help a greater number of small businesses. SBA notes that publicly-held businesses have always been able to participate in the program, so long as they meet the eligibility requirements.

SBA received three comments regarding the eligibility requirements for Tribally-owned concerns. In the proposed rule, SBA amended § 126.200 to establish eligibility requirements for such concerns because Congress had changed these requirements with the enactment of the Reauthorization Act. According to the Reauthorization Act, SBCs owned by Indian Tribal Governments or tribal corporations must certify: (1) That they are owned by an Indian Tribal Government, by a wholly-owned tribal corporation, or owned in part by an Indian Tribal Government or tribal corporation and in part by another SBC or U.S. citizens, and (2) when the concern obtains a HUBZone contract, that at least 35% of its employees engaged in performing that contract will reside within any Indian reservation governed by one or more of the Indian Tribal Government owners, or reside within any HUBZone adjoining any such Indian reservation.

One commenter did not support requiring a Native American concern to have 35% of its employees reside on or adjacent to the Indian reservation during the performance of a contract. This commenter believed that the requirement is too stringent and contradicts the requirements for other HUBZone SBCs. SBA notes that this requirement is statutory and the regulation states the same as the statute on this point.

In addition, one commenter stated that SBA's regulations do not clarify that Tribally-owned concerns must ''attempt to maintain'' the relevant 35% employment requirement and must comply with the limitations on subcontracting. SBA concurs with this comment and has amended § 126.200 to clarify that Tribally-owned concerns must ''attempt to maintain'' the 35% employment requirement during the performance of a HUBZone contract. SBA believes, however, that the regulations are clear that all qualified HUBZone SBCs must meet the subcontracting limitations set forth in the statute and regulations, and therefore it is unnecessary to amend the regulations with respect to that issue.

As discussed above, the statutory amendments provide that an Indian Tribal Government or tribal corporation may own a HUBZone SBC ''in part'' with a SBC or U.S. citizens. For example, an SBC in which a Tribal Government or tribal corporation owned 1% or less could qualify for the program if the other owners were SBCs or U.S. citizens. Further, there is no principal office eligibility requirement for such applicants. Thus, SBA stated in its preamble that it was considering whether or not to require a Tribal Government or tribal corporation own at least 51% of the HUBZone SBC and specifically requested comments addressing this proposal. In the proposed regulation, SBA proposed no specific ownership interest by a Tribal Government or tribal corporation.

SBA received two comments on this specific issue. One commenter supported the proposal to amend the ownership percentage to either 51% or 100% for tribally owned HUBZone SBCs because it will expand opportunities for Native American firms. This commenter recommended allowing only Native American, small and disadvantaged businesses (SDBs) or SBCs owned by U.S. citizens to own the other part of the HUBZone SBC. Another commenter disagreed with the proposal to require 51% ownership for tribally owned HUBZone SBCs. Although SBA proposed the rule to reduce the possibility of ''fronting,'' this commenter believes that Indian Tribes have additional restrictions (35% of the employees must be performing on the HUBZone contract), which are more stringent, and therefore the 51% requirement is unnecessary.

After further review of the issues and comments received, SBA concurs that it is unnecessary to require 51% ownership for tribally-owned HUBZone SBCs, for the reasons stated above. However, SBA believes that it does not matter who owns the other ''part'' of the Tribally-owned HUBZone SBC, so long as it is an SBC or U.S. citizens and the HUBZone SBC meets the contract performance requirements. SBA believes this will help Native American communities. Therefore, SBA retains the rule as proposed.

SBA received one comment pertaining to § 126.201, which addresses ownership of a qualified HUBZone SBC. The commenter stated that it was in favor of allowing certain types of Employee Stock Option Plans (ESOPs) to participate in the HUBZone Program. However, the commenter argued that some forms of ESOPs have corporate structures that restrict shareholder rights. As a result of these restrictions, such entities should be eligible to participate in the program and the employees should not be considered to ''own or control'' the company. Therefore, this commenter believed that the employees should not be counted toward the 100% U.S. ownership requirement. The commenter stated that, in the alternative, SBA should create a de minimus exception for non-U.S. citizen ownership.

SBA notes that it agrees with the commenter as a matter of public policy (SBA does not want to encourage or make incentives for firms to discriminate in hiring based on national origin), but the Agency's actions are constrained by the statute. The U.S. citizen ownership requirement is statutory. With only certain statutory exceptions for CDCs, ANCs, and Tribally-owned concerns, a HUBZone SBC must be owned and controlled 100% by U.S. citizens. Therefore, SBA can not create a de minimus exception to the statutory rule. Further, SBA has researched the issue pertaining to ESOPs and reviewed the comment carefully. Under an ESOP, employees may purchase or are awarded stock in the employing firm. The stock held by most ESOPs are placed in trust. The employee can vote its shares through a trustee or the trustee has the authority to vote the shares. Both forms of ESOPs are variations of ownership of a firm under a trust arrangement. SBA considers any person who has a legal or equitable interest in the concern, or who owns stock, whether voting or non-voting, to be an owner. Therefore, under either form of ESOP, the stock trustees and the plan members must be regarded as the owners of the firm's stock for purposes of the HUBZone Program. This final rule adopts this regulation as proposed.

SBA received one comment on § 126.205, which clarifies that all SBCs, and not just 8(a) Participants, women-owned businesses, and SDBs, may be qualified HUBZone SBCs, if they meet the HUBZone Program's eligibility requirements. The commenter concurs with this re-draft but recommends that SBA consider adding a statement that participation in other SBA programs is not a requirement for participation in the HUBZone Program. SBA concurs with this recommendation and has amended this regulation accordingly.

SBA received one comment on § 126.303, which addresses the filing of a HUBZone application. The commenter stated that SBA should clarify that applicants need only submit a written or an electronic application. SBA concurs and has amended this regulation accordingly.

SBA received one comment on § 126.304, which addresses what concerns must submit with their application for certification into the

program. The commenter recommended that, with respect to determining the location of Indian Reservations, SBA should clarify in the regulations where the HUBZone maps referenced can be found. SBA concurs and has added the Web site address for its HUBZone maps to the regulations.

SBA received one comment on § 126.306, which addresses how SBA will process applications to the HUBZone Program. The commenter recommended that SBA require applicants to notify SBA, prior to certification, of all material changes that could affect eligibility so that SBA could rely on the application materials as submitted. SBA concurs with this recommendation, but has amended § 126.304(a) and not § 126.306, accordingly. In addition, SBA notes that this amendment does not preclude SBA from requesting additional information or clarification of information.

SBA received one comment concerning § 126.307, which concerns the ''List'' of qualified HUBZone SBCs. The commenter recommended that SBA clarify that it is necessary to run a search on Central Contractor Registration (CCR) Dynamic Small Business Search (DSBS), (*http://www.dsbs.sba.gov/dsbs/dsp_dsbs.cfm*) or its successor, if any, to find qualified HUBZone SBCs because there is no ''List,'' per se, on that Web site. SBA concurs and has amended the regulation accordingly.

SBA received one comment on § 126.308, which addresses what happens if SBA inadvertently omits a qualified HUBZone SBC from the ''List.'' The commenter stated that SBA should allow the qualified HUBZone SBC to show the contracting officer (CO) SBA's certification and that the concern must be on the ''List'' within 30 calendar days thereafter. The commenter believed that this would provide more flexibility to the process. SBA understands the commenter's concern. However, the purpose of the List is to provide COs a quick and accurate mechanism for finding qualified HUBZone SBCs. In those rare circumstances when qualified HUBZone SBCs have been inadvertently omitted from the ''List,'' SBA has quickly resolved the problem. For these reasons, SBA has implemented this rule as proposed.

SBA received one comment on § 126.401(b), which addresses program examinations. The commenter did not agree with the proposal to allow program exams in more than one location because it could be a nuisance to SBCs. SBA notes that the purpose of that provision is to ensure that all concerns certified into the HUBZone Program and receiving the benefits of the program are eligible. If a SBC has more than one office, it may be necessary to visit each office to determine the principal office. However, reviews will occur in the fewest number of offices needed to satisfy the purpose of the review. In performing a program examination, SBA takes into account and attempts to reduce the burden of the exam on the SBC. SBA will ensure that this process is streamlined and not overly burdensome to HUBZone SBCs. This final rule implements the regulation as proposed.

SBA received two comments on § 126.403 which requested that HUBZone SBCs submit updated financial information and information relating to its number of employees to SBA. One commenter stated that instead of requiring SBCs to report this information, SBA should verify initial and continued eligibility of HUBZone SBCs as it pertains to employment automatically by cross-referencing employee data with the IRS using the IRS's Form 941 (Employer's Quarterly Federal Tax Return). The commenter recommended SBA implement an automated system connected to the IRS for financial data reporting instead of the proposed request that SBA collect records and data from SBCs.

SBA plans to research this suggestion further. However, SBA believes that if this recommendation can be implemented, it will take time. In the meantime, SBA needs this information as soon as possible in order to effectively gauge the success of the program.

Another commenter stated that this information request should be mandatory so that the resulting data is reliable. SBA concurs with this comment and agrees that the HUBZone SBC's response to the request for updated financials and employee data should be mandatory and has amended the final rule accordingly. However, because SBA has changed this proposal from a voluntary to a mandatory one, at this time the Agency requests comments on the effects implementing this requirement will have on SBCs. In addition, in order to provide SBCs with sufficient time to set up a recordkeeping system if necessary (although SBA believes that all of this information is information generally collected and retained by SBCs during the course of business) to meet this requirement, or to understand what this requirement entails, SBA does not plan to request this information in the near future.

SBA received two comments on § 126.500, concerning SBA's proposal to change the re-certification period from an annual re-certification to every three years. One commenter stated that the annual re-certification requirement is not a burden and that the 3-year term will only increase the likelihood of a concern falling out of compliance. In addition, the commenter suggested that HUBZone SBCs sign a certification each time they submit a bid stating that they agree to notify the SBA anytime there is a change in the business.

Another commenter supported the change as an administrative convenience for the SBA and HUBZone SBCs. However, the commenter recommended SBA amend this rule to provide a cross-reference to § 126.501, which shows that qualified HUBZone SBCs have a continuing obligation to notify SBA of material changes. In addition, this commenter also recommended that SBA change the section heading to read: ''How does a qualified HUBZone SBC maintain HUBZone certification?'' SBA concurs with this commenter and has retained the three-year re-certification period in this final regulation. SBA believes that protests, program examinations, and the requirement that qualified HUBZone SBCs notify SBA of a material change ensure that only qualified HUBZone SBCs receive HUBZone contracts. In addition, SBA has amended the section heading for § 126.500.

In response to another comment, SBA does not believe that changing the re-certification requirements from one to three years will increase the likelihood of firms receiving benefits from the program that do not in fact qualify as HUBZone SBCs. SBA believes that the more important safeguard to prevent this from occurring is the protest mechanism tied to each contract. Where a firm is the apparent successful offeror because of its HUBZone status (either through the HUBZone price evaluation preference or a HUBZone set aside), other affected firms may challenge the firm's HUBZone status. SBA has found that the procurement community is very able to police itself and stop abuse from occurring. However, SBA notes that should the HUBZone Program Office develop electronic on-line capability to efficiently process re-certification actions in a timely manner and a risk assessment supports the need for such a change, SBA will consider amending the regulation to require annual re-certification.

SBA received only one comment on § 125.501, which addresses a qualified HUBZone SBC's ongoing obligations, such as notification to SBA of any material changes. The commenter stated that SBA should consider a cross-

reference to § 126.200, to direct concerns to a more comprehensive list of HUBZone Program eligibility requirements. SBA concurs with the recommendation and has amended this regulation accordingly. However, SBA notes that the eligibility requirements set forth in § 126.200 do not provide a complete list of areas where notification of material changes is necessary.

SBA received one comment on § 126.503, which addresses de-certification. The commenter suggested that the regulation should be written in a more impartial tone. Although SBA believes that the regulation as proposed is impartial, the Agency has amended the regulation to clarify that it will notify the concern it is proposing de-certification, the reasons for the proposed de-certification, and that the concern must rebut each of the reasons SBA sets forth in the letter.

In addition, with respect to § 126.503, the commenter recommended that SBA check for consistency with respect to who makes the de-certification decision—the AA/HUB or designee, or the Deputy AA/HUB or designee. SBA notes that the Deputy AA/HUB or designee may propose the de-certification and the AA/HUB or designee makes the final decision.

SBA received several comments on proposed § 126.601. SBA received one comment on proposed § 126.601(b), which provided that a qualified HUBZone SBC must be qualified at both bid submission and at contract award. The commenter stated that the proposal is counterproductive and inconsistent with 13 CFR 121.404, which provides that the size of an SBC is determined as of the date of the initial offer, with two exceptions. In addition, the commenter noted that sometimes there is a lengthy time between bid submission and award and this is out of the control of the HUBZone SBC.

SBA notes that a concern that is not a qualified HUBZone SBC at the time it submits its initial offer can not submit an offer on a HUBZone sole source or set-aside contract, or receive the benefits of the HUBZone price evaluation preference. Although it is true that there may be a lengthy time period between bid submission and award, SBA believes that awarding a HUBZone contract to a concern that does not meet the requirements of the program provides no help to the HUBZone community or its residents. Therefore, SBA has decided to implement this rule as proposed.

SBA received several comments on § 126.601(e). SBA proposed amending paragraph (e) and addressing confusion regarding the nonmanufacturer rule. The statutory nonmanufacturer rule generally requires a small business nonmanufacturer to supply the product of a domestic small business manufacturer or processor in connection with an 8(a) or small business set aside supply contract. The SBA Administrator may waive that requirement in certain cases.

The nonmanufacturer rule that currently applies to HUBZone contracts requires a qualified HUBZone SBC nonmanufacturer to supply the product of a qualified HUBZone SBC manufacturer, except that for HUBZone contracts valued at or below $25,000, a qualified HUBZone SBC may supply the end item of any domestic manufacturer, including a large business. The proposed rule clarified that for purposes of a HUBZone contract, there are no waivers of the nonmanufacturer rule. The proposed rule provided, however, that for HUBZone contracts at or below the simplified acquisition threshold (currently $100,000), a qualified HUBZone SBC may supply the end item of any domestic manufacturer, including a large business.

SBA received several comments supporting the need for a waiver provision to the nonmanufacturer rule, similar to the one in the 8(a)BD Program. One commenter stated that the proposed rule precluding waivers would make it difficult for HUBZone SBCs to obtain contracts and argued that since the rule is different from the one set forth in the 8(a)BD Program, there is no real ''parity'' between the two programs. In contrast, one commenter expressed support for the proposed rule precluding waivers of the non-manufacturer rule for the HUBZone Program because the program is intended to foster economic growth and job creation in specific geographic areas and frequent waivers would remove the program's incentives for manufacturers to start operations in distressed areas.

SBA has reviewed these comments and believes that the program is designed to assist HUBZones by assuring that individuals residing in those areas are employed generally by a qualified HUBZone SBC and specifically in connection with the performance of a HUBZone contract. SBA believes that allowing a non-HUBZone manufacturer to be the firm ultimately supplying the product for a HUBZone contract would be contrary to the intent of the program. Therefore, this final rule implements that part of the rule as proposed, in that there are no waivers for the nonmanufacturer rule in the HUBZone Program.

In response to the proposal allowing HUBZone SBCs to supply the end item of any business for acquisitions at or below the simplified acquisition threshold, one commenter stated that it is inconsistent with the ''job creation'' goals of the program. On a similar note, one commenter expressed support for the current nonmanufacturer threshold of $25,000 (where the HUBZone SBC can supply the product of any business for contracts at or below $25,000), rather than the simplified acquisition threshold of $100,000, because contracts below $100,000 are not significant enough to entice manufacturers to move into HUBZone areas due to the costs of setting up such an operation. This commenter also believed that SBA should research this issue further to determine the true impact of such a blanket waiver for acquisitions below the simplified acquisition threshold on small business programs, especially the HUBZone Program. SBA has decided not to implement that part of the proposed rule permitting HUBZone SBCs to provide the end item of any manufacturer or contractor at or below the simplified acquisition threshold.

SBA received one comment on § 126.603, which addresses the marketing of HUBZone contracts. As proposed, the regulation referenced only HUBZone set-asides. The commenter suggested that the regulation refer to all HUBZone contract opportunities, which would include sole source acquisitions, set asides, and full and open competition with a price evaluation preference. SBA concurs and has amended this regulation accordingly.

SBA received one comment supporting the proposal in § 126.605 to allow HUBZone contracts for micropurchases. This final rule implements the proposed regulation.

SBA received several comments concerning § 126.605(b) and § 126.606. Both provisions address the requirement that if an 8(a) Participant is currently performing a requirement, or SBA has accepted that requirement for performance under the authority of the 8(a)BD Program, it cannot be available for a HUBZone contract unless SBA has consented to release the procurement from the 8(a)BD Program. Several commenters thought that SBA had deleted this provision from the regulations and argued that the requirement should be put back in the final regulation. SBA notes that the proposed regulation did not delete the requirement. This final rule slightly amends the wording of § 126.605(b) to clarify that only contracts being performed by 8(a) Participants through the 8(a)BD Program are not available for award through the HUBZone Program. SBA intended that result, and believes

that the current regulation provides for that result, but is clarifying the regulation to ensure that it is not misconstrued.

Although SBA proposed amendments to § 126.606, the proposal provided that SBA may release a procurement requirement from the 8(a)BD Program only when neither the incumbent nor any other 8(a) Participant can perform the requirement. If no 8(a) Participant is available to perform the requirement and SBA does not ''release'' it and allow it to become available for HUBZone contracting, then the contracting officer can issue the solicitation as a full and open competition. Thus, the logical alternative is ''releasing'' the requirement. Even if the requirement is ''released,'' if it is later offered to the 8(a)BD Program or an 8(a) Participant performs on it, then § 126.605 takes effect and the requirement is no longer available for HUBZone contracting. The regulation protects the 8(a)BD Program, yet provides opportunities for qualified HUBZone SBCs, but only if an 8(a) Participant is unavailable to perform the requirement.

SBA received over 900 comments on proposed § 126.607, which sought to clarify the interaction between the HUBZone and 8(a)BD Programs. The proposed rule provided for parity between the two programs by requiring a CO look first to the HUBZone and 8(a)BD Programs in determining how to fulfill a particular procurement requirement. In deciding which contracting vehicle to use, the proposed rule required a CO to consider the contracting activity's progress in fulfilling its HUBZone and 8(a) goals, as well as other pertinent factors. The proposed rule directed the CO to exercise his/her discretion on whether to offer the requirement to the 8(a)BD or HUBZone Program.

SBA received 235 comments stating, generally, that the proposed rule will reduce the number of contracts available to companies in the 8(a)BD Program and will hinder entrepreneurship in minority communities. Several commenters were concerned with the proposed rule because the 8(a)BD Program does not have statutory goals like the HUBZone Program. The commenters believe that adopting this rule will be harmful to the interests of businesses owned by socially and economically disadvantaged individuals.

SBA received 732 comments in support of the proposed rule. Commenters believed that parity is consistent with the HUBZone and 8(a) statutes and that it is the only fair position. One commenter noted that this will help the Native American community. Other commenters noted that without parity the HUBZone Program cannot be effective. SBA received some comments suggesting that SBA retain the parity rule, but does not allow goaling to be the basis of determination for a CO. Some commenters believed the ''other factors'' criteria would allow COs to act arbitrarily, while others supported the requirement.

As a result of the numerous comments received, SBA has decided to further examine the issues raised by the commentators and will not amend the rule at this time.

SBA received two comments supporting the proposal to allow HUBZone opportunities at or below the simplified acquisition threshold because it would create more opportunities for HUBZone SBCs. SBA notes that the proposed regulation merely clarified § 126.608 by allowing HUBZone contract opportunities ''at or below'' the simplified acquisition threshold, as opposed to just below the simplified acquisition threshold. This final regulation implements the rule as proposed.

SBA received two comments recommending that the Agency expand sole-source-contracting opportunities for HUBZone SBCs, arguing that such contracting opportunities should be the same as for the 8(a)BD Program in order to achieve parity between two programs. SBA notes that the requirements for sole source contracting opportunities for HUBZone SBCs are set forth in the Small Business Act, and SBA therefore cannot expand those opportunities beyond the statute's limits. This final regulation implements the rule as proposed.

In the proposed rule, SBA amended § 126.613 to conform to the recent statutory amendments made by the Reauthorization Act, which addressed calculating the price evaluation preference for purchases by the Secretary of Agriculture of agricultural commodities. In addition, SBA proposed to add more examples to § 126.613, regarding the price evaluation preference for a qualified HUBZone SBC in full and open competition and to clarify that only qualified HUBZone SBCs should benefit from the preference. SBA also proposed amending the current example by correcting a mathematical error.

SBA received three comments on this proposed section. One commenter stated that contracting officers are skirting the use of the price evaluation preference by using an ''up-front'' budget ceiling to eliminate any offer from consideration that exceeds a specific dollar amount. Two commenters stated that the adoption of the price evaluation preference/best value clarification language was long overdue. Further, two commenters believed that the examples were incorrect.

SBA has reviewed the comments and the proposed regulation and has concluded that the examples are correct. With respect to the ''up-front'' budget ceiling, SBA notes that procuring activities may have to abide by certain statutory fiscal limitations. However, in a similar vein, SBA notes that if there is no statutory limit, an agency can not reject, as unreasonably high, a bid which was low by virtue of the application of the HUBZone price evaluation preference in order to make award to a higher evaluated, but lower actual price bidder. The U.S. General Accounting Office confirmed SBA's position (*see AMI Construction,* B–286351, Dec. 27, 2000, at *http://www.gao.gov*), noting that if a procuring activity could reject a HUBZone SBC's bid as unreasonably high, and yet with the application of the price evaluation preference the bid is the low bid in an Invitation for Bids, then the purpose of the evaluation preference in 15 U.S.C. 657a(b)(3) would be thwarted.

SBA received several comments on its proposal to amend § 126.616 and allow for joint ventures comprised of only qualified HUBZone SBCs. Several commenters stated that this amendment will limit the opportunities available for HUBZone SBCs, it is not necessary as limits to joint ventures already exist in § 126.616(b)(1) and (2) (relating to size), and any joint venture limitation should be the same as for the 8(a)BD Program. One commenter supported the proposed regulation, stating that it will protect the HUBZone Program from becoming a tool for unqualified firms to use a ''front'' to get HUBZone benefits.

SBA believes that allowing HUBZone contracts to go to qualified HUBZone SBCs that joint venture with a non-HUBZone SBC will dilute the benefits intended to go to the HUBZone area and residents. Therefore, SBA has implemented this final rule as proposed.

SBA stated in the preamble to the proposed rule that it was considering a new paragraph to § 126.700, which would add an additional contract performance requirement for construction HUBZone contracts. Specifically, in the case of HUBZone construction contracts (either general construction or specialty trade construction), SBA considered requiring qualified HUBZone SBCs to perform at least 50% of the contract, either at the

prime or subcontracting level. Such a provision would not affect the prime performance of work requirements set forth in § 125.6 (*i.e.,* 15% for general construction and 25% for specialty trade construction); rather, it would be a new overall performance of work requirement for HUBZone construction contracts. Thus, for general construction, if a prime contractor will perform 15% of the contract, it would be required to subcontract at least 35% of the contract to one or more other qualified HUBZone SBCs. For a specialty trade construction contract, if a prime contractor will perform 25% of the contract, it would be required to subcontract at least 25% of the contract to one or more other qualified HUBZone SBCs.

In addition, SBA also stated that it was considering several alternatives that would attempt to encourage increased performance by qualified HUBZone SBCs, but that would not adversely affect the HUBZone Program. One alternative that SBA considered is requiring that HUBZone SBCs perform at least 50% of a construction contract through prime or subcontracting arrangements, but allowing the CO to waive this requirement where he or she believes it cannot be met for a particular procurement. Where a CO believed that the 50% requirement could be met, it would continue to apply. Where a CO waived the 50% requirement, the solicitation would have to specify that the 50% requirement does not apply to the HUBZone procurement. The 15% or 25% prime contractor performance of work requirement would continue to apply. As another alternative, SBA considered imposing an evaluation factor in the award of negotiated HUBZone set-asides relating to overall performance by qualified HUBZone SBCs. SBA specifically requested comments on these proposals, including whether the 50% requirement is one that could be met by the affected concerns, and whether and to what extent an evaluation factor could be used to make the requirement acceptable to COs and the procurement community.

SBA received three comments in support of the idea, in general, to add a contract performance requirement for construction HUBZone contracts. Commenters believed it would further the job creation goal of the program and reduce the chances of abusing the benefits offered by the program by allowing non-HUBZone SBCs to perform the majority of the work. In addition, commenters believed it was consistent with the overall goal that 50% of contract costs be expended in HUBZones.

After review of the comments, SBA believes that an additional contract performance requirement for construction contracts is necessary because the HUBZone Program is intended to stimulate historically underutilized business zones through job creation and capital investment. Where a qualified HUBZone SBC is able to subcontract up to 85% of a general construction contract or up to 75% of a specialty trade construction contract to non-HUBZone SBCs (which may be large businesses), SBA is concerned that it would not be meeting the underlying Congressional purpose of the program. At the same time, however, SBA does not want to impose a barrier that could dissuade COs from using the HUBZone Program. Therefore, the final regulation at § 126.700 requires qualified HUBZone SBCs to perform at least 50% of the contract either at the prime or subcontracting level. In addition, the regulation will allow the CO to waive the requirement where he or she determines that it can not be met by at least two qualified HUBZone SBCs.

SBA proposed amending § 126.801 to clarify that SBA does not review protest issues concerning the conduct or administration of a HUBZone contract. One commenter noted a typo in the proposed regulation—the word ''not'' was missing. SBA concurs and has amended the regulation accordingly. In addition, SBA has made a technical amendment clarifying that for sealed bid acquisitions, an interested party must submit its protest by close of business on the fifth business day after bid opening, or if the price evaluation preference was not applied at the time of bid opening, by close of business on the fifth business day from the date of identification of the apparent successful offeror.

**Application of the Final Rule**

As indicated above, this final rule is effective 30 days after the date of publication in the **Federal Register**. To ensure that applicants to and participants in the HUBZone Program are subject to the same requirements, this final rule applies to all HUBZone applications submitted on or after the effective date of this rule, to all pending HUBZone applications, and to all currently certified HUBZone SBCs.

**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 rule constitutes a ''significant regulatory action'' under Executive Order 12866. SBA prepared an economic impact analysis relating to the rule when it was published as a proposed rule in January. We noted in our analysis that implementing the changes in the rule would provide significant benefits, including (1) Increasing the base number of small businesses in the HUBZone Program and increasing the viability and practicability of using the HUBZone Program by Federal agencies; (2) greater administrative efficiency and program integrity; and (3) greater contracting efficiency for Federal agencies. We did not receive any comments on the economic impact analysis that we published with the proposed rule. We continue to believe that our analysis was accurate.

SBA has determined that this rule imposes additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35 and has submitted the requirement to OMB for review. Section 126.403(b) requires a HUBZone SBC to submit updated financial information and information relating to the number of its employees. This information is needed to gauge the degree to which the HUBZone Program has resulted in increased employment opportunities and an increased level of investment in HUBZones. SBA received two comments on this request for information. One commenter stated that instead of requiring SBCs to report this information, SBA should verify initial and continued eligibility of HUBZone SBCs as it pertains to employment automatically by cross-referencing employee data with the IRS using the IRS's Form 941 (Employer's Quarterly Federal Tax Return). The commenter recommended SBA implement an automated system connected to the IRS for financial data reporting instead of the proposed request that SBA collect records and data from SBCs.

SBA plans to research this suggestion further. However, SBA believes that if this recommendation can be implemented, it will take time. In the meantime, SBA needs this information as soon as possible in order to effectively gauge the success of the program.

Another commenter stated that this information request should be mandatory so that the resulting data is

reliable. SBA concurs with this comment and agrees that the HUBZone SBC's response to the request for updated financials and employee data should be mandatory.

SBA has certified over ten thousand concerns into the HUBZone Program. Each of these concerns could be subject to this request for information. SBA estimates the burden of this collection of information as follows. SBA requires updated financial information and information relating to the number of employees from a qualified HUBZone SBC annually. SBA estimates that the time needed for a HUBZone SBC to complete this collection will average less than one-half hour. SBA estimates that the cost to complete this collection will be approximately $30 per hour. Thus, the estimated aggregated burden for each qualified HUBZone SBC is 0.5 hours per annum costing an estimated $15 for the year. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information. SBA has submitted this information collection package to OMB for review.

For purposes of Executive Order 12988, SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order.

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

The Regulatory Flexibility Act (RFA) requires SBA to publish a final analysis. According to the RFA, the analysis must include: a statement of the need for and objective of the rule; a summary of significant issues raised by public comments in response to the IRFA and an assessment of issues and any changes made as a result; a description of and estimate of the number of small entities to which this rule applies; a description of the reporting, recordkeeping and other compliance requirements and an estimate of the classes of small entities subject to the requirements and type of professional skills necessary for the preparation of the report or record; and a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the objectives of applicable statutes and why the agency selected the alternative adopted in the rule.

*1. Reason for and Objective of the Rule*

The regulations address amendments made to the HUBZone Act by the Reauthorization Act. Specifically, Congress amended the eligibility requirements for SBCs owned by Indian Tribal Governments or tribal corporations, or CDCs. Congress also amended the definition of HUBZone to include ''redesignated areas,'' and added definitions for the terms Indian Reservation and ANC. This regulation addresses those amendments.

The regulation also makes technical amendments, and clarifies existing regulations. Some amendments address certain issues SBA has become aware of while reviewing HUBZone applications.

It is important to remember that the HUBZone Program is a program designed to assist community development through small businesses. SBA's focus in implementing any of its small business programs is always to keep the interests of small businesses in mind. Any regulatory changes made must necessarily consider those interests. The changes made in this final rule are meant to implement new statutory provisions, to make the HUBZone regulations easier to read and understand, to eliminate confusion regarding the intended meaning of several provisions, and to close perceived loopholes that could otherwise open the program to abuse.

*2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA and an Assessment of Issues and Any Changes Made as a Result*

SBA received two comments on its IRFA. One commenter stated that SBA failed to propose regulatory alternatives that would minimize the impact of this regulation on small firms. This commenter also believed that SBA failed to comply with section 609(a) of the Regulatory Flexibility Act, which requires agencies to assure that small businesses have an opportunity to participate in rulemakings that will considerably impact them.

With respect to the first comment, SBA notes that as the federal agency charged with the responsibility of implementing small business programs to ''further the interests of small business,'' it always attempts to minimize any regulatory impact on small business in its own regulations. In addition, the proposed rule cited several alternatives under consideration for different provisions, and asked for public comment on those alternatives, including ones on subcontracting limitations and ownership by Indian Tribes. With respect to the second comment, SBA notes that it extended the original comment period for the rule because it believed that affected businesses needed more time to adequately respond. 67 FR 8739 (Feb. 26, 2002). In addition, SBA received over 900 comments on the rule. Therefore, SBA believes that SBCs had an opportunity to participate in the rulemaking, and did in fact participate in the process.

Another commenter stated that the IRFA failed to incorporate the complete definition of ''small entities'' in its analysis. According to the Regulatory Flexibility Act (RFA), ''small entities'' are small businesses, ''small organizations'' (non-profits), and small governmental jurisdictions. SBA's programs do not apply to ''small organizations'' or ''small governmental jurisdictions;'' rather, under SBA's size regulations, in order to be considered a small ''business concern,'' a business entity must be organized for profit. In addition, according to the Federal Procurement Data Center (FPDC), Javits Wagner O'Day nonprofit agencies, education, non-profit and Historically Black Colleges and Universities, and state and local governments received over $15 billion in Federal government contracts in fiscal year (FY) 2001. In comparison, according to the same data, HUBZone SBCs received far less—about $700 million. Even though certain provisions of the Reauthorization Act, such as the provisions on Indian Tribes, could increase the pool of SBCs eligible for the program, SBA notes that the majority of these concerns were eligible prior to the Reauthorization Act's amendments. Further, the addition of CDC ownership by the Reauthorization Act may also widen the pool of eligible applicants. Although CDCs can now own a HUBZone SBC and there are more HUBZones as a result of the redesignated areas, concerns still need to have a principal office in a HUBZone. This means that some concerns need to move into a HUBZone, which requires the expenditure of funds before any benefit is received. As a result, SBA believes that the provisions of this rule will not alter the pool of eligible small businesses by a sufficient number to change the procurement strategy of a contracting activity. Therefore, the proposed regulation will not impact ''small organizations'' or ''small jurisdictions.''

One commenter also recommended SBA address how the rule will impact service disabled veterans, women-owned small businesses, SDBs, 8(a) Participants and other programs that are part of the 23% annual procurement goal for SBCs. With respect to this

comment, SBA notes that prior to the enactment of the HUBZone Act, the government-wide goal for small business participation was 20%. When Congress enacted the HUBZone Act, it changed the government-wide contracting goal from 20% to 23% to address participation by qualified HUBZone SBCs. *See* Public Law 105–135, section 603(b)(1)(B). The HUBZone Program was intended to add on to, not subtract from, other small business programs. SBA's programs are not meant to compete against each other. As further evidence that the HUBZone Program is not intended to take away from other programs, the regulations provide that SBA will not consent to releasing a requirement previously performed through the 8(a)BD Program to the HUBZone Program unless neither the incumbent nor any other 8(a)BD participant can perform the requirement.

Further, in FY 2001, the Federal Government spent over $234 billion dollars (*see http://www.fpdc.gov*). SBA believes that all SBCs, no matter which program they participate in, can and should be receiving their fair share of this $234 billion. In addition, SBA notes that the statute and regulations now provide that qualified HUBZone SBCs can be owned by CDCs and one or more SBCs, or Indian Tribes and one or more SBCs. Therefore, SBCs, including SDBs and 8(a) Participants, can participate in the HUBZone Program not only by becoming a qualified HUBZone SBC, but also by acquiring ownership of a qualified HUBZone SBC. Thus, SBA does not believe that this rule will negatively impact other SBCs.

Another comment stated that it was not possible to ascertain from the rule or IRFA the full impact of allowing SBCs owned by ESOPs to be eligible for the program. This commenter believed that the proposed regulation could create a cost/economic burden on SBCs by requiring them to make a major decision to hire or not hire qualified employees that are not United States citizens.

In response to this comment, SBA notes that the requirement for ownership by United States citizens is a statutory requirement. The HUBZone Act, the statute that creates the HUBZone Program, outlines the eligibility requirements for SBCs. It requires 100% ownership by U. S. citizens, ownership in part by Tribes or tribal-entities, or ownership in part by CDCs. SBA has no choice but to implement the statute as written. Any perceived ''burden'' is not one created by SBA's regulations. In addition, SBA notes that it has received only a handful of applications from concerns owned by ESOPs. After reviewing the issue, SBA determined that a concern owned by an ESOP is owned and controlled by the trustee of the ESOP and the employees. Consequently, to meet the eligibility requirements of the statute, the employees participating in the ESOP must be U.S. citizens. With respect to whether or not a concern should hire or not hire an employee, SBA believes those are decisions to be made solely by the concern. The benefits of the program for concerns owned by an ESOP are the same as for all other eligible concerns—the possibility of receiving a HUBZone contract. This ''possibility'' was explained in the proposed rule at § 126.603. Further, according to FPDC data, this ''possibility'' amounted to approximately $700 million in contracts awarded to HUBZone SBCs in FY 2001. Only the concern itself can weigh the benefit of receiving a potential HUBZone contract to the benefit of hiring a certain employee. These are everyday business decisions that are made by all concerns, not just concerns wishing to participate in the HUBZone Program.

This commenter also stated that SBA did not determine the costs associated with keeping an accurate system to insure that all employees of an ESOP are United States citizens or that corporations that are HUBZone SBCs must maintain an accurate system to verify that all stock holders are U.S. citizens. SBA did not discuss these costs because such ''systems'' are required of the business in the normal course of business, and any costs are not costs associated with this rule. Every time a concern hires an employee, the employee must complete a W–2 (IRS) tax form. These forms are maintained by the concern. The tax form provides the information on the citizenship of each employee. With respect to public companies, SBA notes that such companies have always been eligible for the program.

Finally, this commenter stated that SBA did not provide economic impact data on the proposed provisions expanding contract performance requirements for construction HUBZone contracts. In response to this comment, SBA provides the following information.

In FY 2001, the Federal Government spent over $16 billion in construction (*see www.fpdc.gov*). It is not clear how much of that went to HUBZone SBCs, although according to the same data, HUBZone SBCs received between $600 million and $700 million in contracts total. According to SBA's CCR/DSBS (*http://dsbs.sba.gov/dsbs/dsp_dsbs.cfm*), there are 2,021 qualified HUBZone SBCs, which are engaged in construction. The rule requiring qualified HUBZone SBCs to perform at least 50% of the construction contract itself or through a subcontract with other qualified HUBZone SBCs may increase the number of subcontracts issued to such concerns. In addition, this could increase the number of contracts ultimately awarded HUBZone SBCs in this area because more concerns could be gaining experience through subcontracting. Further, because there are over 2,000 qualified HUBZone SBCs in this field, a prime HUBZone SBC should not have a problem subcontracting to another HUBZone SBC to meet this requirement. In the alternative, SBA's final regulation provides that COs may waive this requirement if it can not be met.

*3. Description of Reporting, Recordkeeping and Other Compliance Requirements*

The RFA requires a description of the reporting, recordkeeping and other compliance requirements and an estimate of the classes of small entities subject to the requirements and type of professional skills necessary for the preparation of the report or record.

The rule authorizes SBA to request that a qualified HUBZone SBC submit updated financial information and information relating to the number of its employees. This information is needed to gauge the degree to which the HUBZone Program has resulted in increased employment opportunities and an increased level of investment in HUBZones. The office manager of a concern should be able to provide this information.

In addition, because SBA has changed this proposal from a voluntary to a mandatory one, at this time the Agency requests comments on the affects implementing this requirement will have on SBCs. Further, in order to provide SBCs with sufficient time to set up a recordkeeping system if necessary (although SBA believes that all of this information is information generally collected and retained by SBCs during the course of business) to meet this requirement, or to understand what this requirement entails, SBA does not plan to request this information in the near future.

*4. Minimizing Significant Economic Impact*

The RFA requires a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the objectives of applicable statutes and

why the agency selected the alternative adopted in the rule. SBA has addressed this in the preamble.

**List of Subjects**

*13 CFR Part 121*

Government procurement, Government property, Grant programs—business, Loan programs—business, Small businesses.

*13 CFR Part 125*

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

*13 CFR Part 126*

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small businesses.

■ For the reasons set forth in the preamble, amend parts 121, 125 and 126 of title 13 of the Code of Federal Regulations as follows:

## PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. Revise the authority citation for 13 CFR part 121 to read as follows:

**Authority:** 15 U.S.C. 632(a), 634(b)(6), 636(b), 637(a), 644(c) and 662(5); Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188; Pub. L. 105–135 sec. 601 *et seq.*, 111 Stat. 2592; Pub. L. 106–24, 113 Stat. 39.

■ 2. Amend § 121.1001 by revising paragraph (a)(6)(iv), and by adding new paragraph (b)(7) to read as follows:

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

(a) * * *

(6) * * *

(iv) The SBA Associate Administrator for the HUBZone Program, or designee.

* * * * *

(b) * * *

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

(i) The applicant or qualified HUBZone concern; or

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

## PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 3. 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.

■ 4. In § 125.6, redesignate paragraphs (c), (d), (e), (f), (g), and (h) as paragraphs (e), (f), (g), (h), (i), and (j) respectively, and add new paragraphs (c) and (d) to read as follows

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

* * * * *

(c) A qualified HUBZone SBC prime contractor can subcontract part of a HUBZone contract (as defined in § 126.600 of this chapter) provided:

(1) In the case of a contract for services (except construction), the qualified HUBZone SBC spends at least 50% of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs;

(2) In the case of a contract for general construction, the qualified HUBZone SBC spends at least 15% of the cost of contract performance incurred for personnel on the concern's employees;

(3) In the case of a contract for construction by special trade contractors, the qualified HUBZone SBC spends at least 25% of the cost of contract performance incurred for personnel on the concern's employees;

(4) In the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the qualified HUBZone SBC spends at least 50% of the manufacturing cost (excluding the cost of materials) on performing the contract in a HUBZone. One or more qualified HUBZone SBCs may combine to meet this subcontracting percentage requirement; and

(5) In the case of a contract for the procurement by the Secretary of Agriculture of agricultural commodities, the qualified HUBZone SBC may not purchase the commodity from a subcontractor if the subcontractor will supply the commodity in substantially the final form in which it is to be supplied to the Government.

(d) SBA may use different percentages if the Administrator determines that such action is necessary to reflect conventional industry practices among small business concerns that are below the numerical size standard for businesses in that industry group. Representatives of a national trade or industry group or any interested SBC may request a change in subcontracting percentage requirements for the categories defined by six digit industry codes in the North American Industry Classification System (NAICS) pursuant to the following procedures.

(1) *Format of request.* Requests from representatives of a trade or industry group and interested SBCs should be in writing and sent or delivered to the Associate Administrator of the Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416. The requester must demonstrate to SBA that a change in percentage is necessary to reflect conventional industry practices among small business concerns that are below the numerical size standard for businesses in that industry category, and must support its request with information including, but not limited to:

(i) Information relative to the economic conditions and structure of the entire national industry;

(ii) Market data, technical changes in the industry and industry trends;

(iii) Specific reasons and justifications for the change in the subcontracting percentage;

(iv) The effect such a change would have on the Federal procurement process; and

(v) Information demonstrating how the proposed change would promote the purposes of the small business, 8(a), SDB, woman-owned business, or HUBZone programs.

(2) *Notice to public.* Upon an adequate preliminary showing to SBA, SBA will publish in the **Federal Register** a notice of its receipt of a request that it considers a change in the subcontracting percentage requirements for a particular industry. The notice will identify the group making the request, and give the public an opportunity to submit information and arguments in both support and opposition.

(3) *Comments.* SBA will provide a period of not less than 30 days for public comment in response to the **Federal Register** notice.

(4) *Decision.* SBA will render its decision after the close of the comment period. If SBA decides against a change, SBA will publish notice of its decision in the **Federal Register**. Concurrent with the notice, SBA will advise the requester of its decision in writing. If SBA decides in favor of a change, SBA will propose an appropriate change to this part.

* * * * *

## PART—126 HUBZONE PROGRAM

■ 5. The authority citation for 13 CFR part 126 is revised to read as follows:

**Authority:** 15 U.S.C. 632, and 15 U.S.C. 657a.

■ 6–7. Amend § 126.101 by revising paragraph (a) to read as set forth below, removing paragraph (b), and redesignating current paragraph (c) as paragraph (b).

**§ 126.101 Which government departments or agencies are affected directly by the HUBZone Program?**

(a) The HUBZone Program applies to all federal departments or agencies that employ one or more contracting officers.

* * * * *

■ 8. Amend § 126.103 as follows:

A. Remove the definitions for ''AA/8(a)BD'', ''HUBZone 8(a) concern,'' and ''Women-owned business (WOB);''

B. Revise the definitions of ''HUBZone,'' ''HUBZone small business concern (HUBZone SBC),'' ''Indian reservation,'' ''Lands within the external boundaries of an Indian reservation,'' ''Person,'' ''Qualified census tract,'' ''Qualified non-metropolitan county,'' and ''Small disadvantaged business;''

C. Add the terms and definitions for ''AA/BD,'' ''ADA/GC&BD,'' ''Agricultural commodity,'' ''ANCSA,'' ''Alaska Native Corporation,'' ''Alaska Native Village,'' ''Attempt to maintain,'' ''Community Development Corporation,'' ''Contracting Officer,'' ''Indian Tribal Government,'' ''Redesignated area,'' and ''Small business concern''.

The revised and added terms read as follows:

**§ 126.103 What definitions are important in the HUBZone Program?**

* * * * *

*AA/BD* means SBA's Associate Administrator for the Office of Business Development.

* * * * *

*ADA/GC&BD* means SBA's Associate Deputy Administrator for Government Contracting and Business Development.

*Agricultural commodity* has the same meaning as in section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602).

*Alaska Native Corporation (ANC)* has the same meaning as the term ''Native Corporation'' in section 3 of the ANCSA, 43 U.S.C. 1602.

*Alaska Native Village* has the same meaning as the term ''Native village'' in section 3 of the ANCSA, 43 U.S.C. 1602.

*ANCSA* means the Alaska Native Claims Settlement Act, as amended.

*Attempt to maintain* means making substantive and documented efforts such as written offers of employment, published advertisements seeking employees, and attendance at job fairs.

* * * * *

*Community Development Corporation (CDC)* means a corporation that has received financial assistance under Part 1 of Subchapter A of the Community Economic Development Act of 1981, 42 U.S.C. 9805–9808.

* * * * *

*Contracting Officer (CO)* has the meaning given that term in 41 U.S.C. 423(f)(5), which defines a CO as a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

* * * * *

*HUBZone* means a historically underutilized business zone, which is an area located within one or more qualified census tracts, qualified non-metropolitan counties, lands within the external boundaries of an Indian reservation, or redesignated areas.

*HUBZone small business concern (HUBZone SBC)* means an SBC that is

(1) Owned and controlled by 1 or more persons, each of whom is a United States citizen;

(2) An ANC owned and controlled by Natives (as determined pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1));

(3) A direct or indirect subsidiary corporation, joint venture, or partnership of an ANC qualifying pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2) of the ANCSA, 43 U.S.C. 1626(e)(2));

(4) Wholly owned by one or more Indian Tribal Governments, or by a corporation that is wholly owned by one or more Indian Tribal Governments;

(5) Owned in part by one or more Indian Tribal Governments or in part by a corporation that is wholly owned by one or more Indian Tribal Governments, if all other owners are either United States citizens or SBCs; or,

(6) Wholly owned by a CDC or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs.

* * * * *

*Indian reservation* (1) Has the same meaning as the term ''Indian country'' in 18 U.S.C. 1151, except that such term does not include:

(i) Any lands that are located within a State in which a tribe did not exercise governmental jurisdiction as of December 21, 2000, unless that tribe is recognized after that date by either an Act of Congress or pursuant to regulations of the Secretary of the Interior for the administrative recognition that an Indian group exists as an Indian tribe (25 CFR part 83); and

(ii) Lands taken into trust or acquired by an Indian tribe after December 21, 2000 if such lands are not located within the external boundaries of an Indian reservation or former reservation or are not contiguous to the lands held in trust or restricted status as of December 21, 2000; and

(2) In the State of Oklahoma, means lands that:

(i) Are within the jurisdictional areas of an Oklahoma Indian tribe (as determined by the Secretary of the Interior); and

(ii) Are recognized by the Secretary of the Interior as of December 21, 2000, as eligible for trust land status under 25 CFR part 151.

*Indian Tribal Government* means the governing body of any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

* * * * *

*Lands within the external boundaries of an Indian reservation* include all lands within the perimeter of an Indian reservation, whether tribally owned and governed or not. For example, land that is individually owned and located within the perimeter of an Indian reservation is ''lands within the external boundaries of an Indian reservation.'' By contrast, an Indian-owned parcel of land that is located outside the perimeter of an Indian reservation is not ''lands within the external boundaries of an Indian reservation.''

* * * * *

*Person* means a natural person.

*Qualified census tract* has the meaning given that term in section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986.

* * * * *

*Qualified non-metropolitan county* means any county that was not located in a metropolitan statistical area at the time of the most recent census taken for purposes of selecting qualified census tracts under section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986, and in which:

(i) The median household income is less than 80% of the non-metropolitan State median household income, based on the most recent data available from the Bureau of the Census of the Department of Commerce; or

(ii) The unemployment rate is not less than 140% of the Statewide average unemployment rate for the State in which the county is located, based on the most recent data available from the Secretary of Labor.

*Redesignated area* means any census tract or any non-metropolitan county that ceases to be a qualified HUBZone,

except that such census tracts or non-metropolitan counties may be ''redesignated areas'' only for the 3-year period following the date on which the census tract or non-metropolitan county ceased to be so qualified. The date on which the census tract or non-metropolitan county ceases to be qualified is the date that the official government data, which affects the eligibility of the HUBZone, is released to the public.

* * * * *

*Small business concern (SBC)* means a concern that, with its affiliates, meets the size standard for its primary industry, pursuant to part 121 of this chapter.

*Small disadvantaged business (SDB)* means a concern that is small pursuant to part 121 of this chapter, is owned and controlled by one or more socially and economically disadvantaged individuals, tribes, ANCs, Native Hawaiian Organizations, or CDCs and has been certified pursuant to subpart A or B, part 124 of this chapter.

* * * * *

■ 9. Revise § 126.200 to read as follows:

**§ 126.200 What requirements must a concern meet to receive SBA certification as a qualified HUBZone SBC?**

(a) *Concerns owned by Indian Tribal Governments.*—(1) *Ownership.* (i) The concern must be wholly owned by one or more Indian Tribal Governments;

(ii) The concern must be wholly owned by a corporation that is wholly owned by one or more Indian Tribal Governments;

(iii) The concern must be owned in part by one or more Indian Tribal Governments and all other owners are either United States citizens or SBCs; or

(iv) The concern must be owned in part by a corporation, which is wholly owned by one or more Indian Tribal Governments, and all other owners are either United States citizens or SBCs.

(2) *Size.* The concern, with its affiliates, must meet the size standard corresponding to its primary industry classification as defined in part 121 of this chapter.

(3) *Employees.* The concern must certify that when performing a HUBZone contract, at least 35% of its employees engaged in performing that contract will reside within any Indian reservation governed by one or more of the Indian Tribal Government owners, or reside within any HUBZone adjoining such Indian reservation and that it will ''attempt to maintain'' (*see* § 126.103) that percentage during the performance of the contract. A HUBZone and Indian reservation are adjoining when the two areas are next to and in contact with each other.

(b) *Concerns owned by U.S. citizens, ANCs or CDCs*—(1) *Ownership.* (i) The concern must be 100% owned and controlled by persons who are United States citizens;

*Example:* A concern that is a partnership is owned 99.9% by persons who are U.S. citizens, and 0.1% by someone who is not. The concern is not eligible because it is not 100% owned by U.S. citizens;

(ii) The concern must be an ANC owned and controlled by Natives (determined pursuant to section 29(e)(1) of the ANCSA); or a direct or indirect subsidiary corporation, joint venture, or partnership of an ANC qualifying pursuant to section 29(e)(1) of ANCSA, if that subsidiary, joint venture, or partnership is owned and controlled by Natives (determined pursuant to section 29(e)(2)) of the ANCSA); or

(iii) The concern must be wholly owned by a CDC, or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs;

(2) *Size.* The concern, together with its affiliates, must qualify as a small business under the size standard corresponding to its primary industry classification as defined in part 121 of this chapter.

(3) *Principal office.* The concern's principal office must be located in a HUBZone.

(4) *Employees.* At least 35% of the concern's employees must reside in a HUBZone. When determining the percentage of employees that reside in a HUBZone, if the percentage results in a fraction, round up to the nearest whole number;

*Example 1:* A concern has 25 employees, 35% or 8.75 employees must reside in a HUBZone. Thus, 9 employees must reside in a HUBZone.

*Example 2:* A concern has 95 employees, 35% or 33.25 employees must reside in a HUBZone. Thus, 34 employees must reside in a HUBZone.

(5) *Contract Performance.* The concern must represent, as provided in the application, that it will ''attempt to maintain'' (*see* § 126.103) having 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

(6) *Subcontracting.* The concern must represent, as provided in the application, that it will ensure that it will comply with certain contract performance requirements in connection with contracts awarded to it as a qualified HUBZone SBC, as set forth in § 126.700.

■ 10. Revise § 126.201 to read as follows:

**§ 126.201 Who does SBA consider to own a HUBZone SBC?**

An owner of a SBC seeking HUBZone certification or a qualified HUBZone SBC is a person who owns any legal or equitable interest in such SBC. If an Employee Stock Option Plan owns all or part of the concern, SBA considers each stock trustee and plan member to be an owner. If a trust owns all or part of the concern, SBA considers each trustee and trust beneficiary to be an owner. In addition:

(a) *Corporations.* SBA considers any person who owns stock, whether voting or non-voting, to be an owner. SBA considers options to purchase stock and the right to convert debentures into voting stock to have been exercised.

*Example:* U.S. citizens own all of the stock of a corporation. A corporate officer, a non-U.S. citizen, owns no stock in the corporation, but owns options to purchase stock in the corporation. SBA will consider the options exercised and the individual to be an owner. Thus, pursuant to § 126.200, the corporation would not be eligible to be a qualified HUBZone SBC because it is not 100% owned and controlled by persons who are United States citizens.

(b) *Partnerships.* SBA considers all partners, whether general or limited, to be owners in a partnership.

(c) *Sole proprietorships.* The proprietor is the owner.

(d) *Limited liability companies.* SBA considers each member to be an owner of a limited liability company.

■ 11. Revise § 126.202 to read as follows:

**§ 126.202 Who does SBA consider to control a HUBZone SBC?**

Control means both the day-to-day management and long-term decision-making authority for the HUBZone SBC. Many persons share control of a concern, including each of those occupying the following positions: officer, director, general partner, managing partner, managing member and manager. In addition, key employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. SBA will consider the control potential of such key employees on a case by case basis.

■ 12. Revise § 126.203(b) to read as follows:

**§ 126.203 What size standards apply to HUBZone SBCs?**

* * * * *

(b) *At time of initial contract offer.* A HUBZone SBC must be small for the size standard corresponding to the NAICS code assigned to the contract.

■ 13. Revise § 126.205 to read as follows:

**§ 126.205 May participants in other SBA programs be certified as qualified HUBZone SBCs?**

Participants in other SBA programs may be certified as qualified HUBZone SBCs if they meet all of the requirements set forth in this part. Participation in other SBA Programs is not a requirement for participation in the HUBZone Program.

■ 14. Revise § 126.207 to read as follows:

**§ 126.207 May a qualified HUBZone SBC have offices or facilities in another HUBZone or outside a HUBZone?**

A qualified HUBZone SBC may have offices or facilities in another HUBZone or even outside a HUBZone and still be a qualified HUBZone SBC. However, in order to be certified as a qualified HUBZone SBC and if required by § 126.200, the concern's principal office must be located in a HUBZone.

■ 15. Revise § 126.300 to read as follows:

**§ 126.300 How may a concern be certified as a qualified HUBZone SBC and what information will SBA consider?**

A concern must apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where a concern fails to cooperate with SBA or submit information requested by SBA. If SBA determines that the concern is a qualified HUBZone SBC, it will issue a certification to that effect and add the concern to the List.

■ 16. Revise § 126.303 to read as follows:

**§ 126.303 Where must a concern submit its application and certification?**

A concern seeking certification as a HUBZone SBC must submit either an electronic application to SBA via *https://eweb1.sba.gov/hubzone/internet/* or a written application to the AA/HUB, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416. Certification pages must be validated electronically or signed by a person authorized to represent the concern.

■ 17. Revise § 126.304 to read as follows:

**§ 126.304 What must a concern submit to SBA?**

(a) To be certified by SBA as a qualified HUBZone SBC, a concern must submit a completed application and represent to SBA that it meets the requirements set forth in § 126.200. After submitting the application, applicants must notify SBA of any material changes that could affect its eligibility. The concern must also submit any additional information required by SBA.

(b) Concerns applying for HUBZone status based on a location within the external boundaries of an Indian reservation must use SBA's maps (located at *https://eweb1.sba.gov/hubzone/internet/*) to verify that the location is within the external boundaries of an Indian reservation. If, however, SBA's maps indicate that the location is not within the external boundaries of an Indian reservation and the concern disagrees, then the concern must submit official documentation from the appropriate Bureau of Indian Affairs (BIA) Land Titles and Records Office with jurisdiction over the concern's area, confirming that it is located within the external boundaries of an Indian reservation. BIA lists the Land Titles and Records Offices and their jurisdiction in 25 CFR 150.4 and 150.5.

(c) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 126.501, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern.

■ 18. Revise § 126.306(b) to read as follows:

**§ 126.306 How will SBA process the certification?**

* * * * *

(b) SBA may request additional information or clarification of information contained in an application submission at any time.

* * * * *

■ 19. Revise § 126.307 to read as follows:

**§ 126.307 Where will SBA maintain the List of qualified HUBZone SBCs?**

Qualified HUBZone SBCs are identified by running a search on CCR/DSBS *(http://dsbs.sba.gov/dsbs/dsp_dsbs.cfm)* and are listed on the HUBZone Web page at *https://eweb1.sba.gov/hubzone/internet/general/approved-firms.cfm.* In addition, requesters may obtain a copy of the List by writing to the AA/HUB at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416 or at *hubzone@sba.gov.*

■ 20. Revise § 126.308 to read as follows:

**§ 126.308 What happens if SBA inadvertently omits a qualified HUBZone SBC from the List?**

A HUBZone SBC that has received SBA's notice of certification, but is not on the List within 10 business days thereafter, should immediately notify the AA/HUB in writing at U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416 or via e-mail at *hubzone@sba.gov.* The concern must appear on the List to be eligible for HUBZone contracts.

■ 21. Revise § 126.309 to read as follows:

**§ 126.309 May a declined or decertified concern seek certification at a later date?**

A concern that SBA has declined or decertified may seek certification no sooner than one year from the date of decline or decertification if it believes that it has overcome all reasons for decline or decertification through changed circumstances and is currently eligible. *See* § 126.304(c).

■ 22. Revise § 126.401 to read as follows:

**§ 126.401 What is a program examination and what will SBA examine?**

(a) *General.* A program examination is an investigation by SBA officials, which verifies the accuracy of any certification made or information provided as part of the HUBZone application process or in connection with a HUBZone contract. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application for certification, its most recent recertification, or its certification in connection with a HUBZone contract.

(b) *Scope of review.* Examiners may conduct the review, or parts of the review, at one or all of the concern's offices. SBA will determine the location of the examination. Examiners may review any information related to the concern's eligibility requirements including, but not limited to, documentation related to the location and ownership of the concern, the employee percentage requirements, and the concern's ''attempt to maintain'' (*see* § 126.103) this percentage. The concern must document each employee's residence address through employment records. The examiner also may review property tax, public utility or postal records, and other relevant documents. The concern must retain documentation demonstrating satisfaction of the employee residence and other qualifying requirements for 6 years from date of submission of the application and any recertifications issued to SBA.

■ 23. Revise § 126.402 to read as follows:

**§ 126.402 When may SBA conduct program examinations?**

SBA may conduct a program examination at any time after the concern submits its application, during the processing of the application, and at any time while the concern is certified as a qualified HUBZone SBC.

■ 24. Revise § 126.403 to read as follows:

**§ 126.403 May SBA require additional information from a HUBZone SBC?**

(a) At the discretion of the AA/HUB, SBA has the right to require that a HUBZone SBC submit additional information as part of the certification process, or at any time thereafter. SBA may draw an adverse inference from the failure of a HUBZone SBC to cooperate with a program examination or provide requested information.

(b) In order to gauge the success of the program, SBA requires that a HUBZone SBC submit updated financial information and information relating to the number of its employees.

**§ 126.404 [Removed]**

■ 25. Remove § 126.404.

**§ 126.405 [Removed]**

■ 26. Remove § 126.405.

■ 27. Revise § 126.500 to read as follows:

**§ 126.500 How does a qualified HUBZone SBC maintain HUBZone certification?**

Any qualified HUBZone SBC seeking to remain on the List must recertify every three years to SBA that it remains a qualified HUBZone SBC (*See* § 126.501 for ongoing obligations). Concerns wishing to remain in the program without any interruption must recertify their continued eligibility to SBA within 30 calendar days after the third anniversary of their date of certification and each subsequent three-year period. Failure to do so will result in SBA initiating decertification proceedings. Once decertified, the concern then would have to submit a new application for certification pursuant to § 126.309. The recertification to SBA must be in writing and must represent that the circumstances relative to eligibility that existed on the date of certification showing on the List have not materially changed and that the concern meets any new eligibility requirements.

■ 28. Revise § 126.501 to read as follows:

**§ 126.501 What are a qualified HUBZone SBC's ongoing obligations to SBA?**

A qualified HUBZone SBC must immediately notify SBA of any material change that could affect its eligibility. Material change includes, but is not limited to, a change in the ownership, business structure, or principal office of the concern, or a failure to meet the 35% HUBZone residency requirement (*See* § 126.200 for certain eligibility requirements). The notification must be in writing, and must be sent or delivered to the AA/HUB to comply with this requirement. Failure of a qualified HUBZone SBC to notify SBA of such a material change may result in decertification and removal from the List pursuant to § 126.504. In addition, SBA may seek the imposition of penalties under § 126.900. If the concern later becomes eligible for the program, it must apply for certification pursuant to §§ 126.300 through 126.306.

**§ 126.503 [Redesignated as § 126.504]**

■ 29. Redesignate current § 126.503 as § 126.504.

■ 30. Add new § 126.503 to read as follows:

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

If SBA is unable to verify a qualified HUBZone SBC's eligibility or determines it is not eligible for the program, SBA may propose decertification of the concern.

(a) *Proposing Decertification.* Except as set forth in paragraph (c) of this section, the Deputy AA/HUB or designee will first notify the qualified HUBZone SBC in writing that SBA is proposing to decertify it, the reasons for the proposed de-certification, and that the SBC must rebut each of the reasons SBA sets forth. The qualified HUBZone SBC will have 30 calendar days from the date that it receives SBA's notification to respond, in writing, to the AA/HUB or designee.

(b) *SBA's Decision.* The AA/HUB or designee will consider the reasons for proposed decertification and the qualified HUBZone SBC's response before making a written decision whether to decertify. The AA/HUB may draw an adverse inference where a qualified HUBZone SBC fails to cooperate with SBA or provide the information requested. The AA/HUB's decision is the final agency decision.

(c) *Decertifying Pursuant to a Protest.* SBA may decertify a qualified HUBZone SBC and remove its name from the List without first proposing it for decertification if the AA/HUB upholds a protest pursuant to § 126.803 and the AA/HUB's decision is not overturned pursuant to § 126.805.

■ 31. Revise § 126.601 to read as follows:

**§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?**

(a) In order to submit an offer on a specific HUBZone contract, the qualified HUBZone SBC, together with its affiliates, must be small under the size standard corresponding to the NAICS code assigned to the contract.

(b) A firm must be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract.

(c) At the time a qualified HUBZone SBC submits its initial offer, and where applicable its final offer, on a specific HUBZone contract, it must certify to the CO that:

(1) It is a qualified HUBZone SBC that appears on SBA's List;

(2) There has been no material change in its circumstances since the date of certification shown on the List that could affect its HUBZone eligibility;

(3) It is small under the NAICS code assigned to the procurement; and

(4) If the qualified HUBZone SBC was certified pursuant to § 126.200(b), it must represent that it will ''attempt to maintain'' (*See* § 126.103) the required percentage of employees who are HUBZone residents during the performance of a HUBZone contract. If the qualified HUBZone SBC was certified pursuant to § 126.200(a), then it must represent that at least 35% of its employees engaged in performing the HUBZone contract reside within any Indian reservation governed by one or more of its Indian Tribal Government owners or reside within any HUBZone adjoining any such Indian reservation.

(d) If submitting an offer as a joint venture, each qualified HUBZone SBC must make the certifications in paragraph (c) of this section separately under its own name.

(e) A qualified HUBZone SBC may submit an offer on a HUBZone contract for supplies as a nonmanufacturer if it meets the requirements of the nonmanufacturer rule set forth at § 121.406(b)(1) of this chapter, and if the small manufacturer providing the end item for the contact is also a qualified HUBZone SBC.

(1) There are no waivers to the nonmanufacturer rule for HUBZone contracts.

(i) SBA will not issue contract-specific waivers as it does for small business set-aside and 8(a) contracts under § 121.406(b)(3)(i) of this chapter.

(ii) Class waivers issued under § 121.406(b)(3)(ii) of this chapter do not apply to HUBZone contracts.

(2) For HUBZone contracts at or below $25,000 in total value, a qualified

HUBZone SBC may supply the end item of any manufacturer, including a large business, so long as the product acquired is manufactured or produced in the United States.

■ 32. Revise § 126.602 to read as follows:

**§ 126.602 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?**

Qualified HUBZone SBCs eligible for the program pursuant to § 126.200(b) must ''attempt to maintain'' (*See* § 126.103) the required percentage of employees who reside in a HUBZone during the performance of any contract awarded to the concern on the basis of its HUBZone status. Qualified HUBZone SBCs eligible for the program pursuant to § 126.200(a) must have at least 35% of its employees engaged in performing a HUBZone contract residing within any Indian reservation governed by one or more of the concern's Indian Tribal Government owners, or residing within any HUBZone adjoining any such Indian reservation. To monitor compliance, SBA will conduct program examinations, pursuant to §§ 126.400 through 126.403, where appropriate.

■ 33. Amend § 126.603 to read as follows:

**§ 126.603 Does HUBZone certification guarantee receipt of HUBZone contracts?**

HUBZone certification does not guarantee that a qualified HUBZone SBC will receive HUBZone contracts. Qualified HUBZone SBCs should market their capabilities to appropriate contracting activities in order to increase the prospect that the contracting activity will adopt an acquisition strategy that includes HUBZone contract opportunities.

■ 34. Amend § 126.605 by removing paragraph (c) and revising paragraph (b) to read as follows:

**§ 126.605 What requirements are not available for HUBZone contracts?**

* * * * *

(b) An 8(a) participant currently is performing the requirement through the 8(a)BD program or SBA has accepted the requirement for award through the 8(a)BD program, unless SBA has consented to release the requirement from the 8(a)BD program.

■ 35. Revise § 126.606 to read as follows:

**§ 126.606 May a CO request that SBA release a requirement from the 8(a)BD program for award as a HUBZone contract?**

A CO may request that SBA release an 8(a) requirement for award as a HUBZone contract. However, SBA will grant its consent only where neither the incumbent nor any other 8(a) participant can perform the requirement. The request must be made to the AA/BD, who will make a determination after consulting with the AA/HUB.

■ 36. Revise § 126.608 to read as follows:

**§ 126.608 Are there HUBZone contract opportunities at or below the simplified acquisition threshold or micropurchase threshold?**

A CO may make a requirement available as a HUBZone set-aside if it is at or below the simplified acquisition threshold. In addition, a CO may award a requirement as a HUBZone contract to a qualified HUBZone SBC at or below the micropurchase threshold.

■ 37. Revise § 126.610 to read as follows:

**§ 126.610 May SBA appeal a contracting officer's decision not to reserve a procurement for award as a HUBZone contract?**

(a) The Administrator may appeal a CO's decision not to make a particular requirement available for award as a HUBZone contract to the Secretary of the department or head of the agency.

(b) An appeal is initiated by SBA's Procurement Center Representative to the CO, and may be in response to information supplied by the AA/HUB, his or her designee, or other interested parties.

■ 38. Revise § 126.611(c) to read as follows:

**§ 126.611 What is the process for such an appeal?**

* * * * *

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

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■ 39. Revise § 126.612 section heading and paragraphs (b)(1), (b)(2), and (e) to read as follows:

**§ 126.612 When may a CO award sole source contracts to qualified HUBZone SBCs?**

* * * * *

(b) * * *

(1) $5,000,000 for a requirement within the NAICS codes for manufacturing; or

(2) $3,000,000 for a requirement within all other NAICS codes;

* * * * *

(e) In the estimation of the CO, contract award can be made at a fair and reasonable price.

■ 40. Revise § 126.613 to read as follows:

**§ 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC in full and open competition?**

(a)(1) Where a CO will award a contract on the basis of full and open competition, the CO must deem the price offered by a qualified HUBZone SBC to be lower than the price offered by another offeror (other than another SBC) if the price offered by the qualified HUBZone SBC is not more than 10% higher than the price offered by the otherwise lowest, responsive, and responsible offeror. For a best value procurement, the CO must apply the 10% preference to the otherwise successful offer of a large business and then determine which offeror represents the best value to the Government, in accordance with the terms of the solicitation.

(2) Where, after considering the price evaluation adjustment, the price offered by a qualified HUBZone SBC is equal to the price offered by a large business (or, in a best value procurement, the total evaluation points received by a qualified HUBZone SBC is equal to the total evaluation points received by a large business), award shall be made to the qualified HUBZone SBC.

*Example 1:* In a full and open competition, a qualified HUBZone SBC submits an offer of $98, a non-HUBZone SBC submits an offer of $95, and a large business submits an offer of $93. The lowest, responsive, responsible offeror would be the large business. However, the CO must apply the HUBZone price evaluation preference. In this example, the qualified HUBZone SBC's offer is not more than 10% higher than the large business' offer and, consequently, the qualified HUBZone SBC displaces the large business as the lowest, responsive, and responsible offeror.

*Example 2:* In a full and open competition, a qualified HUBZone SBC submits an offer of $103, a non-HUBZone SBC submits an offer of $100, and a large business submits an offer of $93. The lowest, responsive, responsible offeror would be from the large business. The CO must then apply the HUBZone price evaluation preference. In this example, the qualified HUBZone SBC's offer is more than 10% higher than the large business' offer and, consequently, the qualified HUBZone SBC does not displace the large business as the lowest, responsive, and responsible offeror. In addition, the non-HUBZone SBC's offer at $100 does not displace the large business' offer because a price evaluation preference is not applied to change an offer and benefit a non-HUBZone SBC.

*Example 3:* In a full and open competition, a qualified HUBZone SBC submits an offer of $98 and a non-HUBZone SBC submits an offer of $93. The CO would not apply the price evaluation preference in this procurement because the lowest, responsive, responsible offeror is a SBC.

(b)(1) For purchases by the Secretary of Agriculture of agricultural commodities, the price evaluation preferences shall be:

(i) 10%, for the portion of a contract to be awarded that is not greater than 25% of the total volume being procured for each commodity in a single invitation for bids (IFB);

(ii) 5%, for the portion of a contract to be awarded that is greater than 25%, but not greater than 40%, of the total volume being procured for each commodity in a single IFB; and

(iii) Zero, for the portion of a contract to be awarded that is greater than 40% of the total volume being procured for each commodity in a single IFB.

(2) The 10% and 5% price evaluation preferences for agricultural commodities apply to all offers from qualified HUBZone SBCs up to the 25% and 40% volume limits specified in paragraph (b)(1) of this section. As such, more than one qualified HUBZone SBC may receive a price evaluation preference for any given commodity in a single IFB.

*Example:* There is an IFB for 100,000 pounds of wheat. Bid 1 (from a large business) is $1/pound for 100,000 pounds of wheat. Bid 2 (from a HUBZone SBC) is $1.05/pound for 20,000 pounds of wheat. Bid 3 (from a HUBZone SBC) is $1.04/pound for 20,000 pounds. Bid 3 receives a 10% price evaluation adjustment for 20,000 pounds, since 20,000 is less than 25% of 100,000 pounds. With the 10% price evaluation adjustment, Bid 1 changes from $20,000 for the first 20,000 pounds to $22,000. Bid 3's price of $20,800 ($1.04 × 20,000) is now lower than any other bid for 20,000 pounds. Thus, Bid 3 will be accepted for the full 20,000 pounds. Bid 2 receives a 10% price evaluation adjustment for that amount of its bid when added to the volume in Bid 3 that does not exceed 25% of the total volume being procured. Since 25,000 pounds is 25% of the total volume of wheat under the IFB, and Bid 3 totaled 20,000 pounds, a 10% price evaluation adjustment will be applied to the first 5,000 pounds of Bid 2. With the price evaluation adjustment, the price for Bid 1, as measured against Bid 2, for 5,000 pounds changes from $5,000 to $5,500. Bid 2's price of $5,250 ($1.05 × 5,000) is lower than Bid 1 for 5,000 pounds. Bid 2 will then receive a 5% price evaluation adjustment for the remaining 15,000 pounds, since the total volume of Bids 3 and 2 receiving an adjustment does not exceed 40% of the total volume of wheat under the IFB (*i.e.*, 40,000 pounds). With the 5% price evaluation adjustment, Bid 1's price for the next 15,000 pounds changes from $15,000 to $15,750. Bid 2's price for that 15,000 pounds is also $15,750 ($1.05 × 15,000). Because the evaluation price for Bid 2 is *not more than* 10% higher than the price offered by Bid 1, Bid 2's price is deemed to be lower than the price offered by Bid 1. Since the evaluation price for both the first 5,000 pounds (receiving a 10% price evaluation adjustment) and the remaining 15,000 pounds (receiving a 5% price evaluation adjustment) is less than Bid 1, Bid 2 will be accepted for the full 20,000 pounds.

(c) A contract awarded to a qualified HUBZone SBC under a preference described in paragraph (b) of this section shall not be counted toward the fulfillment of any requirement partially set aside for competition restricted to SBCs.

■ 41. Revise § 126.614 to read as follows:

**§ 126.614 How does a CO apply HUBZone and SDB price evaluation preferences in full and open competition?**

A CO may receive offers from both qualified HUBZone SBCs and SDB concerns, or from concerns that qualify as both, during a full and open competition. The CO must first apply the SDB price evaluation preference described in 10 U.S.C. 2323 to all appropriate offerors. The CO must then apply the HUBZone price evaluation preference as described in § 126.613 to all appropriate offerors. A concern that is both a qualified HUBZone SBC and an SDB must receive the benefit of both the HUBZone price evaluation preference described in § 126.613 and the SDB price evaluation preference described in 10 U.S.C. 2323 and the Federal Acquisition Streamlining Act, section 7102(a)(1)(B), Public Law 103–355, in a full and open competition.

*Example 1:* In a full and open competition, a qualified HUBZone SBC (but not an SDB) submits an offer of $102; an SDB (but not a qualified HUBZone SBC) submits an offer of $107; and a large business submits an offer of $93. The CO first applies the SDB price evaluation preference and adds 10% to the qualified HUBZone SBC's offer thereby making that offer $112.2, and to the large business's offer thereby making that offer $102.3. As a result, the large business is the lowest, responsive, and responsible offeror. Next, the CO applies the HUBZone preference and, since the qualified HUBZone SBC's offer is not more than 10% higher than the large business's offer, the CO must deem the price offered by the qualified HUBZone SBC to be lower than the price offered by the large business.

*Example 2:* A qualified HUBZone SBC (but not an SDB) submits an offer of $102; a qualified HUBZone SBC that is also an SDB submits an offer of $105; an SDB (but not a qualified HUBZone SBC) submits an offer of $107; a small business concern (but not a qualified HUBZone SBC or an SDB) submits an offer of $100; and a large business submits an offer of $93. The CO must first apply the SDB price evaluation preference to establish the lowest, responsive, and responsible offeror. Thus, the qualified HUBZone SBC's offer becomes $112.2; the qualified HUBZone SBC/SDB's offer remains $105; the SDB's offer remains $107; the small business concern's offer becomes $110; and the large business's offer becomes $102.3. As a result of the SDB price evaluation preference, the large business is the lowest, responsive, and responsible offeror. Next, the CO must apply the HUBZone price evaluation preference and if a qualified HUBZone SBC's price is not more than 10% higher than the large business's price, the CO must deem its price to be lower than the large business's price. In this example, the qualified HUBZone price of $112.2 is not more than 10% higher than the large business's price, however, the qualified HUBZone/SDB's price of $105 is also not more than 10% higher than the large business's price and is lower than the qualified HUBZone SBC's price. Consequently, the CO must deem the price of the qualified HUBZone/SDB as the lowest, responsive, and responsible offeror.

■ 42. Revise § 126.616 to read as follows:

**§ 126.616 What requirements must a joint venture satisfy to submit an offer on a HUBZone contract?**

A joint venture may submit an offer on a HUBZone contract if the joint venture meets all of the following requirements:

(a) *HUBZone joint venture.* A qualified HUBZone SBC may enter into a joint venture with another qualified HUBZone SBC for the purpose of submitting an offer for a HUBZone contract. The joint venture itself need not be certified as a qualified HUBZone SBC.

(b) *Size of concerns.* (1) A joint venture of two or more qualified HUBZone SBCs may submit an offer for a HUBZone contract so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract and the HUBZone joint venture in the aggregate may exceed the size standard provided the procurement meets the following conditions:

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

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

(2) For a procurement that does not exceed the applicable dollar amount specified in paragraph (b)(1) of this section, a joint venture of two or more qualified HUBZone SBCs may submit an offer for a HUBZone contract so long as the qualified HUBZone SBCs in the aggregate are small under the size standard corresponding to the NAICS code assigned to the contract.

(c) *Performance of work.* The aggregate of the qualified HUBZone SBCs to the joint venture, not each concern separately, must perform the applicable percentage of work required by 13 CFR 125.6.

■ 43. Add new § 126.617 to Subpart F to read as follows:

**§ 126.617 Who decides contract disputes arising between a qualified HUBZone SBC and a contracting activity after the award of a HUBZone contract?**

For purposes of the Disputes Clause of a specific HUBZone contract, the contracting activity will decide disputes arising between a qualified HUBZone SBC and the contracting activity.

■ 44. Add new § 126.618 to Subpart F to read as follows:

**§ 126.618 How does a HUBZone SBC's participation in a Mentor-Protégé relationship affect its participation in the HUBZone Program?**

(a) Qualified HUBZone SBCs may enter into Mentor-Protégé relationships in connection with other Federal programs, provided that such relationships do not conflict with the underlying HUBZone requirements.

(b) For purposes of determining whether an applicant to the HUBZone Program or a HUBZone SBC qualifies as small under part 121 of this chapter, SBA will not find affiliation between the applicant or qualified HUBZone SBC and the firm that is its mentor in a Federally-approved mentor-Protégé relationship (including a mentor that is other than small) on the basis of the mentor-Protégé agreement.

(c)(1) A qualified HUBZone SBC that is a prime contractor on a HUBZone contract may team with and subcontract work to its mentor.

(i) The HUBZone SBC must meet the applicable performance of work requirement set forth in § 125.6(b) of this chapter.

(ii) SBA may find affiliation between a prime HUBZone contractor and its mentor subcontractor where the mentor will perform primary and vital requirements of the contract. *See* § 121.103(f)(4) of this chapter.

(2) A qualified HUBZone SBC may not joint venture with its mentor on a HUBZone contract unless the mentor is also a qualified HUBZone SBC.

■ 45. Revise § 126.700 to read as follows:

**§ 126.700 What are the performance of work requirements for HUBZone contracts?**

(a) A qualified HUBZone SBC receiving a HUBZone contract for general construction must perform at least 50% of the contract either itself, or through subcontracts with other qualified HUBZone SBCs. A contracting officer may waive this requirement for a particular procurement after determining that at least two qualified HUBZone SBCs can not meet the requirement. Where a waiver is granted, the qualified HUBZone SBC must meet the performance of work requirements set forth in § 125.6(b) of this chapter.

(b) A qualified HUBZone SBC receiving a HUBZone contract for specialty construction must perform at least 50% of the contract either itself, or through subcontracts with other qualified HUBZone SBCs. A contracting officer may waive this requirement for a particular procurement after determining that it can not be met. Where a waiver is granted, the qualified HUBZone SBC must meet the performance of work requirements set forth in § 125.6(b) of this chapter.

(c) A prime contractor receiving an award as a qualified HUBZone SBC must meet the performance of work requirements set forth in § 125.6(b) of this chapter.

■ 46. Revise § 126.702 to read as follows:

**§ 126.702 How can the subcontracting percentage requirements be changed?**

SBA may change the required subcontracting percentage for a specific industry if the Administrator determines that such action is necessary to reflect conventional industry practices among SBCs that are below the numerical size standard for businesses in that industry group. The procedures for requesting changes in subcontracting percentages are set forth in § 125.6 of this chapter.

**§ 126.703 [Removed]**

■ 47. Remove § 126.703.

■ 48. Revise § 126.800(b) to read as follows:

**§ 126.800 Who may protest the status of a qualified HUBZone SBC?**

* * * * *

(b) *For all other procurements.* SBA, the CO, or any other interested party may protest the apparent successful offeror's qualified HUBZone SBC status.

■ 49. Revise § 126.801(a), (d)(1), (d)(2), and (e), redesignate current paragraph (d)(3) as (d)(4) and add new paragraph (d)(3), to read as follows:

**§ 126.801 How does one file a HUBZone status protest?**

(a) *General.* The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether a qualified HUBZone SBC is other than small for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the HUBZone SBC and whether the concern meets the HUBZone qualifying requirements set forth in § 126.200, SBA will process protests concurrently, under the procedures set forth in part 121 of this chapter and this part. SBA does not review issues concerning the administration of a HUBZone contract.

* * * * *

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

(2) For sealed bid acquisitions:

(i) An interested party must submit its protest by close of business on the fifth business day after bid opening, or

(ii) If the price evaluation preference was not applied at the time of bid opening, by close of business on the fifth business day from the date of identification of the apparent successful offeror.

(3) Any protest submitted after the time limits is untimely, unless it is from SBA or the CO.

* * * * *

(e) *Referral to SBA.* The CO must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The CO must send the protests, along with a referral letter, to AA/HUB, U.S. Small Business Administration, 409 3rd Street, SW, Washington, DC 20416. The CO's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the CO; the type of HUBZone contract at issue; if the procurement was conducted using full and open competition with a HUBZone price evaluation preference, and whether the protester's opportunity for award was affected by the preference; if the procurement was a HUBZone set-aside, whether the protester submitted an offer; whether the protested concern was the apparent successful offeror; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the CO; and whether a contract has been awarded.

■ 50. Revise § 126.803(d) to read as follows:

**§ 126.803 How will SBA process a HUBZone status protest?**

* * * * *

(d) *Effect of determination.* The determination is effective immediately and is final unless overturned on appeal by the ADA/GC&BD, pursuant to § 126.805. If SBA upholds the protest, SBA will decertify the concern.

■ 51. Revise paragraphs § 126.805(a), (b), and (h) to read as follows:

**§ 126.805 What are the procedures for appeals of HUBZone status determinations?**

(a) *Who may appeal.* The protested HUBZone SBC, the protestor, or the CO may file appeals of protest determinations with the ADA/GC&BD.

(b) *Timeliness of appeal.* The ADA/GC&BD must receive the appeal no later than five business days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the five-day period.

* * * * *

(h) *Decision.* The ADA/GC&BD will make a decision within five business days of receipt of the appeal, if practicable, and will base his or her decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the CO, the protestor, and the protested HUBZone SBC, consistent with law. The ADA/GC&BD's decision is the final agency decision.

■ 52. Revise paragraph § 126.900(b) to read as follows:

**§ 126.900 What penalties may be imposed under this part?**

* * * * *

(b) *Civil penalties.* Persons or concerns are subject to civil penalties under the False Claims Act, 31 U.S.C. 3729–3733, and under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812, and any other applicable laws.

Dated: May 14, 2004.

**Hector V. Barreto,**

*Administrator.*

[FR Doc. 04–11579 Filed 5–21–04; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 1

**[Docket No. 2002N–0276]**

**RIN 0910–AC40**

## Registration of Food Facilities Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002; Technical Amendment

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Interim final rule; technical amendment.

**SUMMARY:** The Food and Drug Administration (FDA) published an interim final rule in the **Federal Register** of October 10, 2003 (68 FR 58894). The interim final rule requires domestic and foreign facilities that manufacture/process, pack, or hold food for human or animal consumption in the United States, to register with FDA by December 12, 2003. Due to several errors in §§ 1.231 and 1.232 (21 CFR 1.231 and 1.232), the interim final rule contains some incorrect information. This document corrects those errors.

**DATES:** Effective May 24, 2004.

**FOR FURTHER INFORMATION CONTACT:** Melissa S. Scales, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1720.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of October 10, 2003 (68 FR 58894), FDA published an interim final rule on Registration of Food Facilities under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Since that time, FDA has discovered that the interim final rule contains several errors.

First, FDA is correcting the phone number to which registration form requests and other technical questions should be directed. The appropriate phone numbers are 1–800–216–7331 or 301–575–0156.

Second, § 1.232 of the interim final rule contains several editorial errors. Section 1.232(d) currently states that each foreign facility must submit ''the name, address, phone number, and emergency contact phone number of its U.S. agent (if there is no other emergency contact designated under § 1.233(c)).'' To improve the clarity of this provision, FDA is also revising § 1.232(d). The reference to § 1.233(c) in this sentence is incorrect; the proper reference is to § 1.233(e). Also, the reference in § 1.232(g) to § 1.233(e) is incorrect; the proper reference is to § 1.233(j).

### List of Subjects in 21 CFR Part 1

Cosmetics, Drugs, Exports, Food labeling, Imports, Labeling, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 1 is amended as follows:

## PART 1—GENERAL ENFORCEMENT REGULATIONS

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

**Authority:** 15 U.S.C. 1453, 1454, 1455; 19 U.S.C. 1490, 1491; 21 U.S.C. 321, 331, 334, 343, 350c, 350d, 352, 355, 360b, 362, 371, 374, 381, 382, 393; 42 U.S.C. 216, 241, 243, 262, 264.

■ 2. Section 1.231 is amended by revising paragraph (b)(1) to read as follows:

**§ 1.231 How and where do you register?**

* * * * *

(b) * * *

(1) You must register using Form 3537. You may obtain a copy of this form by writing to the U.S. Food and Drug Administration (HFS–681), 5600 Fishers Lane, Rockville, MD 20857 or by requesting a copy of this form by phone at 1–800–216–7331 or 301–575–0156.

* * * * *

■ 3. Section 1.232 is amended by revising paragraphs (d) and (g) to read as follows:

**§ 1.232 What information is required in the registration?**

* * * * *

(d) For a foreign facility, the name, address, phone number, and, if no emergency contact is designated under § 1.233(e), the emergency contact phone number of the foreign facility's U.S. agent;

* * * * *

(g) Applicable food product categories as identified in § 170.3 of this chapter, unless you check either ''most/all human food product categories,'' according to § 1.233(j), or ''none of the above mandatory categories'' because your facility manufactures/processes, packs, or holds a food that is not identified in § 170.3 of this chapter;

* * * * *

Dated: May 10, 2004.

**William K. Hubbard,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. 04–11598 Filed 5–21–04; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 172

**[Docket No. 1999F–0719]**

## Food Additives Permitted for Direct Addition to Food for Human Consumption; Olestra

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.