

SMALL BUSINESS ADMINISTRATION**13 CFR Parts 121, 124, 125, 126, and 127**

RIN 3245-AG20

Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation**AGENCY:** Small Business Administration.**ACTION:** Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations governing small business contracting procedures. Specifically, this rule amends SBA's regulations to establish policies and procedures for setting aside, partially setting aside and reserving Multiple Award Contracts for small business concerns. SBA is also establishing policies and procedures for setting aside task and delivery orders for small business concerns under Multiple Award Contracts. In addition, SBA is addressing how it will determine size under certain Agreements and when recertification of status will be required. Finally, SBA is establishing a new definition of consolidation and reorganizing its prime contracting assistance regulations.

DATES: This rule is effective on or before December 31, 2013.

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SUPPLEMENTARY INFORMATION:**I. Background**

On September 27, 2010, President Obama signed into law the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240, which was designed to protect the interests of small businesses and boost their opportunities in the Federal marketplace. The law not only makes significant improvements to the Small Business Act's procurement programs, it also creates new programs and new initiatives. This final rule addresses two important parts of the Jobs Act: (1) the application of the Small Business Administration's (SBA's) small business programs to multiple award contracts; and (2) limitations on contract consolidation and bundling.

Over the past 15 years, Federal agencies have increasingly used multiple award contracts—including the Multiple Award Schedules (MAS or Schedule) contracts managed by the General Services Administration (GSA),

Government-wide acquisition contracts (GWACs), multi-agency contracts, and agency-specific indefinite-delivery indefinite-quantity (IDIQ) contracts—to acquire a wide range of products and services. They have also consolidated acquisitions, often through the use of multiple award contracts, to eliminate duplicative efforts, save money by pooling their buying power, and reduce administrative costs. While these actions provide an important foundation for achieving greater fiscal responsibility, they have also created challenges for agencies seeking to take full advantage of the many benefits that small businesses provide to our taxpayers, including creativity, innovation, cost-effective technical expertise, job growth, and economic expansion, as well as maximizing awards to small businesses as both prime and subcontractors in fulfilling the Government's statutory small business goals. This rule seeks to ensure the increased consideration of small businesses in connection with the establishment and use of multiple award contracts and acquisitions that consolidate contracts.

A. Multiple Award Contracts, and the Use of Set-Asides, Partial Set-Asides and Reserves

Section 1331 of the Jobs Act recognizes the significant opportunities that exist to increase small business participation on multiple award contracts and the ability of set-asides—the most powerful small business contracting tool—to unlock these opportunities. Section 1331 requires the Administrator for the Office of Federal Procurement Policy (OFPP) and the Administrator of SBA, in consultation with the Administrator of GSA, to establish regulations under which Federal agencies may: (1) set aside part or parts of multiple award contracts for small business; (2) reserve one or more awards for small businesses on multiple award contracts that are established through full and open competition; and (3) set aside orders under multiple award contracts awarded pursuant to full and open competition that have not been set-aside or partially set-aside, nor include a reserve for small businesses. This applies to multiple award contracts issued and used by only one agency as well as to multiple award multi-agency contracts (MMACs), which can be used by more than one agency. Section 1331 of the Jobs Act does not revise or repeal the requirement for a contracting officer to set aside a contract for exclusive small business participation if the contracting officer determines that at

least two capable small businesses can meet the contract's requirements.

In November 2011, SBA and OFPP, in consultation with GSA, requested that the Department of Defense (DoD), GSA, and the National Aeronautics and Space Administration (NASA) publish an interim rule in order to provide agencies with initial guidance that they can use to take advantage of the authorities addressed in section 1331. 76 FR 68032 (Nov. 2, 2011). Among other things, the interim rule makes clear that set-asides may be used in connection with the placement of orders under multiple award contracts, notwithstanding the requirement to provide each contract holder a fair opportunity to be considered, and further makes clear that order set-asides may be used in connection with the placement of orders and blanket purchase agreements under Multiple Award Schedule contracts. While the interim rule amends existing solicitation provisions and contract clauses to provide notice of set-asides, it does not define terms, such as “reserve,” nor does it provide guidance for how to apply the various section 1331 authorities.

In May 2012, SBA issued a proposed rule to provide more specific guidance to ensure both that meaningful consideration of set-asides and reserves is given in connection with the award of multiple award contracts and task and delivery orders placed against them, and that these tools are used in a consistent manner across agencies. The proposed rule included the following:

- *Processes for using partial set-asides.* The proposed rule explained that partial set-asides may be used in connection with a multiple award contract when market research indicates that a total set-aside is not appropriate but the procurement can be broken up into smaller discrete portions or categories and two or more small business concerns, including 8(a) Business Development (BD) Participants, Historically Underutilized Business Zone (HUBZone) small business concerns, Service Disabled Veteran-Owned small business concerns (SDVO SBCs) and Women-Owned Small businesses concerns (WOSBs) or Economically Disadvantaged WOSBs are expected to submit an offer on the set-aside part(s) of the requirement at a fair market price. The proposed rule would allow for small businesses to submit an offer on the set-aside portion, non-set-aside portion, or both. This approach would replace the more cumbersome process currently found at Federal Acquisition Regulation (FAR) § 19.502-3 that requires small businesses to first submit responsive

offers on the non-set-aside portion in order to be considered for the set-aside portion. The FAR's partial set-aside process has proven to be unnecessarily complicated, which has resulted in its underutilization over time.

- *Processes for using contract reserves.* The proposed rule established a process for agencies to reserve awards for small businesses under a multiple award contract awarded pursuant to full and open competition if the requirement cannot be broken into discrete components to support a partial set-aside and market research shows that either: at least two small businesses could perform on a part of the contract, or at least one small business could perform all of the contract. The proposed rule provided that orders must be set-aside for small businesses under a reserved contract if the "rule of two" or any alternative set-aside requirements provided in SBA's small business programs have been met.

- *Processes for order set-asides.* The proposed rule laid out processes to permit agencies, when awarding multiple award contracts pursuant to full and open competition without either partial set-asides or reserves, to make commitments to set aside orders, or preserve the right to consider set-asides, when the "rule of two" is met. The contracting officer would state in the solicitation and resulting contract what process would be used—*e.g.*, automatic application of order set-asides or preservation of right to consider order set-asides. These alternatives would maximize agencies' flexibility in exercising their discretion to determine when and how best to use set-asides under multiple award contracts.

- *On Ramps/Off Ramps.* The proposed rule added new coverage to SBA's regulations addressing on ramps and off ramps—*i.e.*, mechanisms for allowing small businesses to enter and exit a contract during the performance period. Specifically, the proposed rule provided that for multiple award contracts that had been set-aside, if a small business becomes other than small (*e.g.*, due to a merger or acquisition), it must be "off ramped." With all other multiple award contracts, the decision regarding how to apply and use "on ramp/off-ramp" provisions would be at the discretion of the contracting agency.

- *Required Documentation.* The proposed rule would require that the contracting officer document the contract file to provide an explanation if the contracting officer decided *not* to use any of the section 1331 tools in connection with the award of a multiple award contract when at least one of

these authorities could have been used—*i.e.*, partial contract set-aside, contract reserve, or contract clause that commits the agency to setting aside orders, or preserving the right to set aside orders, when the "rule of two" is met. In addition, where an agency commits to using or preserving the right to use set-asides for orders under multiple award contracts that have not been set-aside, partially set-aside or reserved, the agency must document the file whenever a task order or delivery order is not set-aside for a small business.

- *Review by SBA's procurement center representatives (PCRs).* The proposed rule provided that SBA's PCR may review acquisitions involving the award of multiple award contracts or orders issued against such contracts that are not set aside for small businesses or where no awards have been reserved for small businesses, consistent with the PCRs' longstanding responsibility to assist small business concerns in obtaining a fair share of Federal Government contracting opportunities. At the same time, the proposed rule made clear that the ultimate decision of whether to apply a section 1331 tool to any given procurement action is at the discretion of the contracting officer.

- *Application of size standards to multiple award contracts.* Under SBA's current rules, a predominant North American Industry Classification System (NAICS) code and size standard is required for all contracts, as well as for all orders. SBA has seen some instances in which an agency assigns multiple NAICS codes to a multiple award contract and a business may be small for one or some of the NAICS codes, but not all, and the agency receives credit for an award to a small business even though the business is not small for the NAICS code assigned (or the NAICS code that should have been assigned) to a particular order. In response, the proposed rule provided several alternatives to ensure every contract and every order issued against a contract contains a NAICS code with a corresponding size standard and that coding for orders more accurately reflects the size of the business for the work being performed. For example, a contracting officer could divide a multiple award contract for divergent goods and services into discrete categories (which could be by contract line item numbers, special item numbers, functional areas, sectors, or any other means for identifying various parts of a requirement identified by the contracting officer), each of which is assigned a NAICS code with a corresponding size standard. Under this

option, the NAICS code and associated size standard assigned to the order must be pulled from the named NAICS code and size standard certified at the base contract level. Alternatively, the contracting officer could assign one NAICS code and corresponding size standard to the multiple award contract if all of the orders issued against that contract can also be classified under that same NAICS code and corresponding size standard.

- *Limitation on subcontracting.* When an order is set-aside—under a contract awarded pursuant to full and open competition or under a contract reserve, or is issued against a set-aside or partial-set aside multiple award contract, the contractor must comply with the limitation on subcontracting (and the non-manufacturer rule) for that order.

- *Agreements.* With respect to "Agreements" including Blanket Purchase Agreements (BPAs) (except for BPAs issued against a GSA Schedule contract), Basic Agreements, Basic Ordering Agreements, or any other Agreement for which a contracting officer sets aside or reserves awards to any type of small business, the proposed rule would require that a concern qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement. Because an Agreement is not a contract, the concern would also be required to qualify as small for each order issued pursuant to the Agreement in order to be considered small for the order and in order for an agency to receive small business goaling credit for the order.

Additional details regarding the proposed rule may be found at 77 FR 29130–29165 (May 16, 2012).

Based on the comments received on the proposed rule (which are discussed in greater detail below) and additional deliberations, SBA has adopted the proposed changes described above with some refinements, including the following:

- *Contract reserves.* The final rule amends the procedures related to reserves to clarify that contracting officers may, but are not required to, set forth targets in the contract showing the dollar value of awards to small businesses.

- *Limitations on subcontracting.* The final rule generally retains the requirement in the proposed rule stating that when an order is set aside under a contract awarded pursuant to full and open competition or a contract reserve, the contractor must comply with the limitations on subcontracting and non-manufacturer rule for that order. The final rule modifies the proposed rule's

handling for orders made under total or partial set-aside contracts. In these cases, the contractor must meet the limitations on subcontracting (as well as the nonmanufacturer rule) in each performance period of the contract—*e.g.*, the base term and each option period as defined in the contract's period of performance. However, the rule gives contracting officers the discretion, on a contract-by-contract basis, to require compliance at the order level.

- *PCRs*. SBA has clarified in the final rule that PCRs will only review multiple award contracts where the agency has not set-aside all or part of the acquisition or reserved the acquisition for small businesses.

- *On Ramps/Off Ramps*. In the final rule, SBA provided greater discretion to the contracting officers on the use of "on ramps/off ramps." Specifically, the final rule states that if a small business awarded a total or partial set-aside multiple award contract becomes other than small as a result of a merger or acquisition, it is up to the contracting officer to decide whether to terminate, or "off-ramp" the contractor. However, any awards issued to such a contractor will not count as an award to a small business.

- *PCRs*. SBA has clarified in the final rule that PCRs will only review multiple award contracts where the agency has not set-aside all or part of the acquisition or reserved the acquisition for small businesses.

Of particular note, the final rule, like the proposed rule, preserves the discretion that section 1331 vests in agencies to decide whether or not to use any of the enumerated set-aside and reserve tools. There is nothing in the rule that compels an agency to award a multiple award contract with a partial set-aside, contract reserve, or contract clause that commits (or preserves the right) to set aside orders when the "rule of two" is met. The rule only requires that agencies consider these tools before awarding the multiple award contract and, if they choose not to use any of them, document the rationale. Agencies have the discretion to forego using the section 1331 tools even if the requirements could be met; they simply need to explain how their planned action is consistent with the best interests of the agency and the agency's overarching responsibility to provide maximum practicable opportunities for small businesses (*e.g.*, agency met its small business goal in the last year; agency has a history of successfully awarding significant amounts of work to small businesses for the stated requirements under multiple award

contracts without set-asides and has received substantial value from being able to select from among small and other than small businesses as needs arise; agency can get better overall value by using the fair opportunity process without restriction for the stated requirements and has developed a strategy with the help of its Office of Small Disadvantaged Business Utilization (OSDBU) or Office of Small Business Programs (OSBP) that involves use of order set-asides whenever the "rule of two" is met on a number of multiple award contracts for other requirements). Once an agency has exercised its discretion to use one of the section 1331 tools, it must honor the commitment when placing orders. For example, if an agency inserts a clause in a multiple award contract awarded pursuant to full and open competition stating that it will set aside orders when the "rule of two" is met, it must do so. Alternatively, if the agency preserves the right to set aside orders, they are not required to set aside an order every time the "rule of two" can be met, but should document the file with an explanation when they do not do so.

In sum, this final rule will provide adequate tools and assurances that agencies will maximize small business participation on multiple award contracts without compromising the greater flexibility and leverage agencies have in conducting procurements through multiple award contracts.

SBA acknowledges that these changes will require a significant planning and implementation effort that will require changes to the central government procurement data systems, such as the Federal Procurement Data System (FPDS), and also each agency's system or systems. A change of this magnitude is estimated to take as many as five years to be fully implemented across the myriad of interdependent government systems. The funding for this initiative, both for the agencies and the Integrated Acquisition Environment (IAE), will need to be addressed across government. The Federal Acquisition Institute and the Defense Acquisition University will also have to revise curriculum and agencies will have to engage in an extensive retraining effort of their acquisition workforce.

B. Consolidation of Contract Requirements

In addition to the provisions relating to multiple award contracts, the Jobs Act amended the Small Business Act to include provisions relating to contract consolidation and bundling. Contract bundling and consolidation have been used in the Federal government for

many years now. The Jobs Act amended the Small Business Act to provide for certain policies to further highlight when agencies conduct contract bundling, including requiring that agencies publish on Web sites a list of bundled contracts and rationale for each such bundled contract. The Jobs Act also requires agencies that bundle requirements to include in their solicitation for multiple award contracts above the substantial bundling threshold a provision soliciting offers from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns. Finally, the Jobs Act also amended the Small Business Act to address consolidation. (Although contract consolidation was addressed in 10 U.S.C. 2383 for DoD, it had never before been addressed in the Small Business Act.)

The proposed rule built on much of DoD's existing guidance regarding consolidation and explained that an agency may not conduct an acquisition that is a consolidation of contract requirements unless the senior procurement executive (SPE) or chief acquisition officer (CAO): (1) justifies the consolidation by showing that the benefits of the consolidated acquisition substantially exceed the benefits of each possible alternative approach that would involve a lesser degree of consolidation and (2) identifies the negative impact on small businesses. The proposed rule also required SBA's PCR to work with the agency's small business specialist and OSDBU or OSBP to identify bundled or consolidated requirements and promote set-asides and reserves.

The final rule adopts the proposed rule with certain refinements (mostly technical in nature) as discussed in the section below.

II. Summary of and Response to Comments

On May 16, 2012, SBA published its proposed rule implementing the Jobs Act provisions described above (77 FR 29130). SBA received comments from over 25 respondents on this proposed rule. In addition, SBA requested and received comments from various Federal agencies. In total, SBA received over 120 comments on the various issues set forth in the proposed rule. Most of the comments supported SBA's rule and believed that it was a major step toward increasing Federal procurement opportunities for small businesses. The comments relating to specific sections of the rule are discussed in further detail below.

A. Small Business Teaming Arrangements (13 CFR 121.103 & 125.1)

In its proposed rule, SBA explained that it was proposing to amend its size regulations to address both bundling and contract consolidation as well as multiple award contracts. The Small Business Act, at 15 U.S.C. 644(e)(4), specifically states that for bundled contracts, a small business concern may submit an offer that provides for the use of a particular team of subcontractors for the performance of the contract and the agency must evaluate the offer in the same manner as other offers. Further, the Act states that if a small business concern forms a team for this purpose (*i.e.*, enters into a formal written Small Business Teaming Arrangement), this must not affect its status as a small business concern for any other purpose. The purpose of this section is to encourage small businesses to form teams to compete on larger contracts for which, by definition, a small business is not on its own able to compete. Therefore, SBA proposed to amend § 121.103 by creating an exception to affiliation for teams of small businesses for bundled contracts that are multiple award contracts.

SBA also proposed a definition for the term “Small Business Teaming Arrangement” in § 125.1. SBA proposed that a Small Business Teaming Arrangement is when two or more small businesses form a joint venture or enter into a written agreement where one small business acts as the prime and the other small business or small businesses are the subcontractors. The proposed rule required the agreement be in writing and submitted to the contracting officer as part of the proposal so that he/she understands that a small business team has submitted the proposal.

SBA received several comments in response to this proposal. Several of the respondents supported this exception to affiliation for teams on bundled contracts and thought that such teaming may be an incentive for small businesses.

However, one respondent thought that a small business team could subcontract out all the work to a large business on a small business reserve for a bundled contract and not perform any of the work itself. On a full and open contract, there is no limitation on the amount of work that a large business can subcontract. Consequently, there is no reason to limit a small business team's ability to subcontract. On the other hand, where a contract or order is set aside for small business, the general limitation on subcontracting rules would apply.

This same respondent thought SBA should limit the size of these teams by either number of combined employees or some other measurable criteria. This respondent did not believe it was fair for a small business to have a large business on its team. In response to this comment, SBA notes that the requirement for the teaming arrangement is that it must be comprised solely of small businesses. The proposed rule had explicitly stated that each team member must be small under the size standard corresponding to the NAICS code assigned to the contract. Therefore, SBA does not agree with this comment that a small business can have a large business on its team. In addition, SBA does not believe it is necessary to limit the team's size. These teams are forming to compete against large businesses on bundled (very large) contracts. Limiting a team's size could affect its ability to compete.

One respondent believed that SBA should allow the small business to team with Ability One (www.abilityone.org). As SBA explained in the proposed rule, however, the purpose of this rule is to encourage small businesses to team together to perform on a contract. SBA does not believe that allowing the small business to form a team with Ability One, which is not a small business, would promote or be beneficial to small businesses in Federal contracting.

One respondent believed that it was overly restrictive to require that the teaming arrangement set forth percentages of work that team members will perform and recommended that SBA allow team members to set forth the percentages *or other allocations* of work in the agreement. SBA agrees that small business team arrangements should have this type of flexibility and has amended the final rule accordingly.

Similarly, another respondent believed that small businesses should be allowed to modify the terms of the teaming arrangement. SBA agrees and notes that there is nothing in the rule that prevents a small business from doing so, as long as the team continues to meet the definition and requirements set forth in regulations, the modification is consistent with any terms in the solicitation or contract, and the contracting officer approves the modification.

One respondent believed that SBA's regulation only permitted a small business team to submit an offer on a bundled contract and that the regulations did not permit an individual small business that could perform the requirement itself, without the team, to submit an offer on a bundled contract. This is not the case; any business can

submit an offer in response to a bundled acquisition.

B. NAICS Codes (13 CFR 121.402)

In its proposed rule, SBA had proposed to amend § 121.402 to explain how small business size standards would be assigned to multiple award contracts and orders issued against such contracts. Specifically, the proposed rule provided that a contracting officer could: (1) assign one NAICS code and corresponding size standard to the multiple award contract if all of the orders issued against that contract can also be classified under that same NAICS code and corresponding size standard; or (2) divide a multiple award contract for divergent goods and services into discrete categories, each of which is assigned a NAICS code with a corresponding size standard. Thus, an agency could assign multiple NAICS codes to a multiple award contract only if the agency could divide the contract into different categories (*e.g.*, Contract Line Item Number (CLIN), Special Item Number (SIN), functional area (FA)) and then compete or award orders in that category. The NAICS code assigned to the order would be the same as the NAICS code assigned to the category (*e.g.*, CLIN) in the contract. Regardless of which method the contracting officer uses to assign a NAICS code, the proposed rule required that every contract and every order issued against a contract must contain a NAICS code with a corresponding size standard.

With respect to assigning a NAICS code to an order in cases like those involving a GSA Multiple Award Schedule contract, where an agency can issue an order against multiple categories on a multiple award contract, the contracting officer would be required to select the single NAICS code from the contract that best represents the principal nature of the acquisition for that order (*i.e.*, usually the component that accounts for the greatest percentage of contract value). That would mean if the agency is buying services and supplies with the order, but the greatest percentage of the order value is for services, the agency would assign a services NAICS code for the order. In such a case, a firm that qualifies as small for a supply/manufacturing contract but is other than small for a services contract could not be considered a small business for the order.

SBA notes that it had considered at least one alternative to this proposed rule where an order contains items/services from multiple NAICS codes and size standards assigned to a multiple award contract. Specifically, SBA

considered requiring that a business meet only the smallest size standard corresponding to any NAICS code of any of the combined items/services (line items) to be procured under the contract. Any order issued against the contract, regardless of the NAICS code assigned to the order, would then be considered an order placed with a small business. SBA specifically requested comments on this alternative.

SBA received several comments on these proposals. One respondent supported the approach set forth in the proposed rule, but disagreed strongly with the alternative considered. Two respondents believed it would be too burdensome on contracting officers to assign several NAICS codes to a solicitation and contract. These respondents thought that managing various NAICS codes and size standards under one contract would impose too much of an administrative burden and therefore, one of the respondents suggested having a maximum of three NAICS codes per multiple award contract. One respondent thought this proposal could negatively impact the construction industry because contracting officers do not have the expertise to create the discrete categories. Another respondent did not believe that a contracting officer could assign multiple NAICS codes to SINS (used on the GSA MAS contract) since SIN descriptions are broad and may cover a number of different services/product categories.

SBA believes that if the requirement can be broken down into discrete requirements, it would not be difficult to then assign a NAICS code to each discrete component. As discussed above, this is a necessary fix to a larger problem that is currently occurring on the schedule, where multiple NAICS codes are often assigned to a multiple award contract solicitation and a business concern may be small for one or some of the NAICS codes, but not all. In such a case, agencies are receiving small business credit on an order for an award to a "small business" where a firm qualifies as small for any NAICS code assigned to the contract, even though the business is not small for the NAICS code assigned or that should have been assigned to that particular order. SBA believes this should not occur. As a result, SBA believes that any potential or perceived burden created by assigning NAICS codes to discrete components of a contract is outweighed by the need to ensure that actual small businesses receive the awards so intended for them.

Several respondents stated that these changes should not be implemented

until the changes to FPDS are made. These respondents did not believe the current FPDS system supported the application of various NAICS codes to one contract and thought that perhaps the NAICS on the contract should be left blank and only NAICS codes for the orders should be assigned in the system. The General Services Administration has stated that there will need to be significant changes to the government-wide system that will take a substantial amount of time and funding. The Integrated Acquisition Environment is reviewing the required changes.

SBA also received comments concerning the assignment of NAICS codes to task or delivery orders. One respondent supported this proposal. Another respondent stated that we should not require NAICS codes for each task or delivery order because it will take too much time to execute, increase the amount of data for the government to manage and therefore increase the contracting officer's workload. SBA does not agree. According to SBA's current regulations, every contract and order for a long term contract is to be assigned a NAICS code with a corresponding size standard. Thus, this is not a substantive change. This provision of the rule merely clarifies that this requirement applies to all contracts and orders. Also, SBA does not believe it will take too much time or effort to select one of the NAICS codes already assigned to the contract and apply it to the order.

SBA has implemented the proposed rule as final. SBA has not implemented as final the alternative discussed in the preamble concerning NAICS codes. While the changes in NAICS code assignments will improve the reliability of the data, leading to greater transparency, SBA acknowledges that these changes will require a significant planning and implementation effort. Not only will the changes in NAICS code assignment levels impact central government procurement data systems, such as the FPDS, they will also impact systems at each agency—frequently multiple systems within a single agency. Identifying the impacts to systems and planning for this level of change is a significant undertaking that will require analyses of interdependencies to ensure efficient and cost-effective implementation. A change of this magnitude is estimated to take as many as five years to fully implement across the myriad of interdependent government systems. The Federal Acquisition Institute and the Defense Acquisition University will have to revise curriculum and agencies will have to engage in an extensive

retraining effort of their acquisition workforce. The funding for this initiative, both for the agencies and the IAE, will need to be addressed across government.

C. Recertification (13 CFR 121.404)

SBA also proposed to amend § 121.404, which addresses when the size status of a small business concern is determined. In order to provide certainty in the procurement process, SBA's regulations require that size will generally be determined at one specific point in time—the date a business concern self-certifies its size status as part of its initial offer including price. When a business represents that it is small, it is then considered small for the life of that specific contract. The concern is not required to again certify that it qualifies as small for that contract unless it has been awarded a long term contract (*i.e.*, the contract exceeds five years) or there is a merger, acquisition, or novation. If the contract is greater than five years, then the contractor must recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract or prior to exercising any option thereafter.

SBA proposed to clarify *only two* issues that have been raised over the past few years relating to this recertification rule, which has been in effect for several years. First, while the regulations clearly required a business that was acquired by another entity to recertify its size status after the acquisition, such a requirement was not as clear where a business that had previously certified itself to be small acquired another business. SBA proposed that re-certification should be required in either case since the acquisition may render the concern other than small for the particular contract. Second, SBA proposed to clarify that recertification is required when a participant in a joint venture is involved in a merger or acquisition, regardless of whether the participant is the acquired concern or the acquiring concern.

One respondent believed that a business should not have to recertify if it is acquired by or merges with another business because it will hurt the market value of the small business. This respondent believes that SBA should allow two small businesses to merge and should create a new size standard for those two merged businesses. Another respondent did not believe a business should have to recertify if it has been acquired because that company would have eventually grown to be large and been allowed to keep the contract and not recertify. This

respondent notes that a business is essentially penalized when it has been acquired but not when it grows “naturally”. One respondent believes that a large business should not be allowed to purchase a small business and keep the contract award. One respondent supported recertification if there is an acquisition or merger by one party to a joint venture, but questioned how the recertification rule would apply to a large business in a mentor-protégé relationship.

SBA believes that if a business is acquired or merges, or acquires another company, then it should recertify its size because when such events occur, there is an increased likelihood that the business is other than small. SBA does not believe it should create a new size standard for these types of acquisitions or mergers. If, after the acquisition, the business meets the size standard corresponding to the NAICS code assigned to the contract, then it is small. Finally, this could impact a mentor-protégé joint venture if the small business protégé becomes other than small. In that case, the mentor-protégé joint venture would not be considered small from that point forward or for that order.

In addition, SBA proposed that, in general, all of the same rules concerning when size is determined apply to multiple award contracts. For multiple award contracts, SBA will determine size at the time of initial offer submitted in response to the solicitation for the contract, based upon the size standard set forth in the solicitation for that contract. If the contract is divided into categories (CLINs, SINs, FAs, sectors or the equivalent), then each such category will have a NAICS code and corresponding size standard. A business will have to represent its size status for each of those NAICS codes at the time of initial offer for the multiple award contract. When the agency places an order against the contract, it must assign to the order a NAICS code with the corresponding size standard, using one of the NAICS codes assigned to the contract which best describes the principal purpose of the good or service being acquired under the order. If the business concern represented it was small for that NAICS code at the time of contract award, then it will be considered small for that order with the same NAICS code. SBA also stated in the proposed rule that a contracting officer may always, on his or her own initiative, require a business concern to recertify its size status at the time of each order, but the regulations do not require that in every instance.

SBA had also considered requiring businesses to recertify their size for long-term orders (*i.e.*, orders greater than five years). SBA was concerned that if an agency issues a long-term order just prior to a business recertifying its status as other-than-small on a multiple award contract, then the long-term order will be counted as an award to a small business for an indefinite amount of time. However, SBA was unsure how often this situation occurs and requested comments specifically on whether small businesses should be required to recertify their size and status for long-term orders.

SBA received several comments on these proposals. One respondent stated that contracting officers should not be permitted to request recertification on every order since it could create confusion; rather, the contracting officer should rely on the contractor's status at the time of submission of the offer for the Blanket Purchase Agreement (BPA) or contract. Another respondent thought that small businesses should be required to recertify their size only on long-term orders, but not on every order issued against a multiple award contract because it would be too cumbersome. In contrast, two respondents believed that businesses that are no longer small, for any reason, should be required to immediately recertify and any order should not be counted as an award to a small business.

In addition, three respondents believed that businesses should be required to recertify their size for each order and if the company is large, the order should not be counted as an award to a small business. These respondents stated that at this time, they do not believe agencies follow SBA's current recertification rule. They believed that requiring recertification for each order is not unduly burdensome.

One respondent represented a group of small businesses that had mixed opinions on this issue. Some of its members believe that size should be determined at the time of offer for each order and the contracting officer should be allowed to award the contract if the business is not small (but the award would not count toward the agency's small business goals). The respondent's other members believe that size should be determined at the time of submission of the offer for a contract, since that has always been SBA's policy, and SBA should continue to allow contracting officers the discretion to request recertification on the order.

SBA has reviewed all of these comments and believes that requiring a business to certify its size at the time of

offer for a multiple award contract, and not for each order issued against the contract, strikes the right balance and is consistent with SBA's current policy. If the contract were not a multiple award contract, then the business would represent its size at the time of offer and if it were small, it would be considered small for the life of the contract up to and including the fifth year. This policy should be the same for multiple award contracts. If a business is small for a size standard assigned to a NAICS code at the time of offer for a multiple award contract, then it is small for all orders with that same NAICS code and size standard for the life of the contract up to and including the fifth year of the multiple award contract. The exceptions for mergers, acquisitions, long-term contracts, and requests for recertification at the discretion of the contracting officer would apply for multiple award contracts as they do for all other contracts. Although some did not agree that contracting officers should have the discretion to request recertification at the order level, SBA notes that this is currently permitted in the regulations and has been upheld by SBA's Office of Hearings and Appeals (*see Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011), available at www.oha.gov (“[A]pplicable regulations permit a size protest to be filed either upon award of an ID/IQ base contract, or upon award of an individual task order if the procuring agency requires recertification of size status for that order.”). SBA does not have a basis to change this current policy. However, recertification for an order applies only to the size or socioeconomic status for the order, and does not apply to the firm's overall size or socioeconomic status for the underlying contract.

With respect to the respondents that believe agencies are not following these requirements, SBA notes that it works with the procuring agencies on these issues. SBA can initiate a size protest at any time, so information can be submitted to SBA for possible action (*see* 13 CFR 121.1004(b), 121.1001). In addition, SBA can notify procuring agencies of errors or anomalies in the data that procuring agencies submit to SBA for purposes of the goaling report.

One respondent believed that SBA deleted an important requirement concerning recertification—the requirement that where a concern grows to be other than small, the procuring agency may exercise the options and still count the award as an award to small business unless certain exceptions apply. SBA did not delete this sentence. Since we were not changing that

sentence, SBA did not need to put it in the **Federal Register** proposed rule. However, to avoid any confusion, SBA has added the sentence in the final rule below.

Finally, one respondent noted that SBA's regulations use the term "recertification" and the FAR uses the term "rerepresentation." The respondent believes the two should be consistent. SBA agrees that there appears to be a disconnect between the two terms as used in the FAR and SBA's regulations. SBA is looking into the issue and will work closely with the FAR Council to ensure that the intent of this final rule is clear.

D. Agreements (13 CFR 121.404)

SBA also proposed amending § 121.404 to address size status for "Agreements," such as Blanket Purchase Agreements (BPAs), Basic Agreements (BAs) or Basic Ordering Agreements (BOAs). These Agreements are not considered contracts under the FAR. *See* FAR 16.702(a)(2) ("A basic agreement is not a contract."). However, SBA has seen examples where agencies are setting aside such Agreements for small businesses. Consequently, SBA proposed an amendment to its regulations to address this practice. Specifically, SBA proposed that if such an Agreement is set-aside, SBA would determine size at the time of the response to the solicitation for the Agreement in order to ensure that only small businesses receive the Agreement. In addition, because such an Agreement is not considered a contract (acceptance and execution of the order is the contract action), the business concern must also qualify as small at the time it submits its offer or otherwise responds to a solicitation for each order under the Agreement in order for the procuring agency to count the award of the order as an award to small business for purposes of goaling. If agencies were permitted to set-aside BPAs, BOAs and other Agreements to small businesses without having to verify size, then it is not clear that small businesses would actually be receiving the awards and it is not clear that the small business would have to meet the Small Business Act's provisions concerning subcontracting limitations, for example, which we believe creates a loophole. The only exception SBA proposed for Agreements was for BPAs issued against the GSA MAS contracts. Because the business represents its status at the time of award of the GSA Schedule contract, SBA did not believe there is a need for the business to represent its size again for the BPA.

SBA received two comments on this section of the proposed rule. One respondent agreed that there has been an increase in the use of BPAs and that size should be determined at the time of solicitation for the BPA. However, the respondent disagreed with SBA's proposal to waive size certification requirements for contractors awarded a BPA against the GSA Schedule since such contracts have a term of at least five years. In contrast, another respondent believed that we should not require certification at the time of each order for a BPA because it seemed excessive and unnecessary considering the large volume of orders generated against a BPA. This respondent believed that SBA should require size certification at the time of proposal submission only.

SBA does not believe that size needs to be determined at the time of the BPA issued against a GSA Schedule because size has already been determined at the time of submission of the offer for the GSA Schedule contract. Requiring additional certifications other than those already required under this rule would be a burden. With respect to requiring certifications at the time of each order for a BPA that is not issued against a GSA Schedule, SBA agrees that it could be a burden and is unnecessary since the business will have been required to represent its size at the time of submission of the offer for the BPA. However, SBA notes that the procuring agency contracting officer may request a size certification at the time of submission of the offer for the order, if he or she so chooses, in accordance with SBA's current size regulations.

E. Bundling and Consolidation (13 CFR 125.2)

Part 125 of SBA's regulations addresses SBA's small business prime contracting program, subcontracting program, the Certificate of Competency (COC) program and the performance of work requirements (limitations on subcontracting). Encompassed in these regulations are issues such as bundling and Procurement Center Representative reviews. SBA proposed reorganizing this part and including a definitions section.

One important proposed definition related to contract consolidation. SBA had implemented the Jobs Act and defined that term to mean a solicitation for a single contract or a multiple award contract to satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate

contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds \$2 million (including options). SBA notes that the \$2 million price is a statutory threshold (*see* 15 U.S.C. 657q), not subject to amendment by the SBA. SBA received one comment supporting this definition.

In addition, SBA's proposed rule, at § 125.2(d), addressed contract consolidation and bundling and added new provisions set forth in the Jobs Act. Specifically, the proposed regulation explained that an agency may not conduct an acquisition that is a consolidation of contract requirements with a total value of more than \$2 million unless the SPE or CAO justifies the consolidation and identifies the negative impact on small businesses. The Jobs Act states that the agency can justify the action if the benefits of the consolidated acquisition substantially exceed the benefits of each possible alternative approach that would involve a lesser degree of consolidation. SBA received one comment supporting the clarification that agencies are responsible for determining the impact on small businesses when requirements have been consolidated.

In the proposed rule, SBA explained that the Jobs Act does not define the terms "substantially exceed" or "benefits" for contract consolidation. SBA had therefore proposed to use the definitions for those terms currently set forth in the bundling regulations in part 125. SBA received one comment on this proposal. According to this respondent, the definition of "substantially exceed" would provide an opportunity to consolidate or bundle even more contracts into a large, single bundled or consolidated acquisition whenever possible so that the cost savings will result in an amount determined to substantially exceed other alternatives. In response to this comment, SBA notes that the Jobs Act specifically permits agencies to justify consolidating or bundling contract requirements if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified (*see* 15 U.S.C. 657q(c)(2)(A)). Therefore, SBA has implemented the statutory provisions in the final rule.

In addition, SBA had proposed regulations to address the Jobs Act requirement that agencies post their rationale for any bundled requirement. SBA actually published a direct rule implementing this Jobs Act requirement at 76 FR 63542 (Oct. 13, 2011), which was effective November 28, 2011. According to the Jobs Act and

implementing rule, an agency must publish on its Web site a list and rationale for each bundled requirement on which the agency solicited offers or issued an award. With the proposed rule, however, SBA encouraged agencies to post the list and rationale prior to the time the agency solicits offers, rather than wait until awards have been made. In the proposed rule, SBA noted that DoD is already posting such a notice at least 30 days prior to issuance of a bundled solicitation. Specifically, DFARS 205.205-70, "Notification of bundling of DoD contracts," states that a contracting officer must publish in FedBizOpps.gov a notification of the intent to bundle all DoD funded acquisitions that involve bundling, including the measurably substantial benefits that are expected to be derived as a result of the bundling. The contracting officer must post the requirement at least 30 days prior to the release of the solicitation or 30 days before placing an order. 48 CFR 205.205-70. SBA believed that the DoD policy is a good one, and proposed to implement it Governmentwide.

SBA received two comments on this proposal. Two respondents supported the rule and believed that the bundling rationale should be posted prior to the release of the solicitation. One respondent did not believe this would be burdensome since the decision is already made and it would make the agencies consider the effects on small businesses more so than if they posted after award. The other respondent believed that posting prior to issuing the solicitation would allow small businesses the opportunity to review the rationale. SBA agrees with these comments and has adopted the proposed rule as final.

F. Procurement Center Representatives (PCRs) (13 CFR 125.2)

In the proposed rule, SBA addressed in part 125 the general objective of SBA's contracting programs, which is to assist small businesses in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales. Specifically, in proposed § 125.2(b), SBA set forth its responsibilities during the procuring agency's acquisition planning and stated that at the earliest stage possible, SBA's PCRs must work with the buying activity or agency by reviewing acquisitions and ensuring that the buying activity has complied with all applicable statutory and regulatory small business requirements. SBA's PCRs work with the procuring agency's small business specialist (SBS) and the procuring agency's OSDDBU or OSBP to

identify bundled or consolidated requirements, and promote set-asides and reserves.

SBA received one comment supporting this provision. SBA received two comments stating that the paragraph requiring that agencies ensure they are structuring procurement requirements to facilitate competition by and among small business concerns, including the various categories of small business concerns, could be interpreted to exclude Native-owned companies. SBA has amended the rule to clarify that when structuring procurement requirements, agencies must facilitate competition among small businesses, including small businesses owned and controlled by service-disabled veteran-owned small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals (*including those owned by ANCs, Indian Tribes and NHOs*), and small business concerns owned and controlled by women.

G. Section 1331 Authorities (13 CFR 125.1 & 125.2)

Most of the comments SBA received concerned the new authorities set forth in section 1331 of the Jobs Act. The respondents largely supported SBA's rule, but sought more clarification on certain issues. These are discussed by topic below.

1. Definition of Multiple Award Contract (13 CFR 125.1)

The section 1331 authorities apply to "multiple award contracts." As SBA stated in the preamble to the proposed rule, the FAR permits agencies to issue several awards to different offerors that submitted an acceptable response to the same solicitation for an IDIQ contract. See FAR subpart 16.5 (48 CFR subpart 16.5). In fact, the FAR states that the contracting officer must give preference to making "multiple awards" of IDIQ contracts under a single solicitation for the same or similar supplies or services to two or more offerors. FAR 16.504(c) (48 CFR 16.504(c)). Hence, these types of contracts are referred to as multiple award contracts. The FAR, however, does not define the term.

In order to provide clarity and certainty about the applicability of section 1331 to multiple award contracts, SBA proposed to define the term to mean: (1) a Multiple Award Schedule contract issued by GSA (*e.g.*, GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.*, Department of Veterans Affairs) as

described in FAR part 38 and subpart 8.4 (48 CFR part 38 and subpart 8.4); (2) a multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5 (48 CFR subpart 16.5), including Governmentwide acquisition contracts; and (3) any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

SBA's proposed rule expressly includes the GSA Multiple Award Schedules (MAS) Program within the scope of the definition of the term "multiple award contract." This was consistent with the interim FAR rule, which is co-signed by GSA, the manager of the MAS Program. 76 FR 68032. That interim rule amended FAR subpart 8.4 (48 CFR subpart 8.4) to make clear that the Jobs Act provisions apply to that part and states that order set-asides may be used in connection with the placement of orders and blanket purchase agreements under the MAS Program.

SBA received several comments on this proposed definition. All but one of these comments supported the definition proposed. Most of the respondents believed that including a specific reference to the GSA MAS Program provided clarity and was especially important in light of the increased use of such contract vehicles over the years. Only one respondent believed that SBA should delete all references to the GSA MAS program from its rule. This respondent stated that GSA should be charged with incorporating the principles of SBA's final rule into the GSA Schedule ordering procedures, to the maximum extent practicable.

SBA has reviewed these comments and believes it is necessary to include the GSA MAS program under the definition of multiple award contract. SBA set forth all of the reasons for this inclusion in the preamble to the proposed rule, including the fact that the statute defines the term multiple award contract to include *all* such contracts; there is no exception for the GSA MAS program. Further, since the Jobs Act amends the Small Business Act, we believe that SBA should address this issue in its rule. However, since GSA is charged with implementing the MAS Program, it will also need to implement regulations or guidance on this issue.

2. Types of Section 1331 Authorities (13 CFR 125.2)

In the proposed rule, SBA explained that there are three types of section 1331 authorities for multiple award contracts:

(1) set-asides for part or parts of a multiple award contract for small business; (2) reserves of one or more awards on multiple award contracts that are established through full and open competition; and (3) set-asides of orders against multiple award contracts awarded pursuant to full and open competition that have not been set-aside or partially set-aside, nor include a reserve for small businesses. The proposed rule defined the term “partial set-aside” and “reserve” and also set forth the mechanics of how such partial set-asides and reserves would work.

Two respondents suggested SBA clarify that this authority is discretionary. However, one of these respondents thought SBA should provide guidelines for the exercise of the discretion, otherwise it will differ from agency to agency and it will be too unpredictable for small and large businesses. Two respondents requested that SBA explain further the interplay of these discretionary authorities with the “rule of two” set-aside authority. Specifically, one respondent stated that SBA should clarify that when the “rule of two” is met for a solicitation that will result in multiple award contracts, the contracting officer must set it aside. One respondent stated that SBA should explain that *Delex Systems, Inc.*, B-400403, Oct. 8, 2008, 2008 CPD ¶ 181 (publicly available at www.gao.gov/decisions/bidpro/40043.htm) is still valid. In *Delex Systems, Inc.*, GAO held that the small business set-aside provisions of FAR 19.502-2(b) apply to competitions for task and delivery orders issued under multiple award contracts.

Both the proposed and final rule explain that if a contracting officer has conducted market research on an acquisition that will result in multiple award contracts, and has a reasonable expectation that at least two small businesses can provide the service or supplies and award will be made at fair market price, the contracting officer shall set-aside the contract for small business (or 8(a), HUBZone, SDVO SBC or WOSB/EDWOSB). Section 1331 did not change the mandatory requirement of a set-aside for a contract if the “rule of two” is met.

Therefore, section 1331 will come into play only on a multiple award acquisition if the “rule of two” cannot be determined through market research prior to the issuance of a solicitation. At that time, in order to ensure that small businesses have the maximum practicable opportunity to participate in contracting, the contracting officer has the discretion to utilize at least one of the three section 1331 authorities—

partial set-aside, reserve, or set-aside of orders under a full and openly competed contract. The FAR has already been amended, at FAR 19.502-4 (48 CFR 19.502-4), “Multiple-Award Contracts and Small Business Set-Asides,” to address this discretionary authority.

With respect to partial set-asides, currently the FAR requires the small business to submit an offer on the non-set-aside portion as well as the set-aside portion and requires the contracting officer to award the non-set-aside portion first and negotiate with eligible concerns on the set-aside portion only after all awards have been made on the non-set-aside portion. See FAR 19.502-3(c) (48 CFR 19.502-3(c)). SBA proposed that small businesses would not be required to submit offers for both the set-aside and non-set-aside portions of the solicitation and the contracting officer would no longer be required to conduct negotiations only with those offerors who have submitted responsive offers on the non-set-aside portion. The small business could submit an offer for both or either the set-aside and non-set-aside portions.

One respondent stated that it agreed with SBA’s new partial set-aside provisions. One respondent did not agree with allowing a “large” small business to submit an offer on both the set-aside and non-set-aside portion. This respondent believes this will hurt both small and large businesses. SBA does not agree with this comment. A small business should have the flexibility to submit an offer on either or both the set-aside or non-set-aside portion of the contract and to structure its offer(s) accordingly. SBA believes this provides the maximum practicable opportunity for small businesses to participate in Federal contracting.

Several respondents also thought SBA should further clarify the difference between a partial set-aside and a reserve and provide examples in the regulations and FAR, as well as examples in addition to the ones provided in the proposed rule, to explain the two authorities. SBA does not believe that the examples need to be placed in its regulations but intends to issue further guidance along with the final rule on this issue. SBA has provided the following discussion that explains these different types of authorities.

As stated in the proposed rule, a partial set-aside occurs when market research indicates that the “rule of two” (*i.e.*, the contracting officer has a reasonable expectation that it will receive at least two offers from small businesses and award can be made at fair market price) will not be met for the

entire contract’s requirement (*e.g.*, each CLIN or SIN). However, the procurement can be broken into smaller, discrete portions such that the “rule of two” can be met and applied for some of those discrete components or categories (*e.g.*, one or more CLINs). Under a partial set-aside, orders placed against the multiple award contract must be set-aside and competed amongst only small businesses for the portion of the contract that has been set-aside; however, the contracting officer may state in the solicitation that small businesses can also compete against other-than-small businesses for the non-set-aside portion if they also submitted an offer on the non-set-aside portion.

SBA notes that it considered an additional definition for a partial set-aside. SBA has seen instances where an agency issues one solicitation that is entirely set-aside for some or all of the various categories of small businesses. The solicitation is divided into categories where one is for HUBZone small businesses, another is for SDVO SBCs, etc. The agency then states an intention to issue orders against the various categories so that only the HUBZone small businesses would be competing against each other, etc. SBA believes that this could be another type of partial set-aside, where the multiple award contract is set-aside in part for the different small business programs. SBA requested comments on this alternative and did not receive any. At this time, SBA is not implementing this alternative as SBA believes that the intent of section 1331 was to afford contracting officers maximum discretion to select among all qualified SBA program participants and afford the agency the opportunity of using that contracting vehicle to help it meet its small business goals.

In comparison, SBA’s proposed rule explained that a reserve is separate and distinct from a partial set-aside and is used when an acquisition for a multiple award contract cannot be broken into discrete components or portions. A reserve will be conducted using full and open competition and:

- The contracting officer’s market research and recent past experience evidence that at least two small businesses could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete categories such that the solicitation could have been partially set-aside; or
- The contracting officer’s market research and recent past experience evidence that at least one small business can perform the entire requirement, but there is not a reasonable expectation of

receiving at least two offers from small business concerns at fair market price for all the work contemplated throughout the term of the contract; and

- The contracting officer states an intention in the solicitation to make one or more awards to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) for the portion of the requirements they can perform and compete any orders solely amongst the specified type of small business concern in accordance with that program's specific procedures. In the alternative, the contracting officer states an intention to make several awards to several different types of small businesses (e.g., one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and compete the orders solely amongst all of the small businesses for the portion of the requirements they can perform.

The purpose of the reserve is to acknowledge that requirements cannot always be identified specifically at the contract level, but can be at the order level. The reserve ensures that small businesses will receive a contract under a multiple award contract scenario. If small businesses are awarded a contract and are capable of performing at the order level, then the contracting officer can compete the order amongst only the small business or small businesses.

In addition to the above, in the proposed rule SBA had specifically requested comments on whether the procuring agency should state in the solicitation and contract where there is a reserve that a certain percentage of the orders must be awarded to small businesses (e.g., a minimum of 30% of the contract's total dollar value will be awarded to small businesses) and, if so, whether this option could be used in connection with not requiring the agency to compete orders solely amongst small businesses if the "rule of two" is met.

SBA received four comments on this issue. One respondent stated that there should be a minimum total dollar value to be awarded to small business on reserves, such as 30%. Another respondent believed that the solicitation should state what types of orders (nature of work, corresponding NAICS code, dollar value, location of work) may be set-aside for small businesses under a reserve because that would help both large and small businesses decide whether or not to submit an offer. Two respondents did not believe that SBA should require that the solicitation set forth a minimum dollar value to be awarded to small businesses because such a minimum would restrict a

contracting officer's flexibility in awarding orders with the best solution. One of these respondents thought that SBA could require the solicitation to set forth a target value to be awarded to small business, but that there should be no penalty or legally enforceable right or ground of protest if the target is not met.

SBA agrees with the comments that the contracting officer needs flexibility in awarding orders. Therefore, SBA has amended the rule to state that contracting officers may, but are not required to, set forth targets in the contract showing the dollar value of awards to small businesses.

In addition, one respondent believed that allowing reserves lets an agency circumvent the requirements for a partial set-aside and a large business would expend time and money in preparing proposals and not submit offers at the order level. This respondent did not believe reserves were "fair."

SBA notes that the Jobs Act specifically states that contracting officers may "reserve" awards in a multiple award contract acquisition for small businesses, and that a "reserve" is something in addition to a set-aside or a partial set-aside. SBA has defined the term reserve in a way that distinguishes this type of acquisition from a partial set-aside and provides the contracting officer with the flexibility he/she needs to structure the acquisition. Reserves are currently being used in the Federal marketplace. There has been no study to show that reserves prevent large businesses from competing, being awarded contracts or receiving orders. In fact, the purpose of the reserve is to ensure that a small business receives a fair share of an acquisition that is clearly too large for a set-aside. Therefore, we do not believe that reserves are "unfair" to large businesses.

In addition, SBA had proposed that a reserve can occur on a bundled contract where a Small Business Teaming Arrangement will submit an offer or receive a contract award. In that case, the individual members of the Small Business Teaming Arrangement will not be affiliated for the bundled contract, the small business subcontracting limitations or nonmanufacturer rule will apply (as applicable) to each order, and the cooperative efforts of the team members will be able to meet the subcontracting limitations requirement. Under such a reserve, the Small Business Teaming Arrangement would be competing on the orders with all awardees.

SBA received one comment supporting this type of reserve for a bundled acquisition. SBA has therefore implemented the proposed rule as final.

Finally, the contracting officer may decide to not use either a partial set-aside or a reserve. The contracting officer would have a third alternative to consider—the set-aside of orders issued against full and openly competed multiple award contracts. The contracting officer would need to state in the solicitation and contract, using FAR clause 52.219–13 (48 CFR 52.219–13), Notice of Set-Aside of Orders, that the procuring agency intends to set aside orders for small businesses. This third alternative obviously works only if there are small business awardees on the multiple award contract. This third alternative can be used to set aside orders against multiple award contracts such as GSA Schedule contracts.

The following provides a comparison of the three authorities to be considered during acquisition planning:

- *Partial Set-Aside*
 - The acquisition can be broken into smaller, discrete portions such as CLINs, SINs, FAs.
 - Market research shows that the "rule of two" will not be met for the entire acquisition.
 - The "rule of two" can be met for some of the smaller, discrete portions of the requirement.
 - The contracting officer will issue the solicitation as a small business partial set-aside, 8(a) partial set-aside, HUBZone partial set-aside, SDVO SBC partial set-aside, WOSB partial set-aside or EDWOSB partial set-aside.
 - The orders will be competed amongst only small businesses awarded the partial set-aside.
 - The small businesses may be able to compete against other-than-small businesses for the non-set-aside portion if they also submitted an offer on that portion.
- *Reserve*
 - The acquisition cannot be broken into smaller, discrete portions because the requirements cannot be clearly identified until the individual task orders are drafted.
 - Market research shows that two or more awards can be made to small businesses that can perform part of the requirement, but not all of it. The contracting officer will issue the solicitation as a small business reserve (and may state an intention to issue awards to several different types of small businesses under a small business reserve such as one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB); an 8(a) reserve; a HUBZone reserve; an SDVO SBC reserve; a WOSB reserve; or an EDWOSB reserve. If the "rule of two" is met on the order, the order is competed solely amongst the small businesses,

8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs, or EDWOSBs that received the reserve.

○ In the alternative, market research shows that at least one small business can perform the entire requirement, but there is no reasonable expectation of receiving at least two offers from small businesses at fair market price for the entire requirement. The contracting officer will issue the solicitation as a small business reserve; an 8(a) reserve; a HUBZone reserve; an SDVO SBC reserve; a WOSB reserve; or an EDWOSB reserve. The orders can be issued directly to the one small business awardee.

○ For bundled acquisitions that have been justified, market research shows that the “rule of two” will not be met for the entire requirement and that no small business can perform it because it is bundled. However, the contracting officer can issue the solicitation as a reserve for a Small Business Teaming Arrangement and an award can be made to a Small Business Teaming Arrangement. The orders are then competed amongst all awardees.

- *Set-Aside of Orders*

○ Market research shows that goods or services can be acquired by using an already established multiple award contract.

○ Market research shows that the “rule of two” will be met for the requirement of an individual order.

○ The contracting officer can set-aside the order for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs, or EDWOSBs in accordance with the program’s requirements (e.g., the offer and acceptance requirements for an 8(a) award).

SBA received one comment stating that because the use of these authorities is subject to broad interpretation, SBA should monitor how agencies use them with the Chief Acquisition Officers (CAO) Council. This respondent believes that monitoring this will let us determine whether additional regulatory or other guidance is needed. SBA agrees and intends to monitor the use of these authorities.

Finally, one respondent questioned whether FPDS will be updated to reflect the new procurement method of a reserve. SBA understands that the government is updating FPDS to reflect these new authorities, which are already implemented in the FAR.

Respondents have questioned whether orders may be set aside for certain socioeconomic categories under contracts that have already been set aside for a broader socioeconomic category—e.g., whether an order can be

set aside for HUBZone SBCs under a total small business set-aside multiple award contract. SBA believes that such an outcome would be unfair to the other small business concerns that competed for and obtained the contract. We also believe that the current differences in program requirements, such as the differences in limitations on subcontracting and the nonmanufacturer rule among the programs, make such an approach impractical. However, we note that SBA will be exploring the differences in performance requirements among the various programs when it implements Section 1651 of the National Defense Authorization Act of 2013.

3. Documentation

SBA explained in the proposed rule that when exercising his or her discretion to decide among the three section 1331 authorities, a contracting officer need not follow any particular order of precedence—that is, the contracting officer is *not* required to consider partial set-asides first, and then reserves and then the set-aside of orders. In other words, if an agency could do a partial set-aside or set-aside orders under a full and openly competed contract, there is no preference for doing the former over the latter. Rather, all three should be considered as part of acquisition planning, and if more than one option is available, the agency should give careful consideration to the option that works best for the agency.

As stated above, whether the agency ultimately uses any of the three authorities is left to the agency’s discretion. However, the agency is ultimately held accountable for taking all reasonable steps to meet its small business goals. In other words, when utilizing this discretion, the procuring agency and contracting officer must consider the statutory requirements and small business contracting goals that are designed to help ensure that small businesses receive a fair proportion of all awards. Consequently, SBA proposed that if the contracting officer decides not to partially set aside or reserve a multiple award contract, or set aside orders against a multiple award contract that is full and openly competed when it could have, then the contracting officer must explain the decision and document it in the contract file.

SBA explained that the requirement to document a decision not to utilize small businesses is already in the FAR and therefore not a new requirement. However, this change would result in new documentation requirements for orders under multiple award contracts.

Agencies must consider small business utilization during acquisition planning. Specifically, agencies must include in the acquisition plan all of the prospective sources of supplies or services that can meet the need, giving consideration to small business and addressing the extent and results of the market research. FAR 7.105(b)(1) (48 CFR 7.105(b)(1)). Further, the acquisition plan must explain how the proposed action benefits the Government, including when “[o]rdering through an indefinite delivery contract facilitates access to small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.” FAR 7.105(b)(5)(B)(ii) (48 CFR 7.105(b)(5)(B)(ii)).

Finally, agencies must document their decision to not proceed with a set-aside pursuant to FAR 19.501(c) (48 CFR 19.501(c)), which states that: “The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, service-disabled veteran-owned, or WOSB programs.”

SBA requested comments on this proposal and whether the contracting officer’s documentation for deciding not to partially set-aside, reserve contracts, or commit to setting aside or preserving the right to set aside orders on a multiple award contract should be approved at a higher level and/or posted online concurrent with the issuance of the solicitation. In addition, SBA requested comments on what the documentation in the file should demonstrate.

SBA received several comments on this issue. At least seven respondents supported the requirement that contracting officers document the decision not to use one of these authorities since it would demonstrate that meaningful consideration was given to using small businesses. Two respondents did not believe that the documentation should be based on whether the agency met its goals the previous year. Two respondents believed that agencies that did not meet their goals in the previous year should be held to higher standards or a more stringent documentation requirement. One respondent believed that SBA should check agency contract files for those agencies that fail to meet their goals and review the rationale.

One respondent believed that the documentation should either be coordinated with the agency's OSDBU or OSBP, while another stated it should not be approved at a higher level because the action to use these authorities is discretionary. In comparison, one respondent stated the head of the contracting agency should be required to approve the use of any "carve-outs" of multiple award contracts for small businesses. Two respondents believed that the documentation should be posted online and one disagreed with this proposal.

One respondent stated that while the requirement to document the decision may serve a purpose in promoting compliance, it acts as a limitation on what is supposed to be a discretionary tool. Therefore, this respondent believed that SBA should rely on current FAR provisions to address this. Similarly, one respondent thought the documentation could be too much of a burden on contracting officers.

Two respondents addressed what the documentation could state. One stated that high costs could be a sufficient rationale for not using the authority and another believed that whatever is sufficient for an acquisition plan would be fine.

The majority of respondents believe, and SBA agrees, that the contracting officer should be required to document the decision to not use one of the authorities and that this is not a burden on contracting officers since they are always required to consider the use of small businesses during acquisition planning. In addition, we believe that the rule needs to specifically address this fact in order to avoid any confusion on this issue. However, because this authority is discretionary, we do not believe that agencies should be required to post their rationale online, receive approval from higher authorities, or be held to a higher standard if they failed to meet their small business goals the prior year. We believe that requiring agencies to document the decision is sufficient to ensure that the contracting officer and program managers considered the use of small businesses.

H. GSA Multiple Award Schedule Program

In the proposed rule, SBA explained that when setting aside orders against a GSA MAS contract, certain regulations in FAR Part 8.4 (48 CFR part 8.4) must be followed. For example, the FAR states that agencies must survey at least three schedule contractors through the GSA Advantage! (<http://www.gsaadvantage.gov/>), or request quotations from at least three schedule

contractors for acquisitions valued below the simplified acquisition threshold. SBA does not believe that this requirement conflicts with the set-aside "rule of two" requirement; rather, the two requirements can be reconciled. SBA explained that the agency would first apply the "rule of two" to determine whether a set-aside is appropriate; however, the agency can request quotes from more than two small businesses. The same is true for acquisitions above the simplified acquisition threshold, where the FAR requires the ordering activity contracting officer to post a request for quotes (RFQ) on e-Buy (<http://www.gsa.gov/portal/content/104675>) or provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances. Agencies would not be required to document the circumstances for restricting consideration to less than three small business schedule contractors based on one of the reasons in FAR 8.405 (48 CFR 8.405).

One respondent stated that the "rule of two" does not apply first when considering an order using the GSA Schedule. This respondent believes that a contracting officer would first select the GSA Schedule that is applicable and then determine whether the "rule of two" could apply. This same respondent believes that the number of orders against the GSA Schedule will decrease as a result of this rule because companies that are now small under the GSA Schedule may not qualify as small under the rule.

SBA believes that contracting officers must give appropriate consideration to the utilization of small businesses during acquisition planning. This consideration could help determine which contracting vehicle or acquisition method to utilize. SBA does not believe that the number of orders against the GSA MAS program will decrease as a result of this rule. Rather, we believe it will increase. In fact, data shows that one in every five request for quotes issued in E-Buy are set-aside for small business and that since April 2011, the number of set-asides on the GSA Schedule have increased threefold. Agencies realize they are able to use the GSA MAS program for strategic sourcing purposes while at the same time setting aside orders for small business to maximize participation of small businesses in Federal contracting and assist in meeting the governmentwide small business goal.

Another respondent asked SBA to clarify whether a particular program's requirements apply to these section 1331 authorities, such as set-asides of

orders against the GSA Schedule and the requirement for an offer and acceptance in the 8(a) program. SBA had proposed that a task or delivery order contract, multiple award contract, or order issued against a multiple award contract that is set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for one or more 8(a) Program Participants must follow the established 8(a) procedures, which would include an offering to and acceptance by SBA of a requirement into the 8(a) program. This is consistent with the FAR's implementation of the Jobs Act, which states at sections 8.405-5 and 16.505 (48 CFR 8.405-5 and 16.505) that the specific program eligibility requirements identified in part 19 (48 CFR part 19) apply to set-asides of orders (as well as reserves and partial set-asides). SBA has adopted this proposed rule as final.

Another respondent asked SBA to clarify whether 8(a) joint ventures that become new legal entities are recognized by the GSA MAS program for 8(a) set-asides if only one party to the legal entity is a schedule contract holder. The answer is no, that entity would not be eligible for an award. This is pursuant to GSA's rules, not SBA's 8(a) rules. According to GSA's Web site, if there is a contractor teaming arrangement, then all parties to the team must be schedule contract holders. See <http://www.gsa.gov/portal/content/200553>. If the joint venture is a new legal entity, then that joint venture would need to be a schedule contract holder.

I. On Ramps/Off Ramps

SBA had also proposed that agencies consider the use of "on and off ramp" provisions when using set-asides, partial set-asides, or reserves for multiple award contracts. These provisions are used by some agencies as a means of ensuring that there are a sufficient number of small business contract awardees for a multiple award contract that was set-aside. Agencies use "on ramp" provisions to award new contracts to small businesses under a multiple award contract where some of the current awardees are no longer small as a result of a size recertification and there has been a decreased pool of small business awardees from which to purchase. Agencies use "off ramp" provisions to remove or terminate a contractor that has recertified its status as other-than-small and therefore is no longer eligible to receive new orders as a small business.

SBA received several comments on these provisions of the proposed rule.

One respondent stated that they supported the proposal because it ensures that contracting officers can respond to the changing market capabilities of small businesses. Two of the respondents believed that any small business that is no longer small and is “off ramped” should be allowed to be “on ramped” to the non-set-aside portion of the multiple award contract. Another two respondents believed that businesses that are no longer small should be allowed to retain the contract, but that any orders issued against the contract would not count toward the agency’s small business goal. One respondent questioned whether the rule allowed a small business to migrate from a set-aside to the unrestricted portion and stated that if that is the case, then large businesses would never get an award.

SBA believes that it would be a decision of the contracting agency as to whether and how a business would move to the non-set-aside portion of a multiple award contract if it did not initially submit an offer for the non-set-aside portion. We believe that if the contracting officer has an “on ramp” provision for the non-set-aside portion and the business submits an offer, it could receive the contract award.

In addition, SBA believes that if a business has recertified that it is other than small because there was a merger or acquisition or the contract exceeded five years, it is best left to the contracting agency to determine continuation of the contract. However, the agency cannot receive credit towards its goals for dollars or orders awarded to such a concern after recertification. A concern that has recertified as other than small will also not be eligible for orders that are set aside for small business concerns.

J. Limitations on Subcontracting/ Nonmanufacturer Rule

SBA had proposed amendments to the limitations on subcontracting requirements set forth in § 125.6 to explain that the period of performance for each order issued against a multiple award contract will be used to determine compliance with the limitations on subcontracting requirements. SBA proposed amendments to the regulations governing the 8(a) BD program (13 CFR 124.510), HUBZone program (13 CFR 126.601, 126.700), and SDVO program (13 CFR 125.15) to state the same.

In the proposed rule, SBA explained that it considered two options with respect to application of the limitations on subcontracting requirements for multiple award contracts: (1) on an

order by order basis; or (2) in the aggregate at any point in time over the course of the contract. SBA believed that requiring the limitations on subcontracting to apply on an order by order basis for a multiple award contract (if the contract is a set-aside, partial set-aside or reserve, or if the order was set-aside) is the best approach to allow contracting officers to monitor such compliance, but that allowing a small business to meet this requirement in the aggregate at certain points in time provides greater flexibility to both the small business and procuring activity.

SBA noted that for 8(a) contracts, it retained a provision that permits SBA to waive this requirement and allow an 8(a) BD Participant to meet the subcontracting limitations for the combined total of all orders issued to date at the end of any six-month period where the District Director makes a written determination that larger amounts of subcontracting are essential during certain stages of performance, provided that there are written assurances from both the 8(a) BD Participant and the procuring activity that the contract will ultimately comply with the requirements of this section. SBA retained this “waiver” in the proposed rule because it affords additional business development opportunities for 8(a) BD Participants. SBA welcomed comments on whether the “waiver” should remain solely for 8(a) contracts, or whether the requirements should be the same for all programs.

SBA received several comments on this proposal. Many of the commenters believed that the limitations on subcontracting and nonmanufacturer rule should not apply on an order-by-order basis and stated that there were alternatives, but did not provide any. These respondents did not believe the small business could perform these requirements for each order and that would limit competition on the task orders. Four of the respondents agreed that SBA should retain the waiver provision that is currently set forth in the rule for the 8(a) BD program, and that SBA should apply it to all of its programs. One respondent believed that SBA should analyze the results from the FAR interim rule, which requires a small business to meet the limitations on subcontracting on an order-by-order basis to determine its impact on small businesses and the GSA Schedule small business holders.

Based on the comments received, SBA has clarified that for total or partial set-aside contracts, the contractor must meet the limitations on subcontracting and nonmanufacturer rule in each

period of the contract—*i.e.*, the base term and each option period. However, the rule also gives contracting officers the discretion, on a contract-by-contract basis, to require compliance at the order level for these types of contracts. In addition, SBA has also clarified that where an order is set aside (under a full and open contract or reserve), the contractor must comply with the limitations on subcontracting and nonmanufacturer rule for that order.

SBA has retained a provision that permits the SBA to waive the order-by-order requirement and allow an 8(a) BD Participant to exceed the subcontracting limitations during a period of performance where the District Director makes a written determination that larger amounts of subcontracting are essential during certain stages of performance, provided that there are written assurances from both the 8(a) BD Participant and the procuring activity that the contract will ultimately comply with the limitations of subcontracting requirements prior to contract completion. SBA retained this provision only for the 8(a) program because it is a business development program and SBA conducts annual reviews on its Participants to assess compliance. SBA is not required to conduct such reviews for small businesses in its other programs.

In addition, and with respect to the limitations on subcontracting, SBA had proposed that a contracting officer must document a small business concern’s compliance with the performance of work requirements as part of the small business’s performance evaluation. This means that if the small business meets the applicable performance of work requirements, its efforts must be documented. This also means that if a small business fails to comply with the applicable limitations on subcontracting for the program, the contracting officer must document this failure. Contracting officers must use this information, which will be available to all contracting officers on the Past Performance Information Retrieval System (PPIRS), when evaluating compliance on future contract awards. The FAR requires agencies to post contractor evaluations in the PPIRS database, which now serves as the single authorized application to retrieve contractor performance information.

SBA explained in the proposed rule that if a small business fails to meet the subcontracting limitations requirement set forth in the contract, the contracting officer could take action to protect the government’s interests, such as a Cure Notice, Show Cause notice, Termination for Convenience, or in the extreme, may

terminate the contract for default pursuant to FAR 49.401 (48 CFR 49.401). SBA also stated that if the small business can establish or the contracting officer determines that the failure to perform is excusable (e.g., arose out of causes beyond the control and without the fault or negligence of the contractor), then a termination for default would be unnecessary.

SBA received two comments on this proposal. One respondent stated that if a contracting officer enters information into PPIRS about a small business's failure to meet the limitations on subcontracting or nonmanufacturer rule requirements, there should be a chance for the small business to respond or cure its failure. FAR 42.1503(b) (48 CFR 42.1503(b)) addresses past performance and explains that "[a]gency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information."

Another respondent stated that while it agrees the contracting officer should document the small business's failure to meet the limitations on subcontracting or nonmanufacturer rule requirements, the contracting officer should be required to explain whether there was a good faith effort by the business to meet the requirement. This respondent believed SBA should consider the good faith effort requirements set forth in FAR 19.705-7 (48 CFR 19.705-7), concerning subcontracting plans. SBA believes that whether the contractor makes a good faith effort should be part of the rebutting statements or additional information a small business provides to the contracting officer as a result of the past performance evaluation. Otherwise, the contracting officer would not know if the small business made good faith efforts.

K. Amendments to Parts 124, 125, 126 and 127

SBA had also proposed amendments to the various parts of its regulations that cover specific procurement programs: part 124 (8(a) BD Program); part 125 (SDVO SBC Program); part 126 (HUBZone Program); and part 127 (WOSB Program). For example, SBA had proposed amending each of these parts to include multiple award contracts as types of contracts available for set-asides, partial set-asides and reserves under these programs and to address status protests and appeals relating to multiple award contracts or orders issued against multiple award contracts, and the limitations on

subcontracting and nonmanufacturer rule requirements. SBA received only one comment supporting application of the "recertification rule" (the recertification requirements used to determine size) to its status programs. Therefore, SBA has adopted these proposed regulations as final in this rule, with one exception.

In the proposed rule, SBA proposed amending the WOSB Program regulations to address application of the contracting thresholds for that program with respect to multiple award contracts. SBA's proposed regulations explained that the thresholds for the WOSB Program would apply to each order issued against the multiple award contract, rather than the estimated contract value for the multiple award contract, and rather than the total value of all orders issued against the multiple award contract. However, recently, the President signed into law the National Defense Authorization Act for Fiscal Year 2013 (NDAA), Public Law 112-239. Section 1697 of the NDAA removed the statutory limitation on the dollar amount of a contract that women-owned small businesses can compete for under the WOSB Program. As a result, contracting officers may now set-aside contracts under the WOSB Program at any dollar level, as long as the other requirements for a set-aside under the program are met. Therefore, SBA has removed the limitations on the anticipated award price of a for a WOSB or EDWOSB set-aside.

L. Other

SBA also received several comments that it believes are outside the scope of this rulemaking. For example, SBA received one comment requesting that SBA report accurately the prime and subcontract amounts awarded to legitimate small business in its goaling report. SBA notes that agencies report each award over \$25,000 to FPDS, which is the government's official system for collecting, developing and disseminating procurement data. SBA then uses the information in FPDS to monitor agencies' achievements against goals throughout the year.

Another respondent stated that prime contractors and GSA Schedule holders do not meet the required subcontracting plans and there are no consequences for these large businesses. SBA notes that MAS contract holders that are large businesses are required to have a subcontracting plan. In fact, GSA has a Web page listing those awardees that are required to have such a plan in its Subcontracting Directory for Small Businesses, with contact information. See <http://www.gsa.gov/portal/service/>

SubContractDir/category/102831/hostUri/portal.

One respondent stated that SBA's regulations should state that AbilityOne has priority over small business set-asides. The AbilityOne Program is a statutory initiative that assists people who are blind or have other significant disabilities to find employment by working with nonprofit agencies that sell products and services to the Federal government. SBA believes that this issue is covered by the FAR and it is unnecessary to amend its regulations to address this policy.

Compliance with Executive Orders 12866, 12988, 13132, 13563, the Paperwork Reduction Act (44 U.S.C. Chapter 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

OMB has determined that this rule is a "significant" regulatory action under Executive Order 12866. SBA set forth its Regulatory Impact Analysis in the proposed rule and received one comment on it.

Regulatory Impact Analysis

1. Necessity of Regulation

This regulatory action implements the Small Business Jobs Act of 2010, Public Law 111-240. Specifically, it implements the following sections of the Jobs Act: section 1311 (definition of multiple award contract); section 1312 (publication on Web site a list and rationale for bundled contracts); section 1313 (consolidation of contracts definitions, policy, limitations on use, determination on necessary and justified); and section 1331 (reservation of multiple award contracts and orders against multiple award contracts for small businesses). Those sections of the Jobs Act address small business set-asides and reserves of multiple award contracts and orders issued pursuant to such contracts, as well as bundling and contract consolidation.

In addition, SBA's current regulations address bundling with respect to multiple award contracts as well as set-asides of its various programs, in general. However, the regulations did not provide the specific guidance needed by the contracting community, which is set forth in this rule.

One respondent believed that in some instances concerning the GSA Schedule, SBA should not implement the Jobs Act in its regulations, but should let GSA implement those provisions. SBA does not agree. The Jobs Act amended the Small Business Act. SBA is charged with implementing the provisions of the Small Business Act to promote small

business in government contracting. Therefore, SBA continues to believe that it is necessary and beneficial to address these recent amendments to the Small Business Act in its regulations to ensure consistency and clarity on these issues as they relate to small businesses. This is especially true since these provisions of the Jobs Act are creating new procurement mechanisms for contracting officers to use to award small businesses contracts and orders issued against contracts.

2. Alternative Approaches to Proposed Rule

SBA considered numerous alternatives when drafting this regulation, which had been set forth in the preamble. In addition, SBA reviewed all of the comments received on the proposed rule and considered any alternative set forth in a comment. These alternatives are discussed above, as well. For example, SBA considered various approaches with respect to application of its programs to multiple award contracts. As noted in the discussion above, the proposed and final rule states that agencies may partially set-aside or reserve awards of multiple award contracts (and set-aside orders issued against multiple award contracts) for small businesses even if the agency did not meet its prior fiscal year's small business goals or is currently not meeting its goals. SBA had explored other options when drafting this rule (e.g., should the contracting officer be required to partially set-aside a multiple award contract if the agency is failing to currently meet its goals) and considered the comments received.

Other examples of alternatives considered are discussed in the preamble above (e.g., teaming arrangements, application of NAICS codes).

3. What are the potential benefits and costs of this regulatory action?

The potential benefits of this rule are increasing small business participation in Federal prime contracts by limiting a procuring agency's use of bundled and consolidated contracts, ensuring small businesses have opportunities with respect to justified bundled and consolidated contracts, and ensuring that small businesses have greater access to multiple award contracts, including orders issued against such contracts. Currently, there is some guidance for agencies regarding application of the SBA's programs to multiple award contracts and orders issued against such contracts, which is set forth in the FAR. This final rule

provides needed clarification on this issue.

In addition, Congress established an annual goal that 23 percent of the dollar value of prime contracts awarded by the Federal government must be awarded to small business. In fiscal year (FY) 2011, small business received 21.64% of federal dollars; in FY 2010, small businesses received 22.65% of federal dollars; in FY 2009, small businesses received 21.89% of federal dollars; and in FY 2008, small businesses received 21.50% of federal dollars. Although it is getting close, the Federal government is still not meeting this statutory goal. One benefit of this rule is to provide needed mechanisms and guidance.

However, we do note that once implemented as final, it is likely that changes would need to be made to the System for Award Management (SAM). For example, modifications will need to be made to the Government's contract award database, the Federal Procurement Data System-NG (FPDS-NG). We understand that this process will take some time and the Government will incur a cost for these changes to the system.

Executive Order 13563

This executive order directs agencies to, among other things: (a) afford the public a meaningful opportunity to comment through the Internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an "open exchange" of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

Yes, the agency utilized the most recent data available on the Federal Procurement Data System (FYs 2011 and 2010 data).

2. Public participation: Did the agency: (a) afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an "open exchange" of information among government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The Jobs Act imposes a specific statutory time by which SBA must issue a final regulation. SBA and OFPP worked with DoD, GSA and NASA to implement these provisions relating to multiple award contracts in an interim final rule in the FAR. The FAR interim final rule provides some, but all the guidance needed by procuring officials on this issue. Therefore, to provide this needed guidance quickly, SBA issued the proposed rule with a 60-day comment period suggested by the executive order. SBA received numerous comments on the rule and made changes to this final rule in response to comments received.

In addition, we note that SBA had taken other steps to encourage public participation in its rulemaking. Specifically, SBA had conducted a "listening tour" to discuss the issues presented in the Jobs Act with interested members of the public. SBA toured 13 cities, transcribed the input from the public and requested and received written comments (comments could be submitted to SBA employees or to www.regulations.gov). See 76 FR 12395 (March 7, 2011); 76 FR 16703 (March 25, 2011); 76 FR 26948 (May 10, 2011). Further, we note that as the sole agency that is charged with representing the interests of small businesses, SBA receives calls every day from small business owners and procurement officials discussing the very issues set forth in the Jobs Act. SBA gave appropriate consideration to the various suggestions, recommendations and relevant information received from these sources when drafting the proposed and final rule.

The Jobs Act required SBA to consult with other agencies, such as GSA, when drafting the proposed regulations, and SBA has done so. SBA met with several procuring agencies to discuss the effects of the Jobs Act on each agency, and in particular its effects on the GSA Schedule. Specifically, the SBA met with agency Offices of Small Business

Programs, Chief Acquisition Officers, and Senior Procurement Executives. SBA also gathered input and ideas from various agencies on their procurement practices, which were used when drafting these rules. In addition, after the rule was issued as proposed, SBA again requested comments from the various agencies. SBA received comments from several agencies, which are discussed in the preamble above.

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

Yes, the agency considered several approaches, as discussed in the preamble. We believe the final rule provides flexibility to procuring agencies with respect to application of the SBA's programs to multiple award contracts.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden. As discussed above in Section IV of the preamble, the action does not have retroactive or preemptive effect.

Executive Order 13132

This final rule does not have federalism implications as defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

Paperwork Reduction Act (PRA), 44 U.S.C. Chapter 35

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this final rule will not impose any new reporting or recordkeeping requirements. Small business must already represent their status at the time of submission of initial offer. This final rule only seeks to clarify when such businesses represent their status for multiple award contracts and orders issued against multiple award contracts.

In addition, in accordance with FAR 4.1202, 52.204-8, 52.219-1 and 13 CFR part 121, concerns must submit paper or electronic representations or certifications in connection with prime contracts and subcontracts. The Jobs Act requires that each offeror or applicant for a Federal contract, subcontract, or grant shall contain a certification

concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant.

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

In the proposed rule, SBA stated that it believed the rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, SBA prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of this Rule. The IRFA examined the objectives and legal basis for the proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with the proposed rule; and whether there are any significant alternatives to the proposed rule. SBA did not receive any comments on the IRFA and therefore has adopted it as final for this rule.

1. What are the reasons for, and objectives of, this final rule?

This regulatory action implements several sections of the Small Business Jobs Act of 2010, Public Law 111-240. These sections of the Jobs Act address small business set-asides and reserves of multiple award contracts and orders issued pursuant to such contracts, as well as bundling and contract consolidation.

The objective of the rule is to implement these statutory changes by further defining terms and expanding on the concepts set forth in the Jobs Act.

2. What is the legal basis for this final rule?

Small Business Jobs Act of 2010, Public Law 111-240.

3. What is SBA's description and estimate of the number of small entities to which the rule will apply?

This rule addresses the application of all of SBA's small business programs on multiple award contracts and addresses the limitations on bundled and consolidated contracts. As of February 2011, there were over 348,000 small business registered in the Central Contractor Registration (CCR) with a Dynamic Small Business Search Supplemental (DSBS) page. (CCR and DSBS are now part of the System for Awards Management (SAM).) According to the FAR 4.11, prospective vendors must be registered in CCR prior to the award of a contract; basic agreement, basic ordering agreement, or blanket

purchase agreement. Therefore, CCR and DSBS (now SAM) are the primary databases used by Federal contracting officers when conducting market research and it shows the small businesses that will be affected by this rule, since those are the small businesses that conduct or would like to conduct business with the Federal Government.

SBA notes that not all of these small businesses have received multiple award contracts in the past and therefore, the number of affected small businesses could be less. However, SBA believes that this rule will open the door to many more Federal procurement opportunities to small businesses, including opportunities for orders against the GSA Schedule. Therefore, SBA believes that all small businesses could be impacted by this rule.

4. What are the projected reporting, recordkeeping, Paperwork Reduction Act and other compliance requirements?

The SBA does not believe that there are any new recordkeeping requirements. The rule does provide that businesses will need to report their size status at the time of contract award for a multiple award contract. As stated above in the discussion of the Paperwork Reduction Act, this is essentially the same reporting that is done now. The rule merely clarifies this requirement. However, the business will need to represent its status for a single or multiple NAICS codes in order to be deemed a small business for the orders issued against the multiple award contract and each order will contain a NAICS code.

In addition, the SBA has a new compliance requirement with respect to the limitations on subcontracting. Under the limitations on subcontracting, a small business must perform a certain percentage of the work itself and it limited as to how much work it can subcontract. The limitations on subcontracting will apply to each performance period under the contractor to specific orders, depending on either the type of multiple award contract awarded or the contracting officer's determination.

5. What relevant Federal rules may duplicate, overlap, or conflict with this rule?

This final rule may conflict with current FAR and General Services Administration regulations. In fact, one respondent commented that SBA should provide a detailed analysis as to how the SBA and FAR rules differ. SBA believes that as a result of this final rule, the FAR will need to be amended. SBA

consulted with the FAR Councils and GSA prior to issuing the proposed and final rule. However, as noted in the discussion in the preamble, SBA attempted to draft the regulations to avoid unnecessary conflicts. For example, the FAR and GSA define the term “teaming” to mean something in particular. Rather than define the term “teaming” to conflict with those rules, SBA defined the term “Small Business Teaming Arrangement.”

6. What significant alternatives did SBA consider that accomplish the stated objectives and minimize any significant economic impact on small entities?

One of the major parts of this rule is size status for multiple award contracts and orders issued against multiple award contracts, including the GSA Schedule. SBA requires that the small business represent its status at the time of submission of initial offer for the multiple award contract and that representation would generally be good for up to five years, including for all orders issued against that multiple award contract with the same or higher size standard. SBA had considered both in the proposed and final rule in response to comments received that a business concern represent its size status at the time of submission of initial offer and on each and every order issued against a multiple award contract. SBA believes this would be too much of a burden on small businesses. SBA believes its final rule imposes less of a burden yet still ensures that an agency’s goals truly reflect awards to small businesses.

The other alternatives are discussed in the preamble as well as the Regulatory Impact Analysis.

List of Subjects

13 CFR Part 121

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

13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Small business, Technical assistance.

13 CFR Part 125

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

13 CFR Part 126

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

13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, and 127 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 638, 662, and 694a(9).

- 2. Amend § 121.103 by:
 - a. Adding new paragraph (b)(9);
 - b. Revising paragraph (h)(3)(i)(A); and
 - c. Revising paragraph (h)(3)(i)(B) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(9) In the case of a solicitation of offers for a bundled contract with a reserve (as defined in § 125.1), a small business concern prime contractor may enter into a Small Business Teaming Arrangement with one or more other small business concerns and submit an offer as a small business for a Federal procurement without regard to affiliation, so long as each team member is small under the size standard corresponding to the NAICS code assigned to the contract and there is a written, signed teaming or joint venture agreement amongst the small business concerns. See § 125.1 for the definition of Small Business Teaming Arrangement. With respect to Small Business Teaming Arrangements that are joint ventures, see § 121.103(h) for specific requirements and limitations.

* * * * *

(h) * * *

(3) * * *

(i) * * *

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

(B) The procurement is other than bundled or consolidated requirement within the meaning of § 125.2(d) of this chapter, and:

* * * * *

- 3. Amend § 121.402 by:
 - a. Revising paragraph (b);

- b. Redesignating paragraphs (c), (d) and (e) as (d), (e), and (f), respectively; and
- c. Adding a new paragraph (c) to read as follows:

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

* * * * *

(b) The procuring agency contracting officer, or authorized representative, designates the proper NAICS code and corresponding size standard in a solicitation, selecting the single NAICS code which best describes the principal purpose of the product or service being acquired. Except for multiple award contracts as set forth in paragraph (c) of this section, every solicitation, including a request for quotations, must contain only one NAICS code and only one corresponding size standard.

(1) Primary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased.

(2) A procurement is usually classified according to the component which accounts for the greatest percentage of contract value. Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code. A concern that submits an offer or quote for a contract, order, or subcontract where the NAICS code assigned to the contract, order, or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of § 121.406(b).

(c) *Multiple Award Contracts* (see definition at § 125.1).

(1) For a Multiple Award Contract, the contracting officer must:

- (i) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract. If a service NAICS code has been assigned to the Multiple Award Contract, then a service NAICS code must be assigned to the solicitation for the order, including an order for services that also requires some supplies; or

(ii) Divide the solicitation into discrete categories (such as Contract Line Item Numbers (CLINs), Special Item Numbers (SINs), Sectors, Functional Areas (FAs), or the equivalent), and assign each discrete category the single NAICS code and corresponding size standard that best describes the principal purpose of the goods or services to be acquired under that category (CLIN, SIN, Sector, FA or equivalent) as set forth in paragraph (b) of this section. A concern must meet the applicable size standard for each category (CLIN, SIN, Sector, FA or equivalent) for which it seeks an award as a small business concern.

(2)(i) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. When placing an order under a Multiple Award Contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principle purpose of each order. In cases like the GSA Schedule, where an agency can issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition.

(ii) With respect to an order issued against a multiple award contract, an agency will receive small business credit for goaling only if the business concern awarded the order has represented its status as small for the underlying multiple award contract for the same NAICS code as that assigned to the order, provided recertification has not been required or occurred for the contract or order.

* * * * *

■ 4. Amend § 121.404 by:

- a. Revising the heading;
- b. Revising paragraph (a);
- c. Amending paragraph (b) by removing “date of certification by SBA” and adding in its place “date the Director of the Division of Program Certification and Eligibility or the Associate Administrator for Business Development requests a formal size determination in connection with a concern that is otherwise eligible for program certification.”
- d. Revising paragraph (f);
- e. Revising the introductory text to paragraph (g);
- f. Amending paragraph (g)(2) by redesignating it as paragraph (g)(2)(i) and adding a new paragraph (g)(2)(ii);
- g. Revising the first sentence in paragraph (g)(3) introductory text;
- h. Revising the second sentence in paragraph (g)(3)(iv);
- i. Removing paragraph (g)(3)(vi);

■ j. Redesignating paragraph (g)(4) as (g)(5); and

■ k. Adding a new paragraph (g)(4), to read as follows:

§ 121.404 When is the size status of a business concern determined?

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation), which includes price.

(1) With respect to Multiple Award Contracts and orders issued against a Multiple Award Contract:

(i) SBA determines size at the time of initial offer (or other formal response to a solicitation), which includes price, for a Multiple Award Contract based upon the size standard set forth in the solicitation for the Multiple Award Contract if a single NAICS code is assigned as set forth in § 121.402(c)(i)(A). If a business is small at the time of offer for the Multiple Award Contract, it is small for each order issued against the contract, unless a contracting officer requests a new size certification in connection with a specific order.

(ii) SBA determines size at the time of initial offer (or other formal response to a solicitation), which includes price, for a Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.*, CLIN, SIN, Sector, FA or equivalent) for which a business concern submits an offer and represents it is small for the Multiple Award Contract as set forth in § 121.402(c)(i)(B). If the business concern submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent). If a business is small at the time of offer for a discrete category on the Multiple Award Contract, it is small for each order issued against that category with the same NAICS code and corresponding size standard, unless a contracting officer requests a new size certification in connection with a specific order.

(iii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for an order issued against a Multiple Award Contract if the contracting officer requests a new size certification for the order.

(2) With respect to “Agreements” including Blanket Purchase Agreements (BPAs) (except for BPAs issued against a GSA Schedule Contract), Basic Agreements, Basic Ordering

Agreements, or any other Agreement that a contracting officer sets aside or reserves awards to any type of small business, a concern must qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement. Because an Agreement is not a contract, the concern must also qualify as small for each order issued pursuant to the Agreement in order to be considered small for the order and for an agency to receive small business goaling credit for the order.

* * * * *

(f) For purposes of architect-engineering or two-step sealed bidding procurements, a concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may or may not include price).

(g) A concern that represents itself as a small business and qualifies as small at the time of its initial offer (or other formal response to a solicitation), which includes price, is considered to be a small business throughout the life of that contract. This means that if a business concern is small at the time of initial offer for a Multiple Award Contract (*see* § 121.1042(c) for designation of NAICS codes on a Multiple Award Contract), then it will be considered small for each order issued against the contract with the same NAICS code and size standard, unless a contracting officer requests a new size certification in connection with a specific order. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business. However, the following exceptions apply:

* * * * *

(2)(i) * * *

(ii) Recertification is required:

(A) When a concern acquires or is acquired by another concern;

(B) From both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and

(C) From a joint venture when an acquired concern, acquiring concern, or merged concern is a participant in a joint venture that has been awarded a contract or order as a small business.

* * * * *

(3) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no

more than 120 days prior to exercising any option thereafter. * * *

* * * * *

(iv) * * * The NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract and must be assigned in accordance with §§ 121.402(b) and (c). * * *

* * * * *

(4) The requirements in paragraphs (g)(1), (2), and (3) of this section apply to Multiple Award Contracts. However, if the Multiple Award Contract was set-aside for small businesses, partially set-aside for small businesses, or reserved for small business, then in the case of a contract novation, or merger or acquisition where no novation is required, where the resulting contractor is now other than small, the agency cannot count any new orders issued pursuant to the contract, from that point forward, towards its small business goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, and ED/WOSBs.

* * * * *

■ 5. Amend § 121.406 by revising paragraphs (a) introductory text and paragraph (d) to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB or EDWOSB set-aside, or 8(a) contract?

(a) *General.* In order to qualify as a small business concern for a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB or EDWOSB set-aside, 8(a) contract, partial set-aside, reserve, or set-aside of orders against a multiple award contract to provide manufactured products or other supply items, an offeror must either:

* * * * *

(d) *Simplified Acquisition Procedures and Orders Set-Aside Against Full and Openly Competed Multiple Award Contracts.* Where the procurement of supplies or manufactured items is processed under Simplified Acquisition Procedures as defined in FAR 13.101 (48 CFR 13.101), or an order for supplies or manufactured items is set-aside against a full and openly competed multiple award contract, and the anticipated cost will not exceed \$25,000, the offeror does not have to supply the end product of a small business concern. However, the product acquired must be manufactured or

produced in the United States, and the small business offeror must meet the requirements of paragraph (b)(1)(i) through (b)(1)(iv) of this section. The offeror need not itself be the manufacturer of any of the items acquired.

* * * * *

■ 6. Amend § 121.1001 by:
 ■ a. Revising paragraph (a)(1) introductory text to read as follows; and
 ■ b. Amending paragraph (b)(9) by removing the phrase “Central Contractor Registration database” and adding in its place “System for Award Management (SAM) (or any successor system)”.

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

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

* * * * *

■ 7. Amend § 121.1004 by revising paragraphs (a)(1), (a)(2) and (a)(3) introductory text to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA—*(1) *Sealed bids or sales (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid opening for

- (i) The contract; or
- (ii) An order issued against a Multiple Award Contract if the contracting officer requested a new size certification in connection with that order.

(2) *Negotiated procurement (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee for

- (i) The contract; or
- (ii) An order issued against a Multiple Award Contract if the contracting officer requested a new size certification in connection with that order.

(3) *Long-Term Contracts.* For contracts with durations greater than five years (including options), including all existing long-term contracts, Multi-agency contracts, Governmentwide Acquisition Contracts and Multiple Award Contracts:

* * * * *

■ 8. Amend § 121.1103 by:
 ■ a. Revising paragraph (a); and
 ■ b. Amending paragraph (b)(1) by removing the phrase “business days” and adding in its place “calendar days”.

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

(a)(1) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. An interested party would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenged procurement, regardless of whether the procurement is reserved for small businesses or unrestricted. The only exception is that, for a sole source contract reserved under SBA’s 8(a) Business Development program (*see* part 124 of this chapter), only SBA’s Associate Administrator for Business Development may appeal the NAICS code designation.

(2) A NAICS code appeal may include an appeal involving the applicable size standard, such as where more than one size standard corresponds to the selected NAICS code, or a question relating to the size standard in effect at the time the solicitation was issued or amended.

* * * * *

§ 121.1204 [Amended]

■ 9. Amend § 121.1204(b)(iv) by removing “For contracts” and adding in its place “For contracts or orders”.

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

■ 10. Revise the authority citation for 13 CFR part 124 to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 11. Amend § 124.501 by adding a sentence after the first sentence in paragraph (a) to read as follows:

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

(a) * * * This includes set-asides, partial set-asides and reserves of

Multiple Award Contracts and set-asides of orders issued against Multiple Award Contracts. * * *

* * * * *

- 12. Amend § 124.503 by:
 - a. Revising the heading in paragraph (h);
 - b. Revising paragraphs (h)(1);
 - c. Revising the heading and first sentence in paragraph (h)(2); and
 - d. Adding new paragraph (h)(3); and
 - e. Amending paragraph (j)(2)(i) by removing the phrase “ORCA” and adding in its place “System for Award Management (SAM) (or any successor system)”:

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

* * * * *

(h) *Task or Delivery Order Contracts, including Multiple Award Contracts.*

(1) *Contracts set-aside for exclusive competition among 8(a) Participants.*

(i) A task or delivery order contract, Multiple Award Contract, or order issued against a Multiple Award Contract that is set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants must follow the established 8(a) competitive procedures. This includes an offering to and acceptance into the 8(a) program, SBA eligibility verification of the apparent successful offerors prior to contract award, compliance with the performance of work requirements set forth in § 124.510, and compliance with the nonmanufacturer rule (see § 121.406(b)), if applicable.

(ii) An agency is not required to offer or receive acceptance of individual orders into the 8(a) BD program if the task or delivery order contract or Multiple Award Contract was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants, and the individual order is to be competed among all 8(a) contract holders.

(iii) A concern awarded a task or delivery order contract or Multiple Award Contract that was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants may generally continue to receive new orders even if it has grown to be other than small or has exited the 8(a) BD program, and agencies may continue to take credit toward their prime contracting goals for orders awarded to 8(a) Participants. However, agencies may not take SDB or small business credit for an

order where the concern has been asked by the procuring agency to recertify its size, 8(a) or SDB status and is unable to do so (see § 121.404(g)), or where ownership or control of the concern has changed and SBA has granted a waiver to allow performance to continue (see § 124.515).

(iv) An agency may issue a sole source award against a Multiple Award Contract that has been set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants if the required dollar thresholds for sole source awards are met. Where an agency seeks to award an order on a sole source basis (i.e., to one particular 8(a) contract holder without competition among all 8(a) contract holders), the agency must offer and SBA must accept the order into the 8(a) program on behalf of the identified 8(a) contract holder.

(2) *Allowing orders issued to 8(a) Participants under Multiple Award Contracts that were not set-aside for exclusive competition among eligible 8(a) Participants to be considered 8(a) awards.* In order for an order issued to an 8(a) Participant and placed against a Multiple Award Contract to be considered an 8(a) award, where the Multiple Award contract was not initially set-aside, partially set-aside or reserved for exclusive competition among 8(a) Participants, the following conditions must be met: * * *

(3) *Reserves.* A procuring activity must offer and SBA must accept a requirement that is reserved for 8(a) Participants (i.e., an acquisition where the contracting officer states an intention to make one or more awards to only 8(a) Participants under full and open competition). However, a contracting officer does not have to offer the requirement to SBA where the acquisition has been reserved for small businesses, even if the contracting officer states an intention to make one or more awards to several types of small business including 8(a) Participants since any such award to 8(a) Participants would not be considered an 8(a) contract award.

- 13. Amend § 124.504 by:
 - a. Revising paragraph (a) to read as follows; and
 - b. Amending paragraph (c)(3) by removing “reserved for” and adding in its place “in”.

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

* * * * *

(a) *Prior intent to award as a small business set-aside, or use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs.* The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract. However, the AA/BD may permit the acceptance of the requirement under extraordinary circumstances.

* * * * *

- 14. Amend § 124.505 by revising the section heading to read as follows:

“§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?”

* * * * *

§ 124.506 [Amended]

- 15. Amend § 124.506(a)(3) by removing the second sentence.

§ 124.510 [Amended]

- 16. Amend § 124.510 by revising paragraph (c) to read as follows:

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

* * * * *

(c) *Indefinite delivery and indefinite quantity contracts.* (1) *Total Set-Aside Contracts.* The Participant must perform the required percentage of work and comply with the nonmanufacturer rule for each performance period of the contract—i.e., during the base term and then during each option period thereafter. However, the contracting officer, in his or her discretion, may require the Participant to perform the applicable amount of work or comply with the nonmanufacturer rule for each order.

(2) *Partial Set-Aside Contracts.* For orders awarded under a partial small business set-aside, the concern must perform the required percentage of work and comply with the nonmanufacturer rule for each performance period of the contract—i.e., during the base term and then during each option period thereafter. However, the contracting officer, in his or her discretion, may require the Participant to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under a partial set aside contract. For orders awarded under the non-set-aside portion, the concern need not comply with any limitations on

subcontracting or nonmanufacturer rule requirements

(3) *Orders*. For orders that are set aside under full and open contracts or reserves, the Participant must perform the applicable amount of work or comply with the nonmanufacturer rule for each order.

(4) The applicable SBA District Director may waive the provisions in paragraphs (c)(1) and (c)(2) of this section requiring a Participant to meet the applicable performance of work requirement for each period of performance or for each order. Instead, the District Director may permit the Participant to subcontract in excess of the limitations on subcontracting where the District Director makes a written determination that larger amounts of subcontracting are essential during certain stages of performance. However, the 8(a) Participant and procuring activity's contracting officer must provide written assurances that the Participant will ultimately comply with the requirements of this section prior to contract completion. The procuring activity's contracting officer does not have the authority to waive the provisions of this section requiring a Participant to meet the applicable performance of work requirements, even if the agency has a Partnership Agreement with SBA.

(5) Where the Participant does not ultimately comply with the performance of work requirements by the end of the contract, SBA will not grant future waivers for the Participant. Further, the contracting officer must document an 8(a) Participant's performance of work requirements as part of its performance evaluation in accordance with the procedures set forth in FAR 42.1502. The contracting officer must also evaluate compliance for future contract awards in accordance with the procedures set forth in FAR 9.104–6.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 17. The authority citation for 13 CFR part 125 is amended to read as follows:

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

■ 18. Revise § 125.1 to read as follows:

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

(a) *Chief Acquisition Officer* means the employee of a Federal agency designated as such pursuant to section 16(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(a)).

(b) *Commercial off-the-shelf item* has the same definition as set forth in 41

U.S.C. 101 (as renumbered) and Federal Acquisition Regulation (FAR) 2.101 (48 U.S.C. 2.101).

(c) *Consolidation of contract requirements, consolidated contract, or consolidated requirement* means a solicitation for a single contract or a Multiple Award Contract to: (1) Satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds \$2 million (including options); or (2) Satisfy requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

(d) *Contract*, unless otherwise noted, has the same definition as set forth in FAR 2.101 (48 U.S.C. 2.101) and includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (e.g., a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).

(e) *Contract bundling, bundled requirement, bundled contract, or bundling* means the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract or a Multiple Award Contract that is likely to be unsuitable for award to a small business concern (but may be suitable for award to a small business with a Small Business Teaming Arrangement) due to:

- (1) The diversity, size, or specialized nature of the elements of the performance specified;
- (2) The aggregate dollar value of the anticipated award;
- (3) The geographical dispersion of the contract performance sites; or
- (4) Any combination of the factors described in paragraphs (e)(1), (2), and (3) of this section.

(f) *Cost of the contract* means all allowable direct and indirect costs allocable to the contract, excluding profit or fees.

(g) *Cost of contract performance incurred for personnel* means direct labor costs and any overhead which has only direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost.

(h) *Cost of manufacturing* means costs incurred by the business concern in the production of the end item being acquired, including the costs associated with crop production. These are costs associated with producing the item

being acquired, including the direct costs of fabrication, assembly, or other production activities, and indirect costs which are allocable and allowable. The cost of materials, as well as the profit or fee from the contract, are excluded.

(i) *Cost of materials* means costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), commercial off-the-shelf items (and similar common supply items or commercial items that require additional manufacturing, modification or integration to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, cost of materials includes the acquisition of services or products from outside sources following normal commercial practices within the industry.

(j) *General Services Administration (GSA) Schedule Contract* means a Multiple Award Contract issued by GSA and includes the Federal Supply Schedules and other Multiple Award Schedules.

(k) *Multiple Award Contract* means a contract that is:

(1) A Multiple Award Schedule contract issued by GSA (e.g., GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (e.g., Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4;

(2) A multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or

(3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

(l) *Office of Small and Disadvantaged Business Utilization (OSDBU) or the Office of Small Business Programs (OSBP)* means the office in each Federal agency having procurement powers that is responsible for ensuring that small businesses receive a fair proportion of Federal contracts in that agency. The office is managed by a Director, who is responsible and reports directly to the head of the agency or deputy to the agency (except that for DoD, the Director reports to the Secretary or the Secretary's designee).

(m) *Personnel* means individuals who are "employees" under § 121.106 of this chapter, except for purposes of the HUBZone program, where the definition of "employee" is found in § 126.103 of this chapter.

(n) *Partial set-aside (or partially set-aside)* means, for a Multiple Award Contract, a contracting vehicle that can be used when: market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price.

(o) *Reserve* means, for a Multiple Award Contract,

(1) An acquisition conducted using full and open competition where the contracting officer makes—

(i) Two or more contract awards to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the “rule of two” or any alternative set-aside requirements provided in the small business program have been met;

(ii) Several awards to several different types of small businesses (e.g., one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the “rule of two” has been met; or

(iii) One contract award to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

(2) An award on a bundled contract to one or more small businesses with a Small Business Teaming Arrangement.

(p) “*Rule of Two*” refers to the requirements set forth in §§ 124.506, 125.2(f), 125.19(c), 126.607(c) and 127.503 of this chapter that there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

(q) *Senior Procurement Executive (SPE)* means the employee of a Federal agency designated as such pursuant to section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c)).

(r) *Separate contract* means a contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery, indefinite quantity contract) that has previously been performed by any business, including an other-than-small business or small business concern.

(s) *Separate smaller contract* means a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.

(t) *Single contract* means any contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery, indefinite quantity contract) resulting in one or more awardee(s).

(u) *Small Business Teaming Arrangement* means an arrangement where:

(1) Two or more small business concerns have formed a joint venture to act as a potential prime contractor (for the definition of and exceptions to affiliation for joint ventures, see § 121.103); or

(2) A potential small business prime contractor agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between a prime and its small business subcontractor(s) must exist through a written agreement between the parties that is specifically referred to as a “Small Business Teaming Arrangement” or “Small Business Teaming Agreement” and which sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition.

(i) A Small Business Teaming Arrangement can include two business concerns in a mentor-protégé relationship so long as both the mentor and the protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to § 121.103(h)(3)(ii) or 121.103(h)(3)(iii) of this chapter.

(ii) The agreement must be provided to the contracting officer as part of the proposal.

(v) *Subcontract or subcontracting* means, except for purposes of § 125.3, that portion of the contract performed by a business concern, other than the business concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available commercial off-the-shelf items, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the Government as part of the contract to use any specific source for parts,

supplies, or components subassemblies, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

(w) *Substantial bundling* means any bundling that meets or exceeds the following dollar amounts (if the acquisition strategy contemplates Multiple Award Contracts or multiple award orders issued against a GSA Schedule Contract or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including options):

(1) \$8.0 million or more for the Department of Defense;

(2) \$6.0 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(3) \$2.5 million or more for all other agencies.

■ 19. Amend § 125.2 by:

■ a. Revising the section heading;

■ b. Revising paragraphs (a), (b), (c), (d) and (e) to read as follows; and

■ c. Amending paragraph (f)(2)(i) by removing “ORCA certifications” and adding in its place “certifications in the System for Award Management (SAM) (or successor system)”:

§ 125.2 What are SBA’s and the procuring agency’s responsibilities when providing contracting assistance to small businesses?

(a) *General.* The objective of the SBA’s contracting programs is to assist small business concerns, including 8(a) BD Participants, HUBZone small business concerns, Service Disabled Veteran-Owned Small Business Concerns, Women-Owned Small Businesses and Economically Disadvantaged Women-Owned Small Businesses, in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales. Therefore, these regulations apply to all types of Federal Government contracts, including Multiple Award Contracts, and contracts for architectural and engineering services, research, development, test and evaluation. Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, and any contract for the sale of Government property, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:

(1) Maintaining or mobilizing the Nation's full productive capacity;

(2) War or national defense programs;

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(b) *SBA's responsibilities in the acquisition planning process.*

(1) *SBA Procurement Center Representative (PCR) Responsibilities.*

(i) *PCR Review.*

(A) SBA has PCRs who are generally located at Federal agencies and buying activities that have major contracting programs. At the SBA's discretion, PCRs will review all acquisitions that are not set-aside or reserved for small businesses above or below the Simplified Acquisition Threshold, to determine whether a set-aside or sole source award to a small business under one of SBA's programs is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement. This review includes acquisitions that are Multiple Award Contracts where the agency has not set-aside all or part of the acquisition or reserved the acquisition for small businesses. It also includes acquisitions where the agency has not set-aside orders placed against Multiple Award Contracts for small business concerns.

(B) PCRs will work with the cognizant Small Business Specialist (SBS) and agency OSDBU or OSBP as early in the acquisition process as practicable to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams and Small Business Teaming Arrangements, as prime contractors.

(C) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs may identify small businesses that are capable of performing particular requirements.

(D) PCRs will also ensure that any Federal agency decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with maximum opportunities to participate as prime contractors and subcontractors in the acquisition or sale of real property.

(E) PCRs will review whether, for bundled and consolidated contracts that are recompeted, the amount of savings and benefits was achieved under the prior bundling or consolidation of contract requirements, that such savings and benefits will continue to be realized if the contract remains bundled or consolidated, or such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(ii) *PCR Recommendations in General.* The PCR must recommend to the procuring activity alternative procurement methods that would increase small business prime contract participation if a PCR believes that a proposed procurement includes in its statement of work goods or services currently being performed by a small business and is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely; will render small business prime contract participation unlikely (e.g., ensure geographical preferences are justified); is for construction and seeks to package or consolidate discrete construction projects; or if a PCR does not believe a bundled or consolidated requirement is necessary and justified. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements, especially construction acquisitions that can be procured as separate projects;

(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate;

(C) Reserving one or more awards for small businesses when issuing Multiple Award Contracts;

(D) Using a partial set-aside;

(E) Stating in the solicitation for a Multiple Award Contract that the orders will be set-aside for small businesses; and

(F) Where the bundled or consolidated requirement is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business contract participation to the maximum extent practicable.

(iii) *PCR Recommendations for Small Business Teaming Arrangements and Subcontracting.* The PCR will work to ensure that small business participation is maximized both at the prime contract level such as through Small Business Teaming Arrangements and through subcontracting opportunities. This may include the subcontracting considerations in source selections set forth in § 125.3(g), as well as the following:

(A) Reviewing an agency's oversight of its subcontracting program, including its overall and individual assessment of a contractor's compliance with its small business subcontracting plans. The PCR will furnish a copy of the information to the SBA Commercial Market Representative (CMR) servicing the contractor;

(B) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals that are expected of the contractor awardee;

(C) Recommending that the small business subcontracting goals be based on total contract dollars instead of, or in addition to, subcontract dollars;

(D) Recommending that separate evaluation factors be established for evaluating the offerors' proposed approach to small business subcontracting participation in the subject procurement, the extent to which the offeror has met its small business subcontracting goals on previous contracts; and/or the extent to which the offeror actually paid small business subcontractors within the specified number of days;

(E) Recommending that a contracting officer include an evaluation factor in a solicitation which evaluates an offeror's commitment to pay small business subcontractors within a specified number of days after receipt of payment from the Government for goods and services previously rendered by the small business subcontractor. The contracting officer will comparatively evaluate the proposed timelines. Such a commitment shall become a material part of the contract. The contracting officer must consider the contractor's compliance with the commitment in evaluating performance, including for purposes of contract continuation (such as exercising options);

(F) For bundled and consolidated requirements, recommending that a separate evaluation factor with significant weight be established for evaluating the offeror's proposed approach to small business utilization, the extent to which the offeror has met its small business subcontracting goals on previous contracts; and the extent to which the other than small business offeror actually paid small business subcontractors within the specified number of days;

(G) For bundled or consolidated requirements, recommending the solicitation state that the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities and past performance of all proposed subcontractors. It may also include

recommending that the agency reserve at least one award to a small business prime contractor with a Small Business Teaming Arrangement;

(H) For Multiple Award Contracts and multiple award requirements above the substantial bundling threshold, recommending or requiring that the solicitation state that the agency will solicit offers from small business concerns and small business concerns with Small Business Teaming Arrangements;

(I) For consolidated contracts, ensuring that agencies have provided small business concerns with appropriate opportunities to participate as prime contractors and subcontractors and making recommendations on such opportunities as appropriate; and

(J) Recommending paragraphs (B) through (I) above apply to an ordering agency placing an order against a Multiple Award Contract or Agreement.

(2) *SBA Breakout PCR (BPCR) Responsibilities.*

(i) BPCRs are assigned to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR.

(ii) BPCRs advocate full and open competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures in paragraph (b)(3) of this section. BPCRs also review restrictions and obstacles to competition and make recommendations for improvement.

Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) (FAR 19.403(c)) and Section 15(l) of the Small Business Act (15 U.S.C. 644(l)).

(3) *Appeals of PCR and Breakout PCR (BPCR) Recommendations.* In cases where there is disagreement between a PCR or BPCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, partial set-aside or reserve, whether or not the acquisition is a bundled, substantially bundled or consolidated requirement, the PCR or BPCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the Secretary of the Department or head of the agency. The time limits for such appeals are set forth in FAR 19.505 (48 CFR 19.505).

(c) *Procuring Agency Responsibilities.*

(1) *Requirement to Foster Small Business Participation.* The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government regardless of the place of performance of the contract. In addition, Federal agencies must ensure that all bundled and consolidated contracts contain the required analysis and justification and provide small business concerns with appropriate opportunities to participate as prime contractors and subcontractors. Agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, 8(a) BD small business concerns (including those owned by ANCs, Indian Tribes and NHOs), and small business concerns owned and controlled by women;

(ii) Avoid unnecessary and unjustified bundling of contracts or consolidation of contract requirements that inhibits or precludes small business participation in procurements as prime contractors;

(iii) Follow the limitations on use of consolidated contracts;

(iv) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under 15 U.S.C. 694b, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work; and

(v) Provide SBA the necessary information relating to the acquisition under review at least 30 days prior to issuance of a solicitation. This includes providing PCRs (to the extent allowable pursuant to their security clearance) copies of all documents relating to the acquisition under review, including, but not limited to, the performance of work statement/statement of work, technical data, market research, hard copies or their electronic equivalents of Department of Defense (DoD) Form 2579 or equivalent, and other relevant information. The DoD Form 2579 or equivalent must be sent electronically to the PCR (or if a PCR is not assigned to the procuring activity, to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(2) *Requirement for market research.* Each agency, as part of its acquisition planning, must conduct market research

to determine the type and extent of foreseeable small business participation in the acquisition. In addition, each agency must conduct market research and any required analysis and justifications before proceeding with an acquisition strategy that could lead to a bundled, substantially bundled, or consolidated contract. The purpose of the market research and analysis is to determine whether the bundling or consolidation of the requirements is necessary and justified and all statutory requirements for such a strategy have been met. Agencies should be as broad as possible in their search for qualified small businesses, using key words as well as NAICS codes in their examination of the System for Award Management (SAM) and the Dynamic Small Business Search (DSBS), and must not place unnecessary and unjustified restrictions when conducting market research (e.g., requiring that small businesses prove they can provide the best scientific and technological sources) when determining whether to set-aside, partially set-aside, reserve or sole source a requirement to small businesses. During the market research phase, the acquisition team must consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located) and the activity's Small Business Specialist.

(3) *Proposed Acquisition Strategy.* A procuring activity must provide to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance:

(i) A copy of a proposed acquisition strategy (e.g., DoD Form 2579, or equivalent) whenever a proposed acquisition strategy:

(A) Includes in its description goods or services the magnitude of the quantity or estimated dollar value of which would render small business prime contract participation unlikely;

(B) Seeks to package or consolidate discrete construction projects;

(C) Is a bundled or substantially bundled requirement; or

(D) Is a consolidation of contract requirements;

(ii) A written statement explaining why, if the proposed acquisition strategy involves a bundled or consolidated requirement, the procuring activity believes that the bundled or consolidated requirement is necessary and justified; the analysis required by

paragraph (d)(2)(i) of this section; the acquisition plan; any bundling information required under paragraph (d)(3) of this section; and any other relevant information. The PCR and agency OSDBU or OSBP, as applicable, must then work together to develop alternative acquisition strategies identified in paragraph (b)(1) of this section to enhance small business participation;

(iii) All required clearances for the bundled, substantially bundled, or consolidated requirement; and

(iv) A written statement explaining why—if the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects—

(A) The proposed acquisition cannot be divided into reasonably small lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage small business participation;

(C) The proposed acquisition cannot be offered so as to make small business participation likely; or

(D) Construction cannot be procured through separate discrete projects.

(4) *Procuring Agency Small Business Specialist (SBS) Responsibilities.*

(i) As early in the acquisition planning process as practicable—but no later than 30 days before the issuance of a solicitation, or prior to placing an order without a solicitation—the procuring activity must coordinate with the procuring activity's SBS when the acquisition strategy contemplates an acquisition meeting the dollar amounts set forth for substantial bundling. If the acquisition strategy contemplates Multiple Award Contracts or orders under the GSA Multiple Award Schedule Program or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including options. The procuring activity is not required to coordinate with its SBS if the contract or order is entirely set-aside for small business concerns, or small businesses under one of SBA's small business programs, as authorized under the Small Business Act.

(ii) The SBS must notify the agency OSDBU or OSBP if the agency's acquisition strategy or plan includes

bundled or consolidated requirements that the agency has not identified as bundled, or includes unnecessary or unjustified bundling of requirements. If the strategy involves substantial bundling, the SBS must assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.

(iii) The SBS must coordinate with the procuring activity and PCR on all required determinations and findings for bundling and/or consolidation, and acquisition planning and strategy documentation.

(5) *OSDBU and OSBP Oversight Functions.* The Agency OSDBU or OSBP must:

(i) Conduct annual reviews to assess the:

(A) Extent to which small businesses are receiving their fair share of Federal procurements, including contract opportunities under programs administered under the Small Business Act;

(B) Adequacy of the bundling or consolidation documentation and justification; and

(C) Adequacy of actions taken to mitigate the effects of necessary and justified contract bundling or consolidation on small businesses (e.g., review agency oversight of prime contractor subcontracting plan compliance under the subcontracting program);

(ii) Provide a copy of the assessment under paragraph (c)(5)(i) of this section to the agency head and SBA's Administrator;

(iii) Identify proposed solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the SBA to revise the procurement strategies for such proposed solicitations to increase the probability of participation by small businesses as prime contractors through Small Business Teaming Arrangements;

(iv) Facilitate small business participation as subcontractors and suppliers, if a solicitation for a substantially bundled contract is to be issued;

(v) Assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of Title 31 or any other protection for contractors or subcontractors (including suppliers) that is included in the FAR or any individual agency supplement to such Government-wide regulation;

(vi) Cooperate, and consult on a regular basis with the SBA with respect

to carrying out these functions and duties;

(vii) Make recommendations to contracting officers as to whether a particular contract requirement should be awarded to any type of small business. The Contracting Officer must document any reason not to accept such recommendations and include the documentation in the appropriate contract file; and

(viii) Coordinate on any acquisition planning and strategy documentation, including bundling and consolidation determinations at the agency level.

(6) *Communication on Achieving Goals.* All Senior Procurement Executives, senior program managers, Directors of OSDBU or Directors of OSBP must communicate to their subordinates the importance of achieving small business goals and ensuring that a fair proportion of awards are made to small businesses.

(d) *Contract Consolidation and Bundling.*

(1) *Limitation on the Use of Consolidated Contracts.*

(i) An agency may not conduct an acquisition that is a consolidation of contract requirements unless the Senior Procurement Executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy:

(A) Conducts adequate market research;

(B) Identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;

(C) Makes a written determination, which is coordinated with the agency's OSDBU/OSBP, that the consolidation of contract requirements is necessary and justified;

(D) Identifies any negative impact by the acquisition strategy on contracting with small business concerns; and

(E) Ensures that steps will be taken to include small business concerns in the acquisition strategy.

(ii) A Senior Procurement Executive or Chief Acquisition Officer may determine that an acquisition strategy involving a consolidation of contract requirements is necessary and justified.

(A) A consolidation of contract requirements may be necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified under paragraph (d)(1)(i)(B).

(B) The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition

cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to: benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is \$94 million or less; or benefits equivalent to 5 percent of the contract or order value (including options) or \$9.4 million, whichever is greater, where the contract or order value exceeds \$94 million.

(C) Savings in administrative or personnel costs alone do not constitute a sufficient justification for a consolidation of contract requirements in a procurement unless the expected total amount of the cost savings, as determined by the Senior Procurement Executive or Chief Acquisition Officer, is expected to be substantial in relation to the total cost of the procurement. To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(iii) Each agency must ensure that any decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with opportunities to participate as prime contractors and subcontractors in the acquisition.

(iv) If the consolidated requirement is also considered a bundled requirement, then the contracting officer must instead follow the provisions regarding bundling set forth in paragraphs (d)(2) through (7) of this section.

(2) *Limitation on the Use of Contract Bundling.*

(i) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(ii) A bundled requirement is necessary and justified if, as compared to the benefits that the procuring activity would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions,

and any other benefits that individually, in combination, or in the aggregate would lead to:

(A) Benefits equivalent to 10 percent of the contract or order value (including options), where the contract or order value is \$94 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or \$9.4 million, whichever is greater, where the contract or order value exceeds \$94 million.

(iii) Notwithstanding paragraph (d)(2)(ii) of this section, the Senior Procurement Executives or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis, determine that a bundled requirement is necessary and justified when:

(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(2)(ii) of this section but, in the aggregate, are critical to the agency's mission success; and

(B) The procurement strategy provides for maximum practicable participation by small business.

(iv) The reduction of administrative or personnel costs alone must not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be bundled (including options). To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(v) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could be charged by small businesses for the work not previously performed by small business.

(vi) The substantial benefit analysis set forth in paragraph (d)(2)(ii) of this section is still required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A-76.

(3) *Limitations on the Use of Substantial Bundling.* Where a proposed procurement strategy involves a Substantial Bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed

bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraph (d)(2)(i) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement;

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements; and

(v) The identification of the alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives (*i.e.*, consider the strategies under paragraph (b)(1)(ii) of this section).

(4) *Significant Subcontracting Opportunities in Justified Consolidated, Bundled and Substantially Bundled Requirements.*

(i) Where a justified consolidated, bundled, or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified above.

(5) *Notification to Current Small Business Contractors of Intent to Bundle.* The procuring activity must notify each small business which is performing a contract that it intends to bundle that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the

procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located). This notification must be documented in the contract file.

(6) *Notification to Public of Rationale for Bundled Requirement.* The head of a Federal agency must publish on the agency's Web site a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification must be made within 30 days of the agency's data certification regarding the validity and verification of data entered in that Federal Procurement Data Base to the Office of Federal Procurement Policy. However, to foster transparency in Federal procurement, the agency is encouraged to provide such notification before issuance of the solicitation.

(7) *Notification to SBA of Recompeted Bundled or Consolidated Requirement.* For each bundled or consolidated contract that is to be recompeted (even if additional requirements have been added or deleted) the procuring agency must notify SBA's PCR as soon as possible but no later than 30 days prior to issuance of the solicitation of:

(i) The amount of savings and benefits achieved under the prior bundling or consolidation of contract requirements;

(ii) Whether such savings and benefits will continue to be realized if the contract remains bundled or consolidated; and

(iii) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(e) *Multiple Award Contracts.*

(1) *General.*

(i) The contracting officer must set-aside a Multiple Award Contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs.

(ii) The contracting officer in his or her discretion may partially set-aside or reserve a Multiple Award Contract, or set aside, or preserve the right to set aside, orders against a Multiple Award Contract that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement action is a decision of the contracting agency.

(iii) The procuring agency contracting officer must document the contract file and explain why the procuring agency did not partially set-aside or reserve a Multiple Award Contract, or set-aside orders issued against a Multiple Award

Contract, when these authorities could have been used.

(2) *Total Set-aside of Multiple Award Contracts.*

(i) The contracting officer must conduct market research to determine whether the "rule of two" can be met. If the "rule of two" can be met, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section.

(ii) The contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order pursuant to § 121.402(c) of this chapter. See § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) When drafting the solicitation for the contract, agencies should consider an "on-ramp" provision that permits the agency to refresh the awards by adding more small business contractors throughout the life of the contract. Agencies should also consider the need to "off-ramp" existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (e.g., termination for convenience).

(iv) A business must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable, during each performance period of the contract (e.g., the base term and each subsequent option period). However, the contracting officer, in his or her discretion, may require the contractor perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Partial Set-asides of Multiple Award Contracts.*

(i) A contracting officer may partially set-aside a multiple award contract when: market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price. A contracting officer has the discretion, but is not required, to set-aside the discrete portions or categories for different small businesses participating in SBA's small business programs (e.g., CLIN 0001, 8(a) set-aside; CLIN 0002, HUBZone set-aside; CLIN 0003, SDVO SBC set-aside; CLIN 0004, WOSB set-

aside; CLIN 0005 EDWOSB set-aside; CLIN 0006, small business set-aside). If the contracting officer decides to partially set-aside a Multiple Award Contract, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section for the part or parts of the contract that have been set-aside.

(ii) The contracting officer must assign a NAICS code and corresponding size standard to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. See § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that the small business will not compete against other-than-small businesses for any order issued against that part or parts of the Multiple Award Contract that are set-aside.

(iv) A contracting officer must state in the solicitation that the small business will be permitted to compete against other-than-small businesses for an order issued against the portion of the Multiple Award Contract that has not been partially set-aside if the small business submits an offer for the non-set-aside portion. The business concern will not have to comply with the limitations on subcontracting (see § 125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed and awarded under the portion of the contract that is not set-aside.

(v) When drafting the solicitation for the contract, agencies should consider an "on ramp" provision that permits the agency to refresh these awards by adding more small business contractors to that portion of the contract that was set-aside throughout the life of the contract. Agencies should also consider the need to "off ramp" existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (e.g., termination for convenience).

(vi) The small business must submit one offer that addresses each part of the solicitation for which it wants to compete. A small business (or 8(a) Participant, HUBZone SBC, SDVO SBC or ED/WOSB) is not required to submit an offer on the part of the solicitation that is not set-aside. However, a small business may choose to submit an offer on the part or parts of the solicitation that have been set-aside and/or on the parts that have not been set-aside.

(vii) A small business must comply with the applicable limitations on

subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule (*see* § 121.406(b)), if applicable, during each performance period of the contract (e.g., during the base term and then during option period thereafter). However, the contracting officer, in his or her discretion, may require the contractor perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(4) *Reserves of Multiple Award Contracts Awarded in Full and Open Competition.* (i) A contracting officer may reserve one or more awards for small business where:

(A) The market research and recent past experience evidence that—

(1) At least two small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete portions or discrete categories by utilizing individual Contract Line Items (CLINs), Special Item Numbers (SINs), Functional Areas (FAs), or other equivalent; or

(2) At least one small business, 8(a) BD Participant, HUBZone SBC, SDVO SBC, WOSB or EDWOSB can perform the entire requirement, but there is not a reasonable expectation of receiving at least two offers from small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs at a fair market price for all the work contemplated throughout the term of the contract; or

(B) The contracting officer makes:

(1) Two or more contract awards to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the “rule of two” or any alternative set-aside requirements provided in the small business program have been met;

(2) Several awards to several different types of small businesses (e.g., one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the “rule of two” has been met; or

(3) One contract award to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

(ii) If the contracting officer decides to reserve a multiple award contract established through full and open competition, the contracting officer

must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that if there are two or more contract awards to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may compete any orders solely amongst the specified types of small business concerns if the “rule of two” or an alternative set-aside requirement provided in the small business program have been met.

(iv) A contracting officer must state in the solicitation that if there are several awards to several different types of small businesses (e.g., one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB), the agency may compete any orders solely amongst all of the small business concerns if the “rule of two” has been met.

(v) A contracting officer must state in the solicitation that if there is only one contract award to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may issue orders directly to that concern for work that it can perform.

(vi) A contracting officer may, but is not required to, set forth targets in the contract showing the estimated dollar value or percentage of the total contract to be awarded to small businesses.

(vii) A small business offeror must submit one offer that addresses each part of the solicitation for which it wants to compete.

(viii) Small businesses are permitted to compete against other-than-small businesses for an order issued against the Multiple Award Contract if agency issued the small business a contract for those supplies or services.

(ix) A business must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule (*see* § 121.406(b)), if applicable, for any order issued against the Multiple Award Contract if the order is set aside or awarded on a sole source basis. However, a business need not comply with the limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst small and other-than-small business concerns.

(5) *Reserve of Multiple Award Contracts that are Bundled.*

(i) If the contracting officer decides to reserve a multiple award contract established through full and open competition that is a bundled contract, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(ii) The Small Business Teaming Arrangement must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule (*see* § 121.406(b)), if applicable, on all orders issued against the Multiple Award Contract, although the cooperative efforts of the team members will be considered in determining whether the subcontracting limitations requirement is met (*see* § 125.6(j)).

(iii) Team members of the Small Business Teaming Arrangement will not be affiliated for the specific solicitation or contract (*see* § 121.103(b)(8)).

(6) *Set-aside of orders against Full and Open Multiple Award Contracts.*

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 253j, the contracting officer has the authority to set-aside orders against Multiple Award Contracts that were competed on a full and open basis.

(ii) The contracting officer may state in the solicitation and resulting contract for the Multiple Award Contract that:

(A) Based on the results of market research, orders issued against the Multiple Award Contract will be set-aside for small businesses or any subcategory of small businesses whenever the “rule of two” or any alternative set-aside requirements provided in the small business program have been met; or

(B) The agency is preserving the right to consider set-asides using the “rule of two” or any alternative set-aside requirements provided in the small business program, on an order-by-order basis.

(iii) For the acquisition of orders valued at or below the simplified acquisition threshold (SAT), the contracting officer may set-aside the order for small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs in accordance with the relevant program’s regulations. For the acquisition of orders valued above the SAT, the contracting officer shall first consider whether there

is a reasonable expectation that offers will be obtained from at least two 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs in accordance with the program's regulations, before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs.

(iv) The contracting officer must assign a NAICS code to the solicitation for each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. See § 121.404 for further determination on size status for each order issued against that contract.

(v) A business must comply with applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable in the performance of each order that is set-aside against the contract.

(7) *Tiered evaluation of offers, or cascading.* An agency cannot create a tiered evaluation of offers or "cascade" unless it has specific statutory authority to do so. This is a procedure used in negotiated acquisitions when the contracting officer establishes a tiered or cascading order of precedence for evaluating offers that is specified in the solicitation, which states that if no award can be made at the first tier, it will evaluate offers at the next lower tier, until award can be made. For example, unless the agency has specific statutory authority to do so, an agency is not permitted to state an intention to award one contract to an 8(a) BD Participant and one to a HUBZone SBC, but only if no awards are made to 8(a) BD Participants.

* * * * *

- 20. Amend § 125.3 by:
- a. Revising the section heading; and
- b. Adding a new paragraph (i) to read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

* * * * *

(i) *Subcontracting consideration in bundled and consolidated contracts.*

(1) For bundled requirements, the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities of all proposed subcontractors.

(2) For substantial bundling, the agency must design actions to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts

that may be awarded to meet the requirements.

(3) For significant subcontracting opportunities in consolidated contracts, bundled requirements, and substantially bundled requirements, see § 125.2(d)(4).

- 21. Amend § 125.4 by revising the section heading to read as follows:

§ 125.4 What is the Government property sales assistance program?

* * * * *

- 22. Amend § 125.5 by:
- a. Revising the section heading;
- b. Revising paragraphs (a)(1) and (a)(2);
- c. Revising paragraphs (b)(1)(i), (b)(1)(ii), and (b)(1)(iii);
- d. Amending paragraph (b)(1)(v)(A) by removing "SIC" and adding in its place "NAICS";
- e. Amending paragraph (b)(1)(v)(C) by adding "or reserve" after "In the case of a set-aside";
- f. Revising the first sentence in paragraph (c)(1);
- g. Revising paragraph (h) introductory text;
- h. Revising the first sentence in paragraph (i)(2);
- i. Revising paragraph (l)(1)(iii); and
- j. Amending paragraph (m) by adding a sentence at the end of the paragraph.

§ 125.5 What is the Certificate of Competency Program?

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)). A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess(es) the responsibility to perform a specific Government procurement (or sale) contract, which includes Multiple Award Contracts and orders placed against Multiple Award Contracts, where responsibility type issues are used to determine award or establish the competitive range. The COC Program is applicable to all Government procurement actions, including Multiple Award Contracts and orders placed against Multiple Award Contracts where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. With respect to Multiple Award Contracts, contracting officers generally determine responsibility at the time of award of the contract. However, if a contracting officer makes a responsibility determination as set forth in paragraph (a)(2) of this section for an order issued against a Multiple Award Contract, the contracting officer must

refer the matter to SBA for a COC. The COC procedures apply to all Federal procurements, regardless of the location of performance or the location of the procuring activity.

(2) A contracting officer must refer a small business concern to SBA for a possible COC, even if the next apparent successful offeror is also a small business, when the contracting officer:

(i) Denies an apparent successful small business offeror award of a contract or order on the basis of responsibility (including those bases set forth in paragraphs (a)(1)(ii) and (iii) of this section);

(ii) Refuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a non-comparative basis (e.g., a pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance); or

(iii) Refuses to consider a small business concern for award of a contract or order because it failed to meet a definitive responsibility criterion contained in the solicitation.

* * * * *

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review.

(i) To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter.

(ii) To be eligible for a COC, an offeror must have agreed to comply with applicable limitations on subcontracting requirements if the acquisition was set-aside or reserved (see § 125.6). Whether an offeror has agreed to comply with the limitations on subcontracting is a matter of proposal acceptability or responsiveness. Whether an offeror will be able to comply with the limitations on subcontracting is a matter of responsibility.

(iii) A nonmanufacturer making an offer on a contract for supplies that is set-aside, partially set-aside or reserved for small business (where the small business will be competing against other small businesses for orders) must furnish end items that have been manufactured in the United States by a small business. A waiver of this requirement may be requested under §§ 121.1201 through 121.1205 of this chapter for either the type of product being procured or the specific contract at issue.

* * * * *

(c) *Referral of nonresponsibility determination to SBA.* (1) The

contracting officer must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. *

* * * * *

(h) *Notification of intent to issue on a contract or order with a value between \$100,000 and \$25 million.* Where the Director determines that a COC is warranted, he or she will notify the contracting officer (or the procurement official with the authority to accept SBA's decision) of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer or the procurement official with the authority to accept SBA's decision has the following options:

* * * * *

(i) * * *

(2) SBA Headquarters will furnish written notice to the Director, OSDDBU or OSBP of the procuring agency, with a copy to the contracting officer, that the case file has been received and that an appeal decision may be requested by an authorized official.

* * * * *

(l) * * *

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the business concern's current circumstances and the reason why the contract has not been issued).

* * * * *

(m) * * * Where SBA issues a COC with respect to a referral in paragraph (a)(2)(ii) or (a)(2)(iii) of this section, the contracting officer is not required to issue an award to that offeror if the contracting officer denies the contract for reasons unrelated to responsibility.

■ 23. Amend § 125.6 by:

■ a. Revising the section heading;

■ b. Revising paragraph (a);

■ c. Removing paragraph (e);

■ d. Redesignating paragraphs (f), (g), (h), and (i) as (e), (f), (g), and (h) respectively;

■ e. Revising newly designated paragraph (f);

■ f. Adding a new paragraph (i); and

■ g. Adding a new paragraph (j) to read as follows:

§ 125.6 What are the prime contractor performance requirements (limitations on subcontracting)?

(a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

* * * * *

(f) The period of time used to determine compliance for a total or partial set-aside contract will be the base term and then each subsequent option period. For an order set aside under a full and open contract or a full and open contract with reserve, the agency will use the period of performance for each order to determine compliance unless the order is competed amongst small and other-than-small businesses (in which case the subcontracting limitations will not apply). However, the contracting officer, in his or her discretion, may require the concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under a total or partial set aside contract.

* * * * *

(i) Where an offeror is exempt from affiliation under § 121.103(b)(8) of this chapter and qualifies as a small business concern for a reserve of a bundled contract, the performance of work requirements set forth in this section apply to the cooperative effort of the small business team members of the Small Business Teaming Arrangement, not its individual members.

(j) The contracting officer must document a small business concern's performance of work requirements as part of the small business' performance evaluation in accordance with the procedures set forth in FAR 42.1502. The contracting officer must also evaluate compliance for future contract awards in accordance with the procedures set forth in FAR 9.104-6.

■ 24. Amend § 125.8 by revising paragraph (b) to read as follows:

§ 125.8 What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program?

* * * * *

(b) *Interested Party* means the contracting activity's contracting officer, SBA, any concern that submits an offer for a specific sole source or set-aside SDVO contract or order (including Multiple Award Contracts), or any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a reserve of an award given to a SDVO SBC.

* * * * *

■ 25. Revise § 125.14 to read as follows:

§ 125.14 What are SDVO contracts?

SDVO contracts, including Multiple Award Contracts (see § 125.1), are those awarded to an SDVO SBC through any of the following procurement methods:

(a) Sole source awards to an SDVO SBC;

(b) Set-aside awards, including partial set-asides, based on competition restricted to SDVO SBCs;

(c) Awards based on a reserve for SDVO SBCs in a solicitation for a Multiple Award Contract (see § 125.1); or

(d) Orders set-aside for SDVO SBCs against a Multiple Award Contract, which had been awarded in full and open competition.

■ 26. Amend § 125.15 by adding new paragraphs (d) and (e) to read as follows:

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

* * * * *

(d) *Multiple Award Contracts.*

(1) *Total Set-Aside Contracts.* The SDVO SBC must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable, in the performance of a contract totally set-aside for SDVO SBCs. However, the contracting officer, in his or her discretion, may require the concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(2) *Partial Set-Aside Contracts.* For orders awarded under a partial set-aside contract, the SDVO SBC must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable, during each performance period of the contract—e.g., during the base term and then during each option period thereafter. For orders awarded under the non-set-aside portion, the SDVO SBC need not comply with any limitations on subcontracting or nonmanufacturer rule requirements. However, the contracting officer, in his or her discretion, may require the concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Orders.* The SDVO SBC must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable, in the performance of each individual order that has been set-aside for SDVO SBCs.

(4) *Reserves.* The SDVO SBC must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable, in the performance of an order that is set aside for SDVO SBCs. However, the SDVO SBC will not have to comply with the

limitations on subcontracting provisions and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst SDVO SBCs and one or more other-than-small business concerns.

(e) *Recertification.* (1) A concern that represents itself and qualifies as an SDVO SBC at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an SDVO SBC throughout the life of that contract. This means that if an SDVO SBC is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order. Where a concern later fails to qualify as an SDVO SBC, the procuring agency may exercise options and still count the award as an award to an SDVO SBC. However, the following exceptions apply:

(i) Where an SDVO contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as an SDVO SBC to the procuring agency, or inform the procuring agency that it does not qualify as an SDVO SBC, within 30 days of the novation approval. If the concern is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals.

(ii) Where a concern that is performing an SDVO SBC contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its SDVO SBC status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDVO SBC. If the contractor is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) Where there has been an SDVO SBC status protest on the solicitation or contract, *see* § 125.27(e) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its SDVO SBC status no more

than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as an SDVO SBC, either initially or prior to an option being exercised, may recertify itself as an SDVO SBC for a subsequent option period if it meets the eligibility requirements at that time.

(4) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(6) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

§ 125.19 [Amended]

■ 27. Amend § 125.19 by removing "ORCA certifications" and adding in its place "certifications in System for Award Management (SAM) (or any successor system)" in paragraph (b)(2)(i).

■ 28. Amend § 125.22 by revising the section heading to read as follows:

§ 125.22 May SBA appeal a contracting officer's decision not to make a procurement available for award as an SDVO contract?

* * * * *

■ 29. Amend § 125.24 by revising paragraph (b) to read as follows:

§ 125.24 Who may protest the status of an SDVO SBC?

* * * * *

(b) For all other procurements, including Multiple Award Contracts (*see* § 125.1), any interested party may protest the apparent successful offeror's SDVO SBC status.

PART 126—HUBZONE PROGRAM

■ 30. The authority citation for part 126 is amended to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

■ 31. Amend § 126.103 by revising the definition of the term "Interested party" to read as follows:

§ 126.103 What definitions are important in the HUBZone program?

* * * * *

Interested party means any concern that submits an offer for a specific HUBZone sole source or set-aside contract (including Multiple Award Contracts) or order, any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC, any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given to a qualified HUBZone SBC, the contracting activity's contracting officer, or SBA.

* * * * *

■ 32. 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 the Dynamic Small Business Search at http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm. In addition, requesters may obtain a copy of the List by writing to the D/HUB at U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416 or at hubzone@sba.gov.

■ 33. Revise § 126.600 to read as follows:

§ 126.600 What are HUBZone contracts?

HUBZone contracts, including Multiple Award Contracts (*see* § 125.1), are those awarded to a qualified HUBZone SBC through any of the following procurement methods:

(a) Sole source awards to qualified HUBZone SBCs;

(b) Set-aside awards, including partial set-asides, based on competition restricted to qualified HUBZone SBCs;

(c) Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference is applied to an other than small business in favor of qualified HUBZone SBCs;

(d) Awards based on a reserve for HUBZone SBCs in a solicitation for a Multiple Award Contract (*see* § 125.1); or

(e) Orders set-aside for HUBZone SBCs against a Multiple Award Contract, which had been awarded in full and open competition.

■ 34. Amend § 126.601 by adding new paragraphs (g) and (h) to read as follows:

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

* * * * *

(g) *Multiple Award Contracts*—(1) *Total Set-Aside Contracts*. The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (see § 126.700) and the nonmanufacturer rule (see § 126.601), if applicable, in the performance of a contract totally set-aside for HUBZone SBCs. However, the contracting officer, in his or her discretion, may require the concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(2) *Partial Set-Aside Contracts*. For orders awarded under a partial set-aside contract, the qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (see § 126.700) and the nonmanufacturer rule (see § 126.601), if applicable, during each performance period of the contract—e.g., during the base term and then during each subsequent option thereafter. For orders awarded under the non-set-aside portion, the qualified HUBZone SBC need not comply with any limitations on subcontracting or nonmanufacturer rule requirements. However, the contracting officer, in his or her discretion, may require the concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Orders*. The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (see § 126.700) and the nonmanufacturer rule (see § 126.601), if applicable, in the performance of each individual order that has been set-aside for HUBZone SBCs.

(4) *Reserves*. The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (see § 126.700) and the nonmanufacturer rule (see § 126.601), if applicable, in the performance of an order that is set aside for HUBZone SBCs. However, the qualified HUBZone SBC will not have to comply with the limitations on subcontracting provisions and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst qualified HUBZone SBCs and one or more other-than-small business concerns.

(h) *Recertification of Status for an Award*. (1) A concern that is a qualified HUBZone SBC at the time of initial offer and contract award, including a Multiple Award Contract, is considered a HUBZone SBC throughout the life of that contract. This means that if a HUBZone SBC is certified at the time of initial offer and contract award for a Multiple Award Contract, then it will be

considered a HUBZone SBC for each order issued against the contract, unless a contracting officer requests a new HUBZone SBC certification in connection with a specific order. Where a concern is later decertified, the procuring agency may exercise options and still count the award as an award to a HUBZone SBC. However, the following exceptions apply:

(i) Where a HUBZone contract (or a contract awarded through full and open competition based on the HUBZone price evaluation preference) is novated to another business concern, the concern that will continue performance on the contract must certify its status as a HUBZone SBC to the procuring agency, or inform the procuring agency that it does not qualify as a HUBZone SBC, within 30 days of the novation approval. If the concern cannot certify that it qualifies as a HUBZone SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.

(ii) Where a concern that is performing a HUBZone contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its HUBZone SBC status to the procuring agency, or inform the procuring agency that it has been decertified or no longer qualifies as a HUBZone SBC. If the contractor is unable to recertify its status as a HUBZone SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals. The agency must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) Where there has been a HUBZone status protest on the solicitation or contract, see § 126.803(d) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its HUBZone SBC status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as a HUBZone SBC, either initially or prior to an option being exercised, may recertify itself as a HUBZone SBC for a subsequent option period if it meets the eligibility requirements at that time.

(4) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order and at the time of award.

(6) A concern's status may be determined at the time of submission of its initial response to a solicitation for and award of an Agreement and each order issued pursuant to the Agreement.

■ 35. Revise § 126.602 to read as follows:

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

(a) Qualified HUBZone SBCs eligible for the program pursuant to § 126.200(b) must meet the HUBZone residency requirement at all times while certified in the program. However, the qualified HUBZone SBC may “attempt to maintain” (see § 126.103) the required percentage of employees who reside in a HUBZone during the performance of any HUBZone contract awarded to the concern on the basis of its HUBZone status, except as set forth in paragraph (d).

(b) For indefinite delivery, indefinite quantity contracts, including Multiple Award Contracts, the qualified HUBZone SBC must attempt to maintain the residency requirement during the performance of each order that is set-aside for HUBZone SBCs.

(c) A qualified HUBZone SBC 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.

(d) Every time a qualified HUBZone SBC submits an offer and is awarded a HUBZone contract, it must meet all of the HUBZone Program's eligibility requirements, including the employee residency requirement at the time it submits its initial offer and up until and including the time of award. This means that if a HUBZone SBC is performing on a HUBZone contract and submits an

offer for another HUBZone contract, it can no longer attempt to maintain the HUBZone residency requirement; rather, it must meet the requirement at the time it submits its initial offer and up until and including the time of award.

§ 126.607 [Amended]

■ 36. Amend § 126.607 by removing “ORCA certifications” and adding in its place “certifications in the System for Award Management (SAM) (or any successor system)” in paragraph (b)(2)(i).

■ 37. Amend § 126.610 by revising the section heading to read as follows:

§ 126.610 May SBA appeal a contracting officer’s decision not to make a procurement available for award as a HUBZone contract?

* * * * *

■ 38. Amend § 126.613 by:

- a. Adding a new sentence at the end of paragraph (a)(1); and
■ b. Adding an Example 4 in paragraph (a).

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

(a) * * *

(1) * * * This does not apply if the HUBZone SBC will receive the contract as part of a reserve for HUBZone SBCs.

Example 4: In a full and open competition, a qualified HUBZone SBC submits an offer of \$98 and a large business submits an offer of \$93. The contracting officer has stated in the solicitation that one contract will be reserved for a HUBZone SBC. The contracting officer would not apply the price evaluation preference when determining which HUBZone SBC would receive the contract reserved for HUBZone SBCs, but would apply the price evaluation preference when determining the awardees for the non-reserved portion.

* * * * *

§ 126.614 [Removed and reserved]

- 39. Remove and reserve § 126.614.
■ 40. Amend § 126.800 by revising paragraph (b) to read as follows:

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

* * * * *

(b) For all other procurements, including Multiple Award Contracts (see § 125.1), SBA, the contracting officer, or any other interested party may protest the apparent successful offeror’s qualified HUBZone SBC status.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT ASSISTANCE PROGRAM

■ 41. The authority for 13 CFR part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

■ 42. Revise § 127.101 to read as follows:

§ 127.101 What type of assistance is available under this part?

This part authorizes contracting officers to restrict competition to eligible Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for certain Federal contracts or orders in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented in Federal procurement. It also authorizes contracting officers to restrict competition to eligible WOSBs for certain Federal contracts or orders in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

■ 43. Amend § 127.102 by:

- a. Removing the definitions for “Central Contractor Registration (CCR)” and “ORCA”;
■ b. Adding the definition for “System for Award Management (SAM) (or any successor system)” to read as follows; and
■ c. Revising the definitions for “EDWOSB requirement”, “Interested party”, “System for Award Management (SAM) (or any successor system)”, “WOSB requirement”, to read as follows:

§ 127.102 What are the definitions of the terms used in this part?

* * * * *

EDWOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to eligible EDWOSBs, including Multiple Award Contracts, partial set-asides, reserves, and orders set-aside for EDWOSBs issued against a Multiple Award Contract.

* * * * *

Interested party means any concern that submits an offer for a specific EDWOSB or WOSB requirement (including Multiple Award Contracts), any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given a WOSB

or EDWOSB, the contracting activity’s contracting officer, or SBA.

* * * * *

System for Award Management (SAM) (or any successor system) means a federal system that consolidates various federal procurement systems (e.g., Central Contractor Registration (CCR), Federal Agency Registration (Fedreg), Online Representations and Certifications Application (ORCA), Excluded Parties List System (EPLS)) and the Catalog of Federal Domestic Assistance into one system.

* * * * *

WOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to eligible WOSBs, including Multiple Award Contracts, partial set-asides, reserves, and orders set-aside for WOSBs issued against a Multiple Award Contract.

■ 44. Amend § 127.300 by:

- a. Revising paragraph (a) to read as follows;
■ b. Amending paragraph (b) by removing “CCR database” and adding in its place “SAM (or any successor system)” ;
■ c. Amending paragraph (d)(1) by removing “ORCA” and adding in its place “SAM (or any successor system)” ; and
■ d. Amending paragraph (f)(1) by removing “on ORCA” and adding in its place “in SAM (or any successor system)” :

§ 127.300 How does a concern self-certify as an EDWOSB or WOSB?

(a) General. At the time a concern submits an offer on a specific contract (including a Multiple Award Contract) or order reserved for competition among EDWOSBs or WOSBs under this Part, it must be registered in the System for Award Management (SAM) (or any successor system), have a current representation posted on SAM (or any successor system) that it qualifies as an EDWOSB or WOSB, and have provided the required documents to the WOSB Program Repository, or if the repository is unavailable, be prepared to submit the documents to the contracting officer if selected as the apparent successful offeror.

* * * * *

§ 127.301 [Amended]

■ 45. Amend § 127.301 by removing “on ORCA” and adding in its place “in SAM (or any successor system)” in paragraph (a)(1), and by removing “ORCA” and adding in its place “SAM (or any successor system)” in paragraph (a)(2).

§ 127.302 [Amended]

■ 46. Amend § 127.302 by removing “ORCA” and adding in its place “SAM (or any successor system)” in the introductory language.

§ 127.303 [Amended]

■ 47. Amend § 127.303 by removing “on CCR” and adding in its place “in SAM (or any successor system)” in paragraph (b)(3).

■ 48. Amend § 127.400 by revising paragraphs (a) and (b) to read as follows:

§ 127.400 What is an eligibility examination?

(a) *Purpose of examination.* Eligibility examinations are investigations that verify the accuracy of any certification made or information provided as part of the certification process (including third-party certifications) or in connection with an EDWOSB or WOSB requirement. In addition, eligibility examinations may verify that a concern meets the EDWOSB or WOSB eligibility requirements at the time of the examination. SBA will, in its sole discretion, perform eligibility examinations at any time after a concern self-certifies in SAM (or any successor system) that it is an EDWOSB or WOSB. SBA may conduct the examination, or parts of the examination, at one or all of the concern's offices.

(b) *Determination on conduct of an examination.* SBA may consider protest allegations set forth in a protest in determining whether to conduct an examination of a concern pursuant to subpart D of this part, notwithstanding a dismissal or denial of a protest pursuant to § 127.604. SBA may also consider information provided to the D/GC by a third-party that questions the eligibility of a WOSB or EDWOSB that has certified its status in SAM in determining whether to conduct an eligibility examination.

■ 49. Amend § 127.401 by revising the first sentence paragraph (a) to read as follows:

§ 127.401 What is the difference between an eligibility examination and an EDWOSB or WOSB status protest pursuant to subpart F of this part?

(a) *Eligibility examination.* An eligibility examination is the formal process through which SBA verifies and monitors the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or WOSB requirement. * * *

* * * * *

§ 127.403 [Amended]

■ 50. Amend § 127.403 by removing “CCR and ORCA” and adding in its place “SAM (or any successor system)”.

§ 127.404 [Amended]

■ 51. Amend § 127.404 by removing “the CCR and ORCA” and adding in its place “SAM (or any successor system)” in paragraph (b)(1).

■ 52. Amend § 127.503 by:

■ a. Revising paragraphs (a)(1), (a)(2), (b)(1) and (b)(2) to read as follows;

■ b. Amending paragraphs (d)(2)(i) and (e) by removing “ORCA certifications” and replacing it with “certifications in SAM (or any successor system)”;

■ c. Revising paragraph (f) to read as follows.

§ 127.503 When is a contracting officer authorized to restrict competition under this part?

(a) * * *

(1) Two or more EDWOSBs will submit offers for the contract; and

(2) Contract award may be made at a fair and reasonable price.

* * * * *

(b) * * *

(1) Two or more WOSBs will submit offers (this includes EDWOSBs, which are also WOSBs); and

(2) Contract award may be made at a fair and reasonable price.

* * * * *

(f) *Recertification.* (1) A concern that represents itself and qualifies as a WOSB or EDWOSB at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered a WOSB or EDWOSB throughout the life of that contract. This means that if a WOSB/EDWOSB is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an WOSB/EDWOSB for each order issued against the contract, unless a contracting officer requests a new WOSB or EDWOSB certification in connection with a specific order. Where a concern later fails to qualify as a WOSB/EDWOSB, the procuring agency may exercise options and still count the award as an award to a WOSB/EDWOSB. However, the following exceptions apply:

(i) Where a WOSB/EDWOSB contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as a WOSB/EDWOSB to the procuring agency, or inform the procuring agency that it does not qualify as a WOSB/EDWOSB, within 30 days of the novation approval. If the concern cannot certify its status as a WOSB/

EDWOSB, the agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(ii) Where a concern that is performing a WOSB/EDWOSB contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its WOSB/EDWOSB status to the procuring agency, or inform the procuring agency that it no longer qualifies as a WOSB/EDWOSB. If the concern is unable to recertify its status as a WOSB/EDWOSB, the agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status if necessary.

(iii) Where there has been a WOSB or EDWOSB status protest on the solicitation or contract, see § 127.604(f) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its WOSB/EDWOSB status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as a WOSB/EDWOSB, either initially or prior to an option being exercised, may recertify itself as a WOSB/EDWOSB for a subsequent option period if it meets the eligibility requirements at that time.

(4) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(6) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

§ 127.504 [Amended]

■ 53. Amend § 127.504(a) by removing “on ORCA” and replacing it with “in SAM (or any successor system)” in paragraph (a) and by removing “on CCR and ORCA” and adding in its place “in SAM (or any successor system)” in paragraph (a)(2).

■ 54. Amend § 127.506 by:

- a. Revising the introductory text and paragraph (a) to read as follows; and
- b. Amending paragraph (b) by removing “on the CCR and the ORCA” and adding in its place “in SAM (or any successor system)”.

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture may submit an offer on an EDWOSB or WOSB requirement

if the joint venture meets all of the following requirements:

(a) Except as provided in § 121.103(h)(3) of this chapter, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the NAICS code assigned to the contract or order;

* * * * *

■ 55. Amend § 127.508 by revising the section heading to read as follows:

§ 127.508 May SBA appeal a contracting officer’s decision not to make a requirement available for award as a WOSB Program contract? * * *

* * * * *

■ 56. Amend § 127.600 by revising the first sentence of the introductory text to read as follows:

§ 127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

An interested party may protest the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement or contract. * * *

§ 127.604 [Amended]

■ 57. Amend § 127.604 by removing the phrase “on the CCR and the ORCA” and adding in its place “in SAM (or any successor system)” in paragraph (e).

Dated: August 22, 2013.

Karen G. Mills,
Administrator.

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