

the contracting officer] percent to the price of all offers, except—

(i) Offers from small disadvantaged business concerns that have not waived the adjustment;

(ii) For DOD, NASA, and Coast Guard acquisitions, otherwise successful offers from historically black colleges or universities or minority institutions;

(iii) Otherwise successful offers of eligible products under the Trade Agreements Act when the dollar threshold for application of the Act is equaled or exceeded (see section 25.402 of the Federal Acquisition Regulation (FAR));

(iv) Otherwise successful offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government; and

(v) For DOD acquisitions, otherwise successful offers of qualifying country end products (see sections 225.000–70 and 252.225–7001 of the Defense FAR Supplement).

(2) The factor shall be applied on a line item basis or to any group of items on which award may be made. Other evaluation factors described in the solicitation shall be applied before application of the factor. The factor may not be applied if using the adjustment would cause the contract award to be made at a price that exceeds the fair market price by more than the factor in paragraph (b)(1) of this clause.

(c) *Waiver of evaluation adjustment.* A small disadvantaged business concern may elect to waive the adjustment, in which case the factor will be added to its offer for evaluation purposes. The agreements in paragraph (d) of this clause do not apply to offers that waive the adjustment.

____ Offeror elects to waive the adjustment.

(d) *Agreements.* (1) A small disadvantaged business concern, that did not waive the adjustment, agrees that in performance of the contract, in the case of a contract for—

(i) Services, except construction, at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern;

(ii) Supplies (other than procurement from a nonmanufacturer of such supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern;

(iii) General construction, at least 15 percent of the cost of the contract, excluding the cost of materials, will be performed by employees of the concern; or

(iv) Construction by special trade contractors, at least 25 percent of the cost of the contract, excluding the cost of materials, will be performed by employees of the concern.

(2) A small disadvantaged business concern submitting an offer in its own name agrees to furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns in the United States. This paragraph does not apply in connection with construction or service contracts.

(End of clause)

Alternate I (Oct 1998). As prescribed in 19.1104, substitute the following paragraph (d)(2) for paragraph (d)(2) of the basic clause:

(2) A small disadvantaged business concern submitting an offer in its own name agrees to furnish in performing this contract only end items manufactured or produced by small business concerns in the United States. This paragraph does not apply in connection with construction or service contracts.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration as the Federal Acquisition Regulatory Council. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121). It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 97–06 which amends the Federal Acquisition Regulation (FAR). Further information regarding this rule may be obtained by referring to FAC 97–06 which precedes this document. This document may be obtained from the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, (202) 501–4755.

Reform of Affirmative Action in Federal Procurement

FAC 97–06/FAR Case 97–004A. The interim rule amends FAR Parts 1, 12, 14, 15, 19, 33, and 52 to establish a mechanism to benefit small disadvantaged business concerns at the prime contract level. This mechanism is a price evaluation adjustment of up to ten percent in certain Standard Industrial Classification (SIC) Major Groups as determined by the Department of Commerce. This price evaluation adjustment conforms to the Department of Justice proposal to reform affirmative action in Federal

procurement and to regulations issued by the Small Business Administration regarding small disadvantaged business programs. This price evaluation adjustment is mandatory for those competitive procurements to which it applies. It does not, however, apply to several major categories of acquisition, including, for example, acquisitions within the simplified acquisition threshold, acquisitions set aside for small business, and acquisitions conducted pursuant to the 8(a) program.

Dated: June 23, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, and 134

Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: In response to President Clinton's government-wide regulatory reform initiative, the Small Business Administration (SBA) amends both the eligibility requirements for, and contractual assistance provisions within, the SBA's 8(a) Business Development (8(a) BD) program. This final rule changes the name of the program from the Minority Small Business and Capital Ownership Development program to the 8(a) BD program to better reflect the purpose of the program. This rule streamlines the operation of the 8(a) BD program, eases certain restrictions perceived to be burdensome on Program Participants, clarifies certain eligibility requirements, and deletes obsolete regulations.

DATES: *Effective Date:* This rule is effective on July 30, 1998.

Compliance Dates: Subpart A applies to all applications for the 8(a) Business Development program pending as of July 30, 1998 and all 8(a) procurement requirements accepted by SBA on or after July 30, 1998. These rules do not apply to any appeals pending before SBA's Office of Hearings and Appeals. The revisions to 13 CFR part 121 apply with respect to all solicitations issued on or after June 30, 1998. Except for 13 CFR 134.408(c), the procedural revisions to 13 CFR part 134 apply to all appeals served or filed on or after June

30, 1998. 13 CFR 134.408(c) applies as of the publication to all pending appeals before SBA's Office of Hearings and Appeals.

FOR FURTHER INFORMATION CONTACT:

William A. Fisher, Acting Associate Administrator for Minority Enterprise Development, at (202) 205-6412.

SUPPLEMENTARY INFORMATION:

On March 4, 1995, President Clinton issued a Memorandum to federal agencies, directing them to simplify their regulations. In response to this directive, SBA completed a page-by-page, line-by-line review of all of its then existing regulations to determine which might be revised or eliminated. Revisions to 13 CFR Part 124 awaited a review by the Department of Justice (DOJ) of all Federal procurement affirmative action programs. On May 23, 1996, DOJ published in the **Federal Register** a comprehensive proposal for tailoring affirmative action programs in the Federal procurement arena (see 61 FR 26042), and on May 9, 1997 the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration proposed amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business (SDB) concerns. In response to and in conjunction with the DOJ and FAR reform proposals, on August 14, 1997, SBA published in the **Federal Register**, 62 FR 43584, a proposed rule to amend 13 CFR part 124. Subpart A of the proposed part 124 dealt with changes pertaining to the 8(a) Business Development (8(a) BD) program which is authorized by sections 7(j)(10) and 8(a) of the Small Business Act, 15 U.S.C. 636(j)(10), 637(a). Subpart B of proposed part 124 dealt with SBA's role in the certification and protest of small disadvantaged businesses, as contemplated by the DOJ and FAR proposals. During the proposed rule's 60-day comment period, SBA received 95 timely comments, the majority of which favored the proposed changes. This rule finalizes subpart A of 13 CFR part 124 (its regulations relating to the SBA's 8(a) Business Development Program. SBA continues to consider issues relating to subpart B of 13 CFR part 124, and will finalize those regulations at a later time. This rule does not address any comments made regarding subpart B of part 124 or SBA's response thereto.

A substantial number of commenters applauded SBA's effort to remove duplicative provisions, and rewrite those that appeared wordy or unclearly written. For the most part, the comments also supported the

substantive changes proposed by SBA. SBA received comments on many aspects of the proposed rule. With the exception of comments which did not set forth any rationale or make suggestions, SBA discusses and responds fully to all the comments below.

In addition to the changes to 13 CFR part 124, the final rule also makes changes to SBA's size regulations (part 121) to permit size protests and appeals of Standard Industrial Classification (SIC) code designations in connection with 8(a) competitive procurements, and to exclude certain joint venture arrangements from SBA's affiliation rules. These changes should increase the potential pool of small businesses available to compete for particular procurements and should encourage contracting officers to consider small business contractors more closely before determining a procurement strategy. The final rule also transfers the procedures relating to certain statutorily authorized appeals in the 8(a) program from part 124 to part 134 of 13 CFR.

This final rule streamlines the operation of the 8(a) BD program, eases certain restrictions perceived to be burdensome on Participants, amends certain eligibility procedures, and deletes obsolete regulations. It reorganizes the regulations into identifiable substantive areas for ease of use and clarity. It also changes all references to SBA's Office of Minority Small Business and Capital Ownership Development to the Office of 8(a) Business Development to emphasize that individuals participating in the program need not be members of minority groups and to stress the importance of assisting participating firms in their overall business development.

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

This rule amends eligibility procedures for admission to the 8(a) BD program and also amends contractual assistance provisions within the 8(a) BD program. It eliminates the requirement that a Participant must have specified SIC codes approved by SBA in its business plan in order to be eligible for 8(a) contracts, establishes consistent remedial measures for firms that do not meet their non-8(a) business activity targets, eases certain joint venture restrictions, and establishes a mentor/protege program for developing 8(a) Participants. This rule also liberalizes

the standard of review for non-group members seeking disadvantaged status from a clear and convincing evidence test to a preponderance of the evidence standard.

Summary of Comments and SBA's Response

Part 121: SBA received a substantial number of comments agreeing with SBA's proposal to exclude certain joint venture arrangements from the normal affiliation rules. This provision will encourage contracting officers to use small business contractors to a greater extent. With the consolidation of procurements becoming an increasing reality, some contracting officers may feel that requirements are too big for a small business to perform successfully. The proposed rule would have permitted two or more small business concerns to joint venture for a particular procurement and be considered a small business concern so long as each concern individually was small. Several commenters recommended that this provision be broadened to exclude affiliation rules where there are "teaming" agreements as well. SBA concurs with this recommendation, and has changed the rule accordingly.

Part 124, subpart A: Most of the comments received by SBA focused on subpart A of part 124. The following analysis discusses each of the significant comments received.

The proposed rule contained no provision for reporting changes that would adversely affect a firm's eligibility, either during the application stage or during a Participant's tenure in the program. As a result of a number of comments, several new provisions have been included in the regulation. Section 124.2 requires, in part, that a Participant must maintain its program eligibility throughout its tenure in the program and is obligated to inform SBA of any changes that would adversely affect its program eligibility. To continue a firm's participation in the program, § 124.112 specifically reasserts this obligation and § 124.112(b)(2) requires program Participants as part of their annual review to represent that no adverse change occurred or, in the alternative, to describe any adverse changes that have occurred. During the application stage, the 8(a) applicant is obligated to inform SBA of any adverse changes that may have occurred since the actual application.

Section 124.103(c) of the proposed rule stated that individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by a "preponderance of the evidence."

Previously, individuals not members of a designated group needed to prove individual social disadvantage by "clear and convincing" evidence. SBA received many comments regarding the proposed change in the evidentiary standard. The majority of commenters did not favor changing the standard. SBA believes that all individuals who can show that they have personally suffered social disadvantage, including women and handicapped individuals, should be admitted to the 8(a) BD program, and that the change in the evidentiary standard is necessary for constitutional reasons. In response to the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 Sup. Ct. 2097 (1995), which requires programs to provide a race-based remedy to be "narrowly tailored," the Department of Justice recommended the "preponderance of the evidence" standard for government-wide disadvantaged business programs. SBA based the "preponderance of the evidence" standard on the Department of Justice proposal, and continues to believe that the use of this standard strengthens the defense of the 8(a) BD program. Therefore, SBA retains the "preponderance of the evidence" standard in the final rule. While the criteria for a case of individual social disadvantage remains basically the same, the final rule changes the evidentiary standard that must be shown to demonstrate an individual case of social disadvantage. In assessing a claim of individual social disadvantage, SBA will consider all relevant information submitted by an applicant. Evidence which tends to show generalized patterns of discrimination against a non-designated group or statistical data showing that businesses owned by a specific non-designated group are disproportionately underrepresented in a particular industry may be used to augment an individual's case. Statistics and generalized patterns are not sufficient by themselves to establish a case of individual social disadvantage. However, an individual's statement of personal experiences in combination with the generalized evidence may be sufficient to demonstrate social disadvantage.

Proposed § 124.103(d) stated that representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a group presumed to be socially disadvantaged. One commenter asked what the evidentiary standard should be for

approval of a designated group. As a result of this comment, § 124.103(d)(1) of the final rule provides that a preliminary showing must be made that substantial evidence exists that a group meets the criteria to be determined presumptively socially disadvantaged. Once this showing is made, SBA will publish a notice for comment and, where deemed appropriate, hold hearings and/or conduct its own research. After completion of the process, SBA will determine whether a preponderance of the evidence shows that the group meets the necessary criteria to be considered presumptively disadvantaged.

Proposed § 124.104, which set forth the factors to be reviewed to determine the economic status of socially disadvantaged individuals, clarified that a contingent liability does not reduce an individual's net worth. A commenter remarked that contingent liabilities reduce capital and credit opportunities and should be considered as reducing net worth. SBA understands this possibility, but does not adopt the comment. There are wide varieties of contingencies and their impacts on credit opportunities. Moreover, individuals should not be permitted to satisfy the net worth criterion by offering guarantees and indemnities with remote possibilities of becoming actual liabilities.

Another commenter felt that § 124.104 needed to set forth in greater detail the criteria SBA uses to determine whether an individual is economically disadvantaged. SBA will study this issue for possible later revision.

Another commenter suggested that under § 124.104, review of the financial status of individuals claiming economic disadvantage should be performed going back two years prior to application. This is already addressed in two subsections of this section and no further provisions are needed. Proposed § 124.104(c) provides that SBA will take into account the individual's personal income for the previous two years. Proposed § 124.104(c)(1) provides that SBA will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a or beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the 8(a) BD program or within two years of a Participant's annual program review, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education,

medical expenses, or some other form of essential support.

One commenter expressed concern that transfers of assets to family members within two years prior to application should be objectionable even if the transfer was "for fair market value." The commenter felt that sham transfers would be made to enable individuals to qualify as economically disadvantaged under the thresholds. SBA has not adopted this comment since, if a transferee received fair market value for an asset, the transfer would be a sale, not a sham. As such, the transfer would not distort a calculation of the transferor's net worth.

SBA had specifically requested comments on proposed § 124.105, seeking input on whether and under what circumstances trust arrangements might be considered permissible without violating the statutory requirement that an applicant or Participant must be at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals. SBA received several comments on this issue. Upon further reflection, SBA has determined that ownership of an 8(a) applicant or Participant by trusts that are the functional equivalent of individuals, like living trusts, are tantamount to individual ownership and should be permitted in the program. One commenter noted that the IRS treats living trusts as individuals for the purposes of income tax calculation, and urged SBA to do the same. The SBA recognizes that an increasing number of entrepreneurs are using such vehicles for tax and estate planning purposes. Therefore, a provision making certain trusts eligible for 8(a) participation has been included in § 124.105(a). The new provision states that an 8(a) BD concern owned by a trust is considered to be directly owned by a disadvantaged individual if the trust is revocable and the disadvantaged individual is also the grantor, a trustee and the sole current beneficiary of the trust.

Section 124.105(h) of the proposed rule set forth certain ownership restrictions for non-disadvantaged individuals and concerns. Proposed § 124.105(h)(1) stated that a non-disadvantaged individual or a non-Participant concern that owns a 10 percent or greater interest in a Participant as a general partner or stockholder may not own more than a 10 percent interest in another Participant. Proposed § 124.105(h)(2) stated that a non-Participant concern in the same or similar line of business may not own more than 10 percent in a current Participant, and a former

Participant in the same or similar line of business may not own more than 20 percent in a current Participant. Five commenters disagreed with these restrictions. They felt they were unnecessary and would place extra burdens on 8(a) firms that non-8(a) firms do not have. Most felt that if SBA determines that the firm is 51 percent owned, managed and controlled by a disadvantaged individual, no other ownership restrictions should apply. Two commenters pointed out that the regulation as proposed would hinder the firm's access to capital. The commenters pointed out that access to money is necessary to make the transition into the competitive market place. In response to these comments, the SBA has revised its regulations to raise the percentages that non-disadvantaged individuals, non-disadvantaged firms and former 8(a) firms may own in an 8(a) Participant in the transitional stage of program participation. With respect to a firm in the transitional stage of 8(a) program participation, the final rule states that (1) a non-disadvantaged individual or a non-Participant concern with at least a 10 percent ownership interest in another Participant may own up to a 20 percent interest; (2) a non-disadvantaged individual or concern in the same or similar line of business may own up to a 20 percent interest; and (3) a former 8(a) Participant may own up to a 30 percent interest. Percentages of ownership for firms in the developmental stage of program participation are not changed in this rule. SBA's decision to ease the current restrictions on ownership of an 8(a) BD concern should improve access to sources of capital. SBA decided not to raise the percentages higher than 20 and 30 percent at this time due to its continued concern over program abuse through the possible establishment of fronts. SBA will continue to monitor this section of the rule and may adjust the percentages further in the future if it deems it appropriate to do so.

Section 124.105(i) contains standards for obtaining SBA approval of a change in a Participant's ownership. Several commenters expressed concern that a time limit should be imposed on SBA to approve or decline change of ownership requests. The final rule provides that the AA/8(a)BD will issue a decision within 60 days of receipt by the Agency of a request containing all necessary documentation, and that the decision of the AA/8(a)BD will be the final Agency decision. The final rule further provides that the denial of a request for a change of ownership may be grounds for

program termination if the change is nonetheless completed.

The preamble to the proposed rule solicited comments on a proposal to use suspension as a tool to allow time for an SBA inquiry into a Participant's change of ownership or control. No negative comments were received relating to this issue. Commenters who did address the matter approved of such use, providing that SBA would restore the length of the suspension to the firm's program term if the change is ultimately approved. As a result of the comments, SBA has revised § 124.105(i). As revised, § 124.105(i) provides that, where a Participant requests a change of ownership or business sture, and the che change has already occurred, SBA will suspend the Participant pending a decision on the request. If the change is approved, the SBA will restore the length of the suspension to the Participant's program term where the change in ownership results from the death or incapacity of a disadvantaged individual, or where the firm requested prior approval and waited 60 days for SBA approval before making the change. SBA will not restore the length of a suspension for any firm that did not request a change in ownership prior to making the change (except, as noted, for a change due to death or incapacity). This provision has also been added to § 124.305 governing suspensions.

The proposed regulation regarding suspension (§ 124.305) has been modified to clarify the jurisdiction of the Office of Hearings and Appeals and the standard of evidence necessary for SBA to sustain its suspension action. The proposed rule stated that SBA has the burden of showing that "substantial" evidence exists in support of at least one of the grounds for termination cited in the Letter of Intent to Terminate. SBA has decided not to adopt this new standard in the final rule. The final rule provides that SBA is required to show only that "adequate" evidence exists in support of a least one of the grounds for termination. The final rule defines the term "adequate evidence" as information sufficient to support the reasonable belief that a particular act or omission has occurred. This definition is adopted from § 9.403 of Title 48 of the Code of Federal Regulations.

Section 124.305 has also been amended to provide that, unless the Administrative Law Judge consolidates the suspension and termination proceedings, the review must be limited to determining whether the government's interest needs protection. SBA's Office of Hearings and Appeals

(OHA) may not review the grounds for termination under a suspension action.

A commenter questioned whether proposed § 124.105(i) conflicts with the requirement in § 124.515 that a change in ownership of an 8(a) BD concern requires a waiver from SBA for the Participant to continue performing on an 8(a) contract. Section 124.105(i) allows continued performance of a contract without a waiver if a disadvantaged individual is substituted for another, with SBA approval before the change is implemented. SBA requires waivers under § 124.515 only where ownership of an 8(a) Participant would be changed to an extent that the 8(a) BD concern would be no longer at least 51 percent owned by one or more disadvantaged individuals. If SBA does not approve a change in ownership because it determines that the acquiring individual is not disadvantaged or that the firm as structured after the change is no longer owned and controlled by disadvantaged individuals, then the firm must seek a waiver under § 124.515 in order to continue to perform any of its 8(a) contracts.

Proposed § 124.106 explained the concept of control and the factors which SBA looks at to determine who controls an 8(a) BD concern. Several commenters raised issues of control where a non-disadvantaged individual held a critical license. SBA does not believe that the mere fact that a non-disadvantaged employee who is not also an equity owner of the firm holds a critical license would cause the disadvantaged principal(s) to lose control. In such a case, the disadvantaged principal(s) must demonstrate their management expertise and the right to replace the non-disadvantaged employee at any time with another technical employee. However, SBA agrees that the situation is much more complicated where the non-disadvantaged individual who holds a critical license is also an equity owner of the firm. The final rule permits SBA to find negative control where a non-disadvantaged owner holds a critical license. The burden is on the applicant or Participant to demonstrate that control is in the hands of one or more disadvantaged individuals. The final rule provides that an individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. SBA recognizes that failure to possess technical expertise or a required license are factors that may be considered in evaluating the disadvantaged

individual's control of the concern, but that such circumstances are not dispositive.

One commenter suggested that 8(a) concerns be allowed to own subsidiary concerns without being in violation of the requirement under proposed § 124.106(a)(3) that an owner of an 8(a) concern devote full time to management of the concern. SBA's policy is to allow such ownership since working with the subsidiary indirectly advances the interests of the 8(a) concern. Therefore, a provision expressly allowing such ownership has been added to § 124.106(a)(3). However, this exception does not change the general requirement that an owner of an 8(a) concern devote full time to manage the concern.

A few commenters requested that some flexibility be given to the requirement under § 124.106(a)(3) that a disadvantaged individual who manages the Participant concern must devote full-time to the business during normal working hours. As stated in the preamble to the proposed regulations, this requirement is not intended to prevent such individual from spending normal business hours away from the premises in such areas as marketing and outreach that benefit the concern. The rule does not imply that business activities could not be conducted by such individual outside the office. It does, however, prohibit such individual from being physically located at a site on a continuing basis which is separate and distinct from the Participant concern during normal business hours, despite any claim that he or she is managing the concern from that location. SBA believes it is important for the growth and development of the 8(a) BD concern that the disadvantaged individual who manages the concern devote full time to such management. Therefore, SBA makes no change to the final rule.

The proposed regulations continued SBA's current approach and required that disadvantaged individuals have majority control of the board of directors. Some commenters felt that this requirement did not reflect business practice in the corporate world. One commenter felt that, particularly in smaller corporations, the sole shareholder or the majority shareholder virtually always controls the board of directors. This control stems from his or her ability to replace directors at will. The commenter recognized, however, that in rare situations the sole or majority owner might not control the board, such as where directors have fixed terms and cannot be removed before the end of such terms. In addition, SBA notes that cumulative

voting practices and super majority requirements (i.e., any provisions requiring more than a simple majority vote) may make it difficult for a shareholder owning only 51% of a corporate concern to control the board of directors of that concern. Likewise, where more than one disadvantaged owner is involved, voting rights and control of the board of directors is harder to pinpoint. As such, SBA accepts this comment to a point. The final rule gives several alternatives for finding control by disadvantaged individuals of the board of directors. Where a single disadvantaged individual owns 100% of an applicant or Participant, SBA deems that individual to control the board of directors, and no further analysis is needed. Where a single disadvantaged individual owning less than 100% seeks to qualify a concern, SBA deems that individual to control the board of directors where he or she owns at least 51% of the concern or, where the concern has super majority voting requirements, that percentage of ownership needed to overcome any such super majority ownership requirements, and he or she is on the board of directors. The applicant will be required to inform SBA of any super majority voting requirements provided for in its articles of incorporation, its by-laws, or by state law. Thus, the disadvantaged owner is able to convene a shareholder's meeting, change corporate by-laws and articles of incorporation, and change directors on the board at will. In such a case, SBA will not look at the makeup of the board of directors for determining control of the firm (although SBA will continue to examine the character of directors). Where more than one disadvantaged owner seeks to qualify an applicant or Participant (i.e., no one individual owns 51%) and each such individual is on the board of directors, SBA deems those individuals to control the board of directors where together they own at least 51% of the concern or, where the concern has super majority voting requirements, that percentage of ownership needed to overcome any such super majority ownership requirements, and they can demonstrate that they have made arrangements to overcome any potential stalemates and that they have the comparable ability of a single majority owner to act quickly. For example, where a concern has three disadvantaged individuals each owning 17%, SBA will deem the individuals to control the board of directors without looking at the board's make-up if two of the three individuals have given their

voting rights to the third individual. Where an applicant or Participant cannot demonstrate the ability for a disadvantaged individual to act quickly to replace members of the board of directors, SBA will look at the composition of the board of directors and will apply the current board of directors control requirements to the concern. The concern must meet the current requirement that one or more disadvantaged individuals must control the board of directors through numbers of individuals on the board or, where permitted by state law, through weighted voting.

Numerous commenters expressed concern that, with the lowering of the evidentiary standard for eligibility in cases of individual social disadvantage, there would be a greater need to police fraud in the program application process. Many warned of potential front situations involving the transfer of ownership and/or control of the applicant firm from one family member to another. This final rule addresses these issues at several points. Section 124.106(f) provides that if a non-disadvantaged individual transfers majority ownership or control of the applicant firm to a family member within two years of the date of application while remaining an owner, officer, director or key employee of the company, the non-disadvantaged individual will be presumed to control the company. As noted above, the final rule also requires program applicants (§ 124.204(d)) and Participants (§ 124.112(b)) to inform SBA of any changes that would adversely affect their eligibility. Failure to inform SBA of these adverse changes, or falsely certifying that no adverse changes exist, are grounds for denial of entry into the program or, if concern is already a program Participant, grounds for termination from the program.

Proposed § 124.107 set forth the requirement that an 8(a) BD applicant must possess potential for success in competing in the private sector. One commenter questioned whether an 8(a) applicant that can meet the requirements under § 124.107(b)(iii) and (iv), needs 8(a) BD assistance. These subsections provide that if an applicant to the 8(a) BD program does not meet the requirement that it has been in business in its primary industry classification for at least two full years prior to applying, this requirement may be waived if certain conditions are met. In 1990, Congress passed legislation that would allow concerns to waive the two year rule after satisfying five conditions. See The Small Business Administration Reauthorization and Amendments Act

of 1990, Pub. L. No. 101-574 § 203(b)(1), 104 Stat. 2814, 2818-2819 (1990). SBA adopted the same five conditions for waiver in the 8(a) regulations, but has clarified that applicants will be assessed in the context of their proposed participation in the program.

As indicated above, several commenters expressed a need for greater oversight by SBA during the application process to prevent fraud. SBA notes that provisions included in the proposed regulations at § 124.108(a)(5) provide that SBA may decline an application due to the submission of false information. SBA may also terminate a firm from the program under § 124.303(a)(1)(15) if it discovers later that the Participant falsified information in its application. SBA retains these provisions in the final rule.

Proposed § 124.108(a) provided that SBA could exclude firms from program participation for lack of good character in circumstances where there was credible evidence of criminal activity. Upon further internal deliberation, the final rule significantly expands and clarifies § 124.108(a). SBA will also find a firm ineligible for the 8(a) BD program if it or one of its principals (1) lacks integrity as demonstrated by information related to an indictment, guilty plea, conviction, civil judgment or settlement; (2) is currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity; or (3) has knowingly submitted false information as part of the application for program admission. This clarification and expansion of the definition of good character reinforces the concept of business character as a requirement for program eligibility. It also promotes greater consistency between the eligibility requirements in this section and the grounds for termination in § 124.303(a).

Several commenters believed that payment of obligations to the Federal government should be included as an element of good business character under § 124.108(a). Failure to pay significant obligations owed to the Federal Government is already a basis for program termination under § 124.303(a)(11). Additionally, the existence of defaults resulting in a loss on a federal loan or federally assisted financing has long been a reason for denying financial assistance in other SBA programs. See 13 CFR § 120.110. For these reasons, SBA has added a new paragraph (e) to § 124.108, providing that any firm or principal that fails to pay significant financial obligations owed to the Federal Government is not

eligible for admission to the 8(a) BD program.

Section 124.108(f) of the proposed rule defined a "broker" as a concern that adds no value to an item being supplied to a procuring activity. One commenter suggested that the definition of broker be expanded to provide that a company would not be considered a broker if it purchased and shipped an item, despite the fact that purchasing and shipping do not technically "add value" to an item. SBA concurs that the proposed language did not adequately capture the meaning of the term "broker." SBA has, therefore, added language to § 124.108 to refine the definition of a broker. The final rule (§ 124.108(d)) provides that a broker is a concern that adds no material value to an item being supplied to a procuring activity or which does not take ownership or possession of or handle the item being procured with its own equipment or facilities. This definition of "broker" is specific to this rule. Some firms which refer to themselves as brokers in their line of business may not be ineligible for 8(a) participation as "brokers" under this rule.

The final rule also clarifies the provision restricting a tribe's (or an ANC's) ability to own more than one firm in the 8(a) program doing the same work. Section 124.109(c)(3)(ii) specifies that a tribe may own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the tribe operates in the 8(a) BD program as its primary SIC code. In other words, SBA will not deny an application from a tribally-owned concern where the application plans to do some work (but not its primary work) in the same SIC as another 8(a) firm owned by the tribe. The final rule makes this same clarification for CDCs and Native Hawaiian Organizations as well. See §§ 124.110(c) and 124.111(d), respectively.

Proposed § 124.112 listed the criteria Participants must meet in order to remain eligible for the 8(a) BD program. One commenter suggested that if SBA determines that a Participant is no longer eligible for the 8(a) BD program under § 124.112, that the Participant be allowed to respond to the factors supporting ineligibility even before SBA initiates early graduation or termination proceedings under § 124.302 and § 124.303, respectively. If SBA initiates such proceedings, the Participant now has 30 days to respond to SBA under § 124.304(b). SBA believes these procedures give the Participant an

adequate opportunity to respond on the issue of continued eligibility.

Another commenter recommended that a Participant which obtains an SBA loan should not thereby be considered to have "access to credit" under § 124.112 such that the socially disadvantaged individuals are no longer considered economically disadvantaged. Since this is already SBA's policy, no change to the regulation is necessary.

One commenter felt that requiring certification of the transfer of assets to family members under § 124.112(b)(4) would penalize individuals for making gifts to their families and would serve no legitimate purpose. SBA does not intend that each disadvantaged owner report every gift made to his or her family members. SBA is merely trying to determine if an individual has transferred significant assets to his or her family members in order to remain eligible for the program (i.e., in order to remain "economically disadvantaged"). Where the individual retains some use or enjoyment of the asset transferred (e.g., real estate is "transferred" to a spouse and the individual continues to have access to it; a piece of art is "transferred" to a family member, but continues to be displayed in the individual's residence), SBA will attribute the asset back to the disadvantaged individual for purposes of determining his or her continued economic disadvantage status. Where the individual demonstrates that the transfer is an irrevocable transfer as to which the disadvantaged individual retains no use or enjoyment (e.g., the one-time transfer of funds to an adult child to assist the child's purchase of a residence), the asset will not be attributed back to the disadvantaged individual. In addition, § 124.104(c)(1)(ii) of the final rule specifies that SBA will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements. This does not mean that an individual claiming disadvantaged status may transfer unreasonably large funds or other assets to an immediate family member and claim that it should not be attributed back to him or her because the transfer was, for example, a birthday present. The funds or assets transferred must be reasonable and within customary limits for the occasion.

Another commenter suggested that SBA also attribute back to the disadvantaged transferor all transfers to

non-family members for less than fair market value. SBA does not adopt this suggestion. Such a rule could discourage, for example, an irrevocable charitable transfer of assets. SBA notes that if an asset is transferred subject to a retained interest or a remainder, then the present value of the retained interest will continue to be counted as an asset in determining the donor's net worth. As such, there is no need to impose further restrictions or requirements on these transfers.

A few commenters noted that language in proposed § 124.112, concerning the continuing eligibility of businesses in the 8(a) BD program, inadvertently requires concerns owned by Alaska Native Corporations (ANCs) to comply with §§ 124.101 through 124.108. SBA has revised § 124.112 to correct this error. In addition, this section has been revised to address the continuing eligibility of concerns owned by Indian tribes, Native Hawaiian Organizations and Community Development Corporations (CDCs).

With respect to the new mentor/protege program, one commenter suggested that SBA should measure the performance of the mentor and benefits of the program. SBA has adopted this suggestion by revising § 124.112(b) to require from protege firms a narrative report on the program as part of their annual report. SBA has also revised § 124.520 to provide specific standards for SBA reviews of mentor/protege relationships.

Proposed § 124.112(c) set forth examples under which SBA may determine that a socially disadvantaged individual is no longer economically disadvantaged. One commenter noted that the proposed rule referred to the economic status of the 8(a) BD Participant, rather than the disadvantaged individual. This error has been corrected in the final regulations, and language has been added to clarify that the economic status of the Participant may be considered in analyzing the status of the individual.

Proposed § 124.204 set forth the process of applying to the 8(a) BD program. Proposed § 124.204(b) stated that eligibility for the program is based on the circumstances existing on the date of application, but that SBA may request clarification of information in the application. Several commenters felt that this was too harsh and that concerns which might easily be eligible for the program would not be allowed the chance to make simple changes in order to be eligible. While SBA understands the desire an applicant would have to be able to change its application at any point in time in order

to come into compliance with SBA's requirements during the application process, SBA believes that it is more important for reviewers not to have an application that is an ever-changing moving target. In addition, SBA notes that the applicant still has its right to request reconsideration of an initial decline letter and it is free to make any changes in its application at that time.

Proposed § 124.302 of the regulations set forth the criteria for early graduation. A Participant could be graduated early if it either successfully completes the program prior to the end of its program term or if one or more of the disadvantaged owners are no longer economically disadvantaged. Some commenters felt that successful firms would be penalized for their success if they were graduated before the expiration of their 9 year term. Although SBA is authorized to graduate firms that meet their business objectives early, this process is at the discretion of the Administrator. Early graduation is not an automatic process. Only Participants that show sufficient competitive strength and viability to compete successfully outside the program will be subject to early graduation. Once they show such strength and viability, their need for continued participation in the program has ended. Accordingly, SBA has retained these provisions in the final rule.

One commenter suggested that SBA should graduate Participants early when the Participants have demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program, whether or not they have achieved the targets, goals and objectives set forth in their business plans. SBA believes that this recommendation is contrary to the Small Business Act. The Small Business Act authorizes SBA to graduate Participants early only under limited circumstances, among them where a Participant has successfully completed the program by substantially achieving its targets, goals and objectives. SBA understands the concerns of the commenter, and will take efforts to ensure that the targets, goals and objectives in the business plans are realistic and appropriate.

Section 124.303(a) of the proposed rule provides for early termination from the 8(a) program prior to the expiration of a concern's Program Term for good cause. Section 124.303(a)(13) lists, as an example of good cause, excessive transfers of funds or other business assets hindering development of the concern, and excessive withdrawals from the concern for the personal benefit of any of its owners or any entity

affiliated with the owners. Several commenters were concerned with SBA labeling withdrawals "excessive" without reviewing the totality of the circumstances. Section 124.112(d)(3) defines as excessive those withdrawals during any one fiscal year of a Participant that exceed \$150,000 for firms with sales up to \$1,000,000; \$200,000 for firms with sales between \$1,000,000 and \$2,000,000; and \$300,000 for firms with sales over \$2,000,000. The regulation permits SBA to terminate the concern for good cause for such withdrawals. However, it does not state that SBA will automatically terminate the concern. SBA realizes that some withdrawals above the "excessive" guidelines are not excessive in light of the totality of the circumstances. SBA decides terminations on a case-by-case basis and always considers the totality of the circumstances beforehand. Nonetheless, the final rule clarifies that SBA will presume to be excessive all withdrawals exceeding the specified amounts.

The final rule changes § 124.303 to add clarity and to eliminate redundancy. Proposed § 124.303(a)(18) stated that a suspension or revocation of any license required to run the business is good cause for termination. SBA has deleted this paragraph and transferred its substance to § 124.303(a)(12). Section 124.303(a)(12) of the final rule now lists as a ground for termination the failure to keep licenses, charters and permits current.

SBA received several comments concerning the application of benchmarks to the 8(a) BD program. This application is based on the DOJ review of Federal procurement affirmative action programs and the Government-wide SDB program. Because this rule is not finalizing SBA's implementation of the SDB program at this time, it eliminates all references to benchmarks from the 8(a) regulations (i.e., subpart A).

SBA has changed many of the 8(a) contracting sections as a result of the comments. It has amended the general provisions in proposed § 124.501 in several respects. The final rule eliminates proposed paragraph (d) of § 124.501 as unnecessary, and renumbers proposed paragraphs (e) and (f) as paragraphs (d) and (e) respectively. That paragraph had clarified that a concern's success in meeting its support level would not preclude future 8(a) BD contract awards. Although SBA thought this clarification necessary at the time the regulations were originally amended to permit 8(a) concerns to exceed their support levels, SBA believes that that need no longer exists.

One commenter requested clarification concerning the purpose of delegating contract execution authority. The primary purpose behind such delegation is improved efficiency. Procuring activities can award contracts much more quickly and efficiently with such authority and may, therefore, see more opportunities for making use of the 8(a) BD program.

A sentence was added to proposed § 124.501 to provide that, where practicable, simplified acquisition procedures should be used for 8(a) contracts at or below the simplified acquisition threshold. This change conforms SBA's regulations to the Federal Acquisition Regulation (FAR) governing simplified acquisition procedures (48 CFR Part 13) and promotes efficiency and economy. SBA has also amended its rule, including § 124.501(e), to change the term "procuring agency" to "procuring activity," thus identifying correctly the Government contracting entity referenced. Since Federal contracting is frequently performed at the sub-Agency level, using the term "procuring agency" did not cover every entity that may enter into an 8(a) contract.

As a result of the comments, SBA added a new paragraph (f) to provide that an 8(a) Participant that identifies a requirement should request SBA to contact the procuring activity to request that the requirement be offered to the 8(a) program.

Proposed § 124.502 addressed offers of procurements to the 8(a) BD Program. SBA has amended its proposed § 124.502(a) to provide that a procuring activity may transmit an offering letter to SBA by electronic mail, if available, or by facsimile transmission, mail or commercial delivery service. This conforms the rule to the simplified acquisition procedures contained in the FAR and helps ensure that procuring activities can award small contracts expeditiously. SBA has amended its proposed § 124.502(b) to provide that, in cases where performance of a construction contract is to take place overseas, the contract should be offered to the Office of 8(a) BD located in SBA Headquarters.

One commenter asked why SBA verified the size of an 8(a) concern prior to accepting a sole source contract on its behalf since self-certification is accepted in every other case. SBA performs this function for sole source awards since there is no mechanism in place for protesting a concern's size in reference to a sole source award. Thus, there is no other check to ensure that concerns in line for award of sole source contracts are in fact small for such contracts.

Moreover, since sole source awards are significant benefits, enabling firms to receive contracts without having to compete with other firms, it is particularly important that eligibility, including size, is verified.

Proposed § 124.503 set forth the procedures for accepting a requirement for the 8(a) BD Program. This rule amends § 124.503(a) to provide that, where a contract is valued at or below the simplified acquisition threshold, SBA will accept or reject the requirement within two days of receipt of the offer. In cases where the offer is made on behalf of a particular Program Participant, if SBA does not accept or reject the requirement or request an extension within two days, the procuring activity may assume that the offer has been approved and go forward with the award. SBA intends this change to conform to the simplified acquisition procedures contained in Part 13 of the FAR and to promote efficiency. This final rule also makes a significant change to promote efficiency where SBA has delegated its 8(a) contract execution functions to an agency and a procuring activity within that agency has a procurement requirement whose value is less than the Simplified Acquisition Procedures (SAP) threshold amount. In such case, this rule authorizes SBA, in its discretion, to permit the procuring activity to award an 8(a) contract under the SAP threshold amount without sending an offering letter to SBA and without receiving SBA's official acceptance of the requirement for the 8(a) program.

A number of comments requested clarification of the treatment of multiple award and federal supply schedule contracts. SBA has added a paragraph to § 124.503 setting forth the standards to be applied to these types of contracts. Since, unlike Basic Ordering Agreements (BOA's), multiple award schedule contracts and federal supply schedule contracts are contracts, a new task order under such a contract will not require a new offer and acceptance. Likewise, if a concern qualifies for award of a multiple award schedule or federal supply schedule contract in terms of eligibility and size, it will not be denied future task orders on that contract if it subsequently grows large. Finally, if a multiple award schedule or federal supply schedule contract was competed when awarded, subsequent task orders under such contract will not require further competition under § 124.506.

As a result of the comments, SBA has added a new paragraph (i) to clarify that where SBA has delegated its 8(a) contract execution authority to a

procuring activity, the procuring activity must still offer and SBA must accept all requirements intended to be awarded as 8(a) contracts. The only exception to the normal offer and acceptance process is that identified above where a procurement requirement is less than the SAP threshold amount and SBA has specifically authorized (through the Memorandum of Understanding delegating its contract execution functions or otherwise) a procuring activity to dispense with offer and acceptance.

Proposed § 124.504 set forth the circumstances limiting SBA's ability to accept a procurement for award as an 8(a) contract. In response to comments identified below, this final rule specifically authorizes the use of SAP in connection with 8(a) contract awards, and requires SBA to review offering letters for requirements under SAP in an expedited two-day time frame. In order to meet this quick acceptance turn around, SBA has decided not to consider adverse impact in connection with a requirement offered under SAP. It is not feasible for SBA to obtain current financial statements from affected small businesses and to make adverse impact determinations within two days. However, because the SAP threshold is \$100,000, SBA believes that adverse impact should not be a real factor with these smaller contracts, and that this change should not have a harmful effect.

Proposed § 124.504(e) (§ 124.504(d) in the final rule) concerned the release of a procurement for non-8(a) competition. One commenter pointed out that the language in proposed § 124.504(e)(3) was misleading. That language provided that if SBA declines to accept an offer and releases the requirement, it will recommend to the procuring agency that the requirement be procured as a small business or SDB set-aside. The commenter correctly pointed out that SDB set-asides are not authorized at this time. SBA has, therefore, amended this paragraph to provide that if SBA declines to accept an offer for the 8(a) program, it will recommend that the requirement be procured as a small business or, if authorized, SDB set-aside.

One commenter suggested that industries for which SBA has elected not to accept requirements should be listed on SBA's website. SBA is considering adopting this idea; however, it need not revise its regulations to adopt this policy. Another commenter recommended that firms that have graduated be permitted to compete for follow-on contracts where the firm had been awarded the original

contract. Applicable law precludes SBA from making this change.

A number of commenters requested additional procedures to protect the rights of small firms which could be adversely impacted by a decision to accept an award for the 8(a) BD program. SBA carefully considered these comments and weighed them against the need of procuring activities for prompt award of contracts. SBA determined that the current procedures were sufficient to ensure that small businesses performing contracts are not unduly harmed by the acceptance of an award for the 8(a) program.

Proposed § 124.506 provided that 8(a) procurements above certain dollar thresholds must be competed among eligible Participants. A number of commenters requested that the competitive thresholds be lowered. These thresholds were set by statute and, therefore, may not be lowered by SBA.

One commenter requested clarification concerning how the thresholds are applied to indefinite delivery/indefinite quantity (ID/IQ) contracts. The commenter asked whether the total value of such contracts would be the value of what the procuring activity actually expects to order or the maximum ordering amount it may order. SBA considers the maximum ordering amount to be the total value of the contract for purposes of determining whether a particular ID/IQ contract must be competed. As a result of this comment, § 124.506(a)(2) has been amended to provide that for indefinite delivery or indefinite quantity type contracts, the thresholds are applied to the maximum order amount authorized.

Language was mistakenly included in proposed § 124.507(c) which referred to limiting competitions to the transitional stage of program participation. SBA has eliminated this language in the final rule, since it does not restrict competitions to the transitional stage.

One commenter objected to the language in proposed § 124.506(c)(3) requiring SBA to deny a request to compete a requirement under the competitive thresholds where the request is made following the inability of the procuring activity and the potential sole source awardee to reach an agreement on price or some other material term or condition. The commenter pointed out that this provision unnecessarily restricts the flexibility of the Federal Government. SBA agrees with this comment and has amended this paragraph to provide only that SBA may deny a request under such circumstances.

A number of commenters objected to SBA's proposal to eliminate its authority to award an 8(a) contract above the competitive threshold on a sole-source basis where there is only one eligible firm capable of performing the requirement. As a result of the comments, SBA has added this provision back to the regulations at § 124.506(d).

Proposed § 124.507 set forth the procedures applicable to competitive 8(a) contracts. One commenter objected to the elimination of the requirement that a firm must obtain SBA approval to do business under a particular SIC code. SBA has considered this comment, but has rejected it. After several years of experience, SBA believes that the burden on an 8(a) Participant to obtain SBA approval for every SIC code under which the Participant might want to perform contracts hinders more than helps the Participant's business development. Moreover, the procuring activity's determination that a particular 8(a) Participant is responsible to perform a given contract should suffice to prevent firms from brokering contracts or from competing for contracts for which they are not qualified.

One commenter correctly pointed out that Certificate of Competency (COC) procedures should not be inapplicable in cases where SBA has delegated contract execution authority to the procuring activity as provided in proposed § 124.507(b)(7). SBA agrees. SBA did not intend to make the COC procedures inapplicable where contract execution authority has been delegated. In addition, the final rule transfers the substance of proposed § 124.507(b)(6) (dealing with the execution of competitive 8(a) contracts) to a new § 124.508. The correction regarding the availability of COCs where SBA has delegated its 8(a) contract execution functions to a procuring activity and the transfer of proposed § 124.507(b)(6) to a new section make proposed § 124.507(b)(7) unnecessary. Thus, SBA has eliminated that provision in this final rule.

A number of commenters objected to the special geographic requirements for construction contracts in proposed § 124.507(c)(2). These requirements are mandated by the Small Business Act and, therefore, may not be eliminated. One commenter correctly pointed out that the reference to principal places of business in proposed § 124.507(c)(2) is incorrect and should be bona fide places of business. SBA agrees with this comment and has made this correction.

This final rule adds a new § 124.508 governing execution of 8(a) contracts.

This new section clarifies that SBA, the procuring activity and the 8(a) firm may sign a tripartite agreement or, where SBA has delegated contract execution authority, the procuring activity and the Participant alone may sign an 8(a) contract. This section also provides that, where SBA receives a contract for signature valued at or below the simplified acquisition threshold, it will sign the contract and return it to the procuring activity within three (3) days of receipt. This addition was made to conform to the simplified acquisition procedures in the FAR and to promote expeditious award of smaller contracts.

Pursuant to proposed § 124.508 (§ 124.509 in the final rule), a Participant could not receive sole source 8(a) contracts where it was not in compliance with its non-8(a) business activity targets. A commenter recommended that SBA allow more flexibility to permit sole source awards where the firm can demonstrate good faith efforts to obtain non-8(a) revenue. SBA agrees that a waiver to the requirement prohibiting further sole source contracts when a Participant does not meet its non-8(a) business activity target may be appropriate in limited, extraordinary circumstances. The final rule permits the AA/8(a)BD, or his or her designee, to allow one or more sole source contracts to a Participant that is not in compliance with its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship to the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target. For example, a Participant might demonstrate that it was the apparent successful offeror for a non-8(a) contract that was cancelled by the procuring activity, and that a loss of that projected revenue caused the Participant not to meet its non-8(a) business activity target. However, loss of additional profit or other normal business consequences will not be grounds for granting a waiver. SBA believes that a more extensive waiver is not needed because the rule permits sufficient flexibility by allowing a firm to come into compliance during authorized quarterly reviews. The rule authorizes no appeal right for decisions not to grant a waiver, and such a waiver is totally at SBA's discretion. The final rule also adds a provision authorizing the SBA Administrator to waive the requirement that a Participant cannot receive an 8(a) sole source award when it is not in

compliance with its non-8(a) business activity targets where the head of the procuring activity requests that award be made for the best interests of the Government.

Proposed § 124.509 (§ 124.510 in the final rule) set forth the requirement that certain percentages of work be performed by the 8(a) BD concern on an 8(a) BD contract. One commenter pointed out that compliance with the percentage of work requirements is an element of responsibility and, therefore, should be determined as of the date of award. SBA agrees with this comment and has amended this section to provide that SBA will determine whether the firm will be capable of complying with the percentage of work requirements by the time of award of the contract for both sealed bid and negotiated procurements.

Another commenter correctly pointed out that the example in the regulation conflicts with the requirements set forth in 13 CFR § 125.6, which refer to the work required as a percentage of total labor rather than as a percentage of the total value of the contract. SBA agrees with this comment and has changed example 1 as well as some of the language in § 124.510(c) of the final rule to conform to the language in § 125.6. (The legislation on which the performance of work requirements are based states the percentage of work required as a percentage of total labor and not total value.) Example 2 was not changed because the example does not conflict with either § 125.6 or the legislation. Example 2 merely clarifies application of the rule in the early stages of performance of an ID/IQ contract.

One commenter pointed out that application of the subcontracting limitations at all times during performance of an ID/IQ contract would keep many contractors from proposing on task orders. SBA agrees that the regulation is not flexible enough in this regard and has amended the language in paragraph (c) to provide that SBA may approve in writing an 8(a) BD firm's request to subcontract out more than the required percentage where it receives assurances from both the contractor and the procuring activity that the percentages will be met by the time performance is completed. SBA believes that this addition will provide firms with the necessary flexibility without undermining the purposes of the rule. Where a firm has received permission to subcontract out more than the required percentage and does not comply with the percentage requirements by the end of the contract, SBA will not grant future waivers.

There were a number of comments on proposed § 124.512 governing joint ventures. Several commenters objected to the requirement in proposed § 124.512(e) that a contract be awarded in the name of the 8(a) BD participant or participants, even though the contract is to be performed by the joint venture. The commenters argued that the contract should be in the name of the joint venture to assure that all parties to the joint venture are obligated to perform. SBA agrees with this view and has amended this section to provide that the procuring activity will execute an 8(a) contract in the name of the joint venture entity. With respect to the statutory requirement that all 8(a) contracts be performed by participant concerns, SBA interprets the AA/8(a)BD's acceptance of Participants into the program to extend to approved joint ventures in which the Participant is the lead joint venture partner. In other words, for purposes of contracting, admission into the program includes both a concern in its own capacity and any approved joint venture in which the concern is the lead entity. For contracting purposes, SBA will consider the joint venture to be the Participant where the joint venture meets all applicable requirements and is approved by SBA.

Paragraph (f) requiring all parties to the joint venture to sign such documents as are necessary to obligate themselves to ensure performance of the contract was deleted as unnecessary where the contract is entered into in the joint venture's name. However, a provision was added requiring the joint venture agreement to obligate each party to the venture to complete performance of the contract even if one of the members withdraws. (See § 124.513(c)(7))

A number of commenters felt that the provision requiring the 8(a) members of the joint venture to perform the applicable percentages of work under the performance of work requirements (§ 124.510) would undermine the benefits derived from the joint venture arrangement. SBA considered this comment and agrees that many of the advantages of performing a particular contract as a joint venture would be lost if the 8(a) BD concern is required to perform as much of the contract as it would have had to perform had it been awarded the contract directly. Therefore SBA has amended paragraph (b)(1)(iv) of this section to provide that the joint venture must perform the applicable percentage of work. Paragraph (g) was also eliminated in light of this change.

SBA made a number of other technical changes to the joint venture

provisions (§ 124.513 in the final rule) as a result of the comments. The term "lead entity" was changed to "managing venturer" to comport with current terminology. One commenter requested clarification of the term "very little" in proposed § 124.512(a) which states that SBA will not approve a joint venture arrangement where the 8(a) concern brings "very little" to the relationship. That provision has been clarified to provide that SBA will not approve the joint venture if the 8(a) concern brings very little in terms of resources and expertise to the relationship. A more precise definition would not leave SBA sufficient discretion to judge each case on its own merits.

Proposed § 124.514 (§ 124.515 in the final rule) set forth the provisions requiring an 8(a) contract to be performed by the Participant that was initially awarded it, and requiring the contract to be terminated for convenience if there is a change in the ownership or control of the concern. SBA received several comments regarding the authority for a waiver where one Participant transfers ownership and control to another eligible Participant. The commenters believed that a bulk transfer of all or substantially all of one 8(a) concern's assets to another 8(a) concern should satisfy the requirement this requirement. SBA carefully considered the legal requirements of the Small Business Act as it pertains to this provision. Upon further deliberation, SBA agrees that a transfer of all a Participant's operating assets to another Participant should be treated the same as a transfer of stock or another ownership interest, provided the Participant that transfers its assets to another eligible Participant withdraws from the 8(a) BD program, and it ceases its business operations, or presents a plan to SBA for its orderly dissolution. The requirement that all "operating assets" be transferred excludes accounts receivable and cash. SBA will require dissolution or a plan to dissolve as a condition for the waiver because SBA does not believe that it is appropriate for the transferor to remain a separate legal entity that could restart operations and seek to obtain 8(a) contracts after the transfer of all of its operating assets.

SBA received three comments on proposed § 124.516 (§ 124.517 in the final rule) concerning protests of 8(a) contract awards. All three commenters recommended extending this provision to permit protests of the size of a concern in line for a sole source award. SBA rejected this comment since it is difficult for other firms to find out about sole source awards and only a few, if

any, firms would have standing to protest the award of a sole-source contract under SBA's size regulations. SBA has historically verified the size of each potential awardee of a sole-source contract since the benefits of receiving a contract without having to compete are so significant. Moreover, if any concern or individual believes a firm in line for a sole-source award does not meet the size standard for the SIC code for the contract, such firm may contact SBA and explain why it believes that the firm is not small. SBA will consider such information in verifying the size of that concern for the award provided the information is specific and credible. While SBA makes no changes to allow size protests and SIC code appeals in connection with sole source 8(a) contracts at this time, SBA will continue to examine this issue and may make additional changes at a later date.

Proposed § 124.518 (§ 124.519 in the final rule), authorized Participants (other than firms owned by an Indian tribe or an ANC) to receive any combination of 8(a) sole source and 8(a) competitive contracts up to a specified dollar amount (excluding contracts of \$100,000 or less). Once that dollar amount of 8(a) contracts is reached, the firm will not be eligible to receive any more 8(a) sole source contracts, but will remain eligible for competitive 8(a) awards. The proposed rule set the dollar limit above which a firm could not receive sole source 8(a) awards at five times the size standard for the firm's primary SIC code or \$100,000,000, whichever was less. SBA received comments on both sides of this issue. Several thought the cap was set at too high a level, while others thought that it should be set even higher. No commenters presented persuasive reasons for setting the cap at a level other than that set forth in the proposed rule. As such, the final rule continues the five times the size standard or \$100,000,000 language. If the size standard for a particular SIC code increases over time, the corresponding cap amount will also increase. One comment suggested that after a firm reaches the specified dollar threshold amount, SBA should require it to use other 8(a) concerns that have not received contracts as subcontractors in order to receive additional sole source awards. SBA considered this comment, but decided not to adopt it. It is important to remember that SBA will not restrict all 8(a) contract support after a Participant receives total 8(a) contract support equaling at least five times the size standard for its primary SIC code or \$100,000,000. A firm will be unable to

receive only sole source 8(a) contracts after reaching the cap amount. The alternative suggested by the commenter seeks to have a Participant that has exceeded the cap subcontract 8(a) sole source contracts to other Participants that have not received an 8(a) contract. SBA believes that enforcing the cap should enable more of those same firms (i.e., the Participants that have not received an 8(a) contract) to receive 8(a) contracts directly. While both would aid in distributing the performance of 8(a) contracts to more Participants, from the perspective of a Participant that has not received an 8(a) contract, receiving a sole source contract directly is preferable to getting a piece of an 8(a) contract as another Participant's subcontractor. In addition, SBA believes that the alternative cap amounts are sufficiently high so that a Participant that reaches the cap amount should be able to compete effectively for 8(a) competitive contracts. That, in turn, should assist such firms in reaching viability after leaving the 8(a) program.

Upon further reflection, SBA also amended the date at which a Participant's eligibility for a sole source contract is measured. The proposed rule stated that such eligibility would be measured as of the date of contract award, without taking into account whether the value of that award would cause the limit to be exceeded. SBA believes that such a requirement could cause an undue hardship for both 8(a) Participants and procuring activities. As proposed, SBA could accept a sole source requirement on behalf of a particular Participant (because the Participant had not yet received contracts in excess of the cap amount), the Participant and the procuring activity could enter into protracted negotiations, and SBA could be required later to deny the award of the contract because eligibility would be determined as of the date of award and the Participant may have received one or more competitive 8(a) contracts between the acceptance and award dates. Thus, this final rule changes the date that a firm's eligibility for a sole source award, in terms of whether the firm has exceeded the dollar limit for 8(a) contracts, from the date of award to the date that the requirement is accepted by SBA. This does not in any way imply that all eligibility for an 8(a) sole source contract will now be measured at the acceptance date. In other words, this final rule will continue to require that a firm be a current Participant in the 8(a) program on the date of contract award in order to receive an 8(a) sole source award. See § 124.508(c).

Finally, similar to the provision identified above when a Participant fails to achieve its non-8(a) business activity targets, the final rule adds a provision authorizing the SBA Administrator to waive the requirement that a Participant cannot receive an 8(a) sole source award in excess of the cap amount where the head of the procuring activity requests that award be made for the best interests of the Government.

Proposed § 124.519 (§ 124.520 in the final rule) set forth the standards for the mentor/protege program. Most of the commenters were in favor of this new program, although several warned that the potential existed for abuse. Numerous commenters requested greater detail in this section. Some of the commenters felt that a section explaining the purpose of the program would be helpful. In response to those comments, SBA has amended paragraph (a) of this section to clarify that the program is designed to encourage approved mentors to provide various forms of assistance to eligible Participants, with examples of the assistance contemplated.

SBA received varying views regarding the type of business that should be able to act as a mentor. The comments ranged from recommendations that any business, large or small, disadvantaged-owned or not, should be able to be a mentor, to only small businesses, to support for the proposed rule which limited mentors to former 8(a) Participants and current 8(a) Participants in the transitional stage of the program. Upon further deliberation, SBA believes that the focus should not be on who the mentor is, but what the concern acting as a mentor will provide to the protege. For that reason, the final rule permits any business, large or small, to be a mentor if it can demonstrate the commitment and ability to assist small, developing 8(a) Participants. Under the final rule, a mentor generally will have no more than one protege at a time. The AA/8(a)BD may, however, authorize a concern to mentor more than one protege at a time where the concern can demonstrate that the additional mentor/protege relationship will not adversely affect the development of either protege firm. SBA does not believe that it would be appropriate to authorize a concern to be a mentor in a second mentor/protege relationship if that relationship would harm or compete with the protege of the first mentor/protege relationship approved by SBA.

Some of the commenters felt that the amount of a contract the protege could perform should be limited. After considering this comment, SBA has

decided not to adopt it at this time. SBA does not want to impose additional requirements on mentor/protege joint ventures that do not apply to joint ventures between 8(a) BD concerns and other entities.

Many of the commenters requested guidelines so that the mentor does not take control of the contracts or the company. SBA will monitor the mentor/protege arrangement on a regular basis to help ensure that this does not occur.

Some commenters requested that the program be expanded to enable companies which have never been in the 8(a) BD program to become proteges. SBA has not adopted this recommendation. It must be remembered that SBA's mentor/protege program is designed to be an additional developmental tool for Participants in the 8(a) BD program. Only firms that SBA has certified to participate in the 8(a) BD program are statutorily eligible to receive any of the benefits of the program.

One commenter suggested that a provision be added clarifying that a mentor and protege will not be determined to be affiliated based on the mentor/protege agreement or assistance provided pursuant to the agreement. SBA agrees with this comment and has amended paragraph (d) of this section to add a new subparagraph (4) to this effect.

Several commenters suggested standards for SBA monitoring of the relationship and the adoption of objective standards by which to measure the success of a mentor/protege relationship. In response to these comments, SBA has added a new paragraph (f) to impose specific reporting requirements on the protege and to provide standards under which SBA will review the mentor/protege relationship. The final rule also amends paragraph (e) of this section (§ 124.519(d) in the proposed rule) to provide that SBA will review the mentor/protege relationship annually to determine whether to approve its continuation for another year. As set forth in the rule, the mentor/protege program is designed to assist the development of Participants in the developmental stage of the program, Participants that have not received an 8(a) contract, and Participants having a size that is less than half the size standard corresponding to its primary SIC code. Where a Participant leaves the developmental stage of the program, receives several significant 8(a) contracts, or has a size that exceeds half the size standard corresponding to its primary SIC code, the firm may no longer need the assistance provided by

the mentor/protege relationship, and the AA/8(a)BD may decide not to authorize its continuation.

SBA received no comments to proposed §§ 124.601 through 124.603 and §§ 124.701 through 124.704. As such, this rule makes no changes to those sections from the proposed rule.

Part 124, subpart B: Subpart B of the proposed rule defined a Small Disadvantaged Business (SDB) and set forth the procedures by which a firm can be recognized as an SDB. As noted above, SBA will discuss the comments to subpart B and finalize its provisions in a later rulemaking action.

Part 134: The proposed new Subpart D of Part 134 contained the rules of procedure applying to appeals of denials of 8(a) BD program admission based solely on the negative finding(s) of social disadvantage, economic disadvantage, ownership or control pursuant to § 124.206; early graduation pursuant to § 124.302 and 124.304; termination pursuant to § 124.303 and 124.304; and denials of requests to issue a waiver of the performance of work/termination for convenience requirements pursuant to § 124.513.

The proposed rules transferred the rules of procedure governing the 8(a) program from § 124.210 to Part 134 so that all procedures related to appeals before OHA are contained in one part of SBA's regulations.

SBA received one comment regarding the proposed revisions to Part 134. The majority of these comments dealt with streamlining the regulations governing the appeals of denials of 8(a) BD program admission and protecting appellant rights.

The proposed rule did not change § 134.202 and § 134.203 of the former regulations. The commenter requested that SBA amend § 134.202 to require that the appeal petition include the SBA determination. SBA agrees that the appeal petition should include the SBA determination and modified § 134.203, which specifies the requirements of a petition, to include the submission of the SBA determination. This provision will allow the Administrative Law Judge to determine, without further delay, whether the appeal was timely filed.

This rule does not finalize the proposed amendment to § 134.206(a) that would have changed the date on which the SBA's 45-day period to file an answer would run. The proposed rule would have changed that date from the date that an appeal is served on SBA to the date that an appeal is filed at OHA. Upon further consideration, SBA does not believe that this change is appropriate. The proposed rule was concerned about SBA not having the

allotted time to answer an appeal where the appeal was incorrectly served on SBA's Office of General Counsel. SBA has addressed this concern by clarifying the service requirements for 8(a)-related appeals set forth in § 134.403.

Proposed § 134.401, which outlined the scope of the rules in Subpart D, had no provision for appeals to OHA from suspensions pursuant to § 124.305. A commenter stated that the inclusion of appeals related to suspension was necessary pursuant to § 124.305(b) which provides that notice of suspension includes a statement that a request for hearing on the suspension will be considered by an Administrative Law Judge at OHA and granted or denied as a matter of discretion. SBA agreed with the comment and added § 134.401(e) in response to it.

A commenter noted that proposed § 134.405, which deals with jurisdiction, failed to include a provision for the jurisdiction of suspension cases pursuant to § 124.305. SBA added subsection (c) to proposed § 134.405 in response to this comment. Subsection (c) provides that the jurisdiction of OHA in suspension cases is limited to determining whether the protection of the Government's interest requires suspension pending resolution of the termination action, unless the Administrative Law Judge has consolidated the suspension appeal with the corresponding termination appeal.

Proposed § 134.406 dealt with review of the administrative record and replaced § 124.210. A commenter requested that an appellant be permitted to object to the absence of a document in the administrative record. Since § 134.406(c) provides that the administrative record need not contain all documents pertaining to the appellant, SBA decided that § 134.406(c) should be amended in response to this request. Revised § 134.406(c) allows an appellant to object to the absence of a document he or she believes was erroneously omitted from the administrative record, thereby helping to ensure that the Administrative Law Judge has all of the information needed to decide the case.

Proposed § 134.406(e) limited remand to situations where "due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide" the case. A commenter requested that remand be extended to include cases in which SBA made an erroneous analysis of facts. SBA determined that SBA error is properly handled on appeal under

proposed § 134.408 and, therefore, did not adopt this comment.

Proposed § 134.408, which dealt with decisions on appeal, replaced § 124.210. A commenter requested that the term "re-examine" be changed to "reconsider," and that a time limit be placed on when the decision is final. SBA determined that for clarity purposes the term "re-examine" should be changed to "reconsider." SBA further determined that, in response to the commenter's request for a reasonable time period after which the decision is final, a period of 20 days should be inserted into the proposed regulation after which time the decision is final.

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

SBA certifies that this rule is not a major rule within the meaning of Executive Order 12866 and will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq.

The rule addresses changes in the SBA's 8(a) BD program. The overall impact of the changes to the 8(a) BD program will be beneficial to small businesses. The rule also makes several changes to SBA's size regulations that will have an impact beyond that program, and should result in more procurement opportunities for small business generally. No definitive data exist that would allow SBA to conclude that the proposed rule will have a substantial impact on a significant number of small businesses.

Specifically, the rule improves and strengthens the 8(a) BD program. It responds to the challenges posed by the findings in the *Adarand Constructors, Inc. v. Pena*, 115 Sup. Ct. 2097 (1995) (*Adarand*), and are designed to improve the success rates for firms after their terms of participation in the 8(a) BD program end. The rule changes fall within three major categories. They are: (1) measures designed to more equitably distribute 8(a) contracts; (2) small business affiliation rule revisions; and (3) a new mentor/protege program.

The changes that exclude certain joint venture and teaming arrangements from SBA's affiliation rules and the 8(a) mentor/protege program are designed to enable small businesses to effectively compete for contracts that were previously too large for a single small business to perform as a prime contractor. By allowing small businesses to form joint venture and teaming relationships without regard to affiliation, they can be considered

responsible contractors for "bundled" and other large contracts which exceed the capability of any of the individual small businesses to perform as prime contractors. Likewise, 8(a) Participants will be able to submit offers for and be considered responsible businesses for larger contracts than they would be able to obtain individually without the newly established mentor/protege program. Expanding the number and dollar amount of contracts available for award through the 8(a) BD program may result in a shift of dollars to small business.

In fiscal year (FY) 1996, the federal government spent \$197.6 billion on the procurement of goods and services. Small businesses were awarded \$41.1 billion in prime contracts, representing about a 21 percent share of the total contract dollars. There are approximately 180,000 small firms registered on PRO-Net, SBA's database of small businesses actively seeking federal government contracts. By comparison, there are approximately 5,800 small firms certified as eligible 8(a) Participants. In FY 1996, \$6.4 billion or 3.2 percent of the total government prime contracts were awarded to less than 2,000 8(a) certified small businesses. SBA believes that the changes set forth in this rule will benefit small firms, but not increase the net number of current 8(a) Participants by more than 500 to 800 businesses, or less than 1 percent of the total universe of small firms seeking federal government contracts.

Similarly, the changes regarding affiliation eligibility and the mentor/protege program will benefit small business contractors, but impact a relatively small number of businesses and dollars, when compared to total government spending and the universe of small firms seeking federal government contracts. Because of consolidation, contracts are becoming larger and fewer in number. It has become increasingly more difficult for small business to possess the wherewithal to individually perform these larger contracts. The changes in small business affiliation rules are designed to counter the growing trend of contract consolidation and allow small firms to compete for larger contracts.

For purposes of the Paperwork Reduction Act of 1995 (Public Law 104-13), SBA certifies that this final rule contains no new reporting or recordkeeping requirements.

For purposes of Executive Order 12612, SBA certifies that this rule has no federalism implications warranting the preparation of a Federalism Assessment.

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

List of Subjects

13 CFR Part 121

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

13 CFR Part 124

Government procurement, Hawaiian Natives, Minority businesses, Reporting and recordkeeping requirements, Technical assistance, Tribally-owned concerns.

13 CFR Part 134

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

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

PART 121—[AMENDED]

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

Authority: Pub. L. 105-135 sec. 601 et seq., 111 Stat. 2592; 15 U.S.C. 632(a), 634(b)(6), 637(a) and 644(c); and Pub. L. 102-486, 106 Stat. 2776, 3133.

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

§ 121.103 What is affiliation?

* * * * *

(f) * * *

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

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

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

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

(ii) A joint venture or teaming arrangement of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (f) of this section so long as the requirements of 13 CFR 124.513(b)(1) are met.

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

* * * * *

3. Section 121.1001 is amended by redesignating paragraphs (a)(2) through (a)(6) as paragraphs (a)(3) through (a)(7), by adding the following new paragraph (a)(2), and by revising paragraph (b)(2) to read as follows:

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

(a) * * *

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

(i) Any offeror;

(ii) The contracting officer; or

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, or the Associate Administrator for 8(a) Business Development.

* * * * *

(b) * * *

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

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

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

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

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

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

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

(C) The SBA District Director in the district office that services the

Participant, or the Associate Administrator for 8(a)BD.

* * * * *

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

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

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

* * * * *

PART 124—[AMENDED]

5. The authority citation for part 124 continues to read as follows:

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

6. In part 124, subpart B consisting of §§ 124.601 through 124.610 is redesignated as subpart B, §§ 124.1001 through 124.1010, and subpart A is revised to read as follows:

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

Subpart A—8(a) Business Development

Provisions of General Applicability

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

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

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

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

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

Applying to the 8(a) BD Program

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

Exiting the 8(a) BD Program

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

Business Development

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

Contractual Assistance

- 124.501 What general provisions apply to the award of 8(a) contracts?
- 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?
- 124.503 How does SBA accept a procurement for award through the 8(a) BD program?
- 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?
- 124.505 When will SBA appeal the terms and conditions of a particular 8(a) contract or a procuring activity decision not to reserve a procurement for the 8(a) BD program?
- 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?
- 124.507 What procedures apply to competitive 8(a) procurements?
- 124.508 How is an 8(a) contract executed?
- 124.509 What are non-8(a) business activity targets?

- 124.510 What percentage of work must a Participant perform on an 8(a) contract?
- 124.511 How is fair market price determined for an 8(a) contract?
- 124.512 Delegation of contract administration to procuring agencies.
- 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?
- 124.514 Exercise of 8(a) options and modifications.
- 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?
- 124.516 Who decides contract disputes arising between a Participant and a procuring activity after the award of an 8(a) contract?
- 124.517 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?
- 124.518 How can an 8(a) contract be terminated before performance is completed?
- 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?
- 124.520 Mentor/Protege program.

Miscellaneous Reporting Requirements

- 124.601 What reports does SBA require concerning parties who assist Participants in obtaining federal contracts?
- 124.602 What kind of annual financial statement must a Participant submit to SBA?
- 124.603 What reports regarding the continued business operations of former Participants does SBA require?

Management and Technical Assistance Program

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

Subpart A—8(a) Business Development

Provisions of General Applicability

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

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

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

A Participant receives a program term of nine years from the date of SBA's approval letter certifying the concern's admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. A firm that completes its nine year term of participation in the 8(a) BD program is deemed to graduate from the program. The nine year program term may be shortened only by termination, early graduation or voluntary graduation as provided for in this subpart.

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

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

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

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

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, *et seq.*

Concern is defined in part 121 of this title.

Days means calendar days unless otherwise specified.

Day-to-day operations of a firm means the marketing, production, sales, and administrative functions of the firm.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, and mother-in-law.

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

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

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

Negative control is defined in part 121 of this title.

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

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

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

Principal place of business means the business location where the individuals who manage the concern's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where the business records are kept are in different locations, SBA will determine the principal place of business for program purposes.

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

Same or similar line of business means business activities within the

same two-digit "Major Group" of the SIC Manual as the primary industry classification of the applicant or Participant. The phrase "same business area" is synonymous with this definition.

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

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

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

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

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

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

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

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

Development Corporation are additionally affected by §§ 124.109, 124.110, and 124.111, respectively.

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

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

§ 124.103 Who is socially disadvantaged?

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

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

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of

such evidence should submit the information in writing to the Associate Administrator for 8(a) BD (AA/8(a)BD) for consideration.

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

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

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

(ii) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

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

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

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channelled the individual into nonprofessional or non-business fields.

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

associates, and exclusion from business or professional organizations.

(d) *Socially disadvantaged group inclusion.* (1) *General.* Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the **Federal Register** that it has received and is considering such a request, and that it will consider public comments.

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

- (i) The group has suffered prejudice, bias, or discriminatory practices;
- (ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and
- (iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

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

(4) *Decision.* In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the **Federal Register**. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

§ 124.104 Who is economically disadvantaged?

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

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

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

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

(1) *Transfers within two years.* (i) Except as set forth in paragraph (c)(1)(ii) of this section, SBA will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the 8(a) BD program or within two years of a Participant's annual program review, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(ii) SBA will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(iii) In determining an individual's access to capital and credit, SBA may consider any assets that the individual transferred within such two-year period described by paragraph (c)(1)(i) of this section that SBA does not consider in evaluating the individual's assets and net worth (e.g., transfers to charities).

(2) *Net worth.* For initial 8(a) BD eligibility, the net worth of an individual claiming disadvantage must be less than \$250,000. For continued 8(a) BD eligibility after admission to the program, net worth must be less than \$750,000. In determining such net worth, SBA will exclude the ownership interest in the applicant or Participant and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive withdrawals from the applicant or Participant). Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

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

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

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

An applicant or Participant must be at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs). See

§ 124.3 for definition of unconditional ownership; and §§ 124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, and CDCs.

(a) *Ownership must be direct.*

Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or Participant owned principally by another business entity or by a trust (including employee stock ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a disadvantaged individual where the trust is revocable, and the disadvantaged individual is the grantor, a trustee, and the sole current beneficiary of the trust.

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

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

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

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

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

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

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

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

(g) *Ownership of another Participant.*

The individuals determined to be disadvantaged for purposes of one Participant, their immediate family members, and the Participant itself, may not hold, in the aggregate, more than a 20 percent equity ownership interest in any other single Participant.

(h) *Ownership restrictions for non-disadvantaged individuals and concerns.*

(1) A non-disadvantaged individual (in the aggregate with all immediate family members) or a non-Participant concern that is a general partner or stockholder with at least a 10 percent ownership interest in one Participant may not own more than a 10 percent interest in another Participant that is in the developmental stage or more than a 20 percent interest in another Participant in the transitional stage of the program. This restriction does not apply to financial institutions licensed or chartered by Federal, state or local government, including investment companies which are licensed under the Small Business Investment Act of 1958.

(2) A non-Participant concern in the same or similar line of business may not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in a transitional stage of the program, except that a former Participant or a principal of a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§ 124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant, in the same or similar line of business.

(i) *Change of ownership.* A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. The decision to approve or deny a Participant's request for a change in ownership or business structure will be made and

communicated to the firm by the AA/8(a)BD. The decision of the AA/8(a)BD is the final decision of the Agency. The AA/8(a)BD will issue a decision within 60 days from receipt of a request containing all necessary documentation, or as soon thereafter as possible. If 60 days lapse without a decision from SBA, the Participant cannot presume that it can complete the change without written approval from SBA. A decision to deny a request for change of ownership or business structure may be grounds for program termination where the change is made nevertheless.

(1) Any Participant that was awarded one or more 8(a) contracts may substitute one disadvantaged individual for another disadvantaged individual without requiring the termination of those contracts or a request for waiver under § 124.515, as long as it receives SBA's approval prior to the change.

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

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

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA will suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

(5) A change in ownership does not provide the new owner(s) with a new 8(a) BD program term. For example, if a concern has been in the 8(a) BD program for five years when a change in ownership occurs, the new owner will have four years remaining until program graduation.

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

development resources of the 8(a) BD program.

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

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

Control is not the same as ownership, although both may reside in the same person. SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals, except for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, or Community Development Corporations (CDCs). (See §§ 124.109, 124.110, and 124.111, respectively, for the requirements for concerns owned by Indian tribes or ANCs, for concerns owned by Native Hawaiian Organizations, and for CDC-owned concerns.) Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A disadvantaged individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-disadvantaged individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.

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

(2) A disadvantaged full-time manager must hold the highest officer position

(usually President or Chief Executive Officer) in the applicant or Participant.

(3) One or more disadvantaged individuals who manage the applicant or Participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. Work in a wholly-owned subsidiary of the applicant or participant may be considered to meet the requirement of full-time devotion. This applies only to a subsidiary owned by the 8(a) firm, and not to firms in which the disadvantaged individual has an ownership interest.

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

(5) Except as provided in paragraph (d)(1) of this section, a disadvantaged owner's unexercised right to cause a change in the control or management of the applicant concern does not in itself constitute disadvantaged control and management, regardless of how quickly or easily the right could be exercised.

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

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

(d) One or more disadvantaged individuals must control the Board of Directors of a corporate applicant or Participant.

(1) SBA will deem disadvantaged individuals to control the Board of Directors where:

(i) A single disadvantaged individual owns 100% of all voting stock of an applicant or Participant concern;

(ii) A single disadvantaged individual owns at least 51% of all voting stock of an applicant or Participant concern, the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve corporation actions. Where super majority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the disadvantaged individual must own at least the percent of the voting

stock needed to overcome any such super majority voting requirements; or

(iii) More than one disadvantaged shareholder seeks to qualify the concern (i.e., no one individual owns 51%), each such individual is on the Board of Directors, together they own at least 51% of all voting stock of the concern, no super majority voting requirements exist, and the disadvantaged shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has super majority voting requirements, the disadvantaged shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements.

(2) Where an applicant or Participant does not meet the requirements set forth in paragraph (d)(1) of this section, the disadvantaged individual(s) upon whom eligibility is based must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation). Where a concern seeks to comply with this paragraph:

(i) Provisions for the establishment of a quorum cannot permit non-disadvantaged Directors to control the Board of Directors, directly or indirectly;

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

(3) An applicant must inform SBA of any super majority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being admitted to the program, a Participant must inform SBA of changes regarding super majority voting requirements.

(4) Non-voting, advisory, or honorary Directors may be appointed without affecting disadvantaged individuals' control of the Board of Directors.

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

(e) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability

members, officers, and/or directors of the applicant or Participant. However, no such non-disadvantaged individual or immediate family member may:

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

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

(3) Receive compensation from the applicant or Participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The highest ranking officer may elect to take a lower salary than a non-disadvantaged individual only upon demonstrating that it helps the applicant or Participant. In the case of a Participant, the Participant must also obtain the prior written consent of the AA/8(a)BD or designee before changing the compensation paid to the highest ranking officer to be below that paid to a non-disadvantaged individual.

(f) Non-disadvantaged individuals who transfer majority stock ownership or control of the firm to an immediate family member within two years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm. The presumption may be rebutted by showing that the transferee has independent management experience necessary to control the operation of the firm.

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

(1) In circumstances where an applicant or Participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.

(2) A non-disadvantaged individual or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or Participant which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant.

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

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

§ 124.107 What is potential for success?

The applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. To do so, it must be in business in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application, unless a waiver for this requirement is granted pursuant to paragraph (b) of this section.

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

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

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

(ii) The applicant has demonstrated technical experience to carry out its business plan with a substantial likelihood for success if admitted to the 8(a) BD program;

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

(iv) The applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category; and

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

(2) The concern seeking a waiver under paragraph (b) must provide

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

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

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

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

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

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

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

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

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

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

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

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

(4) An applicant is ineligible for admission to the 8(a) BD program if the applicant concern or a proprietor, partner, limited liability member, director, officer, or holder of at least 10 percent of its stock, or another person (including key employees) with significant authority over the concern:

- (i) Lacks business integrity as demonstrated by information related to an indictment or guilty plea, conviction, civil judgment, or settlement; or
- (ii) Is currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity.

(5) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. If, after admission to the program, SBA discovers that false information has been knowingly submitted by a firm, SBA will initiate termination proceedings and suspend the firm under §§ 124.304 and 124.305. Whenever SBA determines that the applicant submitted false information, the matter will be referred to SBA's Office of Inspector General for review.

(b) *One-time eligibility.* Once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) BD program,

neither the concern nor that individual will be eligible again.

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

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

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

(4) When at least 50% of the assets of a concern are the same as those of a former Participant, the concern will not be eligible for entry into the program.

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

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

(d) *Brokers.* Brokers are ineligible to participate in the 8(a) BD program. A broker is a concern that adds no material value to an item being supplied to a procuring activity or which does not take ownership or possession of or handle the item being procured with its own equipment or facilities.

(e) *Federal financial obligations.* Neither a firm nor any of its principals that fails to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing, is eligible for admission to or participation in the 8(a) BD program.

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

(a) *Special rules for ANC's.* Small business concerns owned and

controlled by ANC's are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in § 124.112 to the extent the criteria are not inconsistent with this section. ANC-owned concerns are subject to the same conditions that apply to tribally-owned concerns, as described in paragraphs (b) and (c) of this section, except that the following provisions and exceptions apply only to ANC-owned concerns:

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

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

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

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

(5) Paragraphs (b)(3)(i), (ii) and (iv) of this section are not applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation.

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

(b) *Tribal eligibility.* In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section. Thereafter, it need not reestablish such status in order to have other businesses

that it owns certified for 8(a) BD program participation, unless specifically required to do so by the AA/8(a)BD or designee. Each tribally-owned concern seeking to be certified for 8(a) BD participation must comply with the provisions of paragraph (c) of this section.

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

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

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital.
- (vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.
- (vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

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

- (i) A copy of all governing documents such as the tribe's constitution or business charter.
- (ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.
- (iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.
- (iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) *Business eligibility.* In order to be eligible to participate in the 8(a) BD program, a concern which is owned by an eligible Indian tribe (or wholly

owned business entities of such tribe) must meet the conditions set forth in paragraphs (c)(1) through (c)(7) of this section.

(1) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation, partnership agreement or limited liability company articles of organization must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

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

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

(iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(3) *Ownership.* (i) For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest.

(ii) A tribe cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary SIC

code as the applicant. A tribe may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the tribe operates in the 8(a) BD program as its primary SIC code.

(iii) The restrictions of § 124.105(h) do not apply to tribes; they do, however, apply to non disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

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

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

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

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

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

(6) *Potential for success.* (i) A tribally-owned applicant concern must be in business for at least two years, as evidenced by income tax returns for

each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (c)(6)(ii) of this section.

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

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

(B) The financial capacity of the concern; and

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

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

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

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

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

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

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

(b) A concern owned by a Native Hawaiian Organization must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern

applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, unless the Administrator determines that one or more such concerns owned by the Native Hawaiian Organization have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(c) A Native Hawaiian Organization cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary SIC code as the applicant. A Native Hawaiian Organization may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the Native Hawaiian Organization operates in the 8(a) BD program as its primary SIC code.

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

(e)(1) An applicant concern owned by a Native Hawaiian Organization must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

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

(i) The technical and managerial experience and competence of the individual(s) who will manage and control the daily operation of the concern.

(ii) The financial capacity of the concern; and

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

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

(a) Concerns owned at least 51 percent by CDCs (or a wholly owned business entity of a CDC) are eligible for

participation in the 8(a) BD program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. These concerns must meet all eligibility criteria set forth in § 124.101 through § 124.108 and § 124.112 to the extent that they are not inconsistent with this section.

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

(c) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the CDC or any other business enterprise owned by the CDC, unless the Administrator determines that one or more such concerns owned by the CDC have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(d) A CDC cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary SIC code as the applicant. A CDC may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary SIC code.

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

(f)(1) A CDC-owned applicant concern must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

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

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

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

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

(a) *Standards.* In order for a concern (except those owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs) to remain eligible for 8(a) BD program participation, it must continue to meet all eligibility criteria contained in § 124.101 through § 124.108. For concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs to remain eligible, they must meet the criteria set forth in this § 124.112 to the extent that they are not inconsistent with § 124.109, § 124.110 and § 124.111, respectively. The concern must inform SBA in writing of any changes in circumstances which would adversely affect its program eligibility, especially economic disadvantage and ownership and control. Any concern that fails to meet the eligibility requirements after being admitted to the program will be subject to termination or early graduation under §§ 124.302 through 124.304, as appropriate.

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

- (1) A certification that it meets the 8(a) BD program eligibility requirements as set forth in § 124.101 through § 124.108 and paragraph (a) of this section;
- (2) A certification that there have been no changed circumstances which could adversely affect the Participant's program eligibility. If the Participant is unable to provide such certification, the Participant must inform SBA of any changes and provide relevant supporting documentation.
- (3) Personal financial information for each disadvantaged owner;
- (4) A record from each individual claiming disadvantaged status regarding

the transfer of assets for less than fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review. The record must provide the name of the recipient(s) and family relationship, and the difference between the fair market value of the asset transferred and the value received by the disadvantaged individual.

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

(6) If it is an approved protege, a narrative report detailing the contacts it has had with its mentor and benefits it has received from the mentor/protege relationship. See § 124.520(b)(4) for additional annual requirements;

(7) IRS Form 4506, Request for Copy or Transcript of Tax Form; and

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

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

(2) Sufficient reasons for SBA to conclude that a socially disadvantaged individual is no longer economically disadvantaged include, but are not limited to, excessive withdrawals of funds or other assets withdrawn from the concern by its owners, or substantial personal assets, income or net worth of any disadvantaged owner. SBA may also consider access by the Participant firm to a significant new source of capital or loans since the financial condition of the Participant is considered in evaluating the disadvantaged individual's economic status.

(d) *Excessive withdrawals.* (1) The term withdrawal includes, but is not limited to, the following: officer's salary; cash dividends; distributions in excess of amounts needed to pay S Corporation taxes; cash and property withdrawals; bonuses; loans; advances; payments to immediate family members; investments on behalf of an owner, officer, or key employee; acquisition of a business not merged with the 8(a) Participant; charitable contributions; and speculative ventures.

(2) If SBA determines that excessive funds or other assets have been withdrawn from the Participant, SBA may:

(i) Initiate termination proceedings under §§ 124.303 and 124.304 where the withdrawals detrimentally affect the achievement of the Participant's targets, objectives and goals set forth in its business plan, or its overall business development;

(ii) Initiate early graduation proceedings under §§ 124.302 and 124.303 where the withdrawals do not adversely affect the Participant's business development; or

(iii) Require an appropriate reinvestment of funds or other assets, as well as any other actions SBA deems necessary to counteract the detrimental effects of the withdrawals, as a condition of the Participant maintaining program eligibility.

(3) Withdrawals are excessive if during any fiscal year of the Participant they exceed (i) \$150,000 for firms with sales up to \$1,000,000; (ii) \$200,000 for firms with sales between \$1,000,000 and \$2,000,000; and (iii) \$300,000 for firms with sales over \$2,000,000.

(4) The fact that a concern's net worth has increased despite withdrawals that are deemed excessive will not preclude SBA from determining that such withdrawals were detrimental to the attainment of the concern's business objectives or to its overall business development.

Applying to the 8(a) BD Program

§ 124.201 May any business submit an application?

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

§ 124.202 Where must an application be filed?

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

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

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments will include, but not be limited to, financial statements, Federal personal and business tax returns, and personal history statements. An applicant must also submit IRS Form 4506, Request for Copy

or Transcript of Tax Form, to SBA. The application package may be in the form of an electronic application.

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

(a) The AA/8(a)BD is authorized to approve or decline applications for admission to the 8(a) BD program. The appropriate DPCE field office will receive, review and evaluate all 8(a) BD applications except those from ANC-owned applicants. SBA's Anchorage District Office will receive all applications from ANC-owned applicants and review them for completeness before sending them to the AA/8(a)BD for further processing. The appropriate field office will advise each program applicant within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will process an application for 8(a) BD program participation within 90 days of receipt of a complete application package by the DPCE field office. Incomplete application packages will not be processed.

(b) SBA, in its sole discretion, may request clarification of information contained in the application at any time in the application process. SBA will take into account any clarifications made by an applicant in response to a request for such by SBA.

(c) An applicant concern's eligibility will be based on circumstances existing on the date of application, except where clarification is made pursuant to paragraph (b) of this section or as provided in paragraph (d) of this section.

(d) Changed circumstances for an applicant concern occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for decline. The applicant must inform SBA of any changed circumstances that could adversely affect its eligibility for the program (particularly economic disadvantage and ownership and control) during its application review. Failure to inform SBA of any such changed circumstances constitutes good cause for which SBA may terminate the Participant if non-compliance is discovered after admittance.

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

(f) If the AA/8(a)BD approves the application, the date of the approval letter is the date of program certification for purposes of determining the concern's program term.

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

(a) An applicant may request the AA/8(a)BD to reconsider his or her initial decline decision by filing a request for reconsideration with the SBA field office that originally processed its application. Filing means submission by personal delivery, first-class mail, express mail, facsimile transmission followed by first-class mail, or commercial delivery service. The applicant must submit its request for reconsideration within 45 days of receiving notice that its application was declined. The applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

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

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

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

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

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

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

(d) If an appeal is filed with OHA, the written decision of the Administrative

Law Judge is the final Agency decision. If an appealable decision is not appealed, the decision of the AA/8(a)BD is the final Agency decision.

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

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

Exiting the 8(a) BD Program

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

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

(a) Graduation upon the expiration of the program term established pursuant to § 124.2;

(b) Voluntary early graduation;

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

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

§ 124.302 What is early graduation?

(a) *General.* SBA may graduate a firm from the 8(a) BD program prior to the expiration of its Program Term where SBA determines that:

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

(2) One or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.

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

(1) Degree of sustained profitability;

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

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

(4) Current ability to obtain bonding;

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

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

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

(c) *Excessive withdrawals.* SBA may graduate a Participant prior to the expiration of its program term where excessive funds or other assets have been withdrawn from the Participant (see § 124.112(d)(3)), causing SBA to determine that the Participant has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program.

§ 124.303 What is termination?

(a) SBA may terminate the participation of a concern in the 8(a) BD program prior to the expiration of the concern's Program Term for good cause. Examples of good cause include, but are not limited to, the following:

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

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

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

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

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

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

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

(8) Cessation of business operations by the concern.

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

efforts to develop and achieve competitive viability.

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

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

(12) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.

(13) Excessive withdrawals, including transfers of funds or other business assets, from the concern for the personal benefit of any of its owners or any person or entity affiliated with the owners that hinder the development of the concern (see § 124.112(d)).

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

(15) Submission by or on behalf of a Participant of false information to SBA, including false certification of compliance with non-8(a) business activity targets under § 124.507 or failure to report changes that adversely affect the program eligibility of an applicant or program participant under § 124.204 and § 124.112, where responsible officials of the 8(a) BD Participant knew or should have known the submission to be false.

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

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

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

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

(20) Willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues.

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

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

(a) *General.* The same procedures apply to both early graduation and

termination of Participants from the 8(a) BD program.

(b) *Letter of Intent to Terminate or Graduate Early.* When SBA believes that a Participant should be terminated or graduated prior to the expiration of its program term, SBA will notify the concern in writing. The Letter of Intent to Terminate or Graduate Early will set forth the specific facts and reasons for SBA's findings, and will notify the concern that it has 30 days from the date of service (as defined in § 134.204 of this title) of the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination or early graduation. Service is defined in § 134.204.

(c) *Recommendation and decision.* Following the 30-day response period, the Assistant Administrator for DPCE (AA/DPCE) or designee will consider the proposed early graduation or termination and any information submitted in response by the concern. Upon determining that early graduation or termination is not warranted, the AA/DPCE or designee will notify the Participant in writing. If early graduation or termination appears warranted, the AA/DPCE will make such a recommendation to the AA/8(a)BD, who will then make a decision whether to early graduate or terminate the concern. SBA will act in a timely manner in processing early graduation and termination actions.

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

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

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

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

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

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

- (1) The basis for the suspension;
 - (2) A statement that the suspension will continue pending the completion of further investigation, a final program termination determination, or some other specified period of time;
 - (3) A statement that awards of competitive and non-competitive 8(a) contracts, including those which have been "self-marketed" by a Participant, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or an authorized representative to be in the best interest of the Government to do so, and SBA adopts that determination;
 - (4) A statement that the concern is obligated to complete previously awarded section 8(a) contracts;
 - (5) A statement that the suspension is effective nationally throughout SBA;
 - (6) A statement that a request for a hearing on the suspension will be considered by an Administrative Law Judge at OHA, and granted or denied as a matter of discretion.
 - (7) A statement that the firm's participation in the program is suspended effective on the date the Notice is served, and that the program term will resume only if the suspension is lifted or the firm is not terminated.
- (c) The applicant concern may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this title with OHA within 45 days of the date of service (as defined in

§ 134.204) of a Notice of Suspension pursuant to paragraph (b) of this section. It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the Participant requests one, but authority to grant a hearing is within the discretion of the Administrative Law Judge in OHA. A suspension remains in effect pending the result of its appeal.

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension before OHA or the AA/8(a)BD makes a final determination regarding the termination action.

(1) The term "adequate evidence" means information contained in the record before the AA/8(a)BD at the time of his or her suspension decision that is sufficient to support the reasonable belief that the Government's interests need to be protected.

(2) SBA need not demonstrate that an act or omission actually occurred in order for OHA to uphold a suspension. SBA's burden in a suspension proceeding is limited to demonstrating that it had a reasonable belief that a particular act or omission occurred, and that that act or omission requires suspension to protect the interests of the Government.

(3) Unless the Administrative Law Judge consolidates the suspension and termination proceedings, OHA's review is limited to determining whether the Government's interests need to be protected, and will not consider the merits of the termination action.

(e) If there is a timely appeal, the decision of the Administrative Law Judge is the final SBA decision. If there is not a timely appeal, the decision of the AA/8(a)BD is the final Agency decision.

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

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

(h) SBA may suspend a Participant from program benefits where a change of ownership or business structure has been requested if ownership or control of the participant changed prior to SBA's approval pending resolution of the request to change its ownership or control. If the change of ownership is

approved, the length of the suspension will be added to the firm's program term where the change in ownership results from the death or incapacity of a disadvantaged individual or where the firm requested prior approval and waited 60 days for SBA approval before making the change. The suspension will be commenced by the issuance of a notice similar to that required for termination-related suspensions under paragraph (b) of this section, except that a change of ownership suspension is not appealable.

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

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

Business Development

§ 124.401 Which SBA field office services a Participant?

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

§ 124.402 How does a Participant develop a business plan?

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

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

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

- (1) A detailed description of any products currently being produced and any services currently being performed by the concern, as well as any future

plans to enter into one or more new markets;

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

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

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

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

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

(7) Such other information as SBA may require.

§ 124.403 How is a business plan updated and modified?

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

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

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

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

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

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

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

(1) How the Participant intends to meet the applicable non-8(a) business

activity target imposed by § 124.507 during the transitional stage of participation; and

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

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

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

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

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

(2) Financial assistance pursuant to § 120.375 of this title;

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

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

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

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

(2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other Participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements); and

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

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

(a) *General.* (1) Pursuant to 15 U.S.C. 636(j)(13)(F), eligible Participants may receive surplus Federal Government

property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR Part 101-44 and this section will be used to transfer surplus property to eligible Participants.

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

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

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

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

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

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

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

(c) *Use of acquired surplus property.*

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

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

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

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

(iv) That, at its own expense, it will return the property to a SASP or transfer it to another Participant if directed to do so by SBA because it has not used the property as intended within one year of receipt;

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

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

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

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

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

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

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

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

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

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

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

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

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

Participant more for any service than their established fees charged to other transferees.

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

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

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

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

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

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

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

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

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

(5) Where SBA finds that a recipient has sold or otherwise disposed of the acquired surplus property in violation of the agreement covering sale and disposal, the Participant is liable for the agreed upon fair market value of the property at the time of the transfer, or the sale price, whichever is greater. However, a Participant need not repay any amount where it can demonstrate to SBA's satisfaction that the property is no longer useful for the purpose for which it was transferred and receives

SBA's prior written consent to transfer the property. For example, if a piece of equipment breaks down beyond repair, it may be disposed of without being subject to the repayment provision, so long as the concern receives SBA's prior consent.

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

Contractual Assistance

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

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

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

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

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

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

(f) An 8(a) participant that identifies a requirement that appears suitable for award through the 8(a) BD program may request SBA to contact the procuring activity to request that the requirement be offered to the 8(a) BD program.

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

(h) A Participant must certify that it is a small business under the size

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

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

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

(a) A procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA. The procuring activity may transmit the offering letter to SBA by electronic mail, if available, or by facsimile transmission, as well as by mail or commercial delivery service.

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

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

(2) For competitive and open construction requirements, to the SBA district office serving the geographical area in which the work is to be performed or, in the case of such contracts to be performed overseas, to the Office of 8(a) BD located in SBA Headquarters;

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

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

(1) A description of the work to be performed;

(2) The estimated period of performance;

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

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

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

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

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

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

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

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

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

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

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

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

(13) Bonding requirements, if applicable;

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

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

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

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

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

(a) *Acceptance of the requirement.*

Upon receipt of the procuring activity's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) BD program. SBA's decision whether to accept the requirement will be sent to the procuring activity in writing within

10 working days of receipt of the written offering letter if the contract is valued at more than the simplified acquisition threshold, and within two days of receipt of the offering letter if the contract is valued at or below the simplified acquisition threshold, unless SBA requests, and the procuring activity grants, an extension. SBA is not required to accept any particular procurement offered to the 8(a) BD program.

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

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

(3) Where SBA has delegated its contract execution functions to a procuring activity, the procuring activity may assume that SBA accepts its offer for the 8(a) program if the procuring activity does not receive a reply to its offer within five days.

(4) In the case of procurement requirements valued at or below the Simplified Acquisition Procedures threshold:

(i) Where a procuring activity makes an offer to the 8(a) program on behalf of a specific Program Participant and does not receive a reply to its offer within two days, the procuring activity may assume the offer is accepted and proceed with award of an 8(a) contract;

(ii) Where SBA has delegated its 8(a) contract execution functions to an agency, SBA may authorize the procuring activity to award an 8(a) contract without requiring an offer and acceptance of the requirement for the 8(a) program. In such a case, the procuring activity must notify SBA of all 8(a) awards made under this authority.

(5) Where SBA does not respond to an offering letter within the normal 10-day time period, the procuring activity may seek SBA's acceptance through the AA/8(a)BD. The procuring activity may assume that SBA accepts its offer for the 8(a) program if it does not receive a reply from the AA/8(a)BD within 5 days of his or her receipt of the procuring activity request.

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

(1) SBA will accept the SIC code assigned to the requirement by the procuring activity contracting officer as

long as it is reasonable, even though other SIC codes may also be reasonable.

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

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

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

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

(ii) The Participant complies with its applicable non-8(a) business activity target imposed by § 124.509(d);

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

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

(2) If an appropriate match exists, SBA will advise the procuring activity whether SBA will participate in contract negotiations or whether SBA will authorize the procuring activity to negotiate directly with the identified Participant. Where SBA has delegated its contract execution functions to a procuring activity, SBA will also identify that delegation in its acceptance letter.

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

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

(1) If the procurement is a construction requirement, SBA will examine the portfolio of Participants that have a bona fide place of business within the geographical boundaries served by the SBA district office where the work is to be performed to select a qualified Participant. If none is found to be qualified or a match for a concern in that district is determined to be impossible or inappropriate, SBA may

nominate a Participant with a bona fide place of business within the geographical boundaries served by another district office within the same state, or may nominate a Participant having a bona fide place of business out of state but within a reasonable proximity to the work site. SBA's decision will ensure that the nominated Participant is close enough to the work site to keep costs of performance reasonable.

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

(3) In cases in which SBA selects a Participant for possible award from among two or more eligible and qualified Participants, the selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts.

(e) *Formal technical evaluations.* Except for requirements for architectural and engineering services, SBA will not authorize formal technical evaluations for sole source 8(a) requirements. A procuring activity:

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

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

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

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

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

(3) The effect that contract award would have on the equitable distribution of 8(a) contracts; and

(4) Whether the requirement should continue under the 8(a) BD program.

(g) *Basic Ordering Agreements (BOAs).* A Basic Ordering Agreement (BOA) is not a contract under the FAR. See 48 CFR 16.703(a). Each order to be issued under the BOA is an individual

contract. As such, the procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself.

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

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

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

(h) *Multiple Award and Federal Supply Schedule Contracts.* Unlike Basic Ordering Agreements, Multiple Award and Federal Supply Schedule contracts are contracts. Orders issued under these contracts are not considered separate contracts. As such, SBA's acceptance of the original Multiple Award or Federal Supply Schedule contract is valid for the duration of the contract. Separate offers and acceptances will not be made for individual task orders under these contracts.

(1) Task orders are not required to be competed where the value of the task order will exceed the competitive threshold as long as the original contract was competed.

(2) A concern may continue to accept new orders under a Multiple Award or Federal Supply Schedule contract even where a concern's program term expires, the concern otherwise exits the 8(a) BD program, or the concern becomes other than small for the SIC code assigned under the contract subsequent to award of the contract.

(i) Requirements where SBA has delegated contract execution authority. Except as provided in paragraph (a)(4)(i) of this section, where SBA has delegated its 8(a) contract execution authority to the procuring activity, the procuring activity must still offer and SBA must still accept all requirements intended to be awarded as 8(a) contracts.

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

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

(a) *Reservation as small business or SDB set-aside.* The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business or small disadvantaged business (SDB) set-aside prior to offering the requirement to SBA for award as an 8(a) contract. The AA/8(a)BD may permit the acceptance of the requirement, however, under extraordinary circumstances.

Example to paragraph (a). SBA may accept a requirement where a procuring activity made a decision to offer the requirement to the 8(a) BD program before the solicitation was sent out and the procuring activity acknowledges and documents that the solicitation was in error.

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

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

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

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

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

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

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

(B) The small business is performing the requirement at the time it is offered to the 8(a) BD program, or its performance of the requirement ended

within 30 days of the procuring activity's offer of the requirement to the 8(a) BD program; and

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

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

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

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

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

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

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

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

(d) *Release for non-8(a) competition.* In limited instances, SBA may decline to accept the offer of a follow-on or renewal 8(a) acquisition to give a

concern previously awarded the contract that is leaving or has left the 8(a) BD program the opportunity to compete for the requirement outside the 8(a) BD program.

(1) SBA will consider release only where:

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

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

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

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

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

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

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

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

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

(3) The terms and conditions of a proposed 8(a) contract, including the procuring activity's SIC code designation and estimate of the fair market price.

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

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

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

(4) By statute (15 U.S.C. 637(a)(1)(A)), the procuring agency head must specify in writing the reasons for a denial of an appeal brought by the Administrator under this section.

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

(a) *Competitive thresholds.* (1) A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:

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

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

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

(2) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring activity estimate of the total value of the contract, including all options. For indefinite delivery or indefinite quantity type contracts, the thresholds are applied to the maximum order amount authorized.

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

Example to paragraph (a)(3). If the anticipated award price for a professional services requirement is determined to be \$2.7 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source

award will be valid even if the contract price arrived at after negotiation is \$3.1 million.

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

(b) *Exemption from competitive thresholds for Participants owned by Indian tribes.* SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement. There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, but a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole source basis.

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

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

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

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

(d) *Sole source above thresholds.* Where a contract opportunity exceeds the applicable threshold amount and there is not a reasonable expectation that at least two eligible 8(a) Participants will submit offers at a fair price, the AA/8(a)BD may accept the requirement for a sole source 8(a) award if he or she determines that an eligible Participant in the 8(a) portfolio is capable of performing the requirement at a fair price.

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

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

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

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

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

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

(ii) In compliance with any applicable competitive business mix target established or remedial measure imposed by § 124.509 that does not include the denial of future 8(a) contracts;

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

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

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

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

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

(c) *Restricted competition.* (1) *Competition within stages of program participation.* SBA may accept a competitive 8(a) requirement that is limited to Participants in the developmental stage of program

participation, or may accept a requirement to be competed among firms both in the developmental and transitional stages of program participation.

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

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

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

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

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

§ 124.508 How is an 8(a) contract executed?

(a) An 8(a) contract can be awarded in the following ways:

(1) As a tripartite agreement in which the procuring activity, SBA and the Participant all sign the appropriate contract documents. There may be separate prime and subcontract documents (i.e., a prime contract between the procuring activity and SBA and a subcontract between SBA and the selected 8(a) concern) or a combined contract document representing both the prime and subcontract relationships; or

(2) Where SBA has delegated contract execution authority to the procuring activity, directly by the procuring activity through a contract between the procuring activity and the Participant.

(b) Where SBA receives a contract for signature valued at or below the simplified acquisition threshold, it will sign the contract and return it to the procuring activity within three (3) days of receipt.

(c) In order to be eligible to receive a sole source 8(a) contract, a firm must be a current Participant on the date of award. (See § 124.507(d) for competitive 8(a) awards.)

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

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

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

(b) *Required non-8(a) business activity targets during transitional stage.* (1) *General.* During the transitional stage of the 8(a) BD program, a Participant must achieve certain targets of non-8(a) contract revenue (i.e., revenue from other than sole source or competitive 8(a) contracts). These targets are called non-8(a) business activity targets and are expressed as a percentage of total revenue. The targets call for an increase in non-8(a) revenue over time.

(2) *Non-8(a) business activity targets.* During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

Participant's year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	35
4	45
5	55

(3) *Compliance with non-8(a) business activity targets.* SBA will measure the Participant's compliance with the applicable non-8(a) business activity target at the end of each program year in the transitional stage based on the Participant's latest fiscal year-end total revenue. Thus, at the end of the first year in the transitional stage of program participation, SBA will compare the Participant's non-8(a) revenue to its total revenue during that first year. If appropriate, SBA will require remedial measures during the subsequent program year. Thus, for example, non-compliance with the required non-8(a) business activity target in year one of the transitional stage would cause SBA to initiate remedial measures under paragraph (d) of this section for year two in the transitional stage.

(4) *Certification of compliance.* A Participant must certify as part of its offer that it complies with the applicable non-8(a) business activity target or with the measures imposed by SBA under paragraph (d) of this section before it can receive any 8(a) contract during the transitional stage of the 8(a) BD program.

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

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

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

(2) At the end of each year of participation in the transitional stage, the BOS assigned to work with the Participant will review the Participant's total revenues to determine whether the non-8(a) revenues have met the applicable target. In determining compliance, SBA will compare all 8(a) revenues received during the year, including those from options and modifications, to all non-8(a) revenues received during the year.

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

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

- (i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or
- (ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (d)(2)(ii)(B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

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

(B) To qualify for reinstatement during the last six months of the current program year (i.e., at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity target as of that point in the current program year.

Example 1 to paragraph (d)(2). Firm A had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of \$8.5 million and non-8(a) revenues of \$1.5 million (15 percent). Based on total revenues of \$10 million, Firm A should have had at least \$2.5 million in non-

8(a) revenues. Thus, Firm A missed its target by \$1 million (its target (\$2.5 million) minus its actual non-8(a) revenues (\$1.5 million)). Because Firm A did not achieve its non-8(a) business activity target, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling \$1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(2). Firm B had \$10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which \$8.5 million were 8(a) revenues and \$1.5 million were non-8(a) revenues. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least \$1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

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

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

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

(e) Waiver of sole source prohibition.

(1) The AA/8(a)BD, or his or her designee, may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when

a Participant does not meet its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target. The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

(2) The SBA Administrator on a non-delegable basis may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to the SBA Administrator that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

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

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

(b) A Participant must certify in its offer that it will meet the applicable percentage of work requirement. SBA will determine whether the firm will be in compliance as of the date of award of the contract for both sealed bid and negotiated procurements.

(c) **Indefinite quantity contracts.** (1) In order to ensure that the required percentage of costs on an indefinite quantity 8(a) award is performed by the Participant, the Participant must demonstrate semiannually that it has performed the required percentage to that date. For a service or supply contract, this does not mean that the Participant must perform 50 percent of the applicable costs for each task order with its own force, or that a Participant must have performed 50 percent of the applicable costs at any point in time during the contract's life. Rather, the Participant must perform 50 percent of the applicable costs for the combined total of all task orders issued to date at six month intervals.

Example to paragraph (c)(1). Two task orders are issued under an 8(a) indefinite quantity service contract during the first six months of the contract. If \$100,000 in personnel costs are incurred on the first task order, 90% of those costs (\$90,000) are incurred for performance by the Participant's

own work force, and the second task order also requires \$100,000 in personnel costs, the Participant would have to perform only 10 percent of the personnel costs on the second task order because it would still have performed 50% of the total personnel costs at the end of the six-month period (\$100,000 out of \$200,000).

(2) Where there is a guaranteed minimum condition in an indefinite quantity 8(a) award, the required performance of work percentage need not be met on task orders issued during the first six months of the contract. In such a case, however, the percentage of work that a Participant may further contract to other concerns during the first six months of the contract may not exceed 50 percent of the total guaranteed minimum dollar value to be provided by the contract. Once the guaranteed minimum amount is met, the general rule for indefinite quantity contracts set forth in paragraph (c)(1) of this section applies.

Example to paragraph (c)(2). Where a contract guarantees a minimum of \$100,000 in professional services and the first task order is for \$60,000 in such services, the Participant may perform as little as \$10,000 of the personnel costs for that order. In such a case, however, the Participant must perform all of the next task order(s) up to \$40,000 to ensure that it performs 50% of the \$100,000 guaranteed minimum (\$10,000 + \$40,000 = \$50,000 or 50% of the \$100,000).

(3) 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 at the end of any six-month period where he or she 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 Participant and the procuring activity that the contract will ultimately comply with the requirements of this section. Where SBA authorizes a Participant to exceed the subcontracting limitations and 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.

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

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

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

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

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

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

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

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

§ 124.512 Delegation of contract administration to procuring agencies.

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

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

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

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

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

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

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

(i) The size of at least one 8(a) Participant to the joint venture is less than one half the size standard corresponding to the SIC code assigned to the contract; and

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

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

(2) For sole source and competitive 8(a) procurements that do not exceed the dollar levels identified in paragraph (b)(1) of this section, an 8(a) Participant entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code assigned to the 8(a) contract.

(3) Notwithstanding the provisions of paragraphs (b)(1) and (b)(2) of this section, a joint venture between a protege firm and its approved mentor (see § 124.520) will be deemed small provided the protege qualifies as small for the size standard corresponding to the SIC code assigned to the procurement and has not reached the dollar limit set forth in § 124.519.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform an 8(a) contract, including those between mentors and proteges authorized by § 124.520, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and an employee of the managing venturer as the project

manager responsible for performance of the 8(a) contract;

(3) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the 8(a) Participant(s);

(4) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(5) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;

(6) Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the 8(a) contract;

(7) Obligating all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;

(8) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(9) Requiring the final original records be retained by the managing venturer upon completion of the 8(a) contract performed by the joint venture;

(10) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(11) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Performance of work.* For any 8(a) contract, including those between mentors and proteges authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510, and the 8(a) partner(s) to the joint venture must perform a significant portion of the contract.

(e) *Prior approval by SBA.* SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.

(f) *Contract execution.* Where SBA has approved a joint venture, the

procuring activity will execute an 8(a) contract in the name of the joint venture entity.

(g) *Amendments to joint venture agreement.* All amendments to the joint venture agreement must be approved by SBA.

(h) *Inspection of records.* SBA may inspect the records of the joint venture without notice at any time deemed necessary.

§ 124.514 Exercise of 8(a) options and modifications.

(a) *Unpriced options.* The exercise of an unpriced option is considered to be a new contracting action.

(1) If a concern has graduated or been terminated from the 8(a) BD program or is no longer small under the size standard corresponding to the SIC code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.

(2) If the concern is still a Participant and otherwise eligible for the requirement on a sole source basis, the procuring activity contracting officer may negotiate price and exercise the option provided the option, considered a new contracting action, meets all regulatory requirements, including the procuring activity's offering and SBA's acceptance of the requirement for the 8(a) BD program.

(3) If the estimated fair market price of the option exceeds the applicable threshold amount set forth in § 124.506, the requirement must be competed as a new contract among eligible Participants.

(b) *Priced options.* The procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

(c) *Modifications beyond the scope.* A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. It will be treated the same as an unpriced option as described in paragraph (a) of this section.

(d) *Modifications within the scope.* The procuring activity contracting officer may exercise a modification within the scope of the initial 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

(a) An 8(a) contract must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.

(1) An 8(a) contract, whether in the base or an option year, must be terminated for the convenience of the Government if:

(i) One or more of the individuals upon whom eligibility for the 8(a) BD program was based relinquishes or enters into any agreement to relinquish ownership or control of the Participant such that the Participant would no longer be controlled or at least 51% owned by disadvantaged individuals; or

(ii) The contract is transferred or novated for any reason to another firm.

(2) The procuring activity may not assess repurchase costs or other damages against the Participant due solely to the provisions of this section.

(b) The SBA Administrator may waive the requirements of paragraph (a)(1) of this section if requested to do so by the 8(a) contractor when:

(1) It is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;

(2) Ownership and control of the concern that is performing the 8(a) contract will pass to another Participant, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract;

(3) Any individual upon whom eligibility was based is no longer able to exercise control of the concern due to physical or mental incapacity or death;

(4) The head of the procuring agency, or an official with delegated authority from the agency head, certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions; or

(5) It is necessary for the disadvantaged owners of the initial 8(a) awardee to relinquish ownership of a majority of the voting stock of the concern in order to raise equity capital, but only if—

(i) The concern has graduated from the 8(a) BD program;

(ii) The disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and

(iii) The disadvantaged owners will maintain control of the daily business operations of the concern.

(c) The 8(a) contractor must request a waiver in writing prior to the change of

ownership and control except in the case of death or incapacity. A request for waiver due to incapacity or death must be submitted within 60 days after such occurrence. The Participant seeking to change ownership or control must specify the grounds upon which it requests a waiver, and must demonstrate that the proposed transaction would meet such grounds.

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.507(b)(2) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is a responsible and eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring firm must certify that it is a small business for the size standard corresponding to the SIC code assigned to each contract for which a waiver is sought.

(e) Anyone other than a procuring agency head who submits a certification regarding the impairment of the agency's objectives under paragraph (b)(4) of this section, must also certify delegated authority to make the certification.

(f) In processing a request for a waiver under paragraph (b)(2) of this section, SBA will treat a transfer of all a Participant's operating assets to another Participant the same as the transfer of an ownership interest, provided the Participant that transfers its assets to another eligible Participant:

(1) Voluntarily graduates from the 8(a) BD program; and

(2) Ceases its business operations, or presents a plan to SBA for its orderly dissolution.

(g) A concern performing an 8(a) contract must notify SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.

(h) The Administrator has discretion to decline a request for waiver even though legal authority exists to grant the waiver.

(i) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this title within 45 days of the date of service (as defined in § 134.204) of the Administrator's decision.

§ 124.516 Who decides contract disputes arising between a Participant and a procuring activity after the award of an 8(a) contract?

For purposes of the Disputes Clause of a specific 8(a) contract, the contracting officer is that of the procuring activity. A dispute arising between an 8(a) contractor and the procuring activity contracting officer will be decided by the procuring activity, and appeals may be taken by the 8(a) contractor without SBA involvement.

§ 124.517 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?

(a) The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

(b) The size status of the apparent successful offeror for a competitive 8(a) procurement may be protested pursuant to § 121.1001(a)(2) of this chapter. The size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.

(c) A Participant cannot appeal SBA's determination not to award it a specific 8(a) contract because the concern lacks an element of responsibility or is ineligible for the contract, other than the right set forth in § 124.501(h) to request a formal size determination where SBA cannot verify it to be small.

(d)(1) The SIC code assigned to a sole source 8(a) requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the AA/8(a)BD may appeal a SIC code designation with respect to a sole source 8(a) requirement.

(2) In connection with a competitive 8(a) procurement, any interested party who has been adversely affected by a SIC code designation may appeal the designation to SBA's OHA pursuant to § 121.1103 of this title.

(e) Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under § 124.112(c).

§ 124.518 How can an 8(a) contract be terminated before performance is completed?

(a) *Termination for default.* A decision to terminate a specific 8(a) contract for default can be made by the procuring activity contracting officer after consulting with SBA. The

contracting officer must advise SBA of any intent to terminate an 8(a) contract for default in writing before doing so. SBA may provide to the Participant any program benefits reasonably available in order to assist it in avoiding termination for default. SBA will advise the contracting officer of this effort. Any procuring activity contracting officer who believes grounds for termination continue to exist may terminate the 8(a) contract for default, in accordance with the Federal Acquisition Regulations (48 CFR chapter 1). SBA will have no liability for termination costs or reprocurement costs.

(b) *Termination for convenience.* After consulting with SBA, the procuring activity contracting officer may terminate an 8(a) contract for convenience when it is in the best interests of the Government to do so. A termination for convenience is appropriate if any disadvantaged owner of the Participant performing the contract relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, unless a waiver is granted pursuant to § 124.515.

(c) *Substitution of one 8(a) contractor for another.* Where a procuring activity contracting officer demonstrates to SBA that an 8(a) contract will otherwise be terminated for default, SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of the contract without invoking the termination for convenience or waiver provisions of § 124.515.

§ 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?

(a) A Participant (other than one owned by an Indian tribe or an ANC) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of the dollar amount set forth in this section during its participation in the 8(a) BD program.

(1) For a firm having a revenue-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is five times the size standard corresponding to that SIC code as of the date of SBA's acceptance of the requirement for the 8(a) BD program or \$100,000,000, whichever is less.

(2) For a firm having an employee-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is \$100,000,000.

(3) SBA will not consider 8(a) contracts awarded under \$100,000 in determining whether a Participant has reached the limit identified in paragraphs (a)(1) and (a)(2) of this section.

(b) Once the limit is reached, a firm may not receive any more 8(a) sole source contracts, but may remain eligible for competitive 8(a) awards.

(c) The limitation set forth in paragraph (a) of this section will not apply for firms that are current Participants in the 8(a) BD program as of December 31, 1997.

(d) SBA includes the dollar value of 8(a) options and modifications in determining whether a Participant has reached the limit identified in paragraph (a) of this section. If an option is not exercised or the contract value is reduced by modification, SBA will deduct those values.

(e) A Participant's eligibility for a sole source award in terms of whether it has exceeded the dollar limit for 8(a) contracts is measured as of the date that the requirement is accepted for the 8(a) program without taking into account whether the value of that award will cause the limit to be exceeded.

(f) The SBA Administrator on a non-delegable basis may waive the requirement prohibiting a Participant from receiving sole source 8(a) contracts in excess of the dollar amount set forth in this section where the head of a procuring activity represents to the SBA Administrator that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

§ 124.520 Mentor/protege program.

(a) *General.* The mentor/protege program is designed to encourage approved mentors to provide various forms of assistance to eligible Participants. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture arrangements. The purpose of the mentor/protege relationship is to enhance the capabilities of the protege and to improve its ability to successfully compete for contracts.

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist developing 8(a) Participants may act as a mentor and receive benefits as set forth in this section. This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program

participation, other small businesses, and large businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

- (i) Possesses favorable financial health, including profitability for at least the last two years;
- (ii) Possesses good character;
- (iii) Does not appear on the federal list of debarred or suspended contractors; and
- (iv) Can impart value to a protege firm due to lessons learned and practical experience gained because of the 8(a) BD program, or through its general knowledge of government contracting.

(2) Generally, a mentor will have no more than one protege at a time. However, the AA/8(a)BD may authorize a concern to mentor more than one protege at a time where the concern can demonstrate that the additional mentor/protege relationship will not adversely affect the development of either protege firm (e.g., the second firm cannot be a competitor of the first firm).

(3) In order to demonstrate its favorable financial health, a firm seeking to be a mentor must submit its federal tax returns for the last two years to SBA for review.

(4) Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position.

(c) *Proteges.* (1) In order to initially qualify as a protege firm, a Participant must:

- (i) Be in the developmental stage of program participation;
- (ii) Have never received an 8(a) contract; or
- (iii) Have a size that is less than half the size standard corresponding to its primary SIC code.

(2) Only firms that are in good standing in the 8(a) BD program (e.g., firms that do not have termination or suspension proceedings against them, and are up to date with all reporting requirements) may qualify as a protege.

(3) A protege firm may have only one mentor at a time.

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

(2) Notwithstanding the requirements set forth in §§ 124.105(g) and (h), in order to raise capital for the protege firm, the mentor may own an equity

interest of up to 40% in the protege firm.

(3) Notwithstanding the mentor/protege relationship, a protege firm may qualify for other assistance as a small business, including SBA financial assistance.

(4) No determination of affiliation or control may be found between a protege firm and its mentor based on the mentor/protege agreement or any assistance provided pursuant to the agreement.

(e) *Written agreement.* (1) The mentor and protege firms must enter a written agreement setting forth an assessment of the protege's needs and describing the assistance the mentor commits to provide to address those needs (e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor). The agreement must also provide that the mentor will provide such assistance to the protege firm for at least one year.

(2) The written agreement must be approved by the AA/8(a)BD. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protege, or if SBA determines that the agreement is merely a vehicle to enable a non-8(a) participant to receive 8(a) contracts.

(3) The agreement must provide that either the protege or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor/protege relationship and to SBA.

(4) SBA will review the mentor/protege relationship annually to determine whether to approve its continuation for another year.

(5) SBA must approve all changes to a mentor/protege agreement in advance.

(f) *Evaluating the mentor/protege relationship.* (1) In its annual business plan update required by § 124.403(a), the protege must report to SBA for the protege's preceding program year:

(i) All technical and/or management assistance provided by the mentor to the protege;

(ii) All loans to and/or equity investments made by the mentor in the protege;

(iii) All subcontracts awarded to the protege by the mentor, and the value of each subcontract;

(iv) All federal contracts awarded to the mentor/protege relationship as a joint venture (designating each as an 8(a), small business set aside, or unrestricted procurement), the value of each contract, and the percentage of the

contract performed and the percentage of revenue accruing to each party to the joint venture; and

(v) A narrative describing the success such assistance has had in addressing the developmental needs of the protege and addressing any problems encountered.

(2) The protege must annually certify to SBA whether there has been any change in the terms of the agreement.

(3) SBA will review the protege's report on the mentor/protege relationship as part of its annual review of the firm's business plan pursuant to § 124.403. SBA may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor/protege agreement or that the assistance has not resulted in any material benefits or developmental gains to the protege.

Miscellaneous Reporting Requirements

§ 124.601 What reports does SBA require concerning parties who assist Participants in obtaining federal contracts?

(a) Each Participant must submit annually a written report to its assigned BOS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such participant in obtaining a Federal contract. The listing must indicate the amount of compensation paid and a description of the activities performed for such compensation.

(b) Failure to submit the report is good cause for the initiation of a termination proceeding pursuant to §§ 124.303 and 124.304.

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

(a) Participants with gross annual receipts of more than \$5,000,000 must submit to SBA audited annual financial statements prepared by a licensed independent public accountant within 120 days after the close of the concern's fiscal year.

(1) The servicing SBA District Director may waive the requirement for audited financial statements for good cause shown by the Participant.

(2) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following:

(i) The concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements;

(ii) The concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and

(iii) The concern has been a Participant less than 12 months.

(b) Participants with gross annual receipts between \$1,000,000 and \$5,000,000 must submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant within 90 days after the close of the concern's fiscal year.

(c) Participants with gross annual receipts of less than \$1,000,000 must submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor of the Participant, including signature and date, within 90 days after the close of the concern's fiscal year.

(d) Any audited or reviewed financial statements submitted to SBA pursuant to paragraphs (a) or (b) of this section must be prepared in accordance with Generally Accepted Accounting Principles.

(e) While financial statements need not be submitted until 90 or 120 days after the close of a Participant's fiscal year, depending on the receipts of the concern, a Participant seeking to be awarded an 8(a) contract between the close of its fiscal year and such 90 or 120-day time period must submit a final sales report signed by the CEO or President to SBA in order for SBA to determine the concern's eligibility for the 8(a) contract. This report must show a breakdown of 8(a) and non-8(a) sales.

(f) Notwithstanding the amount of a Participant's gross annual receipts, SBA may require audited or reviewed statements whenever they are needed to obtain more complete information as to a concern's assets, liabilities, income or expenses, such as when the concern's capacity to perform a specific 8(a) contract must be determined, or when they are needed to determine continued program eligibility.

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

Former Participants must provide such information as SBA may request concerning the former Participant's continued business operations, contracts, and financial condition for a period of three years following the date on which the concern graduates or is terminated from the program. Failure to provide such information when

requested will constitute a violation of the regulations set forth in this part, and may result in the nonexercise of options on or termination of contracts awarded through the 8(a) BD program, debarment, or other legal recourse.

Management and Technical Assistance Program

§ 124.701 What is the purpose of the 7(j) management and technical assistance program?

Section 7(j)(1) of the Small Business Act, 15 U.S.C. 636(j)(1), authorizes SBA to enter into grants, cooperative agreements, or contracts with public or private organizations to pay all or part of the cost of technical or management assistance for individuals or concerns eligible for assistance under sections 7(a)(11), 7(j)(10), or 8(a) of the Small Business Act.

§ 124.702 What types of assistance are available through the 7(j) program?

Through its private sector service providers, SBA may provide a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including:

(a) Counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and

(b) The identification and development of new business opportunities.

§ 124.703 Who is eligible to receive 7(j) assistance?

The following businesses are eligible to receive assistance from SBA through its service providers:

(a) Businesses which qualify as small under part 121 of this title, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(b) Businesses eligible to receive 8(a) contracts.

§ 124.704 What additional management and technical assistance is reserved exclusively for concerns eligible to receive 8(a) contracts?

In addition to the management and technical assistance available under § 124.702, Section 7(j)(10) of the Small Business Act authorizes SBA to provide additional management and technical assistance through its service providers exclusively to small business concerns eligible to receive 8(a) contracts, including:

(a) Assistance to develop comprehensive business plans with

specific business targets, objectives, and goals;

(b) Other nonfinancial services necessary for a Participant's growth and development, including loan packaging; and

(c) Assistance in obtaining equity and debt financing.

PART 134—[AMENDED]

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

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6) and 637(a).

7a. Section 134.201 is amended by revising the second and third sentences to read as follows:

§ 134.201 Scope of the rules in this subpart B.

* * * Specific procedural rules pertaining to 8(a) program appeals and to proceedings under the Program Fraud Civil Remedies Act are set forth, respectively in subpart D of this part and part 142 of this chapter. In the case of a conflict between a particular rule in this subpart and a rule of procedure pertaining to OHA appearing in another subpart of this part or another part of this chapter, the latter rule shall govern.

8. Section 134.202 is amended in paragraph (c) by removing the reference to "subpart D of this part" and inserting in its place the phrase "subpart E of this part," and in paragraph (d) by removing the phrase "§ 124.211" and inserting in its place the phrase "§ 134.305."

9. Section 134.203 is amended by redesignating paragraphs (a)(2) through (4) as paragraphs (a)(3) through (5) and adding the following new paragraph (a)(2):

§ 134.203 The petition.

(a) * * *

(2) The SBA determination being appealed.

* * * * *

10. Section 134.211 is amended by adding the following new paragraph (d):

§ 134.211 Motions.

* * * * *

(d) *Stay*. A motion to dismiss stays the time to answer. The Judge will establish the time for serving and filing an answer in the order determining the motion to dismiss.

§ 134.213 [Amended]

11. Section 134.213(a) is amended by removing the second sentence.

§ 134.222 [Amended]

12. Section 134.222 is amended by removing the ";" and the word "or" at the end of paragraph (a)(2), by inserting

a "." at the end of paragraph (a)(2), and by removing paragraph (a)(3).

13. Subpart D is redesignated as Subpart E, §§ 134.401 through 134.418 are redesignated as §§ 134.501 through 134.518, and the following new Subpart D is added:

Subpart D—Rules of Practice for Appeals Under the 8(a) Program

- 134.401 Scope of the rules in this subpart D.
- 134.402 Appeal petition.
- 134.403 Service of appeal petition.
- 134.404 Decision by Administrative Law Judge.
- 134.405 Jurisdiction.
- 134.406 Review of administrative record.
- 134.407 Evidence beyond the record and discovery.
- 134.408 Decision on appeal.

Subpart D—Rules of Practice for Appeals Under the 8(a) Program

§ 134.401 Scope of the rules in this subpart D.

The rules of practice in this subpart D apply to all appeals to OHA from:

- (a) Denials of 8(a) BD program admission based solely on a negative finding(s) of social disadvantage, economic disadvantage, ownership or control pursuant to § 124.206 of this title;
- (b) Early graduation pursuant to §§ 124.302 and 124.304;
- (c) Termination pursuant to §§ 124.303 and 124.304;
- (d) Denials of requests to issue a waiver pursuant to § 124.515; and
- (e) Suspensions pursuant to § 124.305(a).

§ 134.402 Appeal petition.

In addition to the requirements of § 134.203, an appeal petition must state, with specific reference to the determination and the record supporting such determination, the reasons why the determination is alleged to be arbitrary, capricious or contrary to law.

§ 134.403 Service of appeal petition.

(a) Concurrent with its filing with OHA, a concern must also serve SBA's AA/8(a)BD and the appropriate Associate General Counsel in SBA's Office of General Counsel with a copy of the petition, including attachments.

(1) For appeals relating to denials of program admission pursuant to § 124.206 of this title, suspensions of program assistance pursuant to § 124.305, or denials of requests for waivers pursuant to § 124.515, a petitioner must serve the SBA's Associate General Counsel for General Law.

(2) For appeals relating to early graduation pursuant to §§ 124.302 and

124.304 or termination pursuant to §§ 124.303 and 124.304, a petitioner must serve the SBA's Associate General Counsel for Litigation.

(3) Service on SBA's Office of General Counsel generally or the SBA General Counsel do not meet the service requirements of this section.

(b) Service should be addressed to the AA/8(a)BD and the applicable Associate General Counsel at the Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

§ 134.404 Decision by Administrative Law Judge.

Appeal proceedings brought under this subpart will be conducted by an Administrative Law Judge.

§ 134.405 Jurisdiction.

(a) The Administrative Law Judge selected to preside over an appeal shall decline to accept jurisdiction over any matter if:

(1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of denials of 8(a) BD program admission based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control;

(2) The appeal is untimely filed under § 134.202 or is not otherwise filed in accordance with the requirements of this subpart or the requirements in subparts A and B of this part; or

(3) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(b) Once the Administrative Law Judge accepts jurisdiction over an appeal, subsequent initiation of an adjudication of the matter by a court of competent jurisdiction will not preclude the Administrative Law Judge from rendering a final decision on the matter.

(c) Jurisdiction of the Administrative Law Judge in a suspension case is limited to the issue of whether the protection of the Government's interest requires suspension pending resolution of the termination action, unless the Administrative Law Judge has consolidated the suspension appeal with the corresponding termination appeal.

§ 134.406 Review of the administrative record.

(a) Except as provided in § 134.407, any proceeding conducted under this subpart shall be decided solely on a review of the written administrative record.

(b) The Administrative Law Judge's review is limited to determining

whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is reasonable, the Administrative Law Judge must uphold it on appeal.

(c) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker relied. The administrative record, however, need not contain all documents pertaining to the petitioner. For example, the administrative record in a termination proceeding need not include the Participant's entire business plan file, documents pertaining to specific 8(a) contracts, or the firm's application for participation in the 8(a) BD program if they are unrelated to the termination action. The petitioner may object to the absence of a document, previously submitted to or sent by SBA, which the petitioner believes was erroneously omitted from the administrative record.

(d) Where the Agency files its answer to the appeal petition after the date specified in § 134.206, the Administrative Law Judge may decline to consider the answer and base his or her decision solely on a review of the administrative record.

(e) The Administrative Law Judge may remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under § 124.515 of this title, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious or contrary to law, or where it is clearly apparent from the record that SBA made an erroneous factual finding (e.g., SBA double counted an asset of an individual claiming disadvantaged status) or a mistake of law (e.g., SBA applied the wrong regulatory provision in evaluating the case). Such a remand will be for a period of 10 working days.

§ 134.407 Evidence beyond the record and discovery.

(a) The Administrative Law Judge may not admit evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit SBA to respond in writing to any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the petitioner has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the petitioner.

§ 134.408 Decision on appeal.

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed. If the Administrative Law Judge does not issue a decision within 90 days after an appeal petition is filed, he or she must indicate the reason that the 90-day time limit has not been met in the decision, when issued.

(c) The Administrative Law Judge may reconsider an appeal decision within 20 days of the decision if there is a clear showing of an error of fact or law material to the decision.

Dated: February 13, 1998.

Aida Alvarez,
Administrator.

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 124

8(a) Business Development/Small Disadvantaged Business Status Determinations

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: In response to the Department of Justice's review of Federal procurement affirmative action programs and amendments to the Federal Acquisition Regulation to implement a government-wide small disadvantaged business (SDB) program, the Small Business Administration (SBA) issues this final rule establishing the procedural framework for certifying

firms as SDBs and for processing protests challenging the disadvantaged status of a firm claiming to be an SDB.

DATES: *Effective Dates.* The amendments made by this rule to subpart A of 13 CFR part 124 are effective on June 30, 1998. Sections 124.1001 through 124.1016 of subpart B of 13 CFR part 124 are effective on August 24, 1998. With the exceptions of §§ 124.1017(b) and 124.1020(c)(2), §§ 124.1017 through 124.1024 of subpart B of 13 CFR part 124 are effective on October 1, 1998. Sections 124.1017(b) and 124.1020(c)(2) of subpart B of 13 CFR part 124 are effective on January 1, 1999.

Compliance Dates. SBA will begin to accept and process applications for SDB certifications as of August 24, 1998.

FOR FURTHER INFORMATION CONTACT:

Calvin Jenkins, Deputy Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, at (202) 205-6459.

SUPPLEMENTARY INFORMATION: On May 9, 1997, the Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) proposed amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business concerns. 62 FR 25786. The amendments were intended to conform to a Department of Justice (DOJ) proposal to reform affirmative action in Federal procurement (see 61 FR 26042) and to comply with the constitutional standards established by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). The proposed amendments to the FAR included procedures by which a firm claiming to be owned and controlled by one or more disadvantaged individuals could certify its status as a small disadvantaged business (SDB) concern for purposes of receiving a benefit as an SDB in connection with a Federal procurement. The proposed FAR change also contained procedures by which an interested party may protest a small business concern's disadvantaged status to the Small Business Administration (SBA). In response to and in conjunction with the DOJ and FAR reform proposals, on August 14, 1997, SBA published in the **Federal Register**, 62 FR 43584, a proposed rule to amend 13 CFR part 124. Subpart A of the proposed part 124 dealt with changes pertaining to the 8(a) Business Development (8(a) BD) program which is authorized by sections 7(j)(10) and 8(a) of the Small Business Act, 15 U.S.C. 636(j)(10), 637(a). Subpart B of proposed