

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

part 124 dealt with SBA's role in the certification and protest of small disadvantaged businesses, as contemplated by the DOJ and FAR proposals. SBA is finalizing the vast majority of subpart A of 13 CFR part 124 as a separate rulemaking action. This rule finalizes subpart B of 13 CFR part 124, discussing fully all substantive comments received regarding subpart B in response to the August 14, 1997 proposed rule. This rule also makes four changes to subpart A of 13 CFR part 124 in order to take into account the effect that benchmark achievement, explained below, may have on the 8(a) BD program.

As recommended in the DOJ review of Federal affirmative action procurement programs, subpart B of part 124 as set forth in this rule describes standards and procedures by which a firm can apply to be recognized as a small disadvantaged business (SDB). Under the rule, SBA, or, where SBA deems it appropriate, SBA-approved state agencies, private sector organizations or business concerns (called Private Certifiers), will determine whether a firm is owned and controlled by specified individuals claiming to be disadvantaged. Where a Private Certifier determines ownership and control, the Private Certifier will issue a written decision as to whether the applicant is actually owned and controlled by the individuals identified as claiming disadvantaged status, and will forward the application along with a copy of its decision to SBA for further processing as to the other aspects of SDB eligibility. Where the Private Certifier finds that the applicant is not owned and controlled by the individuals claiming disadvantaged status, its decision will state the specific reasons for the finding, and inform the applicant of its right to appeal the decision to SBA's Office of Hearings and Appeals (OHA). Where SBA determines ownership and control, SBA will first determine whether the applicant is owned and controlled by the individual(s) claiming to be disadvantaged. If SBA determines that the applicant is not owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a written decision addressing only the ownership and control issues. If SBA determines that the applicant is owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a single written decision as to whether the applicant qualifies as an SDB. Such a decision will include the ownership and control of the firm, the size status of the firm, and the disadvantaged status of those

individuals claiming to be disadvantaged. An applicant may appeal SBA's determination that it is not owned and controlled by those individuals claiming disadvantaged status, or its decision that one or more of the individuals claiming disadvantaged status are not actually disadvantaged to OHA. An applicant may also request a formal size determination with the applicable SBA Government Contracting Area Office.

Individuals who are members of certain designated groups are presumed to be socially and economically disadvantaged. SBA will consider evidence presented to it which is contrary to the presumptions, and may seek further information from the applicant individuals. Other individuals must submit a narrative statement identifying personally how their entry into or advancement in the business world has been impaired because of their individual social disadvantage, and how their ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. These procedures are completely separate from the 8(a) BD requirements. The rule describes procedures for listing and removing firms from an SBA-maintained on-line register of certified SDBs. With respect to the 8(a) BD program, the rule also provides regulatory authority for SBA, in its discretion, to limit program entry, accelerate program graduation, and limit the numbers of 8(a) contracts available when the benchmarks referred to in the FAR are achieved in particular industries.

SBA has attempted to write the regulations in plain English.

#### Discussion of Public Comment

SBA received several comments concerning the application of benchmarks to the 8(a) BD program. Some comments questioned the methodology of establishing benchmarks. Neither the proposed rule nor this final rule addresses the way in which benchmarks will be developed. As such, those comments are not relevant to this rulemaking, and SBA makes no changes in response to them. A few comments expressed concern about the actions SBA may take when the benchmark is exceeded in a particular industry (i.e., SBA may decide not to accept an application for the 8(a) BD program from a concern in that industry (§ 124.108(f)); SBA may accelerate graduation of Participants (§ 124.302(d)); or SBA may elect not to accept a requirement as an 8(a) contract (§ 124.504(d)). While the regulations give SBA discretion to take any of those

actions in appropriate circumstances, they do not mandate that such actions be taken in any case. In considering whether to take action under these provisions, the SBA Administrator will weigh the business development purposes of the program in every case.

*Part 124, subpart B:* Subpart B of the August 14, 1997 proposed rule defined what an SDB is and set forth the procedures by which a firm can be recognized as an SDB. Each of the significant comments received regarding subpart B and the changes made to subpart B are identified below.

Proposed § 124.1001 defined an SDB as a business which is owned and controlled by one or more disadvantaged individuals. One commenter noted that this omitted references to certain entities which are considered disadvantaged. SBA agrees with this comment, and this final rule changes § 124.1001 to make clear that firms owned and controlled by the following entities, i.e., Alaska Native Corporations (ANCs), Community Development Corporations (CDCs), Indian tribes (tribes) or Native Hawaiian Organizations (NHOs), are considered disadvantaged.

Proposed § 124.1002(d) would have required SBA to consider the "character" of each individual claiming disadvantaged status in determining whether a firm qualified as an SDB. Upon further reflection, SBA does not believe that SBA should look at the character of the firm or individuals claiming disadvantaged status as part of its SDB determination. The requirement that a firm and its principals possess "good character" should be a responsibility issue to be determined by the contracting officer in connection with each contract for which the firm is the apparent successful offeror, and should have no bearing on whether a firm should be classified as an SDB. As such, SBA has deleted that requirement from this final rule.

Proposed § 124.1002(b)(4) listed as a requirement for SDB status (relating to DOD, NASA and Coast Guard procurements) the additional requirement that a majority of the SDB's earnings accrue directly to the disadvantaged individuals. One commenter questioned why this restriction applied only to DOD, NASA and the Coast Guard. The reason for the limited applicability is that the restriction appears in the authorizing legislation for the SDB program applying to DOD, NASA and Coast Guard (see section 1207 of the Defense Acquisition Improvement Act of 1986, Public Law 99-661), but not in the authorizing legislation for the

Government-wide SDB program (see section 7102 of the Federal Acquisition Streamlining Act of 1994, Public Law 103-355). This rule is consistent with this statutory distinction.

Proposed § 124.1002(f)(4) required that a majority of a joint venture's earnings must accrue directly to disadvantaged individuals and entities. One commenter noted that this provision could be read to impose an additional requirement on ANCs that would be contrary to 43 U.S.C. 1626(e). SBA does not believe this to be true because the provision was meant to apply to SDBs owned by disadvantaged individuals and not to those owned by tribes, ANCs, CDCs or NHOs. Nevertheless, SBA has deleted this provision from the final rule because it is contract specific and should not affect whether a firm should be considered an SDB generally.

The final rule deletes proposed § 124.1002(g), the requirement that an SDB must perform certain specified percentages of work with its own employees. Upon further deliberation, SBA believes that this requirement is a contract specific requirement and does not belong in the regulations defining what an SDB is. SBA has added a new paragraph (g) clarifying that the ownership restrictions contained in §§ 124.105(g) and (h) do not apply to SDB eligibility. Those restrictions apply to the 8(a) BD program because it is a business development program.

Proposed §§ 124.1003 through 124.1009 set forth various requirements relating to Private Certifiers. The proposed rule stated that Private Certifiers would perform determinations of ownership and control and that SBA would perform such determinations where "a Private Certifier is not reasonably available." SBA received several comments on the proposed use of Private Certifiers. One commenter stated that the use of Private Certifiers provided a quick and cost effective certification process. Several commenters were concerned about the required qualifications, if any, of the Private Certifiers, the procedures to be used by them in the certification process, and the monitoring of the Private Certifiers. One commenter strongly disagreed with the use of Private Certifiers to determine ownership and control in any case, and believed that SBA was better suited for this responsibility.

Upon further deliberation, SBA does not believe it is prudent to limit its ability to perform ownership and control determinations only to situations where Private Certifiers are not available. The final rule still

authorizes SBA to approve Private Certifiers and for Private Certifiers to perform ownership and control determinations in appropriate circumstances. However, it will be within SBA's discretion as to when and to what extent Private Certifiers will be utilized in the SDB certification process. A firm seeking to be certified as an SDB should contact its local SBA field office to learn whether to submit its SDB application to SBA or to a Private Certifier. SBA's Homepage on the Internet will also identify this information.

In addition, in response to concerns about SBA's monitoring Private Certifiers, the final rule (§ 124.1003) provides that SBA will establish standards regarding qualifications, monitoring, procedures and use, if any, of Private Certifiers. SBA will establish these standards in the document approving an organization or concern as a Private Certifier.

Proposed § 124.1004 described how an organization or business concern becomes a Private Certifier. The SBA received five comments regarding this proposed section. One commenter stated that training should be mandatory. While SBA believes that training will be necessary in many cases, it may not be needed in every case. As such, SBA has retained its flexibility to require training where appropriate. A second commenter stated that a monitoring system should be developed. SBA agrees and has provided for SBA monitoring in § 124.1003. A third commenter stated that the Private Certifiers should be nonprofit organizations or governmental agencies and not private sector organizations. SBA considered this comment, but has decided not to restrict Private Certifiers in this way. Nonprofit organizations and state and local governmental agencies may apply and be granted status as Private Certifiers. However, SBA does not believe that those are the only entities reasonably capable of providing this service. Such a restriction is unnecessary and would be contrary to policies that generally encourage competition.

Proposed § 124.1004(f) prohibited a Private Certifier from certifying any company with which it has other business dealings, but did not specify a timeframe for limiting such dealings or what types of activities SBA was in fact attempting to limit. Upon further deliberation, SBA believes that this regulation should provide the general authority for SBA to prohibit conflicts of interest between a Private Certifier and those firms that come to it seeking an ownership and control determination

and protect the integrity of the Private Certifier decision-making process. SBA believes that the document (e.g., contract) that authorizes an entity to act as a Private Certifier should detail the specific conditions or limitations on other business transactions between the Private Certifier and those firms for which it performs an ownership and control determination. These restrictions may pertain to past relationships (so that a Private Certifier could not process an SDB application for a firm with which it had certain business dealings in the past) or to future transactions (so that the Private Certifier could not engage in certain business relationships with a firm for a specified period of time after processing the firm's SDB application). SBA does not intend to preclude a Private Certifier from making a determination with respect to a firm's SDB status for both federal and state/local SDB programs. That is not the type of "other business transactions" that this regulation is intended to prohibit.

Proposed § 124.1005 allowed Private Certifiers to charge a reasonable fee to process the firm's determination of ownership and control. There were two comments on this section. The first commenter noted that the language was confusing. SBA revised the language in the first sentence in response to this comment. The second commenter, a Federal agency, stated that the fee should be the same whether or not the applicant receives SDB certification. SBA agrees and has adopted this language in the final regulation. In addition, SBA has amended this section to provide that SBA may charge a fee to process ownership and control determinations where SBA performs ownership and control determinations. From time to time, SBA will publish a Notice in the **Federal Register** identifying any fee that SBA decides to charge to process a firm's determination of ownership and control. Any funds received by SBA to make these determinations will be remitted promptly to the Treasury of the United States as miscellaneous receipts.

Proposed § 124.1008 explained the process to become certified as an SDB. SBA received several comments on this proposed section. Three comments supported the proposed language, and stated that this section would improve the efficiency of the process and reduce paperwork. A few comments addressed the need for a method of monitoring the Private Certifiers and their fees. As noted above, § 124.1003 of the final rule provides authority for SBA to include specific monitoring provisions in the

document approving an organization or concern to be a Private Certifier.

One commenter questioned the automatic inclusion of current 8(a) BD Participants as SDBs. SBA continues to believe that such inclusion is proper. An 8(a) BD concern's continuing eligibility as an SDB will be reviewed as part of the concern's annual review for the 8(a) BD program.

The final rule also removes all references in § 124.1008 to procuring agencies as certifiers. All SDB certifications will be made by SBA and its Private Certifiers.

One commenter specifically requested that an ANC-owned firm be permitted to apply for SDB status through the SBA Anchorage Office. To address this concern, SBA has added language to § 124.1008(a)(1) allowing SBA flexibility to direct where applications should be made.

Proposed § 124.1008(b) listed the required forms and documents to be submitted by the applicant for SDB certification. One commenter, noted that the required "small business self certification" should be included in this section. SBA does not adopt this comment. SBA concluded that it was not necessary to detail every form or piece of information that SBA might request from an SDB applicant. Instead, the final rule condenses § 124.1008(b) to provide that an SDB applicant must submit the same forms and attachments required by SBA when applying to the 8(a) BD program. This change gives SBA the flexibility to request whatever information is needed to make an informed decision.

SBA has clarified throughout this section that ownership and control determinations may be made by either SBA, or where SBA deems it appropriate, by Private Certifiers. SBA has added a new § 124.1008(d)(3) giving SBA the discretion in any case to analyze and determine whether a firm is owned and controlled by one or more individuals claiming disadvantage. SBA believes that this paragraph provides needed flexibility to the regulation to ensure that the SDB certification process runs smoothly in all circumstances. The final rule also adds a new § 124.1008(d)(4) which authorizes SBA's program office to re-evaluate an ownership and control decision by a Private Certifier where SBA receives credible evidence that the Private Certifier has substantially disregarded the applicable eligibility criteria. This provision provides to SBA the authority to quickly correct a determination that it believes to be clearly contrary to the eligibility requirements, and should promote more consistent decisions.

Proposed § 124.1008(e) was originally entitled "SDB Certification." A commenter stated that this was misleading in light of the fact that subsection (e) dealt with disadvantaged status. SBA agrees and has renamed subsection (e) "Disadvantaged determination."

Proposed § 124.1008(e)(1) stated that those claiming disadvantaged status who are members of a designated group are presumed to be socially and economically disadvantaged. A Federal agency commenter suggested deleting the phrase "and economically disadvantaged," contained in § 124.1008(e)(1) as inconsistent with proposed § 124.1002(c), which requires a net worth of less than \$750,000. SBA does not agree that the language contained in § 124.1008(e)(1) conflicts with the monetary requirement of § 124.1002(c), and believes that eliminating the presumption for economic disadvantage would be contrary to the underlying statutory authority. The presumption of disadvantage for Federal SDB programs is based on the authority set forth in section 8(d) of the Small Business Act, 15 U.S.C. § 637(d). Section 8(d)(3)(C)(ii) clearly authorizes a presumption of both social and economic disadvantage for members of certain designated groups. When members of the designated groups represent to SBA that they are disadvantaged, as part of a firm's application for SDB status, they represent that they meet the \$750,000 net worth requirement for economic disadvantage. Absent credible evidence to the contrary, SBA will accept this representation because of the statutory presumption. Accordingly, SBA did not change the presumption in the final rule.

The final rule adds a new § 124.1008(e)(2)(ii). This provision states the obligations of the Private Certifier in the application process concerning individuals who are not members of a designated group. Proposed §§ 124.1008(e)(2) (i) through (f) have been renumbered for easier understanding and subsection (f) has been renamed "SDB Determination."

Proposed § 124.1008(e)(2)(ii) stated that if one or more of the individuals upon whose status the Private Certifier relied in making its ownership and control decision is not disadvantaged, the Private Certifier would reject the firm's application for SDB status. One commenter stated that this language should be clarified to state that the firm would be rejected only if the disadvantaged status of that individual was needed to establish ownership and control. SBA agrees, and has amended

renumbered § 124.1008(f)(2) to include this language.

The final rule also adds a new § 124.1008(i). This new paragraph provides that if a firm applying for SDB certification has a current, valid certification as a disadvantaged business enterprise (DBE) from a Department of Transportation (DOT) recipient, SBA may adopt the DBE certification as an SDB certification when determined to be appropriate.

Proposed § 124.1009 did not provide a procedure to remand an application back to a Private Certifier. A Federal agency commenter expressed concern that there was no such procedure in place when OHA overruled the Private Certifier's decision regarding ownership and control by those claiming disadvantaged status. SBA has revised § 124.1009 to remedy this omission. SBA has also expanded and clarified the procedures that will apply to an appeal of a decision of a Private Certifier in § 124.1009, and those relating to an appeal of an SBA decision in § 124.1008(f).

Proposed § 124.1010 provided that a firm could not represent itself as an SDB concern for purposes of receiving procurement preferences if it was not on the SBA-maintained list of qualified SDBs. SBA has amended this section to coincide with the final version of the FAR to provide that a firm may represent itself as an SDB if it has submitted an application for certification and that application is pending either at SBA or with a Private Certifier. The final rule further provides that SBA will make a determination on SDB status within 15 days where an SDB applicant is determined to be the successful offeror on a contract. In the event that SBA fails to make a determination within 15 days, the firm will not be eligible for award, and the procuring activity will award to another offeror.

Proposed § 124.1012 stated that a firm may reapply for certification 12 months after the date of the final SBA decision to decline the application. One commenter requested that the period for reapplication begin from the date of submission of the application, rather than denial. SBA does not agree with this suggestion, and has made no change.

Proposed § 124.1013 listed the criteria SBA would use to delete names on the SDB register. A Federal agency commenter noted that recent graduates of the 8(a) BD program are reviewed for social and economic disadvantage each year, through their final year of participation and, therefore, it is unnecessarily burdensome to require

them to apply for SDB certification immediately. SBA agreed and adopted this suggestion by adding a new § 124.1014, which clarifies how long an SDB certification lasts, and specifically allows a firm that has graduated from the 8(a) BD program to remain on the SBA-maintained list of qualified SDBs for a period of three years from the date of its last annual review in the 8(a) BD program.

Proposed § 124.1014 (§ 124.1015 in the final rule) addressed the effect of receiving an SDB certification. Proposed § 124.1014(d) stated that a firm must submit a new application every three years to remain on the SDB register. One commenter noted that a contract award that is not successfully challenged (i.e., the SDB status is upheld) should obviate the need for applying for a new certification. SBA agreed with this comment and has incorporated it in the new § 124.1014, dealing with how long an SDB certification lasts. The final rule provides that SDB status will run three years from the date SBA determines a firm to be disadvantaged in connection with a protest challenging its SDB status. This extension of SDB status applies only where SBA determines a firm to be an SDB on the merits. A firm's SDB status will not be extended where SBA merely dismisses a protest against it for some procedural reason (e.g., lack of timeliness or specificity). In addition, SBA added a new paragraph to clarify that 8(a) BD graduated firms will remain on the qualified list of SDBs for a period of three years from the date of their last annual review in the 8(a) BD program.

The final rule adds a new § 124.1016, authorizing SBA, in the absence of a protest, to re-evaluate the SDB status of a firm that is certified as an SDB where SBA receives credible evidence calling into question a firm's eligibility as an SDB. SBA added this section in response to a comment that was concerned about the possibility of a firm remaining on the list of qualified SDBs where it was clear that it no longer qualified as an SDB because no one had protested its SDB status. This section also provides that an SDB firm has an affirmative obligation to report any changes in ownership or control or any other circumstances that could adversely affect the firm's eligibility for SDB status to SBA.

The final rule adds a new § 124.1021(c) to clarify that SBA will consider a protest against a previously certified SDB which is an apparent successful offeror only where the protest presents credible evidence that the firm's circumstances have materially changed since SBA certified it as an

SDB, or credible evidence that the firm's SDB application contained false or misleading information. SBA believes that this change is needed to give value to the SDB certification process. Without such a change, a firm's status as "disadvantaged" could be repeatedly challenged despite SBA ruling in its favor on one protest and despite its ownership and control remaining unchanged. Such challenges would impose a significant and costly burden on a firm having to defend its SDB status, as well as on SBA, and serve no useful purpose. SBA has also made conforming amendments to §§ 124.1015(c) and 124.1018(d) to recognize the limited right to protest the SDB status of a concern that has received an SDB certification from SBA.

**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 has determined that this rule is not a major rule as defined by Executive Order 12866 in that it is not likely to have an annual economic effect of \$100 million or more on the economy, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. SBA has determined that this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. A summary of the Regulatory Flexibility Analysis follows. For a copy of the complete analysis, contact Calvin Jenkins, Deputy Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, at (202) 205-6459.

**Executive Order 12866**

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 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 DOJ proposal addresses federal contracting with SDBs. Full implementation of the DOJ proposal requires revisions to the FAR, as well as regulatory changes by SBA

and the Department of Commerce. For a full economic analysis of the changes to be made by the implementation of a government-wide SDB program, please refer to the analysis published with the FAR rule.

This final rule addresses only SBA's responsibilities under the SDB program. In brief summary, this rule requires SBA to (1) certify SDB concerns, including those owned by non-designated group members, and establish and maintain an updated list of qualified SDBs; and (2) resolve protests made challenging the eligibility of firms as SDBs for Federal procurement requirements. It also authorizes SBA to establish and oversee a national network of private entities to determine, where SBA deems it appropriate, whether firms seeking to be certified as SDBs are owned and controlled by individuals claiming to be socially and economically disadvantaged.

SBA's determination that this rule is not a major rule within the meaning of Executive Order 12866 is based on its analysis of the costs of implementing its responsibilities under the government-wide SDB program.

SBA has examined current information on procurement patterns, including the bidding behavior of small and small disadvantaged businesses to estimate the number of firms that will seek to be certified for the SDB program. In the first year, SBA estimates that about 30,000 firms will seek to be certified as SDBs. Current 8(a) firms (approximately 6,000 in number) meet all the tests for qualifying as SDBs, and will automatically be certified as SDBs.

Where SBA approves and authorizes a Private Certifier to make ownership and control determinations of firms seeking SDB certification, a Private Certifier may charge a reasonable fee for screening applications for completeness and for processing the ownership and control portion of applications. At the present time, it is uncertain to what extent Private Certifiers will be approved or used to make ownership and control determinations. SBA will make those determinations initially. The regulations authorize SBA to charge a fee in the future following a notice in the **Federal Register**. Should SBA elect to charge a fee, the notice will provide information as to the amount and when it will be charged.

SBA projects the impact of this program, based on this analysis, on those small businesses seeking to become certified SDBs, will be less than \$15 million. This analysis is an estimate of costs for the first year of the program. Absent material changes or a successful protest, a certification of SDB status will

last three years. Firms claiming to be SDBs will certify that they continue to meet all applicable eligibility criteria for any federal contract during the three-year period.

#### Summary of the Analysis Prepared Pursuant to the Regulatory Flexibility Act

SBA believes that this rule may have a significant impact on a substantial number of small businesses. In fiscal year 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 approximately a 21 percent share of the total federal contract dollars. SDBs were awarded \$10.3 billion in federal contracts, about 5 percent of all federal contract dollars. In addition, the federal contract dollars that went to SDBs was about 25 percent of all federal dollars that went to small businesses for the same period.

There are approximately 180,000 small firms registered on PRO-Net, SBA's database of small businesses actively seeking federal government contracts. SBA estimates that 30,000 small businesses will apply to be certified as SDBs in the first year of the program. This is a substantial number of small disadvantaged businesses interested in bidding on federal government contracts. In the proposed rule issued on August 14, 1998 (62 FR 43584-43628), SBA stated its intent to use Private Certifiers to determine "ownership and control" for purposes of the small and disadvantaged business program. We received no comments from the public concerning the economic impact of using Private Certifiers on small business. Although it is uncertain whether SBA will use Private Certifiers, SBA estimates, based on the fees charged by Private Certifiers for similar services, that the cost of a certification would range from \$500 to \$1,000. Similarly, if SBA elects to charge fees for certification, the fees would be equivalent to the fees charged by Private Certifiers. We have no estimates of the size of the small businesses that will apply to be certified or the value of the contracts that these small businesses will receive. Therefore, we cannot determine precisely the significance of the economic impact on small businesses.

For purposes of the Paperwork Reduction Act of 1995 (Public Law 104-13), this rule imposes new reporting or recordkeeping requirements on firms applying to be certified as SDBs. The rule requires such firms to submit evidence that they are owned and controlled by one or more

disadvantaged individuals. It further requires the individuals claiming to be disadvantaged to submit representations of group membership and disadvantaged status or evidence of disadvantaged status to SBA. Once certified as an SDB, this rule does not require an SDB to report any other information to SBA or to maintain additional records.

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 in 13 CFR Part 124

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

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

#### PART 124—[AMENDED]

1. The authority citation for 13 CFR 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.

2. Section 124.108 is amended by adding the following paragraph (f):

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

\* \* \* \* \*

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

3. Section 124.302 is amended by adding the following paragraph (d):

#### § 124.302 What is early graduation?

\* \* \* \* \*

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

classification falls within a SIC Major Group in which the benchmarks described in § 124.403(d) have been achieved.

4. Section 124.403 is amended by adding paragraph (d) to read as follows:

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

\* \* \* \* \*

(d) *Benchmark achievement.* Where actual participation by disadvantaged businesses in a particular SIC Major Group exceeds the benchmark limitations established by the Department of Commerce for that Major Group, SBA may adjust the targets, objectives and goals contained in the business plans of Participants whose primary industry classification falls within that Major Group. Any adjustment will take into account projected decreases in 8(a) and SDB contracting opportunities.

5. Section 124.504 is amended by redesignating paragraph (d) as paragraph (e), and by adding a new paragraph (d) to read as follows:

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

\* \* \* \* \*

(d) *Benchmark achievement.* Where actual participation by disadvantaged businesses in a SIC Major Group exceeds the benchmark limitations established by the Department of Commerce for that Major Group, SBA may elect not to accept a requirement having a SIC code within the Major Group that is offered to SBA for award as an 8(a) contract. In determining whether to accept a requirement in such a case, SBA will consider the developmental needs of Participants and other anticipated contracting opportunities available to them.

\* \* \* \* \*

6. Subpart B to part 124 is revised to read as follows:

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

124.1001 General applicability.

124.1002 What is a Small Disadvantaged Business (SDB)?

124.1003 What is a Private Certifier?

124.1004 How does an organization or business concern become a Private Certifier?

124.1005 Can a fee be charged to a firm to process the firm's application for SDB certification?

124.1006 Is there a list of Private Certifiers?

124.1007 How long may an organization or business concern be a Private Certifier?

124.1008 How does a firm become certified as an SDB?

- 124.1009 How does a firm appeal a decision of a Private Certifier?
- 124.1010 Can a firm represent itself to be an SDB if it has not yet been certified as an SDB?
- 124.1011 What is a misrepresentation of SDB status?
- 124.1012 Can a firm reapply for SDB certification?
- 124.1013 Is there a list of certified SDBs?
- 124.1014 How long does an SDB certification last?
- 124.1015 What is the effect of receiving an SDB certification?
- 124.1016 Can SBA re-evaluate the SDB status of a firm after SBA certifies it to be SDB?
- 124.1017 Who may protest the disadvantaged status of a concern?
- 124.1018 When will SBA not decide an SDB protest?
- 124.1019 Who decides disadvantaged status protests?
- 124.1020 What procedures apply to disadvantaged status protests?
- 124.1021 What format, degree of specificity, and basis does SBA require to consider an SDB protest?
- 124.1022 What will SBA do when it receives an SDB protest?
- 124.1023 How does SBA make disadvantaged status determinations in considering an SDB protest?
- 124.1024 Appeals of disadvantaged status determinations.

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

### § 124.1001 General applicability.

(a) This subpart defines a Small Disadvantaged Business (SDB). It also sets forth procedures by which a firm can apply to be recognized as an SDB, including procedures to be used by private sector entities approved by SBA for determining whether a particular concern is owned and controlled by one or more disadvantaged individuals or Alaska Native Corporations (ANCs), Community Development Corporations (CDCs), Indian tribes (tribes) or Native Hawaiian Organizations (NHOs). Finally, this subpart establishes procedures by which SBA determines whether a particular concern qualifies as an SDB in response to a protest challenging the concern's status as disadvantaged. Unless specifically stated otherwise, the phrase "socially and economically disadvantaged individuals" in this subpart includes tribes, ANCs, CDCs, and NHOs.

(b) Only small firms that are owned and controlled by socially and economically disadvantaged individuals are eligible to participate in Federal SDB price evaluation adjustment, evaluation factor or subfactor, monetary subcontracting incentive, or set-aside

programs, or SBA's section 8(d) subcontracting program.

(c) In order for a concern to represent that it is an SDB as a prime contractor for purposes of a Federal Government procurement, it must have:

(1) Received a certification from SBA that it qualifies as an SDB; or

(2) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application from SBA or the Private Certifier.

(d) A firm cannot represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal subcontracting program if it is not on the SBA-maintained list of qualified SDBs.

### § 124.1002 What is a Small Disadvantaged Business (SDB)?

(a) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. Qualified Private Certifiers must use the 8(a) criteria applicable to ownership and control in determining whether a particular firm is actually owned and controlled by one or more individuals claiming disadvantaged status.

(b) *SDB eligibility criteria.* A small disadvantaged business (SDB) is a concern:

(1) Which qualifies as small under part 121 of this title for the size standard corresponding to the applicable four digit Standard Industrial Classification (SIC) code.

(i) For purposes of SDB certification, the applicable SIC code is that which relates to the primary business activity of the concern;

(ii) For purposes related to a specific Federal Government contract, the applicable SIC code is that assigned by the contracting officer to the procurement at issue;

(2) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals as set forth in § 124.105. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§ 124.109, 124.110, and 124.111, respectively.

(3) Except for tribes, ANCs, NHOs, and CDCs, whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals. For the requirements

relating to tribes and ANCs, NHOs, or CDCs, see §§ 124.109, 124.110, and 124.111, respectively.

(4) Which, for purposes of SDB procurement mechanisms authorized by 10 U.S.C. 2323 (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides) relating to the Department of Defense, NASA and the Coast Guard only, has the majority of its earnings accruing directly to the socially and economically disadvantaged individuals.

(c) *Disadvantaged status.* In assessing the personal financial condition of an individual claiming economic disadvantage, his or her net worth must be less than \$750,000 after taking into account the exclusions set forth in § 124.104(c)(2).

(d) *Additional eligibility criteria.* Except for tribes, ANCs, CDCs and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.

(e) *Potential for success not required.* The potential for success requirement set forth in § 124.107 does not apply as an eligibility requirement for an SDB.

(f) *Joint ventures.* Joint ventures are permitted for SDB procurement mechanisms (such as price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentives, or SDB set-asides), provided that the requirements set forth in this paragraph are met.

(1) The disadvantaged participant(s) to the joint venture must have:

(i) Received an SDB certification from SBA; or

(ii) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application.

(2) For purposes of this paragraph, the term joint venture means two or more concerns forming an association to engage in and carry out a single, specific business venture for joint profit. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible to be certified as an SDB. The entity created by such a relationship would not be owned and controlled by one or more socially and economically disadvantaged individuals. Each contract for which a joint venture submits an offer will be evaluated on a case by case basis.

(3) Except as set forth in 13 CFR 121.103(f)(3), a concern that is owned and controlled by one or more socially and economically disadvantaged



individuals entering into a joint venture agreement with one or more other business concerns is considered to be affiliated with such other concern(s) for size purposes. If the exception does not apply, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(4) An SDB must be the managing venturer of the joint venture, and an employee of the managing venturer must be the project manager responsible for performance of the contract.

(5) The joint venture must perform any applicable percentage of work required of SDB offerors, and the SDB joint venturer(s) must perform a significant portion of the contract.

(g) *Ownership restrictions for non-disadvantaged individuals.* The ownership restrictions set forth in § 124.105 (g) and (h) for non-disadvantaged individuals and concerns do not apply for purposes of determining SDB eligibility.

#### **§ 124.1003 What is a Private Certifier?**

A Private Certifier is an organization or business concern approved by SBA to determine whether firms are owned and controlled by one or more individuals claiming disadvantaged status. SBA may elect to arrange for one or more Private Certifiers to perform certain functions in the SDB Certification process. When that election is made, the provisions of §§ 124.1004 through 124.1007 will apply. SBA will establish more detailed standards regarding qualifications, monitoring, procedures and use, if any, of Private Certifiers in specific contracts or agreements between SBA and the Private Certifiers.

#### **§ 124.1004 How does an organization or business concern become a Private Certifier?**

(a) SBA may execute contracts or agreements with organizations or business concerns seeking to become Private Certifiers. Any such contract or agreement will include provisions for the oversight, monitoring, and evaluation of all certification activities by SBA.

(b) The organization or business concern must demonstrate a knowledge of SBA's regulations regarding ownership and control, as well as business organizations and the legal principles affecting their ownership and control generally, including stock issuances, voting rights, convertibility of debt to equity, options, and powers and responsibilities of officers and

directors, general and limited partners, and limited liability members.

(c) The organization or concern must also, along with its principals, demonstrate good character. Good character does not exist for these purposes if the organization or concern or any of its principals:

(1) Is debarred or suspended under any Federal procurement or non-procurement debarment and suspension regulations; or

(2) Has been indicted or convicted for any criminal offense or suffered a civil judgment indicating a lack of business integrity.

(d) As a condition of approval, SBA may require that appropriate officers and/or key employees of the concern attend a training session on SBA's rules and requirements.

(e) An organization or concern seeking to become a Private Certifier must agree to provide access to SBA of its books and records when requested, including records pertaining to its certification activities. Once SBA approves the organization or concern to be a Private Certifier, SBA may review this information, as well as the decisions of the Private Certifier, in determining whether it will renew or extend the term of the Private Certifier, or terminate the Private Certifier for cause.

(f) SBA will include in any contract or agreement document authorizing an entity to act as a Private Certifier appropriate conditions to prohibit conflicts of interests between the Private Certifier and the firms for which it processes SDB applications and to protect the integrity of the decision-making process.

#### **§ 124.1005 Can a fee be charged to a firm to process the firm's application for SDB certification?**

(a) With SBA's approval, a Private Certifier may charge a reasonable fee to a firm in order to screen the firm's application for completeness and to process a determination of ownership and control. The fee must be for actual services rendered and must not be related to whether or not the business concern is found to be owned and controlled by one or more individuals or entities claiming disadvantaged status.

(b) Where SBA makes the determination of ownership and control, SBA may collect a fee comparable to that which would be charged by a Private Certifier. From time to time, SBA will publish a Notice in the **Federal Register** identifying any fee that SBA will charge to process a firm's determination of ownership and control. SBA will promptly remit any funds

received pursuant to this section to the Treasury of the United States as miscellaneous receipts.

#### **§ 124.1006 Is there a list of Private Certifiers?**

SBA will maintain a list of approved Private Certifiers on SBA's Home Page on the Internet. Any interested person may also obtain a copy of the list from the local SBA district office.

#### **§ 124.1007 How long may an organization or business concern be a Private Certifier?**

(a) SBA's approval document will specify how long the organization or concern may be a Private Certifier. The initial contract or agreement will have a base period of one year, and may include option years or renewal provisions.

(b) SBA may terminate a contract or agreement with an organization or business concern which is a Private Certifier for the convenience of the Government at any time, and may terminate the contract or agreement for default where appropriate. Specific grounds for termination for default include, but are not limited to:

(1) Charging improper, unreasonable or contingent fees in violation of § 124.1005;

(2) Engaging in prohibited business transactions with the firms for which it processes SDB applications in violation of § 124.1004(f); or

(3) A demonstrated record of ownership and control determinations that are overturned on appeal by SBA's Office of Hearings and Appeals (OHA) or by SBA as part of an SDB protest.

#### **§ 124.1008 How does a firm become certified as an SDB?**

Any firm may apply to be certified as an SDB. SBA's field offices will provide further information and required application forms to any firm interested in SDB certification. In order to become certified as an SDB, a firm must apply to SBA or, if directed by SBA, to a Private Certifier. The application must include evidence demonstrating that the firm is owned and controlled by one or more individuals claiming disadvantaged status, along with certifications or narratives regarding the disadvantaged status of such individuals. See paragraph (e)(1) of this section. The firm also must submit information necessary for a size determination. See § 121.1008. Current 8(a) BD Participants do not need to submit applications for SDB status. These concerns automatically qualify as SDBs by virtue of their status as 8(a) BD concerns. An 8(a) Participant's continuing eligibility as an SDB will be



reviewed as part of the concern's 8(a) annual review.

(a) *Filing an SDB application.* (1) An interested firm must first submit a complete application to SBA's Assistant Administrator for Small Disadvantaged Business Certification and Eligibility (AA/SDBCE), Small Business Administration, 409 3rd Street, SW, Washington, DC 20416, or to a specific SBA field office or an approved Private Certifier if directed by SBA.

(2) The firm must identify which individual(s) or entities are claiming disadvantaged status.

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

(c) *Application processing.* (1) SBA or a Private Certifier will advise each applicant generally 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. If the application is not complete, SBA or the Private Certifier will return the application to the firm, and will notify the firm that it may reapply when its application is complete.

(2) The burden is on the applicant to demonstrate that those individuals claiming disadvantaged status own and control the concern.

(d) *Ownership and control decision.* SBA or a Private Certifier will determine whether those individuals claiming disadvantaged status own and control the applicant firm within 30 days of receipt of a complete application package, whenever practicable..

(1) Where a Private Certifier determines ownership and control, the Private Certifier will issue a written decision as to whether the applicant is owned and controlled by the individuals identified as claiming disadvantaged status.

(i) If the Private Certifier finds that the applicant is owned and controlled by the individuals claiming disadvantaged status, the Private Certifier will forward the application to SBA along with a copy of its ownership and control determination and the information required by paragraph (e)(2)(ii) of this section, where appropriate.

(ii) If the Private Certifier finds that the applicant is not owned and controlled by the individuals claiming

disadvantaged status, its decision must state the specific reasons for the finding, and inform the applicant of its right to appeal the decision to SBA pursuant to § 124.1009.

(2) Where SBA determines ownership and control, SBA will first determine whether the applicant is owned and controlled by the individual(s) claiming to be disadvantaged. If SBA determines that the applicant is not owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a written decision addressing only the ownership and control issues. If SBA determines that the applicant is owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a single written decision as to whether the applicant qualifies as an SDB. Such a determination will include the ownership and control of the firm, the size status of the firm, and the disadvantaged status of those individuals claiming to be disadvantaged.

(3) In its sole discretion, SBA may analyze and determine whether a firm is owned and controlled by one or more individuals claiming disadvantaged status notwithstanding the availability of a Private Certifier to make such a decision.

(4) SBA reserves the right to re-evaluate an approved decision on ownership and control by a Private Certifier in a case where it has credible evidence that the Private Certifier has substantially disregarded the eligibility criteria.

(e) *Disadvantaged determination.* Once a concern receives a decision finding that it is owned and controlled by those individuals or entities claiming disadvantaged status (either through an initial determination or on appeal), SBA will determine whether the other eligibility criteria are met, and, if so, will include the SDB on the SBA-maintained list of qualified SDBs. SBA will make this determination within 30 days of receiving an SDB application, if practicable.

(1) *Members of designated groups.* (i) Those individuals claiming disadvantaged status that are members of the same designated groups that are presumed to be socially disadvantaged for purposes of SBA's 8(a) BD program (see § 124.103(b)) are presumed to be socially and economically disadvantaged for purposes of SDB certification. These individuals must represent that they are members of one of the designated groups, that they are identified as a member of one of the designated groups, that their net worth is less than \$750,000 after taking into account the exclusions set forth in

§ 124.104(c)(2), and that they are citizens of the United States.

(ii) Absent credible evidence to the contrary, SBA may accept these representations as true and certify the firm as an SDB.

(2) *Individuals not members of designated groups.* (i) Each individual claiming disadvantaged status who is not a member of one of the designated groups must submit a statement identifying personally how his or her entry into or advancement in the business world has been impaired because of personally specific factors (see § 124.103(c)), and how his or her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities (see §§ 124.103(c) and 124.104).

(ii) Where a Private Certifier determines ownership and control, the Private Certifier must also review the disadvantaged status submission and any other required information, and send to SBA the following:

(A) An executive summary and analysis of the disadvantaged status submission;

(B) The application and all supporting documentation; and

(C) A certification that the application is complete and suitable for evaluation.

(3) *Concerns owned by tribes, ANCs, CDCs, or NHOs:* SBA will process SDB applications from concerns owned and controlled by tribes, ANCs, CDCs, or NHOs in the same way as those from concerns owned by individuals who are members of designated groups.

(f) *SDB Determination.* (1) If SBA's AA/SDBCE determines that the individual(s) claiming disadvantage are disadvantaged and other eligibility criteria are met, he or she will certify the firm as an SDB.

(2) If SBA's AA/SDBCE determines that one or more of the individuals claiming to be disadvantaged is not disadvantaged and their disadvantaged status is required to establish disadvantaged ownership and control of the applicant, or any of the other eligibility criteria are not met, he or she will reject the firm's application for SDB certification. The AA/SDBCE will issue a written decision setting forth SBA's reasons for decline.

(3) Pursuant to part 134 of this title, a firm may appeal to OHA the AA/SDBCE's decision that one or more of the individuals claiming disadvantaged status is not disadvantaged, or, where SBA determines ownership and control, that those claiming disadvantaged status do not own and control the applicant. (See § 124.1009 for appeals from decisions by Private Certifiers.)

(i) The firm must serve SBA's Associate General Counsel for General Law with a copy of the appeal.

(ii) OHA will determine whether SBA's decision in either case was arbitrary, capricious, or contrary to law. OHA's review is limited to the facts that were before SBA at the time of its decision and any arguments submitted in or in response to the appeal. OHA will not consider any facts beyond those that were already presented to SBA unless the administrative judge determines that manifest injustice would occur if the appeal were limited to the record.

(4) A firm may also request a formal size determination pursuant to part 121 of this title where SBA finds that the firm is not small.

(g) *Current 8(a) BD program participants.* Any firm that is currently a Participant in SBA's 8(a) BD program need not seek an ownership and control determination or apply to SBA for a separate certification as an SDB. SBA will certify current 8(a) BD Participants as SDBs, and automatically include them on the list of qualified SDBs.

(h) *8(a) BD graduates.* SBA will automatically certify a firm that has graduated from the SBA's 8(a) BD program to be an SDB, provided SBA determined that the firm continued to be eligible for the 8(a) BD program as part of an annual review within the last three years. (See § 124.1014(b)).

(i) *Certification by DOT recipient.* If a firm applying for SDB certification has a current, valid certification as a disadvantaged business enterprise (DBE) from a Department of Transportation (DOT) recipient, SBA may adopt the DBE certification as an SDB certification when determined by the AA/SDBCE or designee to be appropriate.

#### **§ 124.1009 How does a firm appeal a decision of a Private Certifier?**

Where a Private Certifier performs an ownership and control determination and finds that a firm is not owned and controlled by the individual(s) claiming disadvantaged status, the firm may appeal that decision to OHA pursuant to part 134 of this title. The firm must serve SBA's Associate General Counsel for General Law and the applicable Private Certifier with a copy of the appeal.

(a) The Private Certifier must submit to OHA the full record upon which its decision was based within two days of receiving notification that an appeal has been filed.

(b) The Private Certifier and SBA may each elect to appear or not appear in an appeal proceeding.

(c) OHA's review is limited to the facts that were before the Private Certifier at the time of its final decision and any arguments submitted in or in response to the appeal. OHA will not consider any facts beyond those that were already presented to the Private Certifier unless the administrative judge determines that manifest injustice would occur if the appeal were limited to the record.

(d) OHA will decide whether it believes that the facts support by a preponderance of the evidence the Private Certifier's determination regarding ownership and control.

(e) Where the facts presented in the record leave significant doubt as to whether the petitioner is or is not owned and controlled by one or more individuals claiming to be disadvantaged, the administrative judge may remand the case to the Private Certifier for reconsideration in accord with his or her remand order.

(f) If OHA finds that the firm is owned and controlled by the individual(s) claiming disadvantaged status, OHA will refer the application to SBA for further processing. If OHA finds that the firm is not owned and controlled by such individual(s), the administrative judge will state the reasons for that decision, which will be the final decision of the Agency.

#### **§ 124.1010 Can a firm represent itself to be an SDB if it has not yet been certified as an SDB?**

(a) *General rule.* Except as set forth in paragraph (d) of this section, a firm may represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal procurement program if it has submitted a complete application for SDB certification to SBA or a Private Certifier and it has not received a negative determination regarding that application from SBA or the Private Certifier. A firm that has received a negative determination of ownership and control or a negative determination regarding its disadvantaged status and is awaiting the resolution of its appeal of that determination may not represent itself to be an SDB.

(b) *Where applicant becomes successful offeror.* If a concern becomes the apparent successful offeror on a contract for which it would receive a benefit for being an SDB while its application for SDB certification is pending, either at SBA or a Private Certifier, the contracting officer for the particular contract must immediately inform SBA's AA/SDBCE. SBA will then prioritize the firm's SDB application and make a determination regarding the firm's status as an SDB

within 15 days from the date that SBA received the contracting officer's notification.

(1) Where the apparent successful offeror's completed application is pending an ownership and control determination with a Private Certifier, the concern must inform SBA which Private Certifier has its application. SBA will immediately contact the Private Certifier to require the Private Certifier to complete its ownership and control determination within 5 days of SBA's notification. In appropriate circumstances, SBA may undertake to make the determination itself, and may recoup the cost of the determination from the Private Certifier.

(2) If requested to do so by the procuring activity contracting officer, SBA will determine whether other offerors are SDBs where they have represented that their completed applications for SDB status are pending at SBA or a Private Certifier and they could receive the award if SBA determines that the apparently successful offeror is not an SDB.

(3) If the contracting officer does not receive an SBA determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer will presume that the apparently successful offeror, and any other offerors referred to SBA in connection with the same procurement by the contracting officer, are not disadvantaged, and will make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(c) *Representation as SDB for statistical purposes.* A firm may represent itself as an SDB concern for general statistical purposes without regard to any application for SDB certification or its inclusion on the SBA-maintained list of qualified SDB's.

(d) *Subcontracting programs.* Only firms that are on the SBA-maintained list of qualified SDBs may represent themselves as SDB concerns in order to receive a preference as an SDB for any Federal subcontracting program.

#### **§ 124.1011 What is a misrepresentation of SDB status?**

(a) Any person or entity that misrepresents a firm's status as a "small business concern owned and controlled by socially and economically disadvantaged individuals" ("SDB status") in order to obtain an 8(d) or SDB contracting opportunity or preference will be subject to the penalties imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as well as any other penalty authorized by law.

(b) A representation of SDB status by any firm that SBA has found not to be an SDB (either in connection with an SDB application or protest) will be deemed a misrepresentation of SDB status, unless and until the firm reapplies for and obtains SDB certification.

**§ 124.1012 Can a firm reapply for SDB certification?**

(a) A concern which has been denied SDB certification may reapply for certification at any time 12 months or more after the date of the most recent final decision of SBA to decline its application (either on appeal of an ownership and control determination, or a negative finding of disadvantaged status).

(b) A concern which received a decision that it was not owned and controlled by the individual(s) claiming disadvantaged status from a Private Certifier and does not appeal that decision to OHA may apply for a new ownership and control determination at any time.

**§ 124.1013 Is there a list of certified SDBs?**

(a) If SBA certifies a firm to be an SDB, SBA will enter the name of the firm into an SBA-maintained central on-line register, such as PRO-Net.

(b) The register of SDBs will contain the names of all firms that are currently certified to be SDBs, including the names of all firms currently participating in SBA's 8(a) BD program.

(c) On a continuing basis, SBA will delete from the on-line register those firms that have:

(1) Graduated or been terminated from SBA's 8(a) BD program for any reason and have not otherwise received SDB certification (see, §§ 124.1008(h) and 124.1014(b) for treatment of 8(a) graduates);

(2) Been determined not to be an SDB in response to an SDB protest brought under § 124.1017; or

(3) Other than current 8(a) Participants, not received a renewed SDB certification after being on the register for three years (see § 124.1014(c)).

**§ 124.1014 How long does an SDB certification last?**

(a) Once SBA certifies a firm to be an SDB by placing it on the list of qualified SDBs, the firm will generally remain on the SBA-maintained list of certified SDBs for a period of three years from the date of its certification.

(1) A firm's SDB certification will extend beyond three years where SBA finds the firm to be an SDB:

(i) On the merits in connection with a particular protest (see § 124.1023(h)(2));

(ii) In connection with an SBA-initiated SDB determination (see § 124.1016(a)(2)); or

(iii) As part of an 8(a) BD annual review.

(2) Where SBA finds a firm not to be an SDB in connection with an SDB protest, an SBA-initiated SDB determination, or an 8(a) BD annual review, SBA will immediately decertify the firm as an SDB and remove it from the qualified list of SDBs.

(b) A firm that graduates from the 8(a) BD program will remain on the list of certified SDBs for a period of three years from the date of its last annual review.

(c) To remain on the SDB register after three years, a firm whose status as an SDB has not been upheld in connection with a protest or an SBA-initiated SDB determination, or has not been certified as an eligible 8(a) Participant as part of an annual review, must submit a new application and receive a new certification.

**§ 124.1015 What is the effect of receiving an SDB certification?**

(a) A firm that is certified to be an SDB may represent itself as an SDB for such purposes as Federal price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentive programs, section 8(d) subcontracts, SDB set-asides, or any other programs which accept an SBA certification. A contracting officer may award a contract based on a firm's representation that it is a certified SDB absent a protest that the protested concern's circumstances have materially changed since SBA certified it as an SDB, or that the protested concern's SDB application contained false or misleading information (see § 124.1018(d)).

(b) For purposes of a particular Federal procurement, the firm must represent that it is both disadvantaged and small at the time it submits its initial offer including price (see part 121 of this title). At the same time, the firm must also represent that no material change has occurred in its SDB status since its SDB certification, or from the date of its application for SDB certification if its application has not yet been processed, and must specifically represent that the net worth of the disadvantaged individuals (not including concerns owned by tribes, ANCs, CDCs, or NHOs) upon whom the SDB certification was based still does not exceed \$750,000.

(c) A firm's status as "disadvantaged" or "small" may be protested pursuant to

§§ 124.1017 through 124.1021 and §§ 121.1001 through 121.1005, respectively, despite the presence of the firm on the SDB register, provided the protest contains specific allegations that the firm's circumstances have materially changed since SBA certified it as an SDB, or that the firm's SDB application contained false or misleading information.

**§ 124.1016 Can SBA re-evaluate the SDB status of a firm after SBA certifies it to be SDB?**

(a) SBA may initiate an SDB determination whenever it receives credible information calling into the question a firm's eligibility as an SDB, including an adverse determination from a DOT recipient of the firm's status as a DBE. Upon its completion of an SDB determination, SBA will issue a written decision regarding the SDB status of the questioned firm.

(1) If SBA finds that the firm does not qualify as an SDB, SBA will decertify the firm as an SDB, and immediately remove the firm from the list of qualified SDBs. The firm may appeal SBA's decision to OHA consistent with the provisions of § 124.1008(f) and part 134 of this chapter.

(2) If SBA finds that the firm continues to qualify as an SDB, the determination remains in effect for three years from the date of the decision under the same conditions as if the concern had been granted SDB certification under § 124.1008.

(b) An SDB firm must report within 10 days to the AA/SDBCE any changes in ownership and control or any other circumstances which could adversely affect its eligibility as an SDB.

**§ 124.1017 Who may protest the disadvantaged status of a concern?**

(a) In connection with a requirement for which the apparent successful offeror has invoked an SDB evaluation adjustment or an SDB set-aside, the following entities may protest the disadvantaged status of the apparent successful offeror:

(1) Any other concern which submitted an offer for that requirement, unless the contracting officer has found the concern to be non-responsive or outside the competitive range, or SBA has previously found the protesting concern to be ineligible for the requirement at issue;

(2) The procuring activity contracting officer; or

(3) SBA.

(b) In connection with an 8(d) subcontract, or a requirement for which the apparent successful offeror received an evaluation adjustment for proposing

one or more SDB subcontractors, the procuring activity contracting officer or SBA may protest the disadvantaged status of a proposed subcontractor. Other interested parties may submit information to the contracting officer or SBA in an effort to persuade the contracting officer or SBA to initiate a protest.

(c) An interested party seeking to protest both the disadvantaged status and size of an apparent successful SDB offeror must submit two separate protests, one as to disadvantaged status pursuant to this subpart, and one as to size pursuant to part 121 of this title. An interested party seeking to protest only size of an apparent successful SDB offeror must submit a size protest to the contracting officer pursuant to part 121.

**§ 124.1018 When will SBA not decide an SDB protest?**

(a) SBA will not decide a protest as to disadvantaged status of any concern other than the apparent successful offeror.

(b) SBA will not normally consider a post award protest. SBA may consider a post award protest in its discretion where it determines that a protest decision after award would have a practical effect (e.g., where the contracting officer agrees to terminate the contract if the protest is sustained).

(c) SBA will not decide an untimely protest (see § 124.1020(c)).

(d) SBA will not decide a non-specific protest or one that does not present credible evidence that the protested concern's circumstances have materially changed since SBA certified it as an SDB, or that the protested concern's SDB application contained false or misleading information (see § 124.1021).

(e) An interested party may appeal SBA's dismissal of a protest for lack of specificity, timeliness, or a basis upon which SBA will consider a protest to SBA's Deputy Associate Deputy Administrator for Government Contracting and Minority Enterprise Development (DADA/GC&MED) pursuant to § 124.1024.

**§ 124.1019 Who decides disadvantaged status protests?**

In response to a protest challenging the disadvantaged status of a concern, the SBA's AA/SDBCE will determine whether the concern is disadvantaged.

**§ 124.1020 What procedures apply to disadvantaged status protests?**

(a) *General.* The protest procedures described in this section are separate and distinct from those governing size protests and appeals. All protests relating to whether a concern is a "small" business for purposes of any

Federal program, including SDB set-asides and SDB evaluation adjustments, must be filed and processed pursuant to part 121 of this title.

(b) *Filing.* (1) All protests challenging the disadvantaged status of a concern with respect to a particular Federal procurement requirement must be submitted in writing to the procuring activity contracting officer, except in cases where the contracting officer or SBA initiates a protest.

(2) Any contracting officer who initiates a protest must submit the protest in writing to SBA in accord with paragraph (c) of this section.

(3) In cases where SBA initiates a protest, the protest must be submitted in writing to the AA/SDBCE and notification provided in accord with § 124.1022(a).

(c) *Timeliness of protest.* (1) *SDB evaluation adjustment and set-aside protests.* (i) *General.* In order for a protest to be timely, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the bid opening date for sealed bids, or after the receipt from the contracting officer of notification of the identity of the prospective awardee in negotiated acquisitions.

(ii) *Oral protests.* An oral protest relating to an SDB set-aside or SDB evaluation adjustment made to the contracting officer within the allotted 5-day period will be considered a timely protest only if the contracting officer receives a confirming letter postmarked, FAXed, or delivered no later than one calendar day after the date of such oral protest.

(iii) *Protests of contracting officers or SBA.* The time limitations in paragraph (c)(1)(i) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (c)(3) of this section.

(iv) *Untimely protests.* A protest received after the time limits set forth in this paragraph (c)(1) will be dismissed by SBA.

(2) *Section 8(d) protests.* In connection with an 8(d) subcontract, the contracting officer or SBA must submit a protest to the AA/SDBCE prior to the completion of performance by the intended 8(d) subcontractor.

(3) *Premature protests.* A protest in connection with any procurement which is submitted by any person, including the contracting officer, before bid opening or notification of intended award, whichever applies, will be considered premature, and will be returned to the protestor without action.

A contracting officer that receives a premature protest must return it to the protestor without submitting it to the SBA.

(d) *Referral to SBA.* (1) Any contracting officer who receives a protest that is not premature must promptly forward it to the SBA's AA/SDBCE, 409 3rd Street, SW, Washington, DC 20416.

(2) A contracting officer's referral of a protest to SBA must contain the following:

(i) The written protest and any accompanying materials;

(ii) The date on which the protest was received by the contracting officer;

(iii) A copy of the protested concern's selfrepresentation as an SDB, and the date of such self-representation; and

(iv) The date of bid opening or the date on which notification of the apparent successful offeror was sent to all unsuccessful offerors, as applicable.

**§ 124.1021 What format, degree of specificity, and basis does SBA require to consider an SDB protest?**

(a) *Format.* An SDB protest need not be in any specific format in order for SBA to consider it.

(b) *Specificity.* A protest must be sufficiently specific to provide reasonable notice as to all grounds upon which the protested concern's disadvantaged status is challenged.

(1) SBA will dismiss a protest that merely asserts that the protested concern is not disadvantaged, without setting forth specific facts or allegations.

(2) The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely.

(c) *Basis.* SBA will consider a protest challenging whether the apparent successful offeror is owned and controlled by one or more socially and economically disadvantaged individuals, including whether one or more of the individuals claiming disadvantaged status is in fact socially or economically disadvantaged, only if the protest presents credible evidence that the firm's circumstances have materially changed since SBA certified it as an SDB, or that the firm's SDB application contained false or misleading information.

**§ 124.1022 What will SBA do when it receives an SDB protest?**

(a) Upon receipt of a protest challenging the disadvantaged status of a concern, the AA/SDBCE, or designee, will immediately notify the protestor and the contracting officer of the date the protest was received and whether it

will be processed or dismissed for lack of timeliness or specificity.

(b) In cases where the protest is timely and sufficiently specific, the AA/SDBCE, or designee, will also immediately advise the protested concern of the protest and forward a copy of it to the protested concern.

(1) The AA/SDBCE, or designee, is authorized to ask the protested concern to provide any or all of the following information and documentation, completed so as to show the circumstances existing on the date of self-representation: SBA Form 1010A, "Statement of Personal Eligibility" for each individual claiming disadvantaged status; SBA Form 1010B, "Statement of Business Eligibility;" SBA Form 413, "Personal Financial Statement," for each individual claiming disadvantaged status; information as to whether the protested concern, or any of its owners, officers or directors, have applied for admission to or participated in the SBA's 8(a) BD program and if so, the name of the company which applied or participated and the date of the application or entry into the program; business tax returns for the last two completed fiscal years prior to the date of self-representation; personal tax returns for the last two years prior to the date of self-representation for all individuals claiming disadvantaged status, all officers, all directors and for any individual owning at least 10% of the business entity; annual business financial statements for the last two completed fiscal years prior to the date of self-representation; a current monthly or quarterly business financial statement no older than 90 days; articles of incorporation; corporate by-laws; partnership agreements; limited liability company articles of organization; and any other relevant information as to whether the protested concern is disadvantaged.

(2) SBA's disadvantaged status determination need not be limited to consideration only of the issues raised in the protest. SBA may consider other applicable criteria.

(3) Unless the protest presents specific credible information which calls into question the veracity of application or other documents previously submitted to SBA by a current Participant in SBA's 8(a) BD program, SBA will allow the Participant to submit, in lieu of the information specified in paragraph (b)(1) of this section, a sworn affidavit or declaration that circumstances concerning the ownership and control of the business and the disadvantaged status of its principals have not changed since its application or entry into the program or

its most recent annual review, and a copy of its most recently completed annual review.

(i) If the ownership or control of the business or the disadvantaged status of any principals have changed, the protested concern must comply with paragraph (b)(1) of this section.

(ii) An affidavit or declaration may be allowed only if SBA admitted the protested concern to the 8(a) BD program, or conducted an annual review of the protested concern, during the 12-month period preceding the date on which SBA receives the protest, and if proceedings to suspend, terminate or early graduate the concern from the 8(a) BD program are not pending.

(c) Within 10 working days of the date that notification of the protest was received from the AA/SDBCE or designee, the protested concern must submit to the AA/SDBCE or designee, by personal delivery, FAX, or mail, the information and documentation requested pursuant to paragraph (b)(1) of this section or the affidavit permitted by paragraph (b)(2) of this section. Materials submitted must be received by the close of business on the 10th working day.

(1) SBA will consider only materials submitted timely, and the late or non-submission of materials needed to make a disadvantaged status determination may result in sustaining the protest.

(2) The burden is on the protested concern to demonstrate its disadvantaged status, whether or not it is currently shown on the list of qualified SDBs.

(3) The protested concern must timely submit to SBA any information it deems relevant to a determination of its disadvantaged status.

**§ 124.1023 How does SBA make disadvantaged status determinations in considering an SDB protest?**

(a) *General.* The AA/SDBCE, or designee, will determine a protested concern's disadvantaged status within 15 working days after receipt of a protest. If the procuring activity contracting officer does not receive an SBA determination within 15 working days after the SBA's receipt of the protest, the contracting officer may presume that the challenged offeror is disadvantaged, unless the SBA requests and the contracting officer grants an extension to the 15-day response period.

(b) *Award after protest.* (1) After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until:

(i) The SBA has made an SDB determination, or

(ii) 15 working days have expired since SBA's receipt of a protest and the contracting officer has not agreed to an extension of the 15-day response period.

(2) Notwithstanding paragraph (b)(1) of this section, the contracting officer may award a contract after the receipt of an SDB protest where he or she determines in writing that an award must be made to protect the public interest.

(c) *Withdrawal of protest.* If a protest is withdrawn, SBA will not complete a new disadvantaged status determination, and a previous SDB certification will stand.

(d) *Basis for determination.* (1) Except with respect to a concern which is a current Participant in SBA's 8(a) BD program and is authorized under § 124.1022(b)(3) to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination will be based on the protest record, including reasonable inferences therefrom, as supplied by the protestor, protested concern, SBA or others.

(2) SBA may in its discretion make a part of the protest record information already in its files, and information submitted by the protestor, the protested concern, the contracting officer, or other persons contacted for additional specific information.

(e) *Disadvantaged status.* In evaluating the social and economic disadvantage of individuals claiming disadvantaged status, SBA will consider the same information and factors set forth in §§ 124.103 and 124.104. As provided in § 124.1002(c), individuals claiming disadvantaged status must have a net worth that is less than \$750,000, after taking into account the exclusions set forth in § 124.104(c)(2).

(f) *Disadvantaged status determination.* SBA will render a written determination including the basis for its findings and conclusions.

(g) *Notification of determination.* After making its disadvantaged status determination, the SBA will immediately notify the contracting officer, the protestor, and the protested concern of its determination. SBA will promptly provide by certified mail, return receipt requested, a copy of its written determination to the same entities, consistent with law.

(h) *Results of an SBA disadvantaged status determination.* A disadvantaged status determination becomes effective immediately.

(1) If the concern is found not to be disadvantaged, the determination remains in full force and effect unless reversed upon appeal by SBA's DADA/GC&MED, or designee, pursuant to § 124.1024, or the concern is certified to

be an SDB under § 124.1008. The concern is precluded from applying for SDB certification for 12 months from the date of the final agency decision (whether by the AA/SDBCE, or designee, without an appeal, or by the DADA/GC&MED, or designee, on appeal).

(2) If the concern is found to be disadvantaged, the determination remains in full force and effect unless and until reversed upon appeal by SBA's DADA/GC&MED, or designee, pursuant to § 124.1024. A final Agency decision (whether by the AA/SDBCE, or designee, without an appeal, or by the DADA/GC&MED, or designee, on appeal) finding the protested concern to be an SDB remains in effect for three years from the date of the decision under the same conditions as if the concern had been granted SDB certification under § 124.1008.

**§ 124.1024 Appeals of disadvantaged status determinations.**

(a) *Who may appeal.* Appeals of protest determinations may be filed with the SBA's DADA/GC&MED by the protested concern, the protestor, or the contracting officer.

(b) *Timeliness of appeal.* An appeal must be in writing and must be received by the DADA/GC&MED no later than 5 working days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the five-day time period.

(c) *Notice of appeal.* Notice of the appeal must be provided by the party bringing an appeal to the procuring activity contracting officer and either the protested concern or original protestor, as appropriate.

(d) *Grounds for appeal.* SBA will reexamine a protest determination only if there was a clear and significant error in the processing of the protest, or if the AA/SDBCE, or designee, failed to consider a significant material fact contained within the information supplied by the protestor or the protested concern. SBA will not consider protest determination appeals based on additional information or changed circumstances which were not disclosed at the time of the decision of the AA/SDBCE or designee, or which are based on disagreement with the findings and conclusions contained in the determination.

(e) *Contents of appeal.* No specific format is required for the appeal. However, the appeal must identify the protest determination which is appealed, and set forth a full and specific statement as to why the determination is erroneous under paragraph (c) of this section.

(f) *Completion of appeal after award.* An appeal may proceed to completion even though an award of the SDB acquisition or other procurement requirement which prompted the protest has been made, if so desired by

the protested concern, or where SBA determines that a decision on appeal would have a material impact on contracting decisions, such as where the contracting officer agrees:

(1) In the case where an award is made to a concern other than the protested concern, to terminate the contract and award to the protested concern if the appeal finds that the protested concern is disadvantaged; or

(2) In the case where an award is made to the protested concern, to terminate the contract if the appeal finds that the protested concern is not disadvantaged.

(g) The appeal will be decided by the DADA/GC&MED, within 5 working days of its receipt, if practicable.

(h) The appeal decision will be based only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protestor, and the protested concern, consistent with law.

(i) The decision of the DADA/GC&MED, is the final decision of the SBA, and cannot be further appealed to OHA.

Dated: March 6, 1998.

**Aida Alvarez,**  
Administrator.

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