

**SMALL BUSINESS ADMINISTRATION****13 CFR Parts 121, 124, 125, 126, 127, and 134**

RIN 3245-AG94

**Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments****AGENCY:** U.S. Small Business Administration.**ACTION:** Proposed rule.

**SUMMARY:** In response to President Trump's government-wide regulatory reform initiative, the Small Business Administration (SBA) initiated a review of its regulations to determine which might be revised or eliminated. As a result, SBA is proposing to merge the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This rule proposes to eliminate the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture to SBA for review and approval prior to contract award, revise several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants, and clarify other related regulatory provisions to eliminate confusion among small businesses and procuring activities. In addition, except for orders and Blanket Purchase Agreements issued under the General Services Administration's Federal Supply Schedule Program, the rule proposes to require a business concern to recertify its size and/or socioeconomic status for all set-aside orders under unrestricted multiple award contracts (MACs). The rule also proposes to require a business concern to recertify its socioeconomic status for all set-aside orders where the required socioeconomic status for the order differs from that of the underlying set-aside MAC contract (e.g., HUBZone set-aside order against a small business set-aside MAC). Finally, except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, the rule also allows for size and/or socioeconomic protests at the order-level for set-aside orders issued against unrestricted MACs, or for set-aside orders based on a different socioeconomic status from the underlying set-aside MAC.

**DATES:** Comments must be received on or before January 17, 2020.**ADDRESSES:** You may submit comments, identified by RIN 3245-AG94 by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail, for Paper, Disk, or CD-ROM Submissions:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

- *Hand Delivery/Courier:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416, or send an email to [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination of whether it will publish the information.

**FOR FURTHER INFORMATION CONTACT:** Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205-7337; [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov).

**SUPPLEMENTARY INFORMATION:****I. Background Information**

On January 30, 2017, President Trump issued Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs", which is designed to reduce unnecessary and burdensome regulations and to control costs associated with regulations. In response to the President's directive to simplify regulations, SBA initiated a review of its regulations to determine which might be revised or eliminated. Based on this analysis, SBA has identified provisions in many areas of its regulations that can be simplified or eliminated. Firstly, this proposed rule would merge the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program. This rule also proposes to eliminate the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. This rule also proposes to make several changes to the 8(a) BD Program to eliminate or reduce unnecessary or excessive burdens on 8(a) Participants. As part of this

proposed rulemaking process, SBA also held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Anchorage, AK, Albuquerque, NM and Oklahoma City, OK to provide interested tribal representatives with an opportunity to discuss their views on various 8(a) BD-related issues. SBA considers tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allowed for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and Alaska Native Corporation (ANC) owned firms participating in the 8(a) BD Program. SBA has taken these discussions into account in drafting this proposed rule.

SBA seeks to combine the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program at this time in order to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. SBA originally established a mentor-protégé program for 8(a) Participants a little more than twenty years ago. 63 FR 35726, 35764 (June 30, 1998). The purpose of that program was to encourage approved mentors to provide various forms of business assistance to eligible 8(a) Participants to aid in their development. On September 27, 2010, the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240 was enacted. The Jobs Act was designed to protect the interests of small businesses and increase opportunities in the Federal marketplace. The Jobs Act was drafted by Congress in recognition of the fact that mentor-protégé programs serve an important business development function for small businesses and therefore included language authorizing SBA to establish separate mentor-protégé programs for the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program, the HUBZone Program, and the Women-Owned Small Business (WOSB) Program, each of which was modeled on SBA's existing mentor-protégé program available to 8(a) Participants. See section 1347(b)(3) of the Jobs Act. Thereafter, on January 2, 2013, the National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Public Law 112-239 was enacted. Section 1641 of the NDAA 2013 authorized SBA to establish a mentor-protégé program for all small

business concerns. This section further provided that a small business mentor-protégé program must be identical to the 8(a) BD Mentor-Protégé Program, except that SBA could modify each program to the extent necessary, given the types of small business concerns to be included as protégés.

Subsequently, SBA published a Final Rule in the **Federal Register** combining the authorities contained in the Jobs Act and the NDAA 2013 to create a mentor-protégé program for all small businesses. 81 FR 48558 (July 25, 2016).

Currently, the mentor-protégé program available to firms participating in the 8(a) BD Program (contained in 13 CFR 124.520) is used as a business development tool in which mentors provide diverse types of business assistance to eligible 8(a) BD protégés. This assistance may include, among other things, technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing Federal prime contracts through joint venture arrangements. The explicit purpose of the 8(a) BD Mentor-Protégé relationship is to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts. Similarly, the All Small Mentor-Protégé Program is designed to require approved mentors to aid protégé firms so that they may enhance their capabilities, meet their business goals, and improve their ability to compete for contracts. The purposes of the two programs are identical. In addition, the benefits available under both programs are identical. Small businesses and 8(a) Program Participants receive valuable business development assistance and any joint venture formed between a protégé firm and its SBA-approved mentor receives an exclusion from affiliation, such that the joint venture will qualify as a small business provided the protégé individually qualifies as small under the size standard corresponding to the NAICS code assigned to the procurement. A protégé firm may enter a joint venture with its SBA-approved mentor and be eligible for any contract opportunity for which the protégé qualifies. If a protégé firm is an 8(a) Program Participant, a joint venture between the protégé and its mentor could seek any 8(a) contract, regardless of whether the mentor-protégé agreement was approved through the 8(a) BD Mentor-Protégé Program or the All Small Mentor-Protégé Program. Moreover, a firm could be certified as an 8(a) Participant after its mentor-protégé relationship has been

approved by SBA through the All Small Mentor-Protégé Program and be eligible for 8(a) contracts as a joint venture with its mentor once certified.

Because the benefits and purposes of the two programs are identical, SBA believes that having two separate mentor-protégé programs is unnecessary and causes needless confusion in the small business community. As such, this proposed rule would eliminate a separate 8(a) BD Mentor-Protégé Program and continue to allow any 8(a) Participant to enter a mentor-protégé relationship through the All Small Mentor-Protégé Program. Specifically, the proposed rule would revise § 124.520 to merely recognize that an 8(a) Participant, as any other small business, may participate in SBA's Small Business Mentor-Protégé Program. In merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor-Protégé Program, the proposed rule would also make conforming amendments to SBA's size regulations (13 CFR part 121), the joint venture provisions (13 CFR 125.8), and the All Small Mentor-Protégé Program regulations (13 CFR 125.9).

As stated previously, SBA has also taken this action partly in response to the President's directive that each agency review its regulations. Therefore, this rule also proposes to revise regulations pertaining to the 8(a) BD and size programs in order to further reduce unnecessary or excessive burdens on small businesses and to eliminate confusion or more clearly delineate SBA's intent in certain regulations. Specifically, this rule proposes additional changes to the size and socioeconomic status recertification requirements for orders issued against MACs. A detailed discussion of these proposed changes is contained below in the Section-by-Section Analysis.

## II. Section-by-Section Analysis

### *Section 121.103(b)(6)*

The proposed rule would amend the references to SBA's mentor-protégé programs in this provision, which specifying that a protégé firm cannot be considered affiliated with its mentor based solely on assistance received by the protégé under the mentor-protégé agreement. The proposed rule would eliminate the cross-reference to the regulation regarding the 8(a) BD Mentor-Protégé Program (13 CFR 124.520), leaving only the reference to the regulation regarding the All Small Business Mentor-Protégé Program.

### *Section 121.103(g)*

The proposed rule would amend the newly organized concern rule contained in § 121.103(g) by clarifying that affiliation may be found where both former and "current" officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees. The rule would merely add the word "current" to the regulatory text to ensure that affiliation may arise where the key individuals are still associated with the first company. SBA believes that such a finding of affiliation is authorized in the present regulations, but merely seeks to clarify its intent to make sure there is no confusion.

### *Section 121.103(h)*

The proposed rule would amend the introductory text to § 121.103(h) to revise the requirements for joint ventures. SBA believes that a joint venture is not an on-going business entity, but rather something that is formed for a limited purpose and duration. If two or more separate business entities seek to join together through another entity on a continuing, unlimited basis, SBA views that as a separate business concern with each partner affiliated with each other. To capture SBA's intent on limited scope and duration, SBA's current regulations provide that a joint venture is something that can be formed for no more than three contracts over a two-year period. If the parties intend to jointly seek work beyond three contracts or beyond two years from the date of the first award, they must form a new joint venture entity. That new entity would then be able to perform an additional three contracts over two years from the date of its first award. Several firms have commented to SBA that the three-contract limit unduly restricts small business and can disrupt normal business operations. SBA does not seek to impose unnecessary burdens on small businesses but continues to believe that a joint venture should be a limited duration vehicle. In response to these concerns, SBA proposes to eliminate the three-contract limit for a joint venture, but continue to prescribe that a joint venture cannot exceed two years from the date of its first award. In addition, the proposed rule would clarify SBA's current intent that a novation to the joint venture would start the two-year period if that were the first award received by the joint venture. The

change removing the limit of three awards to any joint venture would relieve small businesses of the requirement of forming additional joint venture entities to perform a fourth contract within that two-year period. The proposed rule attempts to lessen the burden on small businesses, while still preserving SBA's belief that a joint venture is not intended to be an ongoing business entity.

In addition, SBA is interested in comments regarding the exception to affiliation for joint ventures composed of multiple small businesses in which firms enter and leave the joint venture based on their size status. In this scenario, in an effort to retain small business status, joint venture partners expel firms that have exceeded the size standard and then possibly add firms that qualify under the size standard. Generally, this should not be a problem because joint ventures are limited in duration to two years and generally can be awarded no more than three contracts during those two years. However, if the joint venture is awarded a Federal Supply Schedule (FSS) contract or any other multiple award contract vehicle, the awarding of the multiple award contract itself counts against the limit of three contract awards that a joint venture can receive, but individual orders do not count against the limit. As such, a joint venture that is awarded a multiple award contract could receive many orders beyond the two-year limitation for joint venture awards (since the contract was awarded within that two-year period), and could remain small for any order requiring recertification simply by exchanging one joint venture partner for another (*i.e.*, a new small business for one that has grown to be other than small). SBA never intended for the composition of joint ventures to be fluid. The joint venture generally should have the same partners throughout its lifetime, unless one of the partners is acquired. SBA considers a joint venture composed of different partners to be a different joint venture than the original one. To reflect this understanding, SBA could specify that the size of a joint venture outside of the mentor-protégé program will be determined based on the current size status and affiliations of all past and present joint venture partners, even if a partner has left the joint venture. SBA invites comment on this proposal and whether there are alternative ways to address this issue.

The rule also proposes to add clarifying language to the introductory text of § 121.103(h) to recognize that, although a joint venture cannot be

populated with individuals intended to perform contracts awarded to the joint venture, the joint venture can directly employ administrative personnel and such personnel may specifically include Facility Security Officers.

It has also been brought to SBA's attention that some procuring agencies will not award a contract requiring a facility security clearance to a joint venture if the joint venture itself does not have such clearance, even if both partners to the joint venture individually have such clearance. SBA does not believe that such a restriction is appropriate and seeks comments on how best to address that in a final rule. SBA is considering a provision which would require either the joint venture itself or the lead small business partner to the joint venture to have the required facility security clearance. If such a provision were finalized, a joint venture lacking its own separate facility security clearance could still be awarded a contract requiring such a clearance provided the lead small business partner to the joint venture had the required facility security clearance and committed to keep at its cleared facility all records relating to the contract awarded to the joint venture. Additionally, if it is established that the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, SBA believes that the non-lead partner to the joint venture (which may include a large business mentor) could possess such clearance. SBA specifically requests comments on this possible provision as well as other recommendations regarding how best to address this perceived problem.

The rule would also remove current § 121.103(h)(3)(iii), which provides that a joint venture between a protégé firm and its mentor that was approved through the 8(a) BD Mentor-Protégé Program is considered small provided the protégé qualifies as individually small. Because this proposed rule would eliminate the 8(a) BD Mentor-Protégé Program as a separate program, this provision is no longer needed.

The proposed rule also clarifies how to account for joint venture receipts and employees during the process of determining size for a joint venture partner. The joint venture partner must include its percentage share of joint venture receipts and employees in its own receipts or employees. The appropriate percentage share is the same percentage figure as the percentage figure corresponding to the joint venture partner's share of work performed by the joint venture.

#### Section 121.402

This rule proposes to amend how NAICS codes are applied to task orders to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed. Under the proposed rule, a contracting officer would be required to assign a single NAICS code for each order issued against a Multiple Award Contract (MAC), and that NAICS code must be a NAICS code that is included in the underlying MAC and represents the principal purpose of the order. SBA believes that the NAICS code assigned to a task order must reflect the principal purpose of that order. Currently, based on the business rules of the Federal Procurement Data System (FPDS), if a MAC is assigned a service NAICS code, then that service NAICS code flows down to each individual order under that MAC. SBA does not believe it is appropriate for a task order that is nearly entirely for supplies to have a service NAICS code. In such a case, a firm being awarded such an order would not have to comply with the nonmanufacturer rule. In particular, set-aside orders should be assigned a manufacturing/supply NAICS code, so that the nonmanufacturer rule will apply to the order if it is awarded to a nonmanufacturer. Additionally, the current method for NAICS code assignment can also be problematic where a MAC is assigned a NAICS code for supplies but a particular order under that MAC is almost entirely for services. In such a case, firms that qualified as small for the larger employee-based size standard associated with a manufacturing/supply NAICS code may not qualify as small businesses under a smaller receipts-based services size standard. As such, because the order is assigned the manufacturing/supply NAICS code associated with the MAC, firms that should not qualify as small for a particular procurement that is predominantly for services may do so. Thus, this proposed rule attempts to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed.

There will still be anomalies where a procuring agency seeks to award an order whose principal purpose is different than the assigned NAICS code for the MAC until the Federal Acquisition Regulation (FAR) and the FPDS is amended to include multiple NAICS codes at the contract level. SBA does not believe that the order should

be assigned a NAICS code that does not properly reflect its principal purpose. SBA believes that the better approach would be to fulfill such requirement through a different contracting vehicle.

*Sections 121.404(a)(1), 124.503(i), 125.18(d), and 127.504(c)*

#### Size Status

SBA has been criticized for allowing agencies to receive credit towards their small business goals for awards made to firms that no longer qualify as small. SBA believes that much of this criticism is misplaced. Where a small business concern is awarded a small business set-aside contract with a duration of not more than five years and grows to be other than small during the performance of the contract, some have criticized the exercise of an option as an award to an other than small business. SBA disagrees with such a characterization. Small business set-aside contracts are restricted only to firms that qualify as small as of the date of a firm's offer for the contract. A firm's status as a small business is relevant to its qualifying for the award of the contract. If a concern qualifies as small for a contract with a duration of not more than five years, it is considered a small business throughout the life of that contract. Even for MACs that are set-aside for small business, once a concern is awarded a contract as a small business it is eligible to receive orders under that contract and perform as a small business. Again, in such a case, size was relevant to the initial award of the contract. Any competitor small business concern could protest the size status of an apparent successful offeror for a small business set-aside contract (whether single award or multiple award), and render a concern ineligible for award where SBA finds that the concern does not qualify as small under the size standard corresponding to the NAICS code assigned to the contract. Furthermore, firms awarded a long-term contract must recertify their size status at five years and every option thereafter. Firms are eligible to receive orders under that contract and perform as a small business so long as they continue to recertify as small at the required times (e.g., at five years and every option thereafter). Not allowing a concern that legitimately qualified at award and/or recertified later as small to receive orders and continue performance as a small business during the base and option periods, even if it has naturally grown to be other than small, would discourage firms from wanting to do business with the Government, would be disruptive to the

procurement process, and would disincentivize contracting officers from using small business set-asides.

SBA agrees that contract performance by a concern that merges with, acquires, or is acquired by another business concern and no longer qualifies as small should not count towards small business goals. However, SBA already requires a concern to recertify its size status within 30 days of a merger, sale, or acquisition becoming final. See 13 CFR 121.404(g). Under the current regulation, if the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. *Id.*

SBA believes, however, that there is a legitimate concern where a concern self-certifies as small for an unrestricted MAC and at some point later in time when the concern no longer qualifies as small the contracting officer seeks to award an order as a small business set-aside and the firm uses its self-certification as a small business for the underlying unrestricted MAC. Under the current process, size status for an unrestricted MAC is generally determined as of the date a firm submits its offer for the MAC. If a concern self-certifies as small at the time of its offer for the underlying MAC, the concern is generally considered to be small for goaling purposes for each order issued against the contract, unless a contracting officer requests a new size certification in connection with a specific order. Therefore, when a contracting officer seeks to set-aside an order for small business off an unrestricted MAC, the firm's size relates back to its self-certification for the underlying MAC. As such, orders may be set-aside for small businesses and a concern may be awarded one or more orders as a small business even though it does not currently qualify as small and may not have qualified as small for several years.

SBA agrees that this situation needs to be addressed. A firm's status as a small business does not generally affect whether the firm does or does not qualify for the award of an unrestricted MAC contract. As such, competitors are very unlikely to protest the size of a concern that self-certifies as small for an unrestricted MAC. In SBA's view, where a contracting officer sets aside an order for small business under an unrestricted MAC, the order is the first time size status is important. That is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size status. As noted above, no one is considering protesting the size or status of a firm at the time an

unrestricted MAC is awarded. It is only when an order is restricted by size status that firms focus on their competitors' size status. To allow a firm's self-certification for the underlying MAC to control whether a firm is small at the time of an order years after the MAC was awarded does not make sense to SBA.

SBA has considered several alternative proposals. If an order under an unrestricted MAC is set-aside exclusively for small business (i.e., small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), SBA considered requiring a concern to certify its size status and qualify as such at the time it submits its initial offer, which includes price, for the particular order under all unrestricted MACs. SBA has also considered exempting FSS contracts from any recertification requirement, and instead applying it only to all other MACs. SBA does not seek to disrupt the procurement process, but rather to ensure that small business set-aside awards are made to firms that qualify as small at the time of the award. GSA is concerned that requiring firms to certify their size status for an order that is set-aside under a FSS would discourage firms from wanting to do business with the Government, would dissuade contracting officers from setting aside orders, and that this will in turn hurt small businesses.

In considering the issue, SBA looked at the data for orders that were awarded as small business set-asides off unrestricted base multiple award vehicles in FY 2018. In total, 8,666 orders were awarded as small business set-asides off unrestricted MACs in FY 2018. Of those set-aside orders, 10% are estimated to have been awarded to firms that no longer qualified as small under the NAICS code size standard at the time of the order award. Although the vast majority of set-aside orders under unrestricted MACs were awarded off of FSS contracts. Further, it is estimated that only 7.1% of small business set-aside orders off the FSS were awarded to firms that no longer qualified as small under the NAICS code size standard at the time of the order (510 out of 7,266 orders). That amounted to 12.1% of the dollars set-aside for small business off the FSS (\$129.6 million to firms that no longer qualified as small out of a total of \$1.0723 billion in small business set-aside orders). Whereas, it is estimated that 49.4% of small business set-aside orders off of government-wide acquisition contracts (GWACs) were awarded to firms that no longer

qualified as small under the NAICS code size standard at the time of the order (261 out of 528 orders). That amounted to 67% of the dollars set-aside for small business off of GWACs (\$119.6 million to firms that no longer qualified as small out of a total of \$178.6 million in small business set-aside orders). SBA then considered the number and dollar value of new orders that were awarded as small business set-asides off unrestricted base multiple award vehicles in FY 2018 using the size standard “exceptions” that apply in some of SBA’s size standards (*e.g.*, the IT Value-Added Reseller exception to NAICS 541519). Taking into account all current size standards exceptions, which allow a firm to qualify under an alternative size standard for certain types of contracts, it is estimated that 6.5% of small business set-aside orders off the FSS were awarded to firms that no longer qualified as small at the time of the order (468 out of 7,266 orders). That amounted to 11.3% of the dollars set-aside for small business off the FSS (\$120.7 million to firms that no longer qualified as small out of a total of \$1.0723 billion in small business set-aside orders). Considering exceptions for set-aside orders off of GWACs, it is estimated that 11.6% were awarded to firms that no longer qualified as small at the time of the order (61 out of 528 orders). That amounted to 39.5% of the dollars set-aside for small business off of GWACs (\$70.5 million to firms that no longer qualified as small out of a total of \$178.6 million in small business set-aside orders). It is not possible to tell from FPDS whether the “exception” size standard applied to the contract or whether the agency applied the general size standard for the identified NAICS code. Thus, all that can be said with certainty is that for small business set-aside orders off of the FSS, between 11.3% and 12.1% of the order dollars set-aside for small business were awarded to firms that no longer qualified as small. This amounted to somewhere between \$120.7 million and \$129.6 that were awarded to firms that no longer qualified as small. For GWACs, the percentage of orders and order dollars being awarded to firms that no longer qualify as small is significantly greater. Between 39.5% and 67.0% of the order dollars set-aside for small business off GWACs were awarded to firms that no longer qualified as small. This amounted to somewhere between \$70.5 million and \$119.6 million that were awarded to firms that no longer qualified as small. So, set-aside orders off of GWACs, for example, that may potentially go to

other than small businesses are more significant at 11.6–49.4%. However, the data shows that discretionary set-asides under the FSS programs have proven effective in making awards to small business under the schedules program. The data also shows that the percent of dollars going to other than small business off of FSS set-asides is limited. Thus, SBA is considering exempting FSS contracts from the recertification requirement as it may not be efficient. SBA determined that the added burden to the public and Government to implement additional control measures and the potential effect on small business participation in Government contracting outweighed any potential benefits from trying to mitigate the limited risk. As such, this rule proposes to exempt the FSS contracts from the rule.

SBA believes that a contracting vehicle that intends to award to small businesses but instead permits as much as 49.4% of its orders and between 39.5% and 67% of its dollars to be awarded to firms that do not qualify as small is the appropriate area to address. As such, pursuant to this proposed rule, except for orders or Blanket Purchase Agreements issued under any FSS contract, if an order under an unrestricted MAC is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as such at the time it submits its initial offer, which includes price, for the particular order. A firm whose size certification in SAM is current and accurate will not need to submit a new certification or additional documentation.

For a MAC that is set aside for small business (*i.e.*, small business set-aside, 8(a) small business, SDVO small business, HUBZone small business, or WOSB), the proposed rule would generally set size status as of the date of the offer for the underlying MAC itself. A concern that is small at the time of its offer for the MAC would be considered small for each order issued against the contract, unless a contracting officer requests a size recertification in connection with a specific order. As is currently the case, a contracting officer has the discretion to request recertification of size status on MAC orders. If that occurs, size status would be determined at the time of the order. That would not be a change from the current regulations.

## Socioeconomic Status

Where the required status for an order differs from that of the underlying contract (*e.g.*, the MAC is a small business set-aside award, and the procuring agency seeks to restrict competition on the order to only certified HUBZone small business concerns), SBA believes that a firm must qualify for the socioeconomic status of a set-aside order at the time it submits an offer for that order. Although size may flow down from the underlying contract, status in this case cannot. Similar to where a procuring agency seeks to compete an order on an unrestricted procurement as a small business set-aside and SBA would require offerors to qualify as small with respect to that order (except for orders under FSS contracts), SBA believes that where the socioeconomic status is first required at the order level, an offeror seeking that order must qualify for the socioeconomic status of the set-aside order when it submits its offer for the order.

Under current policy and regulations, where a contracting officer seeks to restrict competition of an order off an unrestricted MAC to eligible 8(a) Participants only, the contracting officer must offer the order to SBA to be awarded through the 8(a) program, and SBA must accept the order for the 8(a) program. In determining whether a concern is eligible for such an 8(a) order, SBA would apply the provisions of the Small Business Act and its current regulations which require a firm to be an eligible Program Participant as of the date set forth in the solicitation for the initial receipt of offers for the order. SBA requests comments on the alternative approaches considered as well as any other approaches that would reduce the set-aside awards to firms that do not qualify as small or qualify for the socioeconomic status of a set-aside order while at the same time not disrupting the procurement process or imposing unnecessary burdens on small businesses or contracting officers.

The rule proposes to make these changes in § 121.404(a)(1) for size, § 124.503(i) for 8(a) BD eligibility, § 125.18(d) for SDVO eligibility, and § 127.504(c) for WOSB eligibility.

### Section 121.404

In addition to the revision to § 121.404(a)(1) identified above, the rule proposes to make several other changes or clarifications to § 121.404. In order to make this section easier to use and understand, the proposed rule would add headings to each subsection, which

would identify the subject matter of the subsection.

The rule proposes to amend § 121.404(b), which requires a firm applying to SBA's programs to qualify as a small business for its primary industry classification as of the date of its application. The rule would eliminate references to SBA's small disadvantaged business (SDB) program as obsolete, and add a reference to the WOSB program.

The proposed rule would also amend § 121.404(d) to clarify that size status for purposes of compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding. Currently, only compliance with the nonmanufacturer rule is specifically addressed in this paragraph, but SBA's policy has been to apply the same rule to determine size with respect to the ostensible subcontractor rule and joint venture agreement requirements. This would not be a change in policy, but rather a clarification of existing policy.

The proposed rule would also add a clarifying sentence to § 121.404(e) that would recognize that prime contractors may rely on the self-certifications of their subcontractors provided they do not have a reason to doubt any specific self-certification. SBA believes that this has always been the case, but has added this clarifying sentence, nevertheless, at the request of many prime contractors.

The proposed rule would make several revisions to the size recertification provisions in § 121.404(g). First, the recertification rule pertaining to a joint venture that had previously received a contract as a small business was not clear. If a partner to the joint venture has been acquired, is acquiring or has merged with another business entity, the joint venture must recertify its size status. In order to remain small, however, it was not clear whether only the partner which has been acquired, is acquiring or has merged with another business entity needed to recertify its size status or whether all partners to the joint venture had to do so. SBA believes that the intent of the regulation was to require size recertification only for the affected partner. To do otherwise could unfairly prejudice the joint venture and the procuring activity. For example, assume that a joint venture has two partners, a 75% managing partner and a 25% non-managing partner. In order to have initially been awarded a contract as a small business, both partners to the joint venture had to individually qualify as

small (unless one was an SBA-approved mentor of the other). If since the date of the award the 75% partner has naturally grown to exceed the size standard assigned to the contract and the 25% partner has been acquired by another small business, the joint venture could not recertify as small if both partners had to recertify their individual size status even if the 25% partner still qualified as small after its acquisition. SBA does not believe that would be fair to the 75% partner or to the procuring activity, which could no longer count the contract as an award to small business. Just as SBA allows, under certain conditions, a contract to continue to count as an award to small business if a concern awarded the contract has grown to exceed the applicable size standard after award, so too should a contract to a joint venture continue to count as an award to small business if the non-affected partner has grown to be other than small and the partner that has been acquired continues to be small after the acquisition. Thus, the proposed rule clarifies that only the partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity must recertify its size status in order for the joint venture to recertify its size.

Additionally, the proposed rule clarifies that if a merger or acquisition causes a firm to recertify as an other than small business concern between time of offer and award, then the recertified firm is not considered a small business for the solicitation. Under this proposed rule, SBA would accept size protests with specific facts showing that an apparent awardee of a set-aside has recertified or should have recertified as other than small due to a merger or acquisition before award.

The proposed rule would also clarify that recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, ANC, or Community Development Corporation (CDC)) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. When the small business continues to be owned to the same extent by the tribe, ANC or CDC, SBA does not believe that the real ownership of the concern has changed, and, therefore that recertification is not needed. The proposed rule would make this same change to § 121.603 for 8(a) contracts as well.

Finally, the proposed rule would amend § 121.404(g)(3) to specifically permit a contracting officer to request size recertification as he or she deems appropriate at any point in a long-term

contract. SBA believes that this authority exists within the current regulatory language but is merely articulating it more clearly in this rule.

#### *Section 121.406*

The proposed rule would merely correct a typographical error by replacing the word "provided" with the word "provide."

#### *Section 121.702*

The proposed rule would clarify the size requirements applicable to joint ventures in the Small Business Innovation Research (SBIR) program. Although the current regulation authorizes joint ventures in the SBIR program and recognizes the exclusion from affiliation afforded to joint ventures between a protégé firm and its SBA-approved mentor, it does not specifically apply SBA's general size requirements for joint ventures to the SBIR program. The proposed rule would merely apply the general size rule for joint ventures to the SBIR program. In other words, a joint venture for an SBIR award would be considered a small business provided each partner to the joint venture, including its affiliates, meets the applicable size standard. In the case of the SBIR program, this means that each partner does not have more than 500 employees.

#### *Section 121.1001*

The rule proposes to provide authority to SBA's Associate General Counsel for Procurement Law to independently initiate or file a size protest, where appropriate.

#### *Sections 121.1004, 125.28, 126.801, and 127.603*

The proposed rule would add clarifying language to § 121.1004, § 125.28, § 126.801, and § 127.603 regarding size and/or socioeconomic status protests in connection with orders issued against a MAC. Currently, the provisions authorize a size protest where an order is issued against a MAC if the contracting officer requested a recertification in connection with that order. The proposed rule specifically authorizes a size protest relating to an order issued against a MAC where the order is set-aside for small business and the underlying MAC was awarded on an unrestricted basis, except for orders or Blanket Purchase Agreements issued under any FSS contract. The proposed rule also specifically authorizes a socioeconomic protest relating to set-aside orders based on a different socioeconomic status from the underlying set-aside MAC.

*Section 121.1103*

An explanation of the change is provided with the explanation for § 134.318.

*Section 124.3*

In response to concerns raised to SBA by several Program Participants, the proposed rule would add a definition of what a follow-on requirement or contract is. Whether a procurement requirement may be considered a follow-on procurement is important in several contexts related to the 8(a) BD program. First, SBA's regulations provide that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. 13 CFR 124.504(d)(1). SBA's regulations also require SBA to conduct an adverse impact analysis when accepting requirements into the 8(a) BD program. However, an adverse impact analysis is not required for follow-on 8(a) acquisitions or new requirements. 13 CFR 124.504(c). Finally, SBA's regulations provide that once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on procurement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, Native Hawaiian Organization (NHO), or CDC. 13 CFR 124.109(c)(3)(ii), 124.110(e) and 124.111(d).

In order to properly assess what each of these regulations requires, the rule proposes to define the term "follow-on requirement or contract". The definition provides the determination considerations for whether a particular procurement is a follow-on requirement or contract: (1) Whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; (2) whether the magnitude or value of the requirement has changed by at least 25 percent; and (3) whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. Conversely, if the procurement satisfies none of these conditions, it is considered a follow-on procurement. However, with respect to a change in the value or magnitude of the requirement, SBA intends the 25% amount to be a guide, and not necessarily dispositive of whether a requirement qualifies as "new." Applying the 25 percent rule contained in this definition rigidly could permit

procuring agencies and entity-owned firms to circumvent the intent of release, sister company restriction, and adverse impact rules.

For example, a procuring agency may argue that two procurement requirements that were previously awarded as individual 8(a) contracts can be removed from the 8(a) program without requesting release from SBA because the value of the combined requirement would be at least 25 percent more than the value of either of the two previously awarded individual 8(a) contracts, and thus would be considered a new requirement. This application of the new requirement definition would permit an agency to remove two requirements from the 8(a) BD program without requesting and receiving SBA's permission for release from the program. We believe that would be inappropriate and that a procuring agency must seek SBA's approval to release the two procurements previously awarded through the 8(a) BD program. Likewise, if an entity-owned 8(a) Participant previously performed two sole source 8(a) contracts and a procuring agency sought to offer a sole source requirement to the 8(a) BD program on behalf of another Participant owned by the same entity (tribe, ANC, NHO, or CDC) that, in effect, was a consolidation of the two previously awarded 8(a) procurements, we believe it would be inappropriate for SBA to accept the offer on behalf of the sister company. Similarly, if a small business concern previously performed two requirements outside the 8(a) program and a procuring agency wanted to combine those two requirements into a larger requirement to be offered to the 8(a) program, SBA should perform an adverse impact analysis with respect to that small business even though the combined requirement had a value that was greater than 25 percent of either of the previously awarded contracts.

*Section 124.105*

The proposed rule would amend § 124.105(g) to provide more clarity regarding situations in which an applicant has an immediate family member that has used his or her disadvantaged status to qualify another current or former Participant. The purpose of the immediate family member restriction is to ensure that one individual does not unduly benefit from the 8(a) BD program by participating in the program beyond nine years, albeit through a second firm. This most often happens when a second family member in the same or similar line of business seeks 8(a) BD certification. However, it is not necessarily the type of business

which is a problem, but, rather, the involvement in the applicant firm of the family member that previously participated in the program. The current regulatory language requires an applicant firm to demonstrate that "no connection exists" between the applicant and the other current or former Participant. SBA believes that requiring no connections is a bit extreme. If two brothers own two totally separate businesses, one as a general construction contractor and one as a specialty trade construction contractor, in normal circumstances it would be completely reasonable for the brother of the general construction firm to hire his brother's specialty trade construction firm to perform work on contracts that the general construction firm was doing. Unfortunately, if either firm was a current or former Participant, SBA's current regulations would prohibit SBA from certifying the second firm for participation in the program, even if the general construction firm would pay the specialty trade firm the exact same rate that it would have to pay to any other specialty trade construction firm. SBA does not believe that makes sense. An individual should not be required to avoid all contact with the business of an immediate family member. He or she should merely have to demonstrate that the two businesses are truly separate and distinct entities.

To this end, the rule proposes that an individual would not be able to use his or her disadvantaged status to qualify a concern for participation in the 8(a) BD program if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and the concerns are connected by any common ownership or management, regardless of amount or position, or the concerns have a contractual relationship that was not conducted at arm's length. In the first instance, if one of the two family members (or business entities owned by the family member) owned *any* portion of the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. Similarly, if one of the two family members had any role as a director, officer or key employee in the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. In the second instance, the second in time family member could not qualify his or her business for the 8(a) BD program if it received or gave work to the business owned by the other

family member at other than fair market value. With these changes, SBA believes that the proposed rule more accurately captures SBA's intent not to permit one individual from unduly benefitting from the program, while at the same time permitting normal business relations between two firms. SBA specifically requests comments on this provision.

The proposed rule would also amend the 8(a) BD change of ownership requirements in § 124.105(i). First, the proposed rule would lessen the burden on 8(a) Participants seeking minor changes in ownership by providing that prior SBA approval is not needed where a previous owner held less than a 20 percent interest in the concern both before and after the transaction. This would be a change from the current requirement which allows a Participant to change its ownership without SBA's prior approval where the previous owner held less than a 10 percent interest. This change from 10 percent to 20 percent would permit Participants to make minor changes in ownership more frequently without requiring them to wait for SBA approval. It would also be consistent with other changes SBA has made to reduce burdens on 8(a) applicants and Participants. For example, in 2016, SBA changed the percentage amount related to the requirement that individuals owning a certain percent of the business concern must demonstrate good character from 10 percent to 20 percent (*see* 81 FR 48580). This proposed revision would be consistent with that change and would also eliminate additional burdens on an 8(a) applicant or Participant relating to owners holding between 10 and 20 percent interest.

In addition, the proposed rule would also eliminate the requirement that all changes of ownership affecting the disadvantaged individual or entity must receive SBA prior approval before they can occur. Specifically, proposed revisions to § 124.105(i)(2) would provide that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of the Participant will increase the percentage of his or her (its) ownership interest. SBA believes that prior approval is not needed in such a case because there could be no question as to whether the Participant continues to meet the program's ownership and control requirements. Again, this proposed change would decrease the amount of times and the time spent by Participant firms seeking SBA approval of a change in ownership. SBA would nevertheless continue to review all changes in ownership for which prior approval is not required, including those

contemplated by the proposed rule, to ensure that the transfer was fair and equitable to the disadvantaged individual(s) (or entity) and has not unduly benefited non-disadvantaged parties to the transaction. Where SBA has determined that a change in ownership does not meet such requirements, the Agency may, in its discretion, require remedial action or initiate an appropriate adverse action, such as program suspension or termination.

#### *Section 124.109*

In order to eliminate confusion, the proposed rule would clarify several provisions relating to tribally-owned 8(a) applicants and Participants. First, SBA proposes to amend § 124.109(a)(7) and § 124.109(c)(3)(iv) to clarify that a Participant owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. SBA believes that a tribe or ANC should be able to replace one wholly-owned intermediary company with another without going through the change of ownership process and obtaining prior SBA approval. In each of these cases, SBA believes that the underlying ownership of the Participant is not changing substantively and that requiring a Participant to request approval from SBA is unnecessary. The recommendation and approval process for a change of ownership can take several months, so this change would relieve Participants owned by tribes and ANCs from this unnecessary burden and allow them to proactively conduct normal business operations without interruption.

Second, the proposed rule would amend § 124.109(c)(3)(ii) to clarify the rules pertaining to a tribe/ANC owning more than one Participant in the 8(a) BD program. The proposed rule would add two subparagraphs and an example to § 124.109(c)(3)(ii) for ease of use and understanding. In addition, SBA would clarify that if the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe could then submit an application to qualify another of its firms for participation in the 8(a) BD program under the primary NAICS code that was previously held by the Participant whose primary NAICS code was changed. A change in a primary NAICS code under § 124.112(e) should occur only where SBA has determined that the greatest portion of a Participant's

revenues for the past three years are in a NAICS code other than the one identified as its primary NAICS code. In such a case, SBA has determined that in effect the second NAICS code really has been the Participant's primary NAICS code for the past three years. SBA's rules have historically provided that a Tribe or ANC may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. Thus, this proposed rule will clarify that when SBA has changed the primary NAICS code change for a Participant, SBA has determined that first NAICS code was not the Participant's primary NAICS code for the last two years, and the tribe/ANC would be permitted to have another of its firms apply to and be admitted to the 8(a) BD program under the former primary NAICS code of the sister company.

Finally, the proposed rule would clarify the 8(a) BD program admission requirements governing how a tribally-owned applicant may demonstrate that it possesses the necessary potential for success. SBA's regulations currently permit the tribe to make a firm written commitment to support the operations of the applicant concern to demonstrate a tribally-owned firm's potential for success. Due to the increased trend of tribes establishing tribally-owned economic development corporations to oversee tribally owned businesses, SBA recognizes that in some circumstances it may be adequate to accept a letter of support from the tribally-owned economic development company rather than the tribal leadership. SBA also recognizes that in most cases, tribes are not establishing these economic development corporations as Section 17 corporations, which SBA has previously determined should be treated as an arm of the tribe and thus, the tribe itself for purposes of the 8(a) BD regulations. Rather, these corporations are often tribally owned holding companies that have been delegated authority to oversee tribal economic development and tribal business ventures. In response, this proposed rule would permit a tribally-owned applicant to satisfy the potential for success requirements by submitting a letter of support from a tribally-owned economic development corporation or other relevant tribally-owned holding company. In order for a letter of support from the tribally owned holding company to be sufficient, there must be sufficient evidence that the tribally-owned holding company has the financial resources to support the

applicant and that the tribally-owned company is controlled by the tribe.

#### *Section 124.110*

The proposed rule would make some of the same changes to § 124.110 for applicants and Participants owned and controlled by NHOs as it would to § 124.109 for tribally-owned applicants and Participants. Specifically, the proposed rule would subdivide § 124.110(e) for ease of use and understanding and would clarify that if the primary NAICS code of an NHO-owned Participant is changed pursuant to § 124.112(e), the NHO could submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

#### *Section 124.111*

The proposed rule would make the same change for CDCs and CDC-owned firms as for tribes and ANCs mentioned above. It would clarify that a Participant owned by a CDC need not request a change of ownership from SBA where the CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant. It would also subdivide the current subparagraph (d) into three smaller paragraphs for ease of use and understanding, and would clarify that if the primary NAICS code of a CDC-owned Participant is changed pursuant to § 124.112(e), the CDC could submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

#### *Section 124.112*

SBA proposes to amend § 124.112(d)(5) regarding excessive withdrawals in connection with entity-owned 8(a) Participants. There has been some confusion as to whether an 8(a) Participant that is owned at least 51% by a tribe, ANC, NHO or CDC can make a distribution to a non-disadvantaged individual that exceeds the applicable excessive withdrawal limitation dollar amount if it is made as part of a pro rata distribution to all shareholders. SBA believes that it generally should be able to do so. Through a pro rata distribution, the only way that an entity-owned firm can increase its distribution to the tribe, ANC, NHO or CDC is if it also increases the distribution to the non-entity owner. Since the intent is to

increase the distribution to the tribe, ANC, NHO or CDC, and thus increase the benefits flowing back to the community, SBA believes this serves the purposes of the program. The rule also proposes, however, that SBA could deem the distributions excessive if SBA determines that they would adversely affect the business development of the Participant.

In 2016, SBA amended § 124.112(e) to implement procedures to allow SBA to change the primary NAICS code of a Participant where SBA determined that the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. 81 FR 48558, 48581 (July 25, 2016). The procedures require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate. Several individuals have asked SBA to permit an appeal process, whereby a Participant whose primary NAICS code was changed by its servicing district office could seek further review of that determination at a different level. After hearing this concern repeated several times at the tribal consultations conducted by SBA, this proposed rule would authorize such an appeal process.

#### *Section 124.201*

This proposed rule does not amend § 124.201. However, SBA is considering adding a provision that would require a small business concern that seeks to apply for participation in the 8(a) BD program to first take an SBA-sponsored preparatory course regarding the requirements and expectations of the 8(a) BD program. SBA specifically requests comments on such a requirement.

#### *Section 124.203*

Section 124.203 requires applicants to the 8(a) BD program to submit certain specified supporting documentation, including financial statements, copies of signed Federal personal and business tax returns and individual and business bank statements. In 2016, SBA removed the requirement that an applicant must submit a signed Internal Revenue Service (IRS) Form 4506T, Request for Copy or Transcript of Tax Form, in all cases. 81 FR 48558, 48569 (July 25, 2016). At that time, SBA agreed with a commenter to the proposed rule that questioned the need for every applicant to submit IRS Form 4506T. In eliminating that requirement for every applicant, SBA reasoned that it always

has the right to request any applicant to submit specific information that may be needed in connection with a specific application. As long as SBA's regulations clearly provide that SBA may request any additional documents SBA deems necessary to determine whether a specific applicant is eligible to participate in the 8(a) BD program, SBA will be able to request that a particular firm submit IRS Form 4506T where SBA believes it to be appropriate. This proposed rule would amend § 124.203 to add back the requirement that every applicant to the 8(a) BD program submit IRS Form 4506T (or when available, IRS Form 4506C). SBA believes that not having that Form readily available when needed has unduly delayed the application process for those affected applicants. In addition, SBA believes that requiring Form 4506T in every case will serve as a deterrent to firms that may think it is not necessary to fully disclose all necessary financial information. Although SBA does not often use IRS Form 4506T to verify an applicant's information, SBA believes that this additional requirement imposes a minimal burden on 8(a) BD program applicants. Additionally, SBA believes that the collection of Form 4506T will help to maintain the integrity of the program.

#### *Section 124.204*

SBA proposes to suspend the time to process an 8(a) application where SBA requests clarifying, revised or other information from the applicant. While SBA is waiting on the applicant to provide clarifying or responsive information, the Agency is not continuing to process the application.

#### *Section 124.207*

The proposed rule would amend § 124.207 to allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. This would change the current rule which requires a concern to wait 12 months from the date of the final agency decision to reapply, and would make the 8(a) BD program consistent with the HUBZone program. See 13 CFR 126.309. SBA believes that this change would reduce the number of appeals to SBA's Office of Hearings and Appeals (OHA) and greatly reduce the costs associated with appeals borne by disappointed applicants. If a firm can correct the deficiencies in its initial application and reapply within 90 days, it may be much more likely to forego appealing to OHA, where the process can take 90 days or

more for resolution. Because a firm that is declined could submit a new application 90 days after the decline decision, SBA requests comments on whether the current reconsideration process should be eliminated.

#### *Section 124.300 and 124.301*

The proposed rule would redesignate the current § 124.301 (which discusses the various ways a business may leave the 8(a) BD program) as § 124.300 and add a new § 124.301 to specifically enunciate the voluntary withdrawal and early graduation procedures. The rule would set forth SBA's current policy that a Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. In addition, where a Participant believes it has substantially achieved the goals and objectives set forth in its business plan, SBA would allow the Participant to elect to voluntarily early graduate from the 8(a) BD program. That too is SBA's current policy, and the proposed rule merely captures it in SBA's regulations.

The proposed rule would, however, change the level at which voluntary withdrawal and voluntary early graduation could be finalized by SBA. Currently, a firm submits its request to voluntarily withdraw or early graduate to its servicing SBA district office. Once the district office concurs, the request is sent to the Associate Administrator for Business Development (AA/BD) for final approval. SBA believes that requiring several layers of review to permit a concern to voluntarily exit the 8(a) BD program is unnecessary. Because an entity cannot have a second firm admitted to the 8(a) BD program with the same primary NAICS code as a sister company for a period of two years from the date that the sister company left the program, requiring firms to wait a potentially significant amount of time for several layers of SBA reviewers to approve a voluntary withdrawal or voluntary early graduation action could adversely impact the overall business operations of the entity and other concerns owned by the entity. Thus, the rule proposes that a Participant must still request voluntary withdrawal or voluntary early graduation from its servicing district office, but the action would be complete once the District Director recognizes the voluntary withdrawal or voluntary early graduation. SBA believes this would eliminate unnecessary delay in processing these actions.

#### *Section 124.304*

The proposed rule would clarify the effect of a decision made by the AA/BD

to terminate or early graduate a Program Participant. Under SBA's current procedures, once the AA/BD renders a decision to early graduate or terminate a Participant from the 8(a) BD program, the affected Participant has 45 days to appeal that decision to SBA's OHA. If no appeal is made, the AA/BD's decision becomes the final agency decision after that 45-day period. If the Participant appeals to OHA, the final agency decision will be the decision of the administrative law judge at OHA. There has been some confusion as to what the effect of the AA/BD decision is pending the decision becoming the final agency decision. The proposed rule clarifies that where the AA/BD issues a decision terminating or early graduating a Participant, SBA would treat the firm as being suspended. SBA does not believe that it would not make sense to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. If OHA ultimately overrules the AA/BD decision, the suspension would be lifted and the length of the suspension would be added to the Participant's program term.

#### *Sections 124.305 and 124.402*

Section 124.402 requires each firm admitted to the 8(a) BD program to develop a comprehensive business plan and to submit that business plan to SBA. Currently, § 124.402(b) provides that a newly admitted Participant must submit its business plan to SBA as soon as possible after program admission and that the Participant will not be eligible for 8(a) BD benefits, including 8(a) contracts, until SBA approves its business plan. Several firms have complained that they missed contract opportunities because SBA did not approve their business plans before procuring agencies sought to award contracts to fulfill certain requirements. While SBA continues to believe that it is important for a newly admitted Participant to submit its business plan to SBA as expeditiously as possible, SBA also understands the adverse consequences that can ensue if a firm loses an opportunity that it has lined up because its business plan is not approved prior to the time that a procuring agency seeks to fulfill a particular procurement requirement. In response, the proposed rule would amend § 124.402(b) to eliminate the provision that a Participant cannot receive any 8(a) BD benefits until SBA has approved its business plan. A firm coming in to the 8(a) BD program with commitments from one or more procuring agencies could immediately

be awarded one or more 8(a) contracts. Instead, the proposed rule would provide that SBA would suspend a Participant from receiving 8(a) BD program benefits if it has not submitted its business plan to the servicing district office and received SBA's approval within 60 days after program admission. SBA believes that firms coming into the 8(a) BD program possessing the potential for success required for program entry would most likely have business plans in place and should be able to have their business plans approved by SBA within 60 days of program admission. If that cannot happen within 60 days, SBA would suspend the Participant's business plan under the proposed changes to § 124.305(h). This would freeze a firm's program term, and a firm would not lose any time in the program.

The proposed rule would also correct a typographical error contained in § 124.305(h)(1)(ii). Under § 124.305(h)(1)(ii), an 8(a) Participant can elect to be suspended from the 8(a) program where a disadvantaged individual who is involved in controlling the day-to-day management and control of the Participant is called to active military duty by the United States. Currently, the regulation states that the Participant may elect to be suspended where the individual's participation in the firm's management and daily business operations is critical to the firm's continued eligibility, and the Participant elects not to designate a non-disadvantaged individual to control the concern during the call-up period. That should read where the Participant elects not to designate another disadvantaged individual to control the concern during the call-up period. It was not SBA's intent to allow a non-disadvantaged individual to control the firm during the call-up period and permit the firm to continue to be eligible for the program.

#### *Sections 124.501 and 124.507*

Section 124.501 is entitled "What general provisions apply to the award of 8(a) contracts?" SBA must determine that a Participant is eligible for the award of both competitive and sole source 8(a) contracts. However, the requirement that SBA determine eligibility is currently contained specifically only in the 8(a) competitive procedures at § 124.507(b)(2). Although SBA determines eligibility for sole source 8(a) awards at the time it accepts a requirement for the 8(a) BD program, that process is not specifically stated in the regulations. The proposed rule would move the eligibility determination procedures for

competitive 8(a) contracts from § 124.507(b)(2) to the general provisions of § 124.501 and would specifically address eligibility determinations for sole source 8(a) contracts. To accomplish this, the proposed rule would revise current § 124.501(g).

Similarly, SBA believes that the provisions requiring a bona fide place of business within a particular geographic area for 8(a) construction awards should also appear in the general provisions applying to 8(a) contracts set forth in § 124.501. Section 8(a)(11) of the Small Business Act, 15 U.S.C. 637(a)(11), requires that to the maximum extent practicable 8(a) construction contracts "shall be awarded within the county or State where the work is to be performed." SBA has implemented this statutory provision by requiring a Participant to have a bona fide place of business within a specific geographic location. Currently, the bona fide place of business rules appear only in the procedures applying to competitive 8(a) procurements in § 124.507(c)(2). The proposed rule would move those procedures to a new § 124.501(k), which would clearly make them applicable to both sole source and competitive 8(a) awards. Based on the statutory language, SBA believes that the requirement to have a bona fide place of business in a particular geographic area currently applies to both sole source and competitive 8(a) procurements, but moving the requirement to the general applicability section would remove any doubt or confusion.

In response to concerns raised by Participants, the proposed rule would also impose time limits within which SBA district offices should process requests to add a bona fide place of business. SBA has heard that several Participants missed out on 8(a) procurement opportunities because their requests for SBA to verify their bona fide places of business were not timely processed. In order to alleviate this perceived problem, the proposed rule would provide that in connection with a specific 8(a) competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical boundaries within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. SBA requests comments on whether a Participant that has filed a request to have a bona fide place of business recognized by SBA in time for a particular 8(a) construction procurement may submit an offer for that procurement where it has not

received a response from SBA before the date offers are due. In other words, should a Participant that has requested the recognition of a bona fide place of business beyond the time limits set forth in this proposed rule be able to presume approval and submit an offer as an eligible Participant? SBA does not want to harm Participants that truly have set up bona fide places of business, but at the same time does not want to give eligibility to firms that have not met the requirements necessary to establish a bona fide place of business.

#### *Section 124.503*

Currently, § 124.503(g) provides that a Basic Ordering Agreement (BOA) is not a contract under the FAR. Rather, each order to be issued under the BOA is an individual contract. As such, a procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself. Once a Participant leaves the 8(a) BD program or otherwise becomes ineligible for future 8(a) contracts (e.g., becomes other than small under the size standard assigned to a particular contract) it cannot receive further 8(a) orders under a BOA. Similarly, a blanket purchase agreement (BPA) is also not a contract. A BPA (whether a BPA under part 13 of the Federal Acquisition Regulation (FAR) or a BPA under subpart 8.4 of the FAR) is not a contract because it neither obligates funds nor requires placement of any orders against it. Instead, it is an understanding between an ordering agency and a contractor that allows the agency to place future orders more quickly by identifying terms and conditions applying to those orders, a description of the supplies or services to be provided, and methods for issuing and pricing each order. The government is not obligated to place any orders, and either party may cancel a BPA at any time.

Although current § 124.503(g) addresses BOAs, it does not specifically mention BPAs. The proposed rule would amend § 124.503 to merely specifically recognize that BPAs are also not contracts and should be afforded the same treatment as BOAs.

#### *Section 124.504*

This rule also proposes to make several changes to § 124.504.

The proposed rule would amend § 124.504(b) to alter the provision prohibiting SBA from accepting a requirement into the 8(a) BD program where a procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and receiving SBA's formal acceptance

of the requirement. SBA believes that the restriction as written is overly harsh and burdensome to procuring agencies. Several contracting officers have not offered a follow-on procurement to the 8(a) program prior to conducting a competition restricted to eligible 8(a) Participants because they believed that as a follow-on it must be procured through the 8(a) program. They issued solicitations identifying them as competitive 8(a) procurements, selected an apparent successful offeror and then sought SBA's eligibility determination prior to making an award. A strict interpretation of the current regulatory language would prohibit SBA from accepting such a requirement. Such an interpretation could seriously adversely affect an agency's procurement strategy by unduly delaying the award of a contract. That was never SBA's intent. As long as a procuring agency clearly identified a requirement as a competitive 8(a) procurement and the public fully understood it to be restricted only to eligible 8(a) Participants, SBA should be able to accept that requirement regardless of when the offering occurred.

The rule would clarify SBA's intent regarding the requirement that a procuring agency must seek and obtain SBA's concurrence to release any follow-on procurement from the 8(a) BD program. This is not a change in policy, but rather a clarification of SBA's current policy and the position SBA has taken in several protests before the General Accountability Office. Some agencies have attempted to remove a follow-on procurement from the 8(a) program and reprocure the requirement through a MAC or Government-wide Acquisition Contract (GWAC) that is not an 8(a) contract without seeking release by saying that they intend to issue a competitive 8(a) order off the MAC or GWAC. In other words, because the order off the MAC or GWAC would be offered to and accepted for award through the 8(a) BD program and the follow-on work would be performed through the 8(a) BD program, some procuring agencies believe that release is not needed. SBA does not agree. In such a case, the underlying contract is not an 8(a) contract. The procuring agency is attempting to remove a requirement from the 8(a) program to a contract that is not an 8(a) contract. That is precisely what release is intended to apply to. Moreover, because § 124.504(d)(4) provides that the requirement to seek release of an 8(a) requirement from SBA does not apply to orders offered to and accepted for the 8(a) program where the underlying MAC

or GWAC is not itself an 8(a) contract, allowing a procuring agency to move an 8(a) contract to an 8(a) order off a non-8(a) contract vehicle would allow the procuring agency to then remove the next follow-on to the 8(a) order out of the 8(a) program entirely without any input from SBA. A procuring agency could take an 8(a) contract with a base year and four one-year option periods, turn it into a one-year 8(a) order off a non-8(a) contract vehicle, and then remove it from the 8(a) program entirely after that one-year performance period. That was certainly not the intent of SBA's regulations. As such, this rule clarifies that the request for and granting of a release of a follow-on procurement from the 8(a) BD program is required when the procurement will be moved out of the 8(a) BD program as an independent contract into a MAC or GWAC. SBA has received additional comments recommending that release should also apply even if the underlying pre-existing MAC or GWAC to which a procuring agency seeks to move a follow-on requirement is itself an 8(a) contract. These commenters argue that an 8(a) incumbent contractor may be seriously hurt by moving a procurement from a general 8(a) competitive procurement to an 8(a) MAC or GWAC to which the incumbent is not a contract holder. In such a case, the incumbent would have no opportunity to win the award for the follow-on contract, and, without the release process, would have no opportunity to demonstrate that it would be adversely impacted or to try to dissuade SBA from agreeing to release the procurement. In response, the proposed rule would provide that SBA must agree to release any follow-on requirement where a procuring agency seeks to reprocure that requirement through a limited contracting vehicle which is not available to all 8(a) BD Program Participants (e.g., any multiple award or Governmentwide acquisition contract, whether or not the underlying MAC or GWAC is itself an 8(a) contract). If an agency seeks to reprocure a current 8(a) requirement as a competitive 8(a) award for a new 8(a) MAC or GWAC vehicle, SBA's concurrence would not be required because such a competition would be available to all 8(a) BD Program Participants.

The proposed rule would also clarify that in all cases where a procuring agency seeks to fulfill a follow-on requirement outside of the 8(a) BD program, except where it is statutorily or otherwise required to use a mandatory source (see FAR subpart 8.6 and 8.7), it must make a written request

to and receive the concurrence of SBA to do so. In such a case, the proposed rule would require a procuring agency to notify SBA that it will take a follow-on procurement out of the 8(a) procurement because of a mandatory source. Such notification would be required at least 30 days before the end of the contract period to give the 8(a) Participant the opportunity to make alternative plans.

In addition, SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach. As such, SBA does not typically consider a bridge contract as part of the new requirement analysis, unless there is some basis to believe that the agency is altering the duration of the option periods to avoid particular regulatory requirements. Whether to consider the bridge contract is determined on a case-by-case basis given the facts of the procurement at issue. SBA seeks comments as to whether this long-standing policy should also be incorporated into the regulations.

#### Section 124.509

The proposed rule would revise § 124.509(e), regarding how a Participant can obtain a waiver to the requirement prohibiting it from receiving further sole source 8(a) contracts where the Participant does not meet its applicable non-8(a) business activity target. Currently, the regulations require the AA/BD to process a Participant's request for a waiver in every case. The proposed rule would substitute SBA for the AA/BD to allow flexibility to SBA to determine the level of processing in a standard operating procedure outside the regulations. SBA believes that at least at some level, the district office should be able to process such requests for waiver. That correct level could be any requirement below the Simplified Acquisition Threshold (SAT), or maybe some other specific dollar value. Putting such a requirement in an SOP, instead of the regulations, however, would give flexibility to SBA to adjust the requirement as necessary, and allow more straightforward requests to be processed more expeditiously.

The current regulation also requires the SBA Administrator on a non-delegable bases to decide requests for waiver from a procuring agency. In other words, if the Participant itself does not request a waiver to the requirement prohibiting it from

receiving further sole source 8(a) contracts, but an agency does because it believes that the award of a sole source contract to the identified Participant is needed to achieve significant interests of the Government, the SBA

Administrator must currently make that determination. Requiring such a request to be processed by several levels of SBA reviewers and then by the Administrator slows down the processing. If a procuring agency truly needs something quickly, it could be harmed by the processing time. The proposed rule would change the Administrator from making these determinations to SBA. This should allow these requests to be processed more quickly.

#### Section 124.513

Currently, § 124.513(e) provides that SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. This requirement applies to both competitive and sole source 8(a) procurements. SBA does not approve joint venture agreements in any other context, including a joint venture between an 8(a) Participant and its SBA-approved mentor (which may be other than small) in connection with a non-8(a) contract (i.e., small business set-aside, HUBZone, SDVO small business, or WOSB contract). In order to be considered an award to a small disadvantaged business (SDB) for a non-8(a) contract, a joint venture between an 8(a) Participant and a non-8(a) Participant must be controlled by the 8(a) partner to the joint venture and otherwise meet the provisions of § 124.513(c) and (d). If the non-8(a) partner to the joint venture is also a small business under the size standard corresponding to the NAICS code assigned to the procurement, the joint venture could qualify as small if the provisions of § 124.513(c) and (d) were not met (see § 121.103(h)(3)(i), where a joint venture can qualify as small as long as each party to the joint venture individually qualifies as small), but the joint venture could not qualify as an award to an SDB in such case. If the joint venture were between an 8(a) Participant and its large business mentor, the joint venture could not qualify as small if the provisions of § 124.513(c) and (d) were not met. The size of a joint venture between a small business protégé and its large business mentor is determined without looking at the size of the mentor only when the joint venture complies with SBA's regulations regarding control of the joint venture. Where another offeror believes that a joint venture between a protégé and its large business mentor has not

complied with the applicable control regulations, it may protest the size of the joint venture. The applicable Area Office of SBA's Office of Government Contracting would then look at the joint venture agreement to determine if the small business is in control of the joint venture within the meaning of SBA's regulations. If that Office determines that the applicable regulations were not followed, the joint venture would lose its exclusion from affiliation, be found to be other than small, and, thus, ineligible for an award as a small business. This size protest process has worked well in ensuring that small business joint venture partners do in fact control non-8(a) contracts with their large business mentors. Because size protests are authorized for competitive 8(a) contracts, SBA and believes that the size protest process could work similarly for competitive 8(a) contracts. As such, this proposed rule would eliminate the need for 8(a) Participants to seek and receive approval from SBA of every joint venture for competitive 8(a) contracts. SBA believes that this would significantly lessen the burden imposed on 8(a) small business Participants. Participants would not be required to submit additional paperwork to SBA and would not have to wait for SBA approval in order to seek competitive 8(a) awards.

However, the proposed rule would not eliminate the requirement that SBA must approve joint ventures in connection with sole source 8(a) awards. Because size protests from other Participants are not permitted with respect to sole source 8(a) procurements, there would be no way to ensure that a joint venture for an 8(a) sole source contract between an 8(a) Participant and its large business mentor is controlled by the 8(a) Participant and otherwise meets SBA's joint venture requirements if SBA did not continue to look at joint ventures in that context. SBA believes that it is important to ensure that the joint venture rules would continue to be followed, and without any other enforcement mechanism, SBA must continue to approve joint ventures for 8(a) sole source contracts. The only other alternative approach would be to allow size protests in connection with sole source 8(a) contracts, but SBA believes that is not appropriate because other Participants are not really interested parties with respect to a sole source 8(a) procurement offered to the 8(a) program on behalf of another Participant.

#### *Section 124.519*

Section 124.519 limits the ability of 8(a) Participants to obtain additional sole source 8(a) contracts once they have reached a certain dollar level of overall 8(a) contracts. Currently, for a firm having a receipts-based size standard corresponding to its primary NAICS code, the limit above which a Participant can no longer receive sole source 8(a) contracts is five times the size standard corresponding to its primary NAICS code, or \$100,000,000, whichever is less. For a firm having an employee-based size standard corresponding to its primary NAICS code, the limit is \$100,000,000. In order to simplify this requirement, this proposed rule would provide that a Participant may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of \$100,000,000 during its participation in the 8(a) BD program, regardless of its primary NAICS code. In addition, the rule would clarify that in determining whether a Participant has reached the limit identified in paragraph (a) of this section, SBA would look at the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications. Finally, the proposed rule would amend what types of small dollar value 8(a) contracts should not be considered in determining whether a Participant has reached the 8(a) revenue limit. Currently, SBA does not consider 8(a) contracts awarded under \$100,000 in determining whether a Participant has reached the '1 8(a) revenue limit. The proposed rule would replace the \$100,000 amount with a reference to the SAT. SBA has delegated to procuring agencies the ability to award sole source 8(a) contracts without offer and acceptance for contracts valued at or below the SAT. Because SBA does not accept such procurements into the 8(a) BD program, it is difficult for SBA to monitor these awards. The proposed rule would merely align the 8(a) revenue limit with that authority.

#### *Section 125.2*

The proposed rule would add a new paragraph (g) requiring contracting officers to consider the past performance and experience of first tier subcontractors in certain instances. This consideration is statutorily required for bundled or consolidated contracts (15 U.S.C. 644(e)(4)(B)(i)) and for multiple

award contracts valued above a certain dollar amount that corresponds to the agency's substantial bundling threshold (15 U.S.C. 644(q)(1)(B)). Following the statutory provisions, the proposed rule requires a contracting officer to consider the past performance and experience of first tier subcontractors in those two categories of contracts. The proposed rule would not require a contracting officer to consider the past performance, capabilities and experience of each first tier subcontractor as the capabilities and past performance of the small business prime contractor in other instances. Instead, it would provide discretion to contracting officers to consider such past performance, capabilities and experience of each first tier subcontractor where appropriate. SBA specifically requests comments as to whether as a policy matter such consideration should be required in all cases, or limited only to the statutorily required instances as proposed.

#### *Section 125.3*

The Small Business Act explicitly prohibits the Government from requiring small businesses to submit subcontracting plans. 15 U.S.C. 637(d)(8). This prohibition is set forth in § 125.3(b) of SBA's regulations and in FAR 19.702(b)(1). Under the Alaska Native Claims Settlement Act (ANCSA), a contractor receives credit towards the satisfaction of its small or small disadvantaged business subcontracting goals when contracting with an ANC-owned firm. 43 U.S.C. 1626(e)(4)(B). There has been some confusion as to whether an ANC-owned firm that does not individually qualify as small but counts as a small business or a small disadvantaged business for subcontracting goaling purposes under 43 U.S.C. 1626(e)(4)(B) must itself submit a subcontracting plan. SBA believes that such a firm is not currently required to submit a subcontracting plan, but proposes to add clarifying language to § 125.3(b) to clear up any confusion. The proposed rule would make clear that all firms considered to be small businesses, whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract or is deemed to be treated as a small business concern by statute, would not be required to submit subcontracting plans.

#### *Section 125.5*

The proposed rule clarifies that SBA does not use the certificate of competency (COC) procedures for 8(a) sole source contracts. This has long been SBA's policy. *See* 62 FR 43584,

43592 (Aug. 14, 1997). Instead of using SBA COC procedures, an agency that finds a potential 8(a) sole source awardee to be non-responsible should proceed through the substitution or withdrawal procedures in the proposed § 124.503(e). The proposed rule also changes the threshold for COC appeals from \$100,000 to the simplified acquisition threshold.

#### Section 125.6

Section 125.6(b) provides guidance on which limitation on subcontracting requirement applies to a “mixed contract.” The section currently refers to a mixed contract as one that combines both services and supplies. SBA inadvertently did not include the possibility that a mixed contract could include construction work, although in practice SBA has applied this section to a contract requiring, for example, both services and construction work. The proposed revision would merely recognize that a mixed contract is one that integrates any combination of services, supplies, or construction. A contracting officer would then select the appropriate NAICS code, and that NAICS code is determinative as to which limitation on subcontracting and performance requirement applies.

SBA also asks for comments regarding how the nonmanufacturer rule should be applied in multiple item procurements (reference § 125.6(a)(2)(ii)). Currently, for a multiple item procurement where a nonmanufacturer waiver is granted for one or more items, compliance with the limitation on subcontracting requirement will not consider the value of items subject to a waiver. As such, more than 50% of the value of the products to be supplied by the nonmanufacturer that are not subject to a waiver must be the products of one or more domestic small business manufacturers or processors. The regulation gives an example where a contract is for \$1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. The projected value of the item that is waived is \$10,000. Under the current regulatory language, at least 50% of the value of the items not subject to a waiver, or \$495,000 (50% of \$990,000), must be supplied by one or more domestic small business manufacturers, and the prime small business nonmanufacturer may act as a manufacturer for one or more items. Several small business nonmanufacturers have disagreed with this provision. They believe that in

order to qualify as a small business nonmanufacturer, at least 50% of the value of the contract must come from either small business manufacturers or from any businesses for items which have been granted a waiver (or that small business manufacturers plus waiver must equal at least 50%). In other words, in the above example, \$500,000 (50% of the value of the contract) must come from small business manufacturers or be subject to a waiver. If items totaling \$10,000 are subject to a waiver, then only \$490,000 worth of items must come from small business manufacturers; requiring \$5,000 less from small business manufacturers. SBA is considering changing this in the final rule, but seeks comments on whether this approach makes sense. The current approach provides added incentives for small business manufacturers. The recommended approach might cause more requirements to be set aside for small business, but SBA questions whether this would truly benefit small business if small business manufactures are not ultimately providing the products.

#### Section 125.8

The proposed rule would make conforming changes to § 125.8 in order to take into account merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor-Protégé Program.

Proposed § 125.8(b)(2)(iv) would permit the parties to a joint venture to agree to distribute profits from the joint venture so that the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them. Normally, profits would be distributed commensurate with the work performed. However, several small businesses have asked SBA to allow the parties to agree to pay a small business more if they would like to do so. Of course, SBA would not permit any agreement that would pay a small business less than that corresponding to the work it performed. But, if the parties would like to distribute the profits to further benefit a small business, SBA would not want to prohibit that.

#### Section 125.9

The proposed rule would first reorganize some of the current provisions in § 125.9 for ease of use and understanding. Paragraph 125.9(b) would be reorganized and clarified. The proposed rule clarifies that in order to qualify as a mentor, SBA will look at three things, whether the proposed mentor: Is capable of carrying out its responsibilities to assist the protégé firm

under the proposed mentor-protégé agreement; does not appear on the Federal list of debarred or suspended contractors; and can impart value to a protégé firm. Instead of requiring SBA to look at and determine that a proposed mentor possesses good character in every case, the proposed rule would amend this provision to specify that SBA will decline an application if SBA determines that the mentor does not possess good character. The proposed rule would also clarify that a mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés. That has always been SBA's intent (the current rule specifies that a second mentor-protégé relationship cannot be a competitor of the first), but SBA wants to make this clear in response to questions SBA has received regarding this issue.

SBA is also considering whether to limit mentors only to those firms having average annual revenues of less than \$100 million. Currently, any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor. This includes large businesses of any size. SBA has received several suggestions from “mid-size” companies (*i.e.*, those that no longer qualify as small under their primary NAICS codes, but believe that they cannot adequately compete against the much larger companies) that a mentor-protégé program that excluded very large businesses would be beneficial to the mid-size firms and allow them to more effectively compete. SBA's focus in the mentor-protégé program is the protégé firm, what business development assistance a proposed mentor can provide to a protégé to enable that firm to more effectively compete on its own in the future. Whether a mentor is \$1,000 over the size standard corresponding to its primary NAICS code or many millions of dollars over has not been a concern to SBA. SBA seeks a program that will provide the most effective business development assistance to small business protégé firms. SBA requests comments on whether the size of a mentor should be restricted in the regulations, and whether small businesses would be better or worse served by such a restriction.

The proposed rule would implement Section 861 of the National Defense Authorization Act (NDAA) of 2019, Public Law 115–232, to make three changes to the mentor-protégé program in order to benefit Puerto Rican small businesses. First, the proposed rule would amend § 125.9(b) regarding the

number of protégé firms that one mentor can have at any one time. Currently, the regulation provides that under no circumstances can a mentor have more than three protégés at one time. Section 861 of the NDAA provides that the restriction on the number of protégé firms a mentor can have shall not apply to up to two mentor-protégé relationships if such relationships are with a small business that has its principal office located in the Commonwealth of Puerto Rico. As such, proposed § 125.9(b)(3)(ii) would provide that a mentor generally cannot have more than three protégés at one time, but that the first two mentor-protégé relationships between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico would not count against the limit of three protégés that a mentor can have at one time. Thus, if a mentor did have two protégés that had their principal offices in Puerto Rico, it could have an additional three protégés, or a total of five protégés, and comply with SBA's requirements. The proposed rule would also add a new § 125.9(d)(6) to implement a provision of Section 861 of NDAA 2019, which authorizes contracting incentives to mentors that subcontract to protégé firms that are Puerto Rico businesses. Specifically, proposed § 125.9(d)(6) would provide that a mentor that provides a subcontract to a protégé that has its principal office located in Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor. SBA requests comments as to whether the term "positive consideration" can be better defined. Section 861 specifically authorizes these two incentives, but suggests that other incentives may also be appropriate. SBA also seeks comments as to whether any other contracting incentives could be feasible.

The proposed rule would clarify the requirements for a firm seeking to form a mentor-protégé relationship in a NAICS code that is not the firm's primary NAICS code (§ 125.9(c)(1)(ii)). SBA intended that a firm could be a protégé in a secondary NAICS code for which it qualifies as small if it has done work previously in that secondary NAICS code. SBA did not want a firm that had grown to be other than small in its primary NAICS codes to form a mentor-protégé relationship in a NAICS code in which it had no experience

simply because it qualified as small in that other NAICS code. SBA believes that such a situation (*i.e.*, having a protégé with no experience in a secondary NAICS code) could lead to abuse of the program. It would be hard for a firm with no experience in a secondary NAICS code to be the lead on a joint venture with its mentor. Similarly, a mentor with all the experience could easily take control of a joint venture and perform all of the work required of the joint venture. The current regulation, however, has caused some confusion. It states that where a firm is other than small in its primary NAICS code, the firm can qualify as a protégé in a secondary NAICS code if it is small in that secondary NAICS code and has prior experience or previously performed work in that secondary NAICS code. Some have read this provision as permitting a mentor-protégé relationship in a secondary NAICS code only where the firm is other than small in its primary NAICS code. That was not SBA's intent. In addition, others have read this provision as requiring prior experience in a secondary NAICS code only where the firm is other than small in its primary NAICS code. This too was not SBA's intent. The proposed rule clarifies that a firm may seek to be a protégé in any NAICS code for which it qualifies as small and can form a mentor-protégé relationship in a secondary NAICS code if it qualifies as small and has prior experience or previously performed work in that NAICS code.

In addition, although SBA does not believe that a regulatory change is needed, SBA would like to clarify SBA's position on what experience a protégé firm must have if it seeks a mentor-protégé relationship in its primary NAICS code. As noted above, SBA's regulations require a firm seeking to be a protégé in a secondary NAICS code to demonstrate that it has prior experience in that secondary NAICS code. The regulation is silent with respect to a firm having experience in its primary NAICS code. Generally, a firm would have performed some work in its primary NAICS code—normally, that is how SBA determines what the firm's primary NAICS code is (*i.e.*, the code in which it has received the majority of its revenues). However, a firm owned by an entity (*i.e.*, tribe, ANC, NHO or CDC), can be admitted to the 8(a) BD without much experience in its self-identified primary NAICS code if the entity has made a firm commitment to support the operations of the applicant concern and

it has the financial ability to do so. In these limited instances, where a new entity-owned 8(a) Participant seeks to form a mentor-protégé relationship, it may not have any expertise in its identified primary NAICS code. The 8(a) BD Mentor-Protégé Program has allowed mentor-protégé relationships in these circumstances. Because the 8(a) BD Mentor-Protégé Program is being merged with the All Small Mentor-Protégé Program, it follows that SBA would continue to allow such mentor-protégé relationships.

The proposed rule would also respond to concerns raised by small businesses regarding the regulatory limit of permitting only two mentor-protégé relationships even where the small business protégé receives no or limited assistance from its mentor through a particular mentor-protégé agreement. SBA has informally permitted a mentor-protégé relationship not to count against the limit of two such relationships in total where the protégé can demonstrate that it has not received any assistance from its mentor under the mentor-protégé relationship. SBA believes that a relationship that provides no business development assistance or contracting opportunities to a protégé should not be counted against the firm, or that the firm should not be restricted to having only one additional mentor-protégé relationship in such a case. SBA considered implementing in this proposed rule a provision which would formalize its previous policy—*i.e.*, to not count a mentor-protégé relationship where the protégé can demonstrate that it received no assistance from the relationship. In order to eliminate any disagreements as to whether a firm did or did not receive any assistance under its mentor-protégé agreement, this rule proposes to establish an easily understandable and objective basis for counting or not counting a mentor-protégé relationship. Specifically, the rule proposes to amend § 125.9(e)(6) to not count any mentor-protégé relationship toward a firm's two permitted lifetime mentor-protégé relationships where the mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement.

This rule also proposes to eliminate the reconsideration process for declined mentor-protégé agreements in § 125.9(f) as unnecessary. Currently, if SBA declines a mentor-protégé agreement, the prospective small business protégé may make changes to its agreement and seek reconsideration from SBA within 45 days of SBA's decision to decline the mentor-protégé relationship. The current regulations also allow the small

business to submit a new (or revised) mentor-protégé agreement to SBA at any point after 60 days from the date of SBA's final decision declining a mentor-protégé relationship. SBA believes that this ability to submit a new or revised mentor-protégé agreement after 60 days is sufficient.

Finally, the proposed rule would add clarifying language regarding the annual review of mentor-protégé relationships. It is important that SBA receive an honest assessment from the protégé of how the mentor-protégé relationship is working, whether the protégé has received the agreed-upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. SBA needs to know if the mentor is not providing the agreed-upon business development assistance to the protégé. This would affect that firm's ability to be a mentor in the future. The rule would also provide that if a protégé does not provide information relating to the mentor-protégé relationship, thereby hindering SBA's ability to properly evaluate the relationship, SBA may decide not to approve continuation of the mentor-protégé relationship.

SBA has also received several complaints from small business protégés whose mentor-protégé relationships were terminated by the mentor soon after a joint venture between the protégé and mentor received a Government contract as a small business. SBA considered adding additional protections for protégé firms, but is not certain how best to remedy this situation. Current § 125.9(h) provides consequences for when a mentor does not provide to the protégé firm the business development assistance set forth in its mentor-protégé agreement. Under the current regulations, where that occurs, the firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement, SBA may recommend to the relevant procuring agency to issue a stop work order for each Federal contract for which the mentor and protégé are performing as a small business joint venture, and SBA may seek to substitute the protégé firm for the joint venture if the protégé firm is able to independently complete performance of any joint venture contract without the mentor. SBA believes that provision should be sufficient to dissuade mentors from early terminating mentor-protégé agreements. SBA also considered adding a provision requiring a joint venture between a protégé and its mentor to recertify its size if the mentor-protégé

relationship prematurely ends. In such a case, if the mentor was an other than small business and the joint venture could not recertify as small, the procuring agency could no longer count the contract as an award to small business. SBA specifically requests comments on this alternative and seeks comments on other possible alternatives to remedy this perceived problem.

#### *Section 125.18*

In addition to the revision to § 125.18(c) identified above, the rule proposes to amend the language in § 125.18(a) to clarify what representations and certifications a business concern seeking to be awarded a SDVO contract must submit as part of its offer.

#### *Sections 126.616 and 126.618*

The proposed rule would make minor revisions to §§ 126.616 and 126.618 by merely deleting references to the 8(a) BD Mentor-Protégé Program, since that program would no longer exist as a separate program.

#### *Sections 127.503(h) and 127.504*

In addition to the revision to § 127.504(c) identified above, the rule proposed to make other changes or clarifications to § 127.504. The proposed rule would rename and revise § 127.504 for better understanding and ease of use. The section heading would be changed to "What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB contract?". The text would then more clearly define those requirements and, as identified above, add language similar to that contained in the regulations governing the other socio-economic programs.

The proposed rule would move the recertification procedures for WOSBs from § 127.503(h) to § 127.504(e).

#### *Sections 134.318 and 121.1103*

The proposed rule would amend § 134.318 to make it consistent with SBA's size regulations. In this regard, § 121.1103(c)(1)(i) of SBA's size regulations provides that upon receipt of the service copy of a NAICS code appeal, the contracting officer must "stay the solicitation." However, when that rule was implemented, a corresponding change was not made to the procedural rules for SBA's OHA contained in part 134. Section 134.318(b) provides that if OHA changes a NAICS code in response to a NAICS code appeal, and the contracting officer must amend the solicitation to reflect the new NAICS code if "the contracting officer receives OHA's decision by the date offers are due." Otherwise, OHA's

decision does not apply to the pending procurement, but will apply only to future solicitations for the same supplies or services. If the solicitation is stayed, as required by

§ 121.1103(c)(1)(i), the contracting officer will always receive OHA's decision before the date offers are due. As such, this rule proposes to simply require that the contracting officer must amend the solicitation to reflect the new NAICS code whenever OHA changes a NAICS code in response to a NAICS code appeal. In addition, for clarity purposes, the proposed rule would revise § 121.1103(c)(1)(i) to provide that a contracting officer must stay the date of the closing of the receipt of offers instead of requiring that he or she must stay the solicitation. SBA is not revising these regulations to reflect a change in policy, but merely to more precisely capture what actually is being stayed.

### **III. Compliance With Executive Orders 12866, 12988, 13132, 13175, 13563, 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)**

#### *Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

#### *Regulatory Impact Analysis*

##### *1. Is there a need for the regulatory action?*

In combining the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program, SBA seeks to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. In addition, eliminating the requirement that SBA approve every joint venture in connection with an 8(a) contract will greatly reduce the time required for 8(a) BD Participants to come into and SBA to ensure compliance with SBA's joint venture requirements.

SBA is also proposing to make several changes to clarify its regulations. Through the years, SBA has spoken with small business and representatives and has determined that several regulations need further refinement so that they are easier to understand and implement. The proposed rule would

make several changes to ensure that the rules pertaining to SBA's various small business procurement programs are consistent. SBA believes that making the programs as consistent and similar as possible, where practicable, will make it easier for small businesses to understand what is expected of them and to comply with those requirements.

*2. What is the baseline, and the incremental benefits and costs of this regulatory action?*

The proposed regulations seek to address or clarify several issues, which will provide clarity to small businesses and contracting personnel. Further, SBA is proposing to eliminate the burden that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. There are currently approximately 4500 8(a) BD Participants in the portfolio. Of those, about 10% or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. Under the current rules, SBA must approve the initial joint venture agreement itself and each addendum to the joint venture agreement—identifying the type of work and what percentage each partner to the joint venture would perform of a specific 8(a) procurement—prior to contract award. SBA reviews the terms of the joint venture agreement for regulatory compliance and must also assess the 8(a) BD Participant's capacity and whether the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. It is difficult to calculate the costs associated with submitting a joint venture agreement to SBA because the review process is highly fact-intensive and typically requires that 8(a) firms provide additional information and clarification. However, in the Agency's best professional judgment, it is estimated that an 8(a) Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission. That equates to approximately 1,350 hours at an estimated rate of \$44.06 per hour—the median wage plus benefits for accountants and auditors according to 2018 data from the Bureau of Labor Statistics—for an annual total cost savings to 8(a) Participants of about \$59,500.

In addition, merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program would also provide cost savings. Firms seeking a mentor-protégé relationship through the All Small Mentor-Protégé Program apply through an on-line, electronic

application system. 8(a) Participants seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD program do not apply through an on-line, electronic system, but rather apply manually through their servicing SBA district office. In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and responding manually to questions regarding that submission is estimated at two hours. SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually, which equates to an annual savings to prospective protégé firms of about 300 hours. At an estimated rate of \$44.06 per hour, the annual savings in costs related to the reduced time for mentor-protégé applications through the All Small Mentor Protégé process is about \$13,000 per year.

Moreover, eliminating the 8(a) BD Mentor-Protégé Program as a separate program and merging it with the All Small Mentor-Protégé Program will eliminate confusion firms seeking a mentor-protégé relationship have between the two programs. When SBA first implemented the All Small Mentor-Protégé Program, it intended to establish a program substantively identical to the 8(a) BD mentor-protégé program, as required by Section 1641 of the NDAA of 2013. Nevertheless, feedback from the small business community reveals a widespread misconception that the two programs offer different benefits. By merging the 8(a) BD Mentor-Protégé Program into the All Small-Mentor Protégé Program, firms will not have to read the requirements for both programs and try to decipher any perceived differences. SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship. Based on approximately 600 mentor-protégé applications each year (about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program), this would equate to an annual cost savings to prospective protégé firms of about 600 hours. At an estimated rate of \$44.06 per hour, the annual savings in costs related to the elimination of confusion caused by having two separate programs is about \$26,500.

Thus, in total, the merger of the 8(a) BD mentor-protégé program into the All Small Business Mentor-Protégé Program would provide a cost savings of about \$39,500 per year.

In addition, it generally takes between 60 and 90 days for SBA to approve a mentor-protégé relationship through the

8(a) BD program. Conversely, the average time it takes to approve a mentor-protégé relationship through the All Small Mentor-Protégé Program is about 20 working days. To firms seeking to submit offers through a joint venture with their mentors, this difference is significant. Such joint ventures are only eligible for the regulatory exclusion from affiliation if they are formed after SBA approves the underlying mentor-protégé relationship. It follows that firms applying through the 8(a) BD Mentor-Protégé Program could miss out on contract opportunities waiting for their mentor-protégé relationships to be approved. These contract opportunity costs are inherently difficult to measure, so SBA is requesting comments to better inform our understanding of the costs to the small business community. However, in SBA's best judgment, faster approval timeframes will mitigate such costs by giving program participants more certainty in planning their proposal strategies.

This rule also proposes to eliminate the requirement that any specific joint venture can be awarded no more than three contracts over a two year period, but would instead permit a joint venture to be awarded an unlimited number of contracts over a two year period. The change removing the limit of three awards to any joint venture would reduce the burden of small businesses being required to form additional joint venture entities to perform a fourth contract within that two-year period. SBA has observed that joint ventures are often established as separate legal entities—specifically as limited liability corporations—based on considerations related to individual venture liability, tax liability, regulatory requirements, and exit strategies. Under the current rule joint venture partners must form a new joint venture entity after receiving three contracts lest they be deemed affiliated for all purposes. The proposed rule which allows a joint venture to continue to seek and be awarded contracts without requiring the partners to form a new joint venture entity after receiving its third contract would save small businesses significant legal costs in establishing new joint ventures and ensuring that those entities meet all applicable regulatory requirements.

The proposed rule would also make several changes to reduce the burden of recertifying small business status generally and requesting changes of ownership in the 8(a) BD program. Specifically, the proposed rule would clarify that a concern that is at least 51% owned by an entity (*i.e.*, tribe, ANC, or Community Development Corporation (CDC)) need not recertify its

status as a small business when the ownership of the concern changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. In addition, the proposed rule would also provide that a Participant in SBA's 8(a) BD program that is owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. Both of these changes would save entity-owned small business concerns a significant amount of time and money. Similarly, the proposed rule would provide that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of a Participant in the 8(a) BD program will increase the percentage of his or her (its) ownership interest.

The proposed rule would also allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. This would change the current rule which requires a concern to wait 12 months from the date of the final agency decision to reapply. This would allow firms that have been declined from participating in the 8(a) BD program the opportunity to correct deficiencies, come into compliance with program eligibility requirements, reapply and be admitted to the program and receive the benefits of the program much more quickly. SBA understands that by reducing the re-application waiting period there is the potential to strain the agency's resources with higher application volumes. Because these potential costs are difficult to quantify, SBA is seeking comments to further examine this proposal. However, in the Agency's best judgment, any costs associated with the increase in application volume would be outweighed by the potential benefit of providing business development assistance and contracting benefits sooner to eligible firms.

This rule also proposes to clarify SBA's position with respect to size and socioeconomic status certifications on task orders under MACs. Currently, size certifications at the order level are not required unless the contracting officer, in his or her discretion, requests a recertification in connection with a specific order. The proposed rule would require a concern to submit a recertification or confirm its size and/or socioeconomic status for all set-aside orders (*i.e.*, small business set-aside, 8(a) small business, service-disabled

veteran-owned small business, HUBZone small business, or women-owned small business) under unrestricted MACs, except for orders or Blanket Purchase Agreements issued under any FSS contracts. Additionally, the proposed rule would require a concern to submit a recertification or confirm its socioeconomic status for all set-aside orders where the required socioeconomic status for the order differs from that of the underlying set aside MAC. If the firm's size and status in SAM is current and accurate when the firm submits its offer, the concern would not need to submit a new certification or submit any additional documentation with its offer. SBA recognizes that confirming accurate size and socioeconomic status imposes a burden on a small business contract holder, but the burden is minimal. SBA intends that confirmation of size and status under this rule would be satisfied by confirming that the firm's size and status in SAM is currently accurate and qualifies the firm for award.

FPDS-NG indicates that, in Fiscal Year 2018, agencies set aside about 1,400 orders per year off unrestricted MACs, excluding orders under FSS contracts. SBA adopts the assumption from FAR Case 2014-002 that on average there are three offers per set-aside order. The annual cost of requiring present size and socioeconomic status on set-aside orders under unrestricted MACs, excluding FSS orders, therefore is calculated as 1,400 orders  $\times$  3 offers per order  $\times$  15 minutes per offer  $\times$  \$44.06 cost per hour. This amounts to an annual public burden of about \$46,250.

FPDS-NG indicates that, in Fiscal Year 2018, agencies set aside about 400 orders per year off set-aside MACs, other than the FSS, in the categories covered by this rule. These categories are WOSB or EDWOSB set-aside/sole-source orders off small business set-aside MACs; SDVOSB set-aside/sole-source orders off small business set-aside MACs; WOSB or EDWOSB set-aside/sole-source orders off any small business program MAC (8(a), HUBZone, WOSB/EDWOSB, and SDVOSB); and SDVOSB set-aside/sole-source order off 8 any small business program MAC (8(a), HUBZone, WOSB/EDWOSB, and SDVOSB). Following the same calculations, the annual cost of requiring present socioeconomic status on set-aside orders under set-aside MACs, is calculated as 400 orders  $\times$  3 offers per order  $\times$  15 minutes per offer  $\times$  \$44.06 cost per hour. This amounts to an annual public burden of about \$13,200.

As reflected in the calculation, SBA believes that being presently qualified for the required size or socioeconomic status on an order, where required, would impose a burden on small businesses. A concern already is required by law to update its size and status certifications in SAM at least annually. As such, the added burden to industry is limited to confirming that the firm's certification is current and accurate.

The added burden to ordering agencies includes the act of checking a firm's size and status certification in SAM at the time of order award. Since ordering agencies are already familiar with checking SAM information, such as to ensure that an order awardee is not debarred, suspended, or proposed for debarment, this verification is de minimis. Further, checking SAM at time of order award replaces the check of the offeror's contract level certification. SBA recognizes, however, that an agency's market research for the order level may be impacted where the agency intends to issue a set-aside order off an unrestricted vehicle (or a socioeconomic set-aside off a small business set-aside vehicle). The ordering agency may need to identify MAC-eligible vendors and then find their status in SAM. This is particularly the case where the agency is applying the Rule of Two and verifying that there are at least two small businesses or small businesses with the required status sufficient to set aside the order. SBA does not believe that conducting SAM research is onerous; however, because this rule does not cover the FSS and does not cover orders set aside within the same category as the contract, agencies have readily available alternatives to avoid using SAM.

Using the same set-aside order data, the annual cost of additional market research efforts for applicable set-aside orders under MACs, is calculated as 2,400 orders (1,400 + 1,000)  $\times$  10 minutes per order  $\times$  \$44.06 cost per hour. This amounts to an annual government burden of about \$17,600.

The annual cost is partially offset by the cost savings that result from other changes in this rule. This proposed change goes more to accountability and ensuring that small business contracting vehicles truly benefit small business concerns. Nevertheless, SBA is requesting comments to further assess potential incremental costs.

### 3. *What are the alternatives to this proposed rule?*

As noted above, this rule proposes to make a number of changes intended to reduce unnecessary or excessive burdens on small businesses, and to

clarify other regulatory provisions to eliminate confusion among small businesses and procuring activities. SBA has also considered other alternative proposals to achieve these ends. Concerning SBA’s role in approving 8(a) joint venture agreements, the Agency could also eliminate the requirement that SBA must approve joint ventures in connection with sole source 8(a) awards. However, as noted above, SBA believes that such approval is an important enforcement mechanism to ensure that the joint venture rules are followed. With respect to the requirement that a concern must wait 90 days to re-apply to the 8(a) BD program after the date of the Agency’s final decline decision, SBA could instead eliminate the application waiting period altogether. This would allow a concern to re-apply as soon as it reasonably believed it had overcome the grounds for decline. However, SBA believes that such an alternative would encompass significant administrative burden on SBA.

Under the proposed rule, if an order under an unrestricted MAC is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small

business, or women-owned small business), or the order is set aside in a different category than was the set-aside MAC, a concern must be qualified for the required size and socioeconomic status at the time it submits its initial offer, which includes price, for the particular order. In SBA’s view, the order is the first time size or socioeconomic status is important where the underlying MAC is unrestricted or set aside in a different category than the set-aside MAC, and therefore, that is the date at which eligibility should be examined. SBA considered maintaining the status quo; allowing a one-time certification as to size and socioeconomic status (*i.e.*, at the time of the initial offer for the underlying contract) to control all orders under the contract, unless one of recertification requirements applies (see 121.404(g)). SBA believes the current policy does not properly promote the interests of small business. Long-term contracting vehicles that reward firms that once were, but no longer qualify as, small or a particular socioeconomic status adversely affect truly small or otherwise eligible businesses.

Another alternative is to require business concerns to notify contracting agencies when there is a change to a

concern’s socioeconomic status (*e.g.*, HUBZone, WOSB, etc.), such that they would no longer qualify for set-aside orders. The contracting agency would then be required to issue a contract modification within 30 days, and from that point forward, ordering agencies would no longer be able to count options or orders issued pursuant to the contract for small business goaling purposes. This could be less burdensome than recertification of socioeconomic status for each set-aside order. SBA invites comments on consideration of this approach.

*Summary of Costs and Cost Savings*

*Table 1:* Summary of Incremental Costs and Cost Savings, below, sets out the estimated net incremental cost/(cost saving) associated with this proposed rule. *Table 2:* Detailed Breakdown of Incremental Costs and Cost Savings, below, provides a detailed explanation of the annual cost/(cost saving) estimates associated with this proposed rule. This proposed rule is expected to be an E.O. 13771 deregulatory action. The annualized cost savings of this rule is expected to be \$21,065 in 2016 dollars with a net present value of \$300,935 over perpetuity.

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
1	Eliminating SBA approval of joint venture agreements to perform competitive 8(a) contracts	(\$59,500)
2	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of manual application process.	(13,000)
3	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of confusion among firms seeking a mentor-protégé relationship.	(26,500)
4	Requiring recertification for set-aside orders issued off unrestricted Multiple Award Contracts	46,250
5	Requiring recertification for set-aside orders issued off set-aside Multiple Award Contracts	13,200
6	Additional Government detailed market research to identify qualified sources for set-aside orders	17,600

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
1	<i>Proposed regulatory change:</i> SBA is proposing to eliminate the burden that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. <i>Estimated number of impacted entities:</i> There are currently approximately 4500 8(a) BD Participants in the portfolio. Of those, about 10% or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. <i>Estimated average impact* (labor hour):</i> SBA estimates that an 8(a) BD Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission.	450 entities. 3 hours
	<i>2017 Median Pay** (per hour):</i> Most 8(a) firms use an accountant or someone with similar skills for this task <i>Estimated Cost/(Cost Saving)</i>	\$44.06. (\$59,500)
2	<i>Proposed regulatory change:</i> SBA is proposing to merge the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program. This will reduce the burden on 8(a) Participants seeking a mentor-protégé. <i>Estimated number of impacted entities:</i> SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually.	150 entities.

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
3	<p><i>Estimated average impact* (labor hour):</i> In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and responding manually to questions regarding that submission is estimated at two hours.</p> <p><i>2017 Median Pay** (per hour):</i> Most 8(a) firms use an accountant or someone with similar skills for this task</p> <p><i>Estimated Cost/(Cost Saving)</i> .....</p> <p><i>Proposed regulatory change:</i> SBA is proposing to merge the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program. In doing so, firms will not have to read the requirements for both programs and try to decipher any perceived differences..</p> <p><i>Estimated number of impacted entities:</i> SBA receives approximately 600 mentor-protégé applications each year—about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program).</p>	<p>2 hours.</p> <p>\$44.06. (\$13,000)</p> <p>600 entities.</p>
4	<p><i>Estimated average impact* (labor hour):</i> SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship.</p> <p><i>2017 Median Pay** (per hour):</i> Most small business concerns use an accountant or someone with similar skills for this task.</p> <p><i>Estimated Cost/(Cost Saving)</i> .....</p> <p><i>Proposed regulatory change:</i> SBA is proposing to require that a firm be accurately certified and presently qualified as to size and/or status for set-aside orders issued off Multiple Award Contracts that were not set aside or set aside in a separate category, except for the Federal Supply Schedule.</p> <p><i>Estimated number of impacted entities:</i> Approximately 1,400 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, other than on the Federal Supply Schedule. SBA estimates that three offers are submitted for each order.</p>	<p>1 hour.</p> <p>\$44.06.</p> <p>(\$26,500)</p> <p>4,200 offers.</p>
5	<p><i>Estimated average impact* (labor hour):</i> SBA estimates that a small business will spend an average of 15 minutes confirming that size and status is accurate prior to submitting an offer.</p> <p><i>2017 Median Pay** (per hour):</i> Most small business concerns use an accountant or someone with similar skills for this task.</p> <p><i>Estimated Cost/(Cost Saving)</i> .....</p> <p><i>Proposed regulatory change:</i> SBA is proposing to require that a firm be accurately certified and presently qualified as to socioeconomic status for set-aside orders issued off Multiple Award Contracts that were set aside in a separate category, except for the Federal Supply Schedule contracts.</p> <p><i>Estimated number of impacted entities:</i> Approximately 400 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, other than on the Federal Supply Schedule, are affected by this rule. SBA estimates that three offers are submitted for each order.</p>	<p>0.25 hours.</p> <p>\$44.06</p> <p>\$46,250.</p> <p>1,200 offers.</p>
6	<p><i>Estimated average impact* (labor hour):</i> SBA estimates that a small business will spend an average of 15 minutes confirming that size and status is accurate prior to submitting an offer.</p> <p><i>2017 Median Pay** (per hour):</i> Most small business concerns use an accountant or someone with similar skills for this task.</p> <p><i>Estimated Cost/(Cost Saving)</i> .....</p> <p><i>Proposed regulatory change:</i> SBA is proposing to require that firms be accurately certified and presently qualified as to size and socioeconomic status for certain set-aside orders issued off Multiple Award Contracts, except for the Federal Supply Schedule contracts. This change impacts the market research required by ordering activities to determine if a set-aside order for small business or for any of the socioeconomic programs may be pursued.</p> <p><i>Estimated number of impacted entities:</i> Approximately 2,400 set-aside orders are issued annually as described in the proposed rule on Multiple Award Contracts, other than on the Federal Supply Schedule. 33000.</p> <p><i>Estimated average impact* (labor hour):</i> SBA estimates that ordering activities applying the Rule of Two will spend an average of 10 additional minutes to locate contractors awarded MACs and looking up the current business size for each of the contractors in SAM to determine if a set-aside order can be pursued.</p> <p><i>2017 Median Pay** (per hour):</i> Contracting officers typically perform the market research for the acquisition plan.</p> <p><i>Estimated Cost/(Cost Saving)</i> .....</p>	<p>0.25 hours.</p> <p>\$44.06.</p> <p>\$13,200.</p> <p>2,400 orders.</p> <p>0.16 hours.</p> <p>\$44.06.</p> <p>\$17,600.</p>

\* This estimate is based on SBA's best professional judgment.  
 \*\* Source: Bureau of Labor Statistics, Accountants and Auditors.

*Executive Order 12988*

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

*Executive Order 13132*

For the purposes of Executive Order 13132, SBA has determined that this proposed rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the

purpose of Executive Order 13132, Federalism, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

*Executive Order 13175*

As part of this proposed rulemaking process SBA held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Anchorage, AK

(see 83 FR 17626), Albuquerque, NM (see 83 FR 24684), and Oklahoma City, OK (see 83 FR 24684). This executive order reaffirms the Federal Government's commitment to tribal sovereignty and requires Federal agencies to consult with Indian tribal governments when developing policies that would impact the tribal community. The purpose of the above-referenced tribal consultation meetings was to provide interested parties with an opportunity to discuss their views on the issues, and for SBA to obtain the views of SBA's stakeholders on approaches to the 8(a) BD program regulations. SBA has always considered tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allow for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and ANC-owned firms participating in the 8(a) BD program.

In general, tribal stakeholders were supportive of SBA's intent to implement changes that will make it easier for small business concerns to understand and comply with the regulations governing the 8(a) BD program, and agreed that this rulemaking will make the program more effective and accessible to the small business community. SBA received significant comments on its approaches to the proposed regulatory changes, as well as several recommendations regarding the 8(a) BD program not initially contemplated by this planned rulemaking. SBA has taken these discussions into account in drafting this proposed rule. SBA intends to hold additional tribal consultations before issuing a final rule.

#### *Executive Order 13563*

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

1. *Did the agency use the best available techniques to quantify*

*anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?*

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System—Next Generation (FPDS—NG), Dynamic Small Business Search (DSBS) and System for Award Management (SAM).

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

The proposed rule will have a 60-day comment period and will be posted on [www.regulations.gov](http://www.regulations.gov) to allow the public to comment meaningfully on its provisions. In addition, SBA submitted the proposed rule to the Office of Management and Budget for interagency review.

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

Yes, the proposed rule is intended to reduce unnecessary or excessive burdens on 8(a) Participants, and clarify other regulatory related provisions to eliminate confusion among small businesses and procuring activities.

#### *Executive Order 13771*

This proposed rule is expected to be an E.O. 13771 deregulatory action. The annualized cost savings of this rule is expected to be \$21,065 in 2016 dollars with a net present value of \$300,935 over perpetuity. A detailed discussion of the estimated cost of this proposed rule can be found in the above Regulatory Impact Analysis.

#### *Paperwork Reduction Act, 44 U.S.C. Ch. 35*

This proposed rule does impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. The rule provides a number of size and/or socioeconomic status recertification requirements for set-aside orders under MACs. The annual total public reporting

burden for this collection of information is estimated to be 1,800 total hours (\$79,300), including the time for reviewing data sources, gathering and maintaining the data needed, and completing information reporting.

*Respondents:* 7,200.

*Responses per respondent:* 1.

*Total annual responses:* 7,200.

*Preparation hours per response:* 0.25 (15 min).

*Total response burden hours:* 1,800.

*Cost per hour:* \$44.06.

*Estimated cost burden to the public:* \$79,300.

This added information collection burden will be officially reflected through OMB Control Number 9000–0163 if the rule is implemented.

SBA invites comments, particularly on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

#### *Regulatory Flexibility Act, 5 U.S.C. 601–612*

The Regulatory Flexibility Act (RFA) requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines "small entity" to include "small businesses," "small organizations," and "small governmental jurisdictions."

This proposed rule concerns various aspects of SBA's 8(a) BD program, as such the rule relates to small business concerns but would not affect "small organizations" or "small governmental jurisdictions" because those programs generally apply only to "business concerns" as defined by SBA regulations, in other words, to small businesses organized for profit. "Small organizations" or "small governmental

jurisdictions” are non-profits or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA’s regulations.

There are currently approximately 4500 8(a) BD Participants in the portfolio. Most of the proposed changes are clarification of current policy or designed to reduce unnecessary or excessive burdens on 8(a) BD Participants and therefore should not impact many of these concerns. There are about 385 Participants with 8(a) BD mentor-protégé agreements and about another 850 small businesses that have SBA-approved mentor-protégé agreements through the All Small Mentor-Protégé Program. The consolidation of SBA’s two mentor-protégé programs into one program will not have a significant economic impact on small businesses. In fact, it should

have no affect at all on those small businesses that currently have or on those that seek to have an SBA-approved mentor-protégé relationship. The proposed rule would eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. The benefits of the two programs are identical, and will not change under the proposed rule.

SBA is also proposing to require a business to be qualified for the required size and status when under consideration for a set-aside order off a MAC that was awarded outside of the same set-aside category. Pursuant to the Small Business Goaling Report (SBGR) Federal Procurement Data System—Next Generation (FPDS–NG) records,

about 236,000 new orders were awarded off MACs per year from FY 2014 to FY 2018. Around 199,000, or 84.3 percent, were awarded off MACs established without a small business set aside. For this analysis, small business set asides include all total or partial small business set asides; and all 8(a), WOSB, SDVOSB, and HUBZone awards. There were about 9,000 new orders awarded annually with a small business set aside off MACs established without a small business set aside. These orders were issued to approximately 2,600 firms. The 9,000 new orders awarded with a small business set aside off a MAC without a small business set aside were 4.0 percent of the 236,000 new orders off MACs in a year (Table 3). In FY 2018, only 1,400 for these set-aside orders used MACs other than the FSS Program.

TABLE 3—0.47% OF NEW MAC ORDERS IN A FY ARE NON-FSS ORDERS SET ASIDE FOR SMALL BUSINESS WHERE UNDERLYING BASE CONTRACT NOT SET ASIDE FOR SMALL BUSINESS

	FY 014	FY 015	FY 016	FY 017	FY 018	AVG
Total new modification 0 orders off MACs in FY .....	244,664	231,694	245,978	234,304	223,861	236,100
Orders awarded with SB set aside without MAC IDV SB set aside .....	10,089	9,347	9,729	9,198	8,666	9,406
Non-FSS orders awarded with SB set aside without MAC IDV SB set aside ..	902	780	1,019	1,422	1,400	1,105
Percent .....	0.37%	0.34%	0.41%	0.61%	0.63%	0.47%

If all firms receiving a non-FSS small business set aside order off a MAC that was not itself set aside for small business were adversely affected by the proposed rule (i.e., every such firm receiving an award as a small business had grown to be other than a small business or no longer qualified as 8(a), WOSB, SDVO, or HUBZone), the rule requiring a business to be certified as small for a non-FSS small business set aside orders off MACs not set aside for small business would impact only 0.47 percent of annual new MAC orders. As such, SBA certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, throughout the supplementary information to this proposed rule, SBA has identified the reasons why the proposed changes are being considered, the objectives and basis for the proposed rule, a description of the number of small entities to which the proposed rule will apply, and a description of alternatives considered.

**List of Subjects**

*13 CFR Part 121*

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

*13 CFR Part 124*

Administrative practice and procedure, Government procurement, Government property, Small businesses.

*13 CFR Part 125*

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

*13 CFR Part 126*

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

*13 CFR Part 127*

Government contracts, Reporting and recordkeeping requirements, Small businesses.

*13 CFR Part 134*

Administrative practice and procedure, Claims, Equal employment opportunity, Lawyers, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 121, 124, 125, 126, 127, and 134 as follows:

**PART 121—SMALL BUSINESS SIZE REGULATIONS**

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

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

- 2. Amend § 121.103 by:
  - a. Revising the first sentence of paragraphs (b)(6) and (9);
  - b. Revising paragraph (f)(2)(i);
  - c. Revising the first sentence of paragraph (g);
  - d. Revising paragraph (h) introductory text and example 1 to paragraph (h) introductory text;
  - e. Adding two sentences to the end of paragraph (h)(3)(ii);
  - f. Removing paragraph (h)(3)(iii); and
  - g. Revising paragraph (h)(5).

The revisions and addition read as follows:

**§ 121.103 How does SBA determine affiliation?**

\* \* \* \* \*

(b) \* \* \*

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 125.9 of this chapter is not affiliated with its mentor or protégé firm solely because the protégé firm receives assistance from the mentor under the agreement. \* \* \*

\* \* \* \* \*

(9) In the case of a solicitation for a bundled contract or a Multiple Award Contract with a value in excess of the agency's substantial bundling threshold, a small business contractor may enter into a Small Business Teaming Arrangement with one or more small business subcontractors and submit an offer as a small business without regard to affiliation, so long as each team member is small for the size standard assigned to the contract or subcontract. \* \* \*

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(i) This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.

\* \* \* \* \*

(g) *Affiliation based on the newly organized concern rule.* Affiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. \* \* \*

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out business ventures for joint profit over a

two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer including price prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. A joint venture: Must be in writing; must do business under its own name and be identified as a joint venture in the System for Award Management (SAM) for the award of a prime contract; may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (*i.e.*, the joint venture may have its own separate employees to perform administrative functions, including one or more Facility Security Officer(s), but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture pursuant to paragraph (h)(4) of this section. For purposes of this paragraph (h), contract refers to prime contracts, novations of prime contracts, and any subcontract in which the joint venture is treated as a similarly

situated entity as the term is defined in part 125 of this chapter.

*Example 1 to paragraph (h) introductory text.* Joint Venture AB receives a contract on April 2, year 1. Joint Venture AB may receive additional contracts through April 2, year 3. On June 6, year 2, Joint Venture AB submits an offer for Solicitation 1. On July 13, year 2, Joint Venture AB submits an offer for Solicitation 2. In May, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 1. In June, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 2. Even though the award of the two contracts emanating from Solicitations 1 and 2 would occur after April 2, year 3, Joint Venture AB may receive those awards without causing general affiliation between its joint venture partners because the offers occurred prior to the expiration of the two-year period.

\* \* \* \* \*

(3) \* \* \*

(ii) \* \* \* Except for sole source 8(a) awards, the joint venture must meet the requirements of § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate, at the time it submits its initial offer including price. For a sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of § 124.513(c) and (d) prior to the award of the contract.

\* \* \* \* \*

(5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the concern and its joint ventures (*e.g.*, subcontracts from a joint venture entity to joint venture partners). In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees. For both the calculation of receipts and of employees, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture.

*Example 1 to paragraph (h)(5).* Joint Venture AB is awarded a contract for \$10M. The joint venture will perform 50% of the work, with A performing \$2M (40% of the 50%, or 20% of the total value of the contract) and B performing \$3M (60% of the 50% or 30% of the total value of the contract). Since A will perform 40% of the work done by the joint venture, its share of the revenues for the entire contract is 40%, which means that the receipts from the contract awarded to Joint Venture AB that must be included in A's receipts for size purposes are \$4M. A must add \$4M to its receipts for size purposes, unless its receipts

already account for the \$4M in transactions between A and Joint Venture AB.

\* \* \* \* \*

■ 3. Amend § 121.402 by:

- a. Revising the first sentence of paragraph (b)(2);
- b. Revising paragraph (c)(1)(i);
- c. Redesignating paragraph (c)(2)(ii) as paragraph (c)(2)(iii); and
- d. Adding a new paragraph (c)(2)(ii).

The revisions and addition read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(2) A procurement is generally classified according to the component which accounts for the greatest percentage of contract value. \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract; or

\* \* \* \* \*

(2) \* \* \*

(ii) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. The NAICS code assigned to an order must be a NAICS code included in the underlying Multiple Award Contract. When placing an order under a Multiple Award Contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principal purpose of each order. In cases like the GSA Schedule, where an agency can issue an order against multiple SINS with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition. If the base contract has not been assigned a NAICS code that reflects the principal purpose of the order, the contracting officer shall select a new NAICS code and corresponding size standard for the order.

\* \* \* \* \*

■ 4. In § 121.404:

- a. Amend paragraph (a) by:
  - i. Revising paragraphs (a) introductory text and (a)(1); and
  - ii. Adding a subject heading to paragraph (a)(2);
- b. Revise paragraph (b);
- c. Add a subject heading to paragraph (c);

- d. Revise paragraph (d);
- e. Add a subject heading to paragraph (e) and a sentence at the end of paragraph (e);
- f. Add a subject heading to paragraph (f);
- g. Amend paragraph (g) by:
  - i. Revising paragraph (g) introductory text and paragraphs (g)(2)(ii)(C) and (D);
  - ii. Adding paragraph (g)(2)(iii) and a new second sentence to paragraph (g)(3) introductory text; and
- h. Add a subject heading to paragraph (h).

The additions and revisions read as follows:

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

(a) *Time of size*—(1) *Multiple award contracts*. With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) *Single NAICS*. If a single NAICS code is assigned as set forth in § 121.402(c)(1)(i), SBA determines size status for the underlying Multiple Award Contract at the time of initial offer (or other formal response to a solicitation), which includes price, based upon the size standard set forth in the solicitation for the Multiple Award Contract, unless the concern was required to recertify under paragraph (g)(1), (2), or (3).

(A) *Unrestricted Multiple Award Contracts*. For an unrestricted Multiple Award Contract, if a business concern is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for goaling purposes for each order issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. However, except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement.

(B) *Set-aside Multiple Award Contracts*. For a Multiple Award Contract that is set aside for small business (*i.e.*, small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award

veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for each order or Blanket Purchase Agreement issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement.

(ii) *Multiple NAICS*. If multiple NAICS codes are assigned as set forth in § 121.402(c)(1)(ii), SBA determines size status at the time of initial offer (or other formal response to a solicitation), which includes price, for a Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.*, CLIN, SIN, Sector, FA or equivalent) for which a business concern submits an offer and represents it is small for the Multiple Award Contract, unless the firm was required to recertify under paragraph (g)(1), (2), or (3). If the business concern submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent).

(A) *Unrestricted Multiple Award Contracts*. For an unrestricted Multiple Award Contract, if a business concern is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for goaling purposes for each order issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. However, except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or Blanket Purchase Agreement for a discrete category under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.*, small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Agreement.

(B) *Set-aside Multiple Award Contracts*. For a Multiple Award Contract that is set aside for small business (*i.e.*, small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award

Contract, it is small for each order or Agreement issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase.

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

(2) *Agreements.* \* \* \*

(b) *Eligibility for SBA programs.* A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a HUBZone small business (under part 126 of this chapter), or as a women-owned small business concern (under part 127 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification.

(c) *Certificates of competency.* \* \* \*

(d) *Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Size status is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding for the following purposes: compliance with the nonmanufacturer rule set forth in § 121.406(b)(1), the ostensible subcontractor rule set forth in § 121.103(h)(4), and the joint venture agreement requirements in § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.

(e) *Subcontracting.* \* \* \* A prime contractor may rely on the self-certification of subcontractor provided it does not have a reason to doubt the concern's self-certification.

(f) *Two-step procurements.* \* \* \*

(g) *Effect of size certification and recertification.* A concern that represents itself as a small business and qualifies as small at the time of its initial offer (or other formal response to a solicitation), which includes price, and after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business, except that a required recertification as other than small under

paragraph (g)(1), (2), or (3) of this section changes the firm's status for future options and orders. The following exceptions apply to this paragraph (g):

\* \* \* \* \*

(2) \* \* \*

(ii) \* \* \*

(C) In the context of a joint venture that has been awarded a contract or order as a small business, from any partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity.

(D) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the offeror is unable to recertify as small, it will not be eligible as a small business for the award of the contract.

(iii) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

*Example 1 to paragraph (g)(2)(iii).* Indian Tribe X owns 100% of small business ABC. ABC wins an award for a small business set-aside contract. In year two of contract performance, X changes the ownership of ABC so that X owns 100% of a holding company XYZ, Inc., which in turn owns 100% of ABC. This restructuring does not require ABC to recertify its status as a small business because it continues to be 100% owned (indirectly rather than directly) by Indian Tribe X.

(3) \* \* \* A contracting officer may also request size recertification, as he or she deems appropriate, prior to the 120-day point in the fifth year of a long-term contract. \* \* \*

\* \* \* \* \*

(h) *Follow-on contracts.* \* \* \*

**§ 121.406 [Amended]**

■ 5. Amend § 121.406 by removing the word "provided" and adding in its place the word "provide" in paragraph (a) introductory text.

■ 6. Amend § 121.603 by adding paragraph (c)(3) to read as follows:

**§ 121.603 How does SBA determine whether a Participant is small for a particular 8(a) BD subcontract?**

\* \* \* \* \*

(c) \* \* \*

(3) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as

long as the ultimate owner remains that entity.

\* \* \* \* \*

■ 7. Amend § 121.702 by revising paragraph (c)(6) to read as follows:

**§ 121.702 What size and eligibility standards are applicable to the SBIR and STTR programs?**

\* \* \* \* \*

(c) \* \* \*

(6) *Size requirement for joint ventures.* Two or more small business concerns may submit an application as a joint venture. The joint venture will qualify as small as long as each concern is small under the size standard for the SBIR program, found at § 121.702(c), or the joint venture meets the exception at § 121.103(h)(3)(ii) for two firms approved to be a mentor and protégé under SBA's All Small Mentor-Protégé Program.

\* \* \* \* \*

■ 8. Amend § 121.1001 by revising paragraphs (a)(1)(iii), (a)(2)(iii), (a)(3)(iv), (a)(4)(iii), (a)(6)(iv), (a)(7)(iii), (a)(8)(iv), and (a)(9)(iv) to read as follows:

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

(a) \* \* \*

(1) \* \* \*

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, the Director, Office of Government Contracting, or the Associate General Counsel for Procurement Law; and

\* \* \* \* \*

(2) \* \* \*

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

\* \* \* \* \*

(3) \* \* \*

(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting, or the SBA's Associate General Counsel for Procurement Law; and

\* \* \* \* \*

(4) \* \* \*

(iii) The responsible SBA Government Contracting Area Director; the Director, Office of Government Contracting; the Associate Administrator, Investment

Division, or the Associate General Counsel for Procurement Law.

\* \* \* \* \*

(6) \* \* \*

(iv) The SBA Director, Office of HUBZone, or designee, or the SBA Associate General Counsel for Procurement Law.

\* \* \* \* \*

(7) \* \* \*

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

\* \* \* \* \*

(8) \* \* \*

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

\* \* \* \* \*

(9) \* \* \*

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

\* \* \* \* \*

■ 9. Amend § 121.1004 by revising paragraph (a)(2)(ii) and adding paragraph (a)(2)(iii) to read as follows:

**§ 121.1004 What time limits apply to size protests?**

(a) \* \* \*

(2) \* \* \*

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a size recertification in connection with that order; or

(iii) Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, an order or Blanket Purchase Agreement set-aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

\* \* \* \* \*

■ 10. Amend § 121.1103 by revising paragraph (c)(1)(i) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Stay the date for the closing of receipt of offers;

\* \* \* \* \*

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

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

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

■ 12. Amend § 124.3 by adding in alphabetical order a definition for “Follow-on requirement or contract” to read as follows:

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

\* \* \* \* \*

*Follow-on requirement or contract.*

The determination of whether a particular procurement is a follow-on includes the following considerations:

(1) Whether the scope has changed significantly, requiring meaningful different types of work or different capabilities;

(2) Whether the magnitude or value of the requirement has changed by at least 25 percent; and

(3) Whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. Conversely, if the procurement satisfies none of these conditions, it is considered a follow-on procurement.

The 25 percent rule, however, cannot be applied rigidly in all cases because by doing so could encourage a result that is inconsistent with the intent of another provision in this part.

\* \* \* \* \*

■ 13. Amend § 124.105 by revising paragraphs (g) and (i)(2) and (4) to read as follows:

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

\* \* \* \* \*

(g) *Ownership of another current or former Participant by an immediate family member.* (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and any of the following circumstances exist:

(i) The concerns are connected by any common ownership or management, regardless of amount or position; or

(ii) The concerns have a contractual relationship that was not conducted at arm’s length.

*Example 1 to paragraph (g)(1).* X applies to the 8(a) BD program. X is 95% owned by A and 5% by B, A’s father and the majority owner in a former 8(a) Participant. Even though B has no involvement in X, X would be ineligible for the program.

*Example 2 to paragraph (g)(1).* Y applies to the 8(a) BD program. C owns 100% of Y. However, D, C’s sister and the majority owner in a former 8(a) Participant, is acting as a Vice President in Y. Y would be ineligible for the program.

*Example 3 to paragraph (g)(1).* X seeks to apply to the 8(a) BD program with a primary NAICS code in plumbing. X is 100% owned by A. Z, a former 8(a) participant with a primary industry in general construction, is owned 100% by B, A’s brother. For general construction jobs, Z has subcontracted plumbing work to X in the past at normal commercial rates. Subcontracting work at normal commercial rates would not preclude X from being admitted to the 8(a) BD program. X would be eligible for the program.

(2) If the AA/BD approves an application under paragraph (g)(1) of this section, SBA will, as part of its annual review, assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member. SBA may initiate proceedings to terminate a firm from further participation in the 8(a) BD program if it is apparent that there are connections between the two firms that were not disclosed to the AA/BD at the time of application or that came into existence after program admittance.

\* \* \* \* \*

(i) \* \* \*

(2) Prior approval by the AA/BD is not needed where all non-disadvantaged individual (or entity) owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction, the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, or the disadvantaged individual or entity in control of the Participant will increase the percentage of its ownership interest. The concern must notify SBA within 60 days of such a change in ownership.

*Example 1 to paragraph (i)(2).* Disadvantaged individual A owns 90% of 8(a) Participant X; non-disadvantaged individual B owns 10% of X. In order to raise additional capital, X seeks to change its ownership structure such that A would own 80%, B would own 10% and C would own 10%. X can accomplish this change in ownership without prior SBA approval. Non-disadvantaged owner B is not involved in the transaction and non-disadvantaged individual C owns less than 20% of X both before and after the transaction.

*Example 2 to paragraph (i)(2).* Disadvantaged individual C owns 60% of 8(a) Participant Y; non-disadvantaged

individual D owns 30% of Y; and non-disadvantaged individual E owns 10% of Y. C seeks to transfer 5% of Y to E. Prior SBA approval is not needed. Although non-disadvantaged individual D owns more than 20% of Y, D is not involved in the transfer. Because the only non-disadvantaged individual involved in the transfer, E, owns less than 20% of Y both before and after the transaction, prior approval is not needed.

Example 3 to paragraph (i)(2).

Disadvantaged individual A owns 85% of 8(a) Participant X; non-disadvantaged individual B owns 15% of X. A seeks to transfer 15% of X to B. Prior SBA approval is needed. Although B, the non-disadvantaged owner of X, owns less than 20% of X prior to the transaction, prior approval is needed because B would own more than 20% after the transaction.

Example 4 to paragraph (i)(2). ANC A owns 60% of 8(a) Participant X; non-disadvantaged individual B owns 40% of X. X seeks to transfer 15% to A. Prior SBA approval is not needed. Although a non-disadvantaged individual who is involved in the transaction, B, owns more than 20% of X both before and after the transaction, SBA approval is not needed because the change only increases the percentage of A's ownership interest in X.

\* \* \* \* \*

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

\* \* \* \* \*

- 14. Amend § 124.109 by:
■ a. Revising the section heading;
■ b. Adding paragraph (a)(7);
■ c. Revising paragraph (c)(3)(ii);
■ d. Adding paragraphs (c)(3)(iv) and (c)(4)(iii)(C); and
■ e. Revising paragraphs (c)(6)(iii) and (c)(7)(ii).

The revisions and additions to read as follows:

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

(a) \* \* \*

(7) Notwithstanding § 124.105(i), where an ANC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC and the Participant, the

Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(ii) A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern.

(A) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard.

(B) If the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe can submit an application and qualify another firm owned by the tribe for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

Example 1 to paragraph (c)(3)(ii)(B). Tribe X owns 100% of 8(a) Participant A. A entered the 8(a) BD program with a primary NAICS code of 236115, New Single-Family Housing Construction (except For-Sale Builders). After four years in the program, SBA noticed that the vast majority of A's revenues were in NAICS Code 237310, Highway, Street, and Bridge Construction, and notified A that SBA intended to change its primary NAICS code pursuant to § 124.112(e). A agreed to change its primary NAICS Code to 237310. Once the change is finalized, Tribe X can immediately submit a new application to qualify another firm that it owns for participation in the 8(a) BD program with a primary NAICS Code of 236115.

\* \* \* \* \*

(iv) Notwithstanding § 124.105(i), where a Tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the Tribe and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

\* \* \* \* \*

(4) \* \* \*

(iii) \* \* \*

(C) Because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants.

\* \* \* \* \*

(6) \* \* \*

(iii) The Tribe, a tribally-owned economic development corporation, or other relevant tribally-owned holding company vested with the authority to oversee tribal economic development or business ventures has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(7) \* \* \*

(ii) The officers, directors, and all shareholders owning an interest of 20% or more (other than the tribe itself) of a tribally-owned applicant or Participant must demonstrate good character (see § 124.108(a)) and cannot fail to pay significant Federal obligations owed to the Federal Government (see § 124.108(e)).

■ 15. Amend § 124.110 by revising the section heading and paragraph (e) to read as follows:

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

\* \* \* \* \*

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

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same NHO. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard.

(2) If the primary NAICS code of a Participant owned by an NHO is changed pursuant to § 124.112(e), the NHO can submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program

under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

\* \* \* \* \*

■ 16. Amend § 124.111 by revising the section heading, adding paragraph (c)(3), and revising paragraph (d) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(3) Notwithstanding § 124.105(i), where a CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

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

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same CDC. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard.

(2) If the primary NAICS code of a Participant owned by a CDC is changed pursuant to § 124.112(e), the CDC can submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

\* \* \* \* \*

■ 17. Amend § 124.112 by revising paragraph (d)(5), redesignating paragraph (e)(2)(iv) as paragraph (e)(2)(v), and adding a new paragraph (e)(2)(iv).

The revision and addition read as follows:

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

\* \* \* \* \*

(d) \* \* \*

(5) The excessive withdrawal analysis does not apply to Participants owned by Tribes, ANCs, NHOs, or CDCs where a withdrawal is made for the benefit of the Tribe, ANC, NHO, CDC or the native or shareholder community. It does, however, apply to withdrawals from a firm owned by a Tribe, ANC, NHO, or CDC that do not benefit the relevant entity or community. Thus, if funds or assets are withdrawn from an entity-owned Participant for the benefit of a non-disadvantaged manager or owner that exceed the withdrawal thresholds, SBA may find that withdrawal to be excessive. However, a non-disadvantaged minority owner may receive a payout in excess of the excessive withdrawal amount if it is a pro rata distribution paid to all shareholders (*i.e.*, the only way to increase the distribution to the Tribe, ANC, NHO or CDC is to increase the distribution to all shareholders) and it does not adversely affect the business development of the Participant.

*Example 1 to paragraph (d)(5).* Tribally-owned Participant X pays \$1,000,000 to a non-disadvantaged manager. That would be deemed an excessive withdrawal.

*Example 2 to paragraph (d)(5).* ANC-owned Participant Y seeks to distribute \$550,000 to the ANC and \$450,000 to non-disadvantaged individual A based on their 55%/45% ownership interests. Because the distribution is based on the pro rata share of ownership, this would not be prohibited as an excessive withdrawal unless SBA determined that Y would be adversely affected.

(e) \* \* \*

(2) \* \* \*

(iv) A Participant may appeal a district office's decision to change its primary NAICS code to SBA's Associate General Counsel for Procurement Law (AGC/PL) within 10 business days of receiving the district office's final determination. The AGC/PL will examine the record, including all information submitted by the Participant in support of its position as to why the primary NAICS code contained in its business plan continues to be appropriate despite performing more work in another NAICS code, and issue a final agency decision within 15 business days of receiving the appeal.

\* \* \* \* \*

■ 18. Amend § 124.203 by revising the first two sentences and adding a new third sentence to read as follows:

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

Each 8(a) BD applicant concern must submit information and supporting documents required by SBA when applying for admission to the 8(a) BD program. This information may include, but not be limited to, financial data and statements, copies of filed Federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional information or documents SBA deems necessary to determine eligibility. Each individual claiming disadvantaged status must also submit a signed IRS Form 4506T, Request for Copy or Transcript of TAX Form, to SBA. \* \* \*

■ 19. Amend § 124.204 by adding a sentence to the end of paragraph (a) to read as follows:

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

(a) \* \* \* Where during its review SBA requests clarifying, revised or other information from the applicant, SBA's processing time for the application will be suspended pending the receipt of such information.

\* \* \* \* \*

■ 20. Revise § 124.207 to read as follows:

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

A concern which has been declined for 8(a) BD program participation may submit a new application for admission to the program at any time after 90 days from the date of the Agency's final decision to decline.

**§ 124.301 [Redesignated as § 124.300]**

■ 21. Redesignate § 124.301 as § 124.300.

■ 22. Add new § 124.301 to read as follows:

**§ 124.301 Voluntary withdrawal or voluntary early graduation.**

(a) A Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. Where a Participant has substantially achieved the goals and objectives set forth in its business plan, it may elect to voluntarily early graduate from the 8(a) BD program.

(b) To initiate withdrawal or early graduation from the 8(a) BD program, a Participant must notify its servicing SBA district office of its intent to do so in writing. Once the SBA servicing district office processes the request and the District Director recognizes the withdrawal or early graduation, the

Participant is no longer eligible to receive any 8(a) BD program assistance.

■ 23. Amend § 124.304 by revising the paragraph (d) subject heading and adding a sentence at the end of paragraph (d) to read as follows:

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

\* \* \* \* \*

(d) Notice requirements and effect of decision. \* \* \* Once the AA/BD issues a decision to early graduate or terminate a Participant, the Participant will be immediately suspended from receiving further program assistance until the determination becomes the final agency decision.

\* \* \* \* \*

■ 24. Amend § 124.305 by revising paragraphs (h)(1)(ii) and (iv), and adding paragraph (h)(1)(v) to read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(1) \* \* \*

(ii) A disadvantaged individual who is involved in controlling the day-to-day management and control of the Participant is called to active military duty by the United States, his or her participation in the firm's management and daily business operations is critical to the firm's continued eligibility, the Participant does not designate another disadvantaged individual to control the concern during the call-up period, and the Participant requests to be suspended during the call-up period;

\* \* \* \* \*

(iv) Federal appropriations for one or more Federal departments or agencies have lapsed, a Participant would lose an 8(a) sole source award due to the lapse in appropriations (e.g., SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant or an agency could not offer a sole source 8(a) requirement to the program on behalf of the Participant due to the lapse in appropriations, and the Participant's program term would end during the lapse), and the Participant elects to suspend its participation in the 8(a) BD program during the lapse in Federal appropriations; or

(v) A Participant has not submitted a business plan to its SBA servicing office within 60 days after program admission.

\* \* \* \* \*

■ 25. Amend § 124.402 by revising paragraph (b) to read as follows:

§ 124.402 How does a Participant develop a business plan?

\* \* \* \* \*

(b) Submission of initial business plan. Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission.

\* \* \* \* \*

■ 26. Amend § 124.501 by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, and by adding new paragraphs (g) and (k) to read as follows:

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

\* \* \* \* \*

(g) Before a Participant may be awarded either a sole source or competitive 8(a) contract, SBA must determine that the Participant is eligible for award. SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract, and after the apparent successful offeror is identified for a competitive 8(a) contract. Eligibility is based on 8(a) BD program criteria, including whether the Participant:

(1) Qualifies as a small business under the size standard corresponding to the NAICS code assigned to the requirement;

(2) Is in compliance with any applicable competitive business mix targets established or remedial measure imposed by § 124.509 that does not include the denial of future sole source 8(a) contracts or 8(a) contracts generally, as applicable;

(3) Complies with the continued eligibility reporting requirements set forth in § 124.112(b);

(4) Has a bona fide place of business in the applicable geographic area if the procurement is for construction;

(5) Has not received 8(a) contracts in excess of the dollar limits set forth in § 124.519 for a sole source 8(a) procurement;

(6) Has complied with the provisions of § 124.513(c) and (d) if it is seeking a sole source 8(a) award through a joint venture; and

(7) Can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 124.510.

\* \* \* \* \*

(k) In order to be awarded a sole source or competitive 8(a) construction

contract, a Participant must have a bona fide place of business within the applicable geographic location determined by SBA. This will generally be the geographic area serviced by the SBA district office in which the work will be performed. SBA may determine that a Participant with a bona fide place of business within the entire state (if the state is serviced by more than one SBA district office), a contiguous SBA district office (in the same or another state), or another nearby area is eligible for the award of an 8(a) construction contract.

(1) A Participant may have bona fide places of business in more than one location.

(2) In order for a Participant to establish a bona fide place of business in a particular geographic location, the SBA district office serving the geographic area of that location must determine if that location in fact qualifies as a bona fide place of business under SBA's requirements.

(i) A Participant must submit a request for a bona fide business determination to the SBA district office servicing it. Such request may, but need not, relate to a specific 8(a) requirement. In order to apply to a specific competitive 8(a) solicitation, such request must be submitted at least 20 working days before initial offers that include price are due.

(ii) The servicing district office will immediately forward the request to the SBA district office serving the geographic area of the particular location for processing. Within 10 working days of receipt of the submission, the reviewing district office will conduct a site visit, if practicable. If not practicable, the reviewing district office will contact the Participant within such 10-day period to inform the Participant that the reviewing office has received the request and may ask for additional documentation to support the request.

(iii) In connection with a specific competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical area within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. If the request is not related to a specific procurement, the reviewing office will make a determination within 30 working days of its receipt of the request from the servicing district office, if practicable.

(3) The effective date of a bona fide place of business is the date that the

evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.

(4) In order for a Participant to be eligible to submit an offer for an 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement.

(5) Once a Participant has established a bona fide place of business, the Participant may change the location of the recognized office without prior SBA approval. However, the Participant must notify SBA and provide documentation demonstrating an office at that new location within 30 days after the move. Failure to timely notify SBA will render the Participant ineligible for new 8(a) construction procurements limited to that geographic area.

■ 27. Amend § 124.503 by:

- a. Removing the phrase “in § 124.507(b)(2)” and adding in its place the phrase “in § 124.501(g)” in paragraph (a)(1);
- b. Redesignating paragraphs (e) through (j) as paragraphs (f) through (k), respectively;
- c. Adding a new paragraph (e);
- d. Revising the introductory text of the newly redesignated paragraph (h);
- e. Adding the phrase “or BPA” after the phrase “BOA”, wherever it appears, in the newly redesignated paragraphs (h)(1) through (4);
- f. Revising newly redesignated paragraph (i)(1)(iii);
- g. Adding a sentence at the end of newly redesignated paragraph (i)(1)(iv); and
- h. Revising newly redesignated paragraph (i)(2)(iv).

The additions and revisions read as follows:

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

(e) *Withdrawal/substitution of offered requirement or Participant.* After SBA has accepted a requirement for award as a sole source 8(a) contract on behalf of a specific Participant (whether nominated by the procuring agency or identified by SBA for an open requirement), if the procuring agency believes that the identified Participant is not a good match for the procurement—including for such reasons as the procuring agency finding the Participant non-responsible or the negotiations between the procuring agency and the Participant otherwise failing—the procuring agency may seek to substitute another Participant for the originally

identified Participant. The procuring agency must inform SBA of its concerns regarding the originally identified Participant and identify whether it believes another Participant could fulfill its needs.

(1) If the procuring agency and SBA agree that another Participant can fulfill its needs, the procuring agency will withdraw the original offering and reoffer the requirement on behalf of another 8(a) Participant. SBA will then accept the requirement on behalf of the newly identified Participant and authorize the procuring agency to negotiate directly with that Participant.

(2) If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency will withdraw the original offering letter and fulfill its needs outside the 8(a) BD program.

(3) If the procuring agency believes that another Participant cannot fulfill its needs, but SBA does not agree, SBA may appeal that decision to the head of the procuring agency pursuant to § 124.505(a)(2).

(h) *Basic Ordering Agreements (BOAs) and Blanket Purchase Agreements (BPAs).* Neither a Basic Ordering Agreement (BOA) nor a Blanket Purchase Agreement (BPA) is a contract under the FAR. See 48 CFR 16.703(a). Each order to be issued under a BOA or BPA is an individual contract. As such, the procuring activity must offer, and SBA must accept, each task order under a BOA or BPA in addition to offering and accepting the BOA or BPA itself.

(i) (1) \* \* \*

(iii) A concern awarded a task or delivery order contract or Multiple Award Contract that was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants may generally continue to receive new orders even if it has grown to be other than small or has exited the 8(a) BD program, and agencies may continue to take SDB credit toward their prime contracting goals for orders awarded to 8(a) Participants. However, a firm will be ineligible for the award of an order if the procuring agency asks contract holders to recertify their 8(a) BD status in connection with a specific order and the firm is unable to do so. Where a contracting officer asks contract holders to recertify their 8(a) BD status in connection with a specific order, a firm must be an eligible Participant in accordance with § 124.501(g) as of the

initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation.

(iv) \* \* \* To be eligible for the award of a sole source order, a concern must be a current Participant in the 8(a) BD program at the time of award.

(2) \* \* \* SBA must verify that a concern is an eligible 8(a) Participant in accordance with § 124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation. If a concern has exited the 8(a) BD program prior to that date, it will be ineligible for the award of the order.

- 28. Amend § 124.504 by:
- a. Revising the section heading and paragraph (b);
- b. Removing the term “Simplified Acquisition Procedures” and adding in its place the phrase “the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101)” in paragraph (c) introductory text;
- c. Removing the word “will” and adding in its place the word “may” in paragraph (c)(1)(ii)(C);
- d. Revising the subject heading for paragraph (d) and paragraphs (d)(1) introductory text and (d)(4).

The revisions read as follows:

**§ 124.504 What circumstances limit SBA’s ability to accept a procurement for award as an 8(a) contract, and when can a requirement be released from the 8(a) BD program?**

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and did not clearly evidence its intent to conduct an 8(a) competitive acquisition.

(d) *Release for non-8(a) or limited 8(a) competition.* (1) Except as set forth in paragraph (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. Additionally, SBA must agree to release any follow-on requirement where a procuring agency seeks to reprocur that requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants (e.g., any multiple award or Governmentwide acquisition contract, whether or not the underlying MAC or GWAC is itself an 8(a) contract), and the

previous/current 8(a) award was not so limited. If a procuring agency would like to fulfill a follow-on requirement outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the AA/BD to do so. In determining whether to release a requirement from the 8(a) BD program, SBA will consider:

\* \* \* \* \*

(4) The requirement that a follow-on procurement must be released from the 8(a) BD program in order for it to be fulfilled outside the 8(a) BD program does not apply:

- (i) Where previous orders were offered to and accepted for the 8(a) BD program pursuant to § 124.503(i)(2); or
- (ii) Where a procuring agency will use a mandatory source (see FAR Subparts 8.6 and 8.7). In such a case, the procuring agency must notify SBA at least 30 days prior to the end of the contract or order.

■ 29. Amend § 124.505 by:

- a. Removing the word “and” at the end of paragraph (a)(2);
- b. Redesignating paragraph (a)(3) as paragraph (a)(4); and
- c. Adding new paragraph (a)(3).

The addition reads as follows:

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

(a) \* \* \*

(3) A decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in § 124.504(d); and

\* \* \* \* \*

■ 30. Amend § 124.507 by:

- a. Revising paragraph (b)(2);
- b. Removing paragraph (b)(3);
- c. Redesignating paragraphs (b)(4) through (6) as paragraphs (b)(3) through (5), respectively;
- d. Removing paragraph (c)(1);
- e. Redesignating paragraphs (c)(2) and (3) as paragraphs (c)(1) and (2), respectively; and
- f. Revising newly redesignated paragraph (c)(1).

The revisions read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(2) SBA determines a Participant’s eligibility pursuant to § 124.501(g).

\* \* \* \* \*

(c) \* \* \*

(1) *Construction competitions.* Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction

requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only those Participants with bona fide places of business within the appropriate geographical boundaries are eligible to submit offers.

\* \* \* \* \*

■ 31. Amend § 124.509 by:

- a. Removing the word “maximum” and adding in its place the words “good faith” in paragraph (a)(1);
- b. Removing the words “substantial and sustained” and adding in their place the words “good faith” in paragraph (a)(2); and
- c. Revising paragraph (e).

The revision reads as follows:

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

\* \* \* \* \*

(e) *Waiver of sole source prohibition.*

(1) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when a Participant does not meet its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant’s survival may be jeopardized, or where extenuating circumstances beyond the Participant’s control caused the Participant not to meet its non-8(a) business activity target.

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

(3) The decision to grant or deny a request for a waiver is at SBA’s discretion, and no appeal may be taken with respect to that decision.

(4) A waiver generally applies to a specific sole source opportunity. If SBA grants a waiver with respect to a specific procurement, the firm will be able to self-market its capabilities to the applicable procuring activity with respect to that procurement. If the Participant seeks an additional sole source opportunity, it must request a waiver with respect to that specific opportunity. Where, however, a Participant can demonstrate that the same extenuating circumstances beyond its control affect its ability to receive specific multiple 8(a) contracts, one

waiver can apply to those multiple contract opportunities.

■ 32. Amend § 124.513 by revising paragraphs (c)(4) and (e) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or a percentage agreed to by the parties to the joint venture whereby the 8(a) Participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by the 8(a) Participant(s);

\* \* \* \* \*

(e) *Prior approval by SBA.* (1) When a joint venture between one or more 8(a) Participants seeks a sole source 8(a) award, SBA must approve the joint venture prior to the award of the sole source 8(a) contract. SBA will not approve joint ventures in connection with competitive 8(a) awards.

(2) Where a joint venture has been established for one 8(a) contract, the joint venture may receive additional 8(a) contracts provided the parties create an addendum to the joint venture agreement setting forth the performance requirements for each additional award (and provided any contract is awarded within two years of the first award as set forth in § 121.103(h)). If an additional 8(a) contract is a sole source award, SBA must also approve the addendum prior to contract award.

\* \* \* \* \*

■ 33. Amend § 124.515 by revising paragraph (d) to read as follows:

**§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?**

\* \* \* \* \*

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought. SBA will not grant a waiver for any contract if the work to be performed under the contract is not similar to the type of work

previously performed by the acquiring concern.

\* \* \* \* \*

- 34. Amend § 124.519 by:
  - a. Revising paragraph (a);
  - b. Removing paragraph (c);
  - c. Redesignating paragraph (b) as paragraph (c); and
  - d. Adding a new paragraph (b).

The revision and addition read as follows:

**§ 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?**

(a) A Participant (other than one owned by an Indian Tribe, ANC, NHO, or CDC) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of \$100,000,000 during its participation in the 8(a) BD program.

(b) In determining whether a Participant has reached the limit identified in paragraph (a) of this section, SBA:

(1) Looks at the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications; and

(2) Will not consider 8(a) contracts awarded under the Simplified Acquisition Threshold.

\* \* \* \* \*

- 35. Revise § 124.520 to read as follows:

**§ 124.520 Can 8(a) BD Program Participants participate in SBA’s Mentor-Protégé program?**

(a) An 8(a) BD Program Participant, as any other small business, may participate in SBA’s All Small Mentor-Protégé Program authorized under § 125.9 of this chapter.

(b) In order for a joint venture between a protégé and its SBA-approved mentor to receive the exclusion from affiliation with respect to a sole source or competitive 8(a) contract, the joint venture must meet the requirements set forth in § 124.513(c) and (d).

**PART 125—GOVERNMENT CONTRACTING PROGRAMS**

- 36. The authority citation for part 125 continues to read as follows:

**Authority:** 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644; 657(f); 657q; and 657s; 38 U.S.C. 501 and 8127.

- 37. Amend § 125.2 by adding paragraph (g) to read as follows:

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

\* \* \* \* \*

(g) *Past performance and experience.*

(1) In the case of a solicitation for a bundled contract, a consolidated contract, or a multiple award contract above the substantial bundling threshold of the Federal agency, the head of the agency must consider the past performance, capabilities and experience of each first tier subcontractor that is part of the team as the capabilities and past performance of the small business prime contractor when evaluating an offer of a small business prime contractor that includes a proposed team of small business subcontractors.

(2) For other solicitations, based on the circumstances of the procurement, the agency may consider the past performance, capabilities and experience of each first tier subcontractor that is part of the team as the capabilities and past performance of the small business prime contractor.

- 38. Amend § 125.3 by adding a sentence to the end of paragraph (b)(2) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* This applies whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract, or is deemed to be treated as a small business concern by statute (*see e.g.*, 43 U.S.C. 1626(e)(4)(B)).

\* \* \* \* \*

- 39. Amend § 125.5 by:
  - a. Revising the third sentence of paragraph (a)(1);
  - b. Removing the phrase “\$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures” and adding in its place the phrase “Less than the Simplified Acquisition Threshold” in paragraph (g);
  - c. Removing the phrase “Between \$100,000 and \$25 million” and adding in its place the phrase “Between the Simplified Acquisition Threshold and \$25 million” in paragraph (g);
  - d. Removing the term “\$100,000” and adding in its place “the simplified acquisition threshold” in paragraphs (h) and (i).

The revision reads as follows:

**§ 125.5 What is the Certificate of Competency Program?**

(a) \* \* \*

(1) \* \* \* The COC Program is applicable to all Government procurement actions, with the exception of 8(a) sole source awards but including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. \* \* \*

\* \* \* \* \*

- 40. Amend § 125.6 by revising the paragraph (b) introductory text and adding example 3 to paragraph (b) to read as follows:

**§ 125.6 What are the prime contractor’s limitations on subcontracting?**

\* \* \* \* \*

(b) *Mixed contracts.* Where a contract integrates any combination of services, supplies, or construction, the contracting officer shall select the appropriate NAICS code as prescribed in § 121.402(b) of this chapter. The contracting officer’s selection of the applicable NAICS code is determinative as to which limitation on subcontracting and performance requirement applies. Based on the NAICS code selected, the relevant limitation on subcontracting requirement identified in paragraphs (a)(1) through (4) of this section will apply only to that portion of the contract award amount. In no case shall more than one limitation on subcontracting requirement apply to the same contract.

\* \* \* \* \*

*Example 3 to paragraph (b).* A procuring activity is acquiring both services and general construction through a small business set-aside. The total value of the requirement is \$10,000,000, with the construction portion comprising \$8,000,000, and the services portion comprising \$2,000,000. The contracting officer appropriately assigns a construction NAICS code to the requirement. The 85% limitation on subcontracting identified in paragraph (a)(3) would apply to this procurement. Because the services portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the limitation on subcontracting requirement is \$8,000,000. As such, the prime contractor cannot subcontract more than \$6,800,000 to non-similarly situated entities, and the prime and/or similarly situated entities must perform at least \$1,200,000.

\* \* \* \* \*

- 41. Amend § 125.8 by revising paragraphs (b)(2)(iv), (xi), and (xii), (e), and (h)(2) to read as follows:

**§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iv) Stating that the small business participant(s) must receive profits from the joint venture commensurate with the work performed by them, or a percentage agreed to by the parties to the joint venture whereby the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them;

\* \* \* \* \*

(xi) Stating that annual performance-of-work statements required by paragraph (h)(1) must be submitted to SBA and the relevant contracting officer not later than 45 days after each operating year of the joint venture; and

(xii) Stating that the project-end performance-of-work required by paragraph (h)(2) must be submitted to SBA and the relevant contracting officer no later than 90 days after completion of the contract.

\* \* \* \* \*

(e) *Past performance and experience.* When evaluating the past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

\* \* \* \* \*

(h) \* \* \*

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, and upon request by the SBA or the relevant contracting officer, the small business partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

\* \* \* \* \*

■ 42. Amend § 125.9 by:

- a. Revising paragraphs (b), (c)(1)(ii), and (c)(2) introductory text;
- b. Removing paragraph (c)(4);
- c. Revising paragraphs (d)(1)(iii) introductory text and (d)(1)(iii)(B);
- d. Adding paragraph (d)(6);

■ e. Removing “(e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor)” and adding in its place “(e.g., management and or technical assistance; loans and/or equity investments; bonding; use of equipment; export assistance; assistance as a subcontractor under prime contracts being performed by the protégé; cooperation on joint venture projects; or subcontracts under prime contracts being performed by the mentor)” in paragraph (e)(1) introductory text.

- f. Revising paragraph (e)(1)(i);
- g. Removing the first sentence and revising the new first sentence of paragraph (e)(5);
- h. Redesignating paragraphs (e)(6) through (8) as paragraphs (e)(7) through (9), respectively;
- i. Adding new paragraph (e)(6);
- j. Revising paragraph (f);
- k. Adding paragraph (g) introductory text; and
- l. Revising paragraph (g)(4).

The revisions and additions to read as follows:

**§ 125.9 What are the rules governing SBA’s small business mentor-protégé program?**

\* \* \* \* \*

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

- (i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;
- (ii) Does not appear on the Federal list of debarred or suspended contractors; and
- (iii) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) SBA will decline an application if SBA determines that the mentor does not possess good character or a favorable financial position, employs or otherwise controls the managers of the protégé, or is otherwise affiliated with the protégé. Once approved, SBA may terminate the mentor-protégé agreement if the mentor does not possess good character or a favorable financial position, was affiliated with the protégé at time of application, or is affiliated with the protégé for reasons other than the mentor-protégé agreement or

assistance provided under the agreement.

(3) In order for SBA to agree to allow a mentor to have more than one protégé at time, the mentor and proposed additional protégé must demonstrate that the added mentor-protégé relationship will not adversely affect the development of either protégé firm (e.g., the second firm may not be a competitor of the first firm).

(i) A mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés.

(ii) A mentor generally cannot have more than three protégés at one time. However, the first two mentor-protégé relationships approved by SBA between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico do not count against the limit of three proteges that a mentor can have at one time.

(c) \* \* \*

(1) \* \* \*

(ii) Where a small business seeks to qualify as a protégé in a secondary NAICS code, the firm must demonstrate how the mentor-protégé relationship will help the firm further develop or expand its current capabilities in that secondary NAICS code. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the firm has no prior experience.

(2) A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship, and:

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(iii) Once a protégé firm no longer qualifies as a small business for the size standard corresponding to the NAICS code under which SBA approved its mentor-protégé relationship, any joint venture between the protégé and its mentor will not continue to receive the exclusion from affiliation authorized by paragraph (a) of this section. However, a change in the protégé’s size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

(A) \* \* \*

(B) For contracts with durations of more than five years (including options), where size re-certification is required under § 121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract

and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to the NAICS code assigned to the contract, the joint venture will not be able re-certify itself to be a small business for that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

(6) A mentor that provides a subcontract to a protégé that has its principal office located in the Commonwealth of Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor.

(e) \* \* \*

(1) \* \* \*

(i) Specifically identify the business development assistance to be provided and address how the assistance will help the protégé enhance its growth and/or foster or acquire needed capabilities;

(5) Unless rescinded in writing as a result of an SBA review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm. \* \* \*

(6) A protégé may generally have a total of two mentor-protégé agreements with different mentors.

(i) Each mentor-protégé agreement may be for an initial period of three years and may be extended an additional three years provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance through the extended mentor-protégé agreement.

(ii) If a mentor-protégé agreement is terminated within a year from the date SBA approved the agreement, that mentor-protégé relationship will not count as one of the two mentor-protégé relationships that a small business may enter as a protégé.

(f) *Decision to decline mentor-protégé relationship.* Where SBA declines to approve a specific mentor-protégé agreement, SBA will issue a written decision setting forth its reason(s) for the decline. The small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business

concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor-protégé relationship.* SBA will review the mentor-protégé relationship annually. SBA will ask the protégé for its assessment of how the mentor-protégé relationship is working, whether or not the protégé received the agreed upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future.

(4) SBA may decide not to approve continuation of a mentor-protégé agreement where:

(i) SBA finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement;

(ii) SBA finds that the assistance provided by the mentor has not resulted in any material benefits or developmental gains to the protégé; or

(iii) A protégé does not provide information relating to the mentor-protégé relationship, as set forth in paragraph (g).

■ 43. Amend § 125.18 by:

■ a. Revising paragraph (a);

■ b. Removing “(see §§ 125.9 and 124.520 of this chapter)” and adding in its place “(see § 125.9 of this chapter)” in paragraph (b)(1)(ii);

■ c. Removing “§ 124.520 or” in paragraph (b)(2) introductory text;

■ d. Removing “or § 124.520” in paragraph (b)(3)(i);

■ e. Redesignating paragraphs (d)(1) through (4) as paragraphs (d)(2) through (5), respectively; and

■ f. Adding a new paragraph (d)(1).

The revision and addition read as follows:

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

(a) *General.* In order for a business concern to submit an offer and be eligible for the award of a specific SDVO contract, the concern must submit the appropriate representations and certifications at the time it submits its initial offer which includes price (or other formal response to a solicitation) to the contracting officer, including, but not limited to, the fact that:

(1) It is small under the size standard corresponding to the NAICS code(s) assigned to the contract;

(2) It is an SDVO SBC; and

(3) There has been no material change in any of its circumstances affecting its SDVO SBC eligibility.

\* \* \* \* \*

(d) *Multiple Award Contracts—(1) SDVO status.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) SBA determines SDVO small business eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as an SDVO small business concern as part of its initial offer (or other formal response to a solicitation), which includes price, unless the firm was required to recertify under paragraph (e) of this section.

(A) Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than SDVO. For an unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for SDVO, if a business concern is an SDVO small business concern at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business concern for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement. However, except for orders and Blanket Purchase Agreements issued off any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for SDVO small business, a concern must recertify that it qualifies as an SDVO small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement.

(B) SDVO Set-Aside Multiple Award Contracts. For a Multiple Award Contract that is specifically set aside for SDVO small business, if a business concern is an SDVO small business at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement.

(ii) SBA will determine SDVO small business status at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new SDVO

small business certification for the order or Agreement.

\* \* \* \* \*

■ 44. Amend § 125.28 by revising the section heading and adding a sentence to the end of paragraph (d)(1) to read as follows:

**§ 125.28 What are the requirements for filing a service-disabled veteran-owned status protest?**

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \* Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, an order or a Blanket Purchase Agreement that is set-aside or reserved for SDVO small business off a Multiple Award Contract that is not itself set aside for SDVO small business (or any SDVO order where the contracting officer has requested recertification of SDVO status), an interested party must submit its protest challenging the SDVO status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

\* \* \* \* \*

**PART 126—HUBZONE PROGRAM**

■ 45. The authority citation for part 126 continues to read as follows:

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

**§ 126.616 [Amended]**

■ 46. Amend § 126.616 by removing “(or, if also an 8(a) BD Participant, with an approved mentor authorized by § 124.520 of this chapter)” in paragraph (a).

**§ 126.618 [Amended]**

■ 47. Amend § 126.618 by removing “(or, if also an 8(a) BD Participant, under § 124.520 of this chapter)” in paragraph (a).

■ 48. Amend § 126.801 by adding a sentence to the end of paragraph (d)(1) to read as follows:

**§ 126.801 How does an interested party file a HUBZone status protest?**

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \* In connection with an order or an Agreement that is set-aside or reserved for a certified HUBZone small business concern off a Multiple Award Contract that is not itself set aside for certified HUBZone small business concerns, except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, (or any HUBZone set-aside order where the contracting officer has requested

recertification of such status), an interested party must submit its protest challenging the HUBZone status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

\* \* \* \* \*

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

■ 49. The authority citation for part 127 continues to read as follows:

**Authority:** 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

**§ 127.503 [Amended]**

■ 50. Amend § 127.503 by removing paragraph (h).

■ 51. Revise § 127.504 to read as follows:

**§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB contract?**

(a) *General.* In order for a business concern to submit an offer and be eligible for the award of a specific EDWOSB or WOSB contract, the concern must submit the appropriate representations and certifications at the time it submits its initial offer which includes price (or other formal response to a solicitation) to the contracting officer, including, but not limited to, the fact that:

(1) It is small under the size standard corresponding to the NAICS code(s) assigned to the contract;

(2) It is listed in SAM (or any successor system) as a WOSB or EDWOSB; and

(3) There has been no material change in any of its circumstances affecting its EDWOSB or WOSB eligibility.

(b) *Joint ventures.* A business concern seeking an EDWOSB or WOSB contract as a joint venture may submit an offer if the joint venture meets the requirements as set forth in § 127.506.

(c) *Multiple Award Contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(1) SBA determines EDWOSB or WOSB eligibility for the underlying Multiple Award Contract as of the date a concern certifies its status as an EDWOSB or WOSB as part of its initial offer (or other formal response to a solicitation), which includes price, unless the concern was required to recertify its status as a WOSB or EDWOSB under paragraph (f) of this section.

(i) Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than EDWOSB or WOSB. For an unrestricted Multiple Award Contract or other Multiple Award Contract not set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement. However, except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for EDWOSB or WOSB, a concern must recertify it qualifies as an EDWOSB or WOSB at the time it submits its initial offer, which includes price, for the particular order or Agreement.

(ii) EDWOSB or WOSB Set-Aside Multiple Award Contracts. For a Multiple Award Contract that is set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement.

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

(d) *Limitations on subcontracting.* A business concern seeking an EDWOSB or WOSB contract must also meet the applicable limitations on subcontracting requirements as set forth in § 125.6 of this chapter for the performance of contracts totally set aside for EDWOSB or WOSB, the performance of the set-aside portion of a partial set-aside contract, or the performance of orders set-aside for EDWOSB or WOSB. However, EDWOSB or WOSB concerns will not have to comply with the limitations on subcontracting provisions for any order issued against an unrestricted Multiple Award Contract if the order is competed amongst EDWOSB or WOSB concerns and at

least one other-than-small business concern.

(e) *Non-manufacturers.* An EDWOSB or WOSB that is a non-manufacturer, as defined in § 121.406(b) of this chapter, may submit an offer on an EDWOSB or WOSB contract for supplies, if it meets the requirements under the non-manufacturer rule set forth in § 121.406(b) of this chapter.

(f) *Recertification.* (1) Where a contract being performed by an EDWOSB or WOSB is novated to another business concern, the concern that will continue performance on the contract must recertify its status as an EDWOSB or WOSB to the procuring agency, or inform the procuring agency that it does not qualify as an EDWOSB or WOSB, within 30 days of the novation approval. If the concern cannot recertify its status as an EDWOSB or WOSB, the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(2) Where an EDWOSB or WOSB concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its EDWOSB or WOSB status to the procuring agency, or inform the procuring agency that it no longer qualifies as an EDWOSB or WOSB. If the concern is unable to recertify its status as an EDWOSB or WOSB, the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(3) For purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern

recertify its EDWOSB or WOSB status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option. If the concern is unable to recertify its status as an EDWOSB or WOSB, the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(4) A business concern that did not certify as an EDWOSB or WOSB, either initially or prior to an option being exercised, may recertify as an EDWOSB or WOSB for a subsequent option period if it meets the eligibility requirements at that time. The agency must modify the contract to reflect the new status, and may count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

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

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

**§ 127.505 [Removed and Reserved]**

■ 52. Remove and reserve § 127.505.

■ 53. Amend § 127.603 by revising the section heading and adding a sentence to the end of paragraph (c)(1) to read as follows:

**§ 127.603 What are the requirements for filing an EDWOSB or WOSB status protest?**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, an order or a Blanket Purchase Agreement that is set-aside or reserved

for EDWOSB or WOSB small business under a Multiple Award Contract that is not itself set aside for EDWOSB or WOSB small business (or any EDWOSB or WOSB order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the EDWOSB or WOSB status of a concern for the order or Blanket Purchase Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

\* \* \* \* \*

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

■ 54. The authority citation for part 134 continues to read as follows:

**Authority:** 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), and 687(c); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 38 U.S.C. 8127(f)(8)(B).

Subpart K issued under 38 U.S.C. 8127(f)(8)(A).

■ 55. Amend § 134.318 by adding a subject heading to paragraph (a) and revising paragraph (b) to read as follows:

**§ 134.318 NAICS Appeals.**

(a) *General.* \* \* \*

(b) *Effect of OHA's decision.* If OHA grants the appeal (changes the NAICS code), the contracting officer must amend the solicitation to reflect the new NAICS code. The decision will also apply to future solicitations for the same supplies or services.

\* \* \* \* \*

Dated: October 16, 2019.

**Christopher Pilkerton,**  
*Acting Administrator.*

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