

§ 121.1203 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

(a) Where appropriate, SBA will generally grant waivers for an individual contract or order prior to the issuance of a solicitation, or, where a solicitation has been issued, when the contracting officer provides all potential offerors additional time to respond.

(b) SBA may grant a waiver after contract award, where the contracting officer has determined that the modification is within the scope of the contract and the agency followed the regulations prior to issuance of the solicitation and properly and timely requested a waiver for any other items under the contract, where required.

Example to paragraph (b): The Government seeks to buy spare parts to fix Item A. After conducting market research, the government determines that Items B, C, and D that are being procured may be eligible for waivers and requests and receives waivers from SBA for those items prior to issuing the solicitation. After the contract is awarded, the Government determines that it will need additional spare parts to fix Item A. The Government determines that adding the additional parts as a modification to the original contract is within scope. The contracting officer believes that one of the additional parts is also eligible for a waiver from SBA, and requests the waiver at the time of the modification. If all other criteria are met, SBA would grant the waiver, even though the contract has already been awarded.

(c) An individual waiver for an item in a solicitation will be approved when the SBA Director, Office of Government Contracting, reviews and accepts a contracting officer's determination that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of a solicitation, including the period of performance.

(d) *Waivers for the purchase of software.* (1) SBA may grant an individual waiver for the procurement of software provided that the software being sought is an item that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and the item:

(i) Has been sold, leased, or licensed to the general public, or has been offered

for sale, lease, or license to the general public;

(ii) Is sold in substantial quantities in the commercial marketplace; and

(iii) Is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) If the value of services provided related to the purchase of a supply item that meets the requirements of paragraph (d)(1) of this section exceeds the value of the item itself, the procurement should be identified as a service procurement, even if the services are provided as part of the same license, lease, or sale terms. If a contracting officer cannot make a determination of the value of services being provided, SBA will assume that the value of the services is greater than the value of items or supplies, and will not grant a waiver.

(3) Subscription services, remote hosting of software, data, or other applications on servers or networks of a party other than the U.S. Government are considered by SBA to be services and not the procurement of a supply item. Therefore SBA will not grant waivers of the nonmanufacturer rule for these types of services.

[81 FR 34260, May 31, 2016]

§ 121.1204 What are the procedures for requesting and granting waivers?

(a) *Waivers for classes of products.* (1) SBA may, at its own initiative, examine a class of products for possible waiver of the Nonmanufacturer Rule.

(2) Any interested person, business, association, or Federal agency may submit a request for a waiver for a particular class of products. Requests should be addressed or hand-carried to the Director, Office of Government Contracting, Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

(3) Requests for a waiver of a class of products need not be in any particular form, but should include a statement of the class of products to be waived, the applicable NAICS code, and detailed information on the efforts made to identify small business manufacturers or processors for the class.

(4) If SBA decides that there are small business manufacturers or processors in the Federal procurement market, it will deny the request for waiver, issue notice of the denial, and provide the names, addresses, and telephone numbers of the sources found. If SBA does not initially confirm the existence of small business manufacturers or processors in the Federal market, it will:

(i) Publish notices in the Commerce Business Daily and the FEDERAL REGISTER seeking information on small business manufacturers or processors, announcing a notice of intent to waive the Nonmanufacturer Rule for that class of products and affording the public a 15-day comment period; and

(ii) If no small business sources are identified, publish a notice in the FEDERAL REGISTER stating that no small business sources were found and that a waiver of the Nonmanufacturer Rule for that class of products has been granted.

(5) An expedited procedure for issuing a class waiver may be used for emergency situations, but only if the contracting officer provides a determination to the Director, Office of Government Contracting that the procurement is proceeding under the authority of FAR § 6.302-2 (48 CFR 6.302-2) for “unusual and compelling urgency,” or provides a determination materially the same as one of unusual and compelling urgency. Under the expedited procedure, if a small business manufacturer or processor is not identified by a PASS search, the SBA will grant the waiver for the class of products and then publish a notice in the FEDERAL REGISTER. The notice will state that a waiver has been granted, and solicit public comment for future procurements.

(6) The decision by the Director, Office of Government Contracting to grant or deny a waiver is the final decision by the Agency.

(7) A waiver of the Nonmanufacturer Rule for classes of products has no specific time limitation. SBA will, however, periodically review existing class waivers to the Nonmanufacturer Rule to determine if small business manufacturers or processors have become available to participate in the Federal

market for the waived classes of products and the waiver should be terminated.

(i) Upon SBA’s receipt of evidence that a small business manufacturer or processor exists in the Federal market for a waived class of products, the waiver will be terminated by the Director, Office of Government Contracting. This evidence may be discovered by SBA during a periodic review of existing waivers or may be brought to SBA’s attention by other sources.

(ii) SBA will announce its intent to terminate a waiver for a class of products through the publication of a notice in the FEDERAL REGISTER, asking for comments regarding the proposed termination.

(iii) Unless public comment reveals that no small business manufacturer or processor in fact exists for the class of products in question, SBA will publish a final Notice of Termination in the FEDERAL REGISTER.

(b) *Individual waivers for specific solicitations.* (1) A contracting officer’s request for a waiver of the Nonmanufacturer Rule for specific solicitations need not be in any particular form, but must, at a minimum, include:

(i) A definitive statement of the specific item to be waived and justification as to why the specific item is required;

(ii) The proposed solicitation number, NAICS code, dollar amount of the procurement, and a brief statement of the procurement history;

(iii) A determination by the contracting officer that no small business manufacturer or processor reasonably can be expected to offer a product or products meeting the specifications (including period of performance) required by a particular solicitation. Include a narrative describing market research and supporting documentation; and

(iv) For contracts or orders expected to exceed \$500,000, a copy of the Statement of Work.

(2) Requests should be addressed to the Director, Office of Government Contracting, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(3) SBA will examine the contracting officer’s determination and any other

information it deems necessary to make an informed decision on the individual waiver request. If SBA's research verifies that no small business manufacturers or processors exist for the item, the Director, Office of Government Contracting will grant an individual, one-time waiver. If a small business manufacturer or processor is found for the product in question, the Associate Administrator will deny the request. Either decision represents a final decision by SBA.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 78 FR 61132, Oct. 2, 2013; 81 FR 34260, May 31, 2016]

§ 121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers for the Nonmanufacturer Rule have been granted is maintained in SBA Web site at: http://www.sba.gov/aboutsba/sbaprograms/gc/programs/gc_waivers_nonmanufacturer.html. A list of such waivers may also be obtained by contacting the Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or the nearest SBA Government Contracting Area Office.

[69 FR 29208, May 21, 2004, as amended at 74 FR 46313, Sept. 9, 2009]

§ 121.1206 How will potential offerors be notified of applicable waivers?

(a) Contracting officers must provide written notification to potential offerors of any waivers being applied to a specific acquisition, whether it is a class waiver or a contract specific waiver. This notification must be provided at the time a solicitation is issued. If the notification is provided after a solicitation is issued, the contracting officer must provide potential offerors a reasonable amount of additional time to respond to the solicitation.

(b) If a contracting officer does not provide notice, and additional reasonable time for responses when required, then the waiver cannot be applied to the solicitation. This applies to both class waivers and individual waivers.

[81 FR 34260, May 31, 2016]

APPENDIX A TO PART 121—PAYCHECK PROTECTION PROGRAM SAMPLE ADDENDUM A

[Sample]

ADDENDUM A

✓ The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility because the Applicant has made a reasonable, good faith determination that the Applicant qualifies for a religious exemption under 13 CFR 121.103(b)(10), which says that "[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion."

[85 FR 20821, Apr. 15, 2020]

PART 123—DISASTER LOAN PROGRAM

Subpart A—Overview

Sec.

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- 123.3 How are disaster declarations made?
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- 123.7 Are there restrictions on how disaster loans can be used?
- 123.8 Does SBA charge any fees for obtaining a disaster loan?
- 123.9 What happens if I don't use loan proceeds for the intended purpose?
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- 123.11 Does SBA require collateral for any of its disaster loans?
- 123.12 Are books and records required?
- 123.13 What happens if my loan application is denied?
- 123.14 How does the Federal Debt Collection Procedures Act of 1990 apply?
- 123.15 What if I change my mind?
- 123.16 How are loans administered and serviced?
- 123.17 Do other Federal requirements apply?
- 123.18 Can I request an increase in the amount of a physical disaster loan?
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- 123.20 How long do I have to request an increase in the amount of a physical disaster loan or an economic injury loan?
- 123.21 What is a mitigation measure?