summarized information that you consider to be CBI and explain why you believe SBA
shall hold this information as confidential. SBA will review the information and make the final
determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: LeAnn Delaney, Deputy Director, Office of
Business Development, at (202) 205–5852, or LeAnn.Delaney@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background

time established a 5 percent goal for all Department of Defense (DOD) contracts
to be awarded to SDBs. To achieve the 5 percent SDB goal, the statute
authorized the award of contracts to SDBs using less than full and open
competitive procedures. Specifically, DOD developed through regulation a
practice known as the “rule of two” for SDBs. Pursuant to the “rule of two,”
whenever a contracting officer identified two or more SDBs that it
believed could perform a specific procurement at a fair and reasonable
price, the contracting officer was required to set the contract aside for
bidding exclusively among SDBs. In addition, SDBs would receive a 10%
price evaluation adjustment in the evaluation of offers in an unrestricted or
full and open competition. The DOD’s SDB program was a self-certification
program. SBA established eligibility criteria, but firms certified their SDB
status for particular procurements. SBA

II. Background

The Department of Defense (DOD)’s prime contracts to those limited
agencies that have authority and chose to use price evaluation adjustments to
SDBs. Pursuant to the “rule of two,” whenever a contracting officer
identified two or more SDBs that it
believed could perform a specific
procurement at a fair and reasonable
price, the contracting officer was required to set the contract aside for
bidding exclusively among SDBs. In addition, SDBs would receive a 10%
price evaluation adjustment in the evaluation of offers in an unrestricted or
full and open competition. The DOD’s SDB program was a self-certification
program. SBA established eligibility criteria, but firms certified their SDB
status for particular procurements.
did, however, process protests and appeals relating to SDB status in connection with individual procurements.

In 1994, Congress extended the authority granted to DOD by 10 U.S.C. 2323 to all agencies of the Federal Government through enactment of the Federal Acquisition Streamlining Act (FASA), Public Law 103–355. However, as a result of the Supreme Court’s decision in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), President Clinton ordered the Department of Justice (DOJ) to work with Federal agencies to conduct a review of all race and gender conscious Federal contracting programs and implement necessary regulatory reforms to comply with the Court’s ruling. Regulations to implement FASA were delayed until the completion of this review.

In 1996, DOJ completed its review and, on May 23, 1996, published in the Federal Register proposed reforms to these Federal preferential contracting programs and programs their 10 U.S.C. 2323 to all agencies of the Federal Procurement Data System indicates that NASA and the Coast Guard rarely use the price evaluation adjustment.

Thus, at this point, only two agencies (NASA and the Coast Guard) are currently able to use the SDB price evaluation preference, and their use is minimal. Considering this, having SBA certify SDBs Government-wide for prime contracts is no longer the most efficient or effective way to certify firms. This rule removes SBA from the SDB certification process. In terms of prime contracts, the rule will have those procuring agencies that have an SDB prime contracts program certify firms as SDBs where the need to do so arises. In other words, if an agency uses the Price Evaluation Adjustment, then they should develop procedures for certifying SDBs. But in other cases, agencies can rely on self-certification of SDBs. The rule recognizes that the approximately 9,545 firms currently certified SDBs for both prime contracts and subcontracts as SDBs. The rule’s effect of having procuring agencies to certify firms as SDBs for their programs. The rule’s effect of having procuring agencies make SDB certifications is consistent with one of the alternatives set forth in the 1996 DOJ SDB proposal. In order to make the transition smoother, SBA will conduct training seminars designed to instruct personnel from other agencies on the procedures for making eligibility determinations. This training component is also consistent with the DOJ proposal.

Moreover, as noted above, any firm seeking to represent itself as a SDB for a subcontract on a federal prime contract must currently also be certified as an SDB by SBA. Requiring certification for subcontracts is not required by law, and may contradict the express language of the Small Business Act. In this regard, § 8(d)(3)(F) of the Small Business Act, 15 U.S.C. 637(d)(3)(F), states: “Contractors acting in good faith may rely on written representations by their subcontractors that they are small business concerns owned and controlled by socially and economically disadvantaged individuals * * *” (Emphasis added). This language clearly suggests that Congress intended to allow large business prime contractors to rely on the self representations of subcontractors claiming to be SDBs.

SBA believes that the clear language of the Small Business Act should be adhered to. As such, SBA’s regulatory change permits firms to self-represent their status as SDBs for subcontracts. Specific Regulatory Changes

Section 124.1001 is amended to eliminate references to SBA performing SDB certifications. It also changes the provisions regarding which firms can certify their status as SDBs for both Federal prime contracts and subcontracts on federal prime contracts. The rule eliminates the requirement that a firm must have received an SDB certification from SBA before it can represent itself to be a SDB. In order for a concern to represent that it is an SDB in order to receive a benefit as a prime contractor on a Federal Government procurement, the rule states that a firm must: (1) Be a current Participant in SBA’s 8(a) BD program; (2) have been certified by SBA as an SDB within three years of the date it seeks to certify as an SDB; (3) have received certification from the procuring agency that it qualifies as an SDB; or (4) have submitted an application for SDB certification to the procuring agency and must not have received a negative determination regarding that application. For subcontracts, the rule permits a firm to represent that it...
Because SBA will no longer certify firms the negative determination. A firm has not overcome the reason(s) for misrepresentation of SDB status if the firm did not qualify as an SDB, SBA’s decision would overturn the procuring agency determination. In addition, if in connection with a protest SBA finds that a firm does not qualify as an SDB, the procuring agency cannot take SDB goaling credit for that contract.

II. Justification for Publication as Interim Final Status Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act and SBA regulations. 5 U.S.C. 553 and 13 CFR 101.108. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation. Congress agreed that in such circumstances, an agency may publish an interim final rule without soliciting public comment. In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation. Congress agreed that in such circumstances, an agency may publish an interim final rule without soliciting public comment.
Any such delay would be extremely prejudicial to the affected businesses. Although this rule is being published as an interim final rule, comments are hereby solicited from interested members of the public. These comments must be received on or before November 3, 2008. SBA may then consider these comments in making any necessary revisions to these regulations.

III. Justification for Immediate Effective Date of Interim Final Rule

The APA requires that “publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule.” 5 U.S.C. 553(d)(3). SBA finds that good cause exists to make this final rule effective the same day it is published in the Federal Register.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth above in II, Justification of Publication of Interim Final Status Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date.

SBA is aware of many entities that will be assisted by the immediate adoption of this rule.

Compliance with Executive Orders 12866, 12988, 13175, and 13132, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C., Ch. 35)

Executive Order 12866

OMB has determined that this rule is significant regulatory action for purposes of Executive Order 12866. OMB has also determined that this rule is not major under the Congressional Review Act.

Because this rule is a significant regulatory action, a Regulatory Impact Analysis, discussing the need, cost, benefits and alternatives to the rule is required.

1. Is there a need for this regulatory action?

Yes, there is a need for this regulatory action. Under the existing regulation, SBA is required to perform SDB certification services for other Agencies. 13 CFR s. 124.1001(c). In addition, the FAR defines an SDB as a small business that has received certification from SBA as a SDB consistent with 13 CFR 124, Subpart B. This Interim Final Rule is necessary since SBA must cease performing SDB certifications as of the end of Fiscal Year 2008 due to a lack of funding. By the time this Interim Final Rule has been published, SBA will have initiated a FAR case to make the conforming changes to the FAR. These changes will ensure that eligible SDBs will be able to continue to compete for SDB procurements that Agencies use to meet their SDB statutory goals, as well as use the SDB price evaluation preference for NASA and Coast Guard, by self-representing their SDB status. It may also open up other Agencies using either private SDB certifiers or establishing Agency-specific SDB programs. In addition, it will allow these SDBs to continue to participate in the Department of Transportation’s (DOTs) Disadvantaged Business Enterprise Program, 49 CFR 26.5, which has relied upon the SBA and FAR SDBs status. Moreover, the SBA Office of Inspector General early on recognized that the current funding structure for the SDB Program is unreliable and unpredictable and that there was no legal basis that assured the other Agencies would continue funding the SDB Program. SBA OIG Audit Report No. 00–19, SDB Certification Program Obligations and Expenditures. Without continued interagency funding, SBA is unable to continue to support the existing rule process by certifying SDBs for the entire Federal Government.

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

Currently, SBA has certified only 2,814 firms other than 8(a) participants as eligible solely for SDB status. From FY 98 through FY 07 SBA has been reimbursed by procuring agencies over $27.5 million for these SDB certifications. The procuring agencies are obligated to reimburse SBA another $1.2 million in FY 2008, so total reimbursements from procuring agencies will exceed $28.7 million since FY 1998.

The SDB procurement goal achievement calculation includes 8(a) certified firms (9,994) and SDB certified firms (2,814). Firms certified as 8(a) are also considered to be SDB for statistical purposes. In FY 2005 Federal agencies reported SDB contracts awarded to SDBs totaling $21.7 billion. When 8(a) contract award dollars are subtracted, the contracts awarded to SDBs in dollars totaled $11.2 billion, of which DoD awarded $7.4 billion or 66%. DoD was successful in awarding this amount without the use of the SDB price evaluation adjustment. Based on conversations with the other Federal agencies, virtually all of the remaining SDB dollars, $3.8 billion, were awarded under full and open competition without the use of the SDB price evaluation adjustment. During this same period, the Federal Government exceeded the SDB 5% goal, reaching 6.92%.

The SDB certification process is time consuming and costly for many small businesses. During the past five years, the Federal Government has exceeded the statutory 5% SDB goal without the use of the SDB price evaluation adjustment. Eliminating SDB certification would have little negative impact on the SDB community as long as self-representation is allowed. Presently, there is minimal use of the SDB price evaluation adjustment at the Federal prime contract level. Specifically, Congress allowed the SDB price evaluation adjustment authority to expire on December 9, 2004 for all but two agencies. Authority for the two remaining agencies was reauthorized for another three years to 2009. However, for the most part these agencies are not using the price evaluation preference to meet the 5% SDB goal. Therefore, at the prime contract level, there is little or no benefit for a firm to expend substantial time and expense to obtain SDB certification.

Therefore, continuation of the existing SDB certification process is costly, time consuming and burdensome. As opposed to this, self-representation by firms of their status in good faith is cheaper, quicker and less burdensome. SBA will continue to provide an appeal process for contract protests and SDB status. Allowing firms to self represent at the subcontracting level appears to be consistent with Congressional intent.

3. What are the alternatives to this rule?

SBA has identified three separate alternatives to this rule: (1) Self-representation; (2) private certification, and (3) agency specific SDB certification programs.

We believe self-representation is supported by the relevant statute. In terms of subcontracting, § 8(d)(3)(F) of the Small Business Act, 15 U.S.C. 637(d)(3)(F), states: “Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as * * * a small business concern owned and controlled by socially and economically disadvantaged individuals, * * *” (Emphasis added). This language suggests that Congress intended to allow large business prime contractors to rely on self certifications by companies claiming to be SDBs. Small business contractors would not have the self-representation as an SDB in good faith and the determination would be subject to review.
to SBA SDB protest and appeal procedures.

Private certifiers were contemplated under the existing SBA SDB regulations, but none were ever approved. 13 CFR 124.1003–1009. However, the Private Certifier structure is available if an Agency wanted to go replicate or approximate those regulations and proceed with that option. Since a Private Certifier must be compensated by the Agency hiring them under contract, this option does require a procurement action and Agency funding and oversight.

Agency-specific SDB certification programs could also be established by interested Agencies. We believe this would require rulemaking and the commitment of Agency resources to creation and maintenance of each Agency’s SDB program. SBA will also provide training and educational assistance on how to implement and administer a SDB certification program to any interested Agency.

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 purposes of E.O. 13132, the SBA has determined that the 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 determines that this Interim Final Rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13175, Tribal Summary Impact Statement

For the purposes of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, SBA has determined that this Interim Final Rule will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

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

SBA has determined that this proposed rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

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

Because the rule is an interim final rule, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act (IRFA) analysis. The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an IRFA which describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires analysis of a rule only where notice and comment rulemaking are required. Rules are exempt from Administrative Procedure Act (APA) notice and comment requirements and therefore from the RFA requirements when the agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rules issued) that notice and public procedure thereon is impracticable, unnecessary, or contrary to the public interest. In this case it would be contrary to the public interest to delay the promulgation of the rule.

List of Subjects in 13 CFR Part 124

Administrative practice and procedure, Government procurement, Hawaiian Natives, Indians—business and finance, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

For the reasons stated in the preamble, the Small Business Administration amends title 13 CFR part 124 as follows:

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

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

§ 124.1001 General applicability.

(a) This subpart defines a Small Disadvantaged Business (SDB). It also establishes procedures by which SBA determines whether a particular concern qualifies as an SDB in response to a protest challenging the concern’s status as disadvantaged. Unless specifically stated otherwise, the phrase “socially and economically disadvantaged individuals” in this subpart includes, Indian tribes, ANCs, CDCs, and NHOS.

(b) In order for a concern to represent that it is an SDB in order to receive a benefit as a prime contractor on a Federal Government procurement, it must:

1. Be a current Participant, as defined in §124.3 of this part, in SBA’s 8(a) BD program as described in §124.1 of this part, program;

2. Have been certified by SBA as an SDB within three years of the date it seeks to certify as an SDB;

3. Have received certification from the procuring agency that it qualifies as an SDB; or

4. Have submitted an application for SDB certification to the procuring agency and must not have received a negative determination regarding that application.

(c) A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.

3. Revise §§124.1001 through 124.1006 to read as follows:

§ 124.1003 How does a firm become certified as an SDB?

(a) All firms that are current Participants in SBA’s 8(a) BD program are automatically deemed to be certified SDBs.

(b) Any firm seeking to be certified as an SDB in order to represent that it qualifies and is eligible to obtain a benefit on a federal prime contract as an SDB may apply to the procuring agency for such certification.

(c) A procuring agency may accept a certification from another entity, e.g., a private certifying entity, or a state or local government, that a firm qualifies as an SDB if the agency deems it appropriate.

§ 124.1004 What is a misrepresentation of SDB status?

(a) Any person or entity that misrepresents a firm’s status as a “small business concern owned and controlled by socially and economically disadvantaged individuals” (“SDB status”) in order to obtain an 8(d) or
Upon its completion of an SDB question the SDB status of the firm. If SBA finds that the firm continues to qualify as an SDB, the determination remains in effect for three years from the date of the decision.

§ 124.1005 How long does an SDB certification last?

(a) A firm that is certified to be an SDB will generally be certified for a period of three years from the date of the certification.

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

(1) In connection with a protest challenging the firm’s SDB status (see § 124.1013(h)(2));

(2) In connection with an SBA-initiated SDB determination (see § 124.1006); or

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

(c) A firm that completes its nine-year program term in the 8(a) BD program will continue to be deemed a certified SDB firm for a period of three years from the date of its last 8(a) annual review.

§ 124.1006 Can SBA initiate a review of the SDB status of a firm claiming to be an SDB?

SBA may initiate an SDB determination on any firm that has been certified to be an SDB by a procuring agency or that has represented itself to be an SDB on a subcontract to a federal prime contract whenever it receives credible information calling into question the SDB status of the firm. Upon its completion of an SDB determination, SBA will issue a written decision regarding the SDB status of the questioned firm. If SBA finds that the firm continues to qualify as an SDB, the determination remains in effect for three years from the date of the decision.

3. Remove §§ 124.1007 through 124.1016 and redesignate §§ 124.1017 through 124.1024 as §§ 124.1007 through 124.1014, respectively.

Sandy K. Baruah,
Acting Administrator.
[FR Doc. E8–23472 Filed 10–2–08; 8:45 am]
BILLING CODE 8025–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 732, 734, 738, 740, 742, 744, 746, 748, 750, 762, 770, 772, and 774

[Docket No. 080211163–81224–01]

RIN 0694–AE18

Encryption Simplification

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule.

SUMMARY: This interim final rule amends the Export Administration Regulations (EAR) to make the treatment of encryption items more consistent with the treatment of other items subject to the EAR, as well as to simplify and clarify regulations pertaining to encryption items. The restrictions pertaining to technical assistance by U.S. persons with respect to encryption items are removed, because the current export and reexport restrictions set forth in the EAR for technology already include technical assistance. This rule also removes License Exception KMI as it has become obsolete because of developments in uses of encryption. In addition, this rule removes notification requirements for items classified as 5A992, 5D992, and 5E992. This rule also increases certain parameters under License Exception ENC, which is intended to reflect advances in technology. This rule adds two new review and reporting requirement exclusion paragraphs under License Exception ENC for wireless “personal area network” items and for “ancillary cryptography” items. This rule also adds Bulgaria, Canada, Iceland, Romania, and Turkey to the list of countries that receive favorable treatment under License Exception ENC. Commodities and software pending mass market review may no longer be exported under ECCNs 5A992 and 5D992 using No License Required (NLR). However, once the mass market review has been received by BIS, then such commodities and software may be exported using License Exception ENC under ECCNs 5A002 and 5D002. This rule will reduce the paperwork burden on the public by 9% (annual dollar amount savings of approximately $14,000 to the public and $5,000 to the U.S. Government), because of the removal of certain notification requirements, addition of countries to the list of those receiving favorable treatment under License Exception ENC, and the increase of reporting and review requirement exclusions. The Departments of Commerce, State and Defense will continue to review export control, license review policies, and license exceptions for encryption items in the EAR.

DATES: Effective Date: This rule is effective October 3, 2008.

ADDRESSES: Written comments on this interim final rule may be sent by e-mail to publiccomments@bis.doc.gov. Include “Encryption rule” in the subject line of the message. Comments may also be submitted by mail or hand delivery to Sharron Cook, Office of Exporter Services, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, ATTN: Encryption rule; or by fax to (202) 482–3355.

FOR FURTHER INFORMATION CONTACT: For questions of a general nature contact Sharron Cook, Office of Exporter Services, Regulatory Policy Division at (202) 482–2440 or E-Mail: scook@bis.doc.gov. For questions of a technical nature contact: The Information Technology Division, Office of National Security and Technology Transfer Controls at 202–482–0707 or E-Mail: C. Randall Pratt at cpratt@bis.doc.gov.

SUPPLEMENTARY INFORMATION: Background

Steps Regarding Scope of the EAR

This rule revises paragraph 732.2(b) of the EAR, which sets forth instructions on how to determine if your technology or software is publicly available, by adding mass market encryption software with symmetric key length exceeding 64-bits classified under ECCN 5D992. The addition of this phrase harmonizes with the scope of publicly available encryption software that is considered to be subject to the EAR because of the criteria set forth in § 734.3(b)(3) of the EAR.