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: Final rule.

SUMMARY: In response to President Trump's government-wide regulatory reform initiative, the U.S. Small Business Administration (SBA) initiated a review of its regulations to determine which might be revised or eliminated. As a result, this rule merges 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 also eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award, revises several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants, and clarifies other related regulatory provisions to eliminate confusion among small businesses and procuring activities. In addition, in response to public comment, the rule requires a business concern to recertify its size and/or socioeconomic status for all set-aside orders under unrestricted multiple award contracts, unless the contract authorized limited pools of concerns for which size and/or status was required.

DATES: This rule is effective on November 16, 2020, except for § 127.504 which is effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–7625; *mark.hagedorn@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 identified provisions in many areas of its regulations that can be simplified or eliminated.

On November 8, 2019, SBA published in the **Federal Register** a comprehensive proposal 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; 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. 84 FR 60846. Some of the proposed changes involved technical issues. Others were more substantive and resulted from SBA's experience in implementing the current regulations. The proposed rule initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289.

As part of the rulemaking process, SBA also held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, 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. *See* 84 FR 66647. These consultations were in addition to those held by SBA before issuing the proposed rule in Anchorage, AK (*see* 83 FR 17626), Albuquerque, NM (*see* 83 FR 24684), and Oklahoma City, OK (*see* 83 FR 24684). 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. Additionally, SBA held a Listening Session in Honolulu, HI to obtain comments and input from key 8(a) BD program stakeholders in the Hawaiian small business community, including 8(a) applicants and Participants owned by Native Hawaiian Organizations (NHOs).

During the proposed rule's 91-day comment period, SBA received 189 timely comments, with a high percentage of commenters favoring the proposed changes. A substantial number of commenters applauded SBA's effort to clarify and address misinterpretations of the rules. For the most part, the comments supported the substantive changes proposed by SBA.

This rule merges the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program. The rule also eliminates 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 in every instance. Additionally, the rule makes several other changes to the 8(a) BD Program to eliminate or reduce unnecessary or excessive burdens on 8(a) Participants.

The rule combines the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program 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 20 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).

The mentor-protégé program available to firms participating in the 8(a) BD Program has been 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 has been 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 rule eliminates a separate 8(a) BD Mentor-Protégé Program and continues to allow any 8(a) Participant to enter a mentor-protégé relationship through the All Small Mentor-Protégé Program. Specifically, the rule revises § 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 rule also makes 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).

A mentor-protégé relationship approved by SBA through the 8(a) BD Mentor-Protégé Program will continue to operate as an SBA-approved mentor-protégé relationship under the All Small Mentor-Protégé Program. It will continue to have the same remaining time in the All Small Mentor-Protégé Program as it would have had under the 8(a) BD Mentor-Protégé Program if that Program continued. Any mentor-protégé relationship approved under the 8(a) BD Mentor-Protégé Program will count as one of the two lifetime mentor-protégé relationships that a small business may have under the All Small Mentor-Protégé Program.

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 revises 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 makes additional changes to the size and socioeconomic status recertification requirements for orders issued against multiple award contracts (MACs). A detailed discussion of these changes is contained below in the Section-by-Section Analysis.

II. Section-by-Section Analysis

Section 121.103(b)(6)

The rule amends the references to SBA's mentor-protégé programs in this provision, 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 rule eliminates 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(f)(2)(i)

Under § 121.103(f)(2), SBA may presume an identity of interest (and thus affiliate one concern with another) based upon economic dependence if the concern in question derived 70 percent or more of its receipts from another concern over the previous three fiscal years. The proposed rule provided that 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. Commenters supported this change, appreciating that SBA seemed to be making economic dependence more about the issue of control, where they thought it should be. SBA adopts this language as final.

Section 121.103(g)

The rule amends 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 merely adds 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 has always been authorized, but merely seeks to clarify its intent to make sure there is no confusion. Several commenters were concerned that the rule was not clear with respect to entity-owned firms, specifically that the newly organized concern rule should not apply to tribes, ANCs and NHOs. SBA believes that entities and entity-owned firms are already excepted from affiliation under the newly organized concern rule by § 121.103(b)(2). A few commenters recommended that SBA put in clarifying language to ensure that the rule cannot be read to contradict § 124.109(c)(4)(iii), which permits a manager of a tribally-owned concern to manage no more than two Program Participants at the same time. The final rule adds such clarifying language.

Section 121.103(h)

The proposed rule sought to 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. The proposed rule sought 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 clarified 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. Commenters generally supported the proposal to eliminate the three-contract limit, saying that the change will eliminate significant and unnecessary confusion. Commenters also believed that requiring partners to form a second or third joint venture after they received three contract awards created an undue administrative burden on joint ventures, and they viewed this change as an elimination of an unnecessary burden. Several commenters recommended further amending the rule to extend the amount of time that a joint venture could seek contracts to some point greater than two years. These commenters recommended two approaches, either allowing all joint ventures to seek contracts for a period greater than two years or allowing only joint ventures between a protégé and its mentor to seek contracts beyond two years. In the mentor-protégé context, commenters reasoned that a joint venture between a protégé and its mentor should be either three years (the length of the initial mentor-protégé agreement) or six years (the total allowable length of time for a mentor-protégé relationship to exist). It is SBA's view that the requirements for all joint ventures should be consistent, and that they should not be different with respect to joint ventures between protégé firms and their mentors. One of the purposes of this final rule is to remove inconsistencies and confusion in the regulations. SBA believes that having differing requirements for different types of joint ventures would add to, not reduce, the complexity and confusion in the regulations. Regarding extending the amount of time a joint venture could operate and seek additional contracts generally, SBA opposes such an extension. As SBA noted in the supplementary information to the proposed rule, SBA believes that a joint venture should not be an on-going entity, but, rather, something formed for a limited purpose with a limited duration. SBA believes that allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture. If the parties intend to jointly seek work beyond two years from the date of the first award, the regulations allow them to form a new joint venture. That new entity would then be able to seek additional contracts over two years from the date of its first award. Although requiring the formation of several joint venture entities, SBA believes that is the correct approach. To do otherwise would be to ignore what a joint venture is intended to do.

In addition, one commenter sought further clarification regarding novations. The rule makes clear that where a joint venture submits an offer prior to the two-year period from the date of its first award, the joint venture can be awarded a contract emanating from that offer where award occurs after the two-year period expires. The commenter recommended that SBA add clarifying language that would similarly allow a novation to occur after the two-year period if the joint venture submits a novation package for contracting officer approval within the two-year period. SBA agrees, and has added clarifying language to one of the examples accompanying the regulatory text.

In the proposed rule, SBA also asked for 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. This may be problematic where the joint venture is awarded a Federal Supply Schedule (FSS) contract or any other MAC vehicle. A joint venture that is awarded a MAC 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, the proposed rule asked for comments as to whether SBA should 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 received several comments responding to this provision on both sides of the issue. Several commenters believed that SBA should not consider the individual size of partners who have left the joint venture in determining whether the joint venture itself continues to qualify as small. These commenters thought that permitting substitution of joint venture partners allows small businesses to remain competitive for orders under large, complex MACs. Other commenters acknowledged that SBA has accurately recognized a problem that gives a competitive advantage to joint ventures over individual small businesses. They agreed that SBA likely did not contemplate a continuous turnover of joint venture partners when it changed its affiliation rules to allow a joint venture to qualify as small provided that each of its partners individually qualified as small (instead of aggregating the receipts or employees of all joint venture partners as was previously the case). SBA notes that this really is an issue only with respect to MACs. For a single award contract, size is determined at one point in time—the date on which an offeror submits its initial offer including price. Where an offeror is a joint venture, it qualifies as small provided each of the partners to the joint venture individually qualifies as small on the date of the offer. The size of the joint venture awardee does not change if an individual member of the joint venture grows to be other than small during the performance of the contract. As detailed elsewhere in this rule, for a MAC that is not set-aside for small business, however, size may be determined as of the date a MAC holder submits its offer for a specific order that is set-aside for small business. In such a case, if a partner to the joint venture has grown to be other than small, the joint venture would not be eligible as a small business for the order. One commenter recommended that once a multi-small business joint venture wins its first MAC, its size going forward (for future contracts or any recertification required under the awarded MAC) should be determined based on the size of the joint venture's present members and any former members that were members as of the date the joint venture received its first MAC. This would allow a joint venture to remove members for legitimate reasons before the first award of the first MAC, but not allow the joint venture to change members after such an award just to be able to recertify as small for an order under the MAC. SBA thoroughly considered all the comments in response to this issue. After further considering the issue, SBA does not believe that reaching back to consider the size of previous partners (who are no longer connected to the joint venture) would be workable. A concern that is no longer connected to the joint venture has no incentive to cooperate and provide information relating to its size, even if it still qualified individually as small. Thus, SBA is not making any changes to the regulatory text to address this issue in this final rule.

The rule also proposed 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. SBA received overwhelming support of this change and adopts it as final in this rule.

The proposed rule also sought comments on the broader issue of facility clearances with respect to joint ventures. SBA understands 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. Under SBA's regulations, a joint venture *cannot* hire individuals to perform on a contract awarded to the joint venture (the joint venture cannot be ''populated''). Rather, work must be done individually by the partners to the joint venture so that SBA can track who does what and ensure that some benefit flows back to the small business lead partner to the joint venture. SBA proposed allowing a joint venture to be awarded a contract where either the joint venture itself or the lead small business partner to the joint venture has the required facility security clearance. In such a case, 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, then the non-lead partner to the joint venture (which may include a large business mentor) could possess such clearance. The majority of commenters supported this proposal, agreeing that it does not make sense to require the joint venture to have the necessary facility security clearance where the joint venture entity itself is not performing the contract. These commenters believed that as long as the joint venture partner(s) performing the necessary security work had the required facility security clearance, the Government would be adequately protected.

This rule also removes 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 rule eliminates the 8(a) BD Mentor-Protégé Program as a separate program, this provision is no longer needed.

The proposed rule also clarified 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 proposed rule provided that 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. Commenters generally agreed with the proposed treatment of receipts. Several commenters sought further clarification regarding subcontractors, specifically asking how to treat revenues generated through subcontracts from the individual partners. One commenter recommended that the joint venture partner responsible for a specific subcontract should take on that revenue as its share of the contract's total revenues. As with all contracts, SBA does not exclude revenues generated by subcontractors from the revenues deemed to be received by the prime contractor. Where a joint venture is the prime contractor, 100 percent of the revenues will be apportioned to the joint venture partners, regardless of how much work is performed by other subcontractors. The joint venture must perform a certain percentage of the work between the partners to the joint venture (generally 50 percent, but 15 percent for general construction). SBA does not believe that it matters which partner to the joint venture the subcontract flows through. Of the 50 percent of the total contract that the joint venture partners must perform, SBA will look at how much is performed by each partner. That is the percentage of total revenues that will be attributed to each partner. This rule makes clear that revenues will be attributed to the joint venture in the same percentage as that of the work performed by each partner.

A few commenters thought that that same approach should not be applied to the apportionment of employees. They noted that some or all of the joint venture's employees may also be employed concurrently by a joint venture partner. Without taking that into account, the proposed methodology would effectively double count employees who were also employed by one of the joint venture partners. In response, SBA has amended this paragraph to provide that for employees, the appropriate way to apportion individuals employed by the joint venture is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in the employee count of one of the partners.

Section 121.402

The proposed rule amended 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. Consistent with the final rule for FAR Case 2014–002, 85 FR 11746 (Feb. 27, 2020), a contracting officer must assign a single NAICS code for each order issued against a 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) and the FAR, all contracts including MACs are restricted to only being assigned a single NAICS code, and 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. SBA recognizes that § 121.402(c) already provides for a solution that will ensure that NAICS codes assigned to task and delivery orders accurately reflect the work being done under the orders. Specifically, the requirement for certain MACs to be assigned more than one NAICS code (*e.g.,* service NAICS code and supply NAICS code) will allow for orders against those MACs to reflect both a NAICS code assigned to the MAC and also a NAICS code that accurately reflects work under the order. The requirement to assign certain MACs more than one NAICS code has already been implemented in the FAR at 48 CFR 19.102(b)(2)(ii) but it will not go into effect until October 1, 2022. The future effective date is when FPDS is expected to implement the requirement and it allows all the Federal agencies to budget and plan for internal system updates across their multiple contracting systems to accommodate the requirement. Thus, this rule makes only minor revisions to the existing regulations 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.

Commenters supported SBA's intent. They noted that allowing contracting officers to assign a NAICS code to an order that differs from the NAICS code(s) already contained in the MAC could unfairly disadvantage contractors who did not compete for the MAC because they did not know orders would be placed under NAICS codes not in the MAC's solicitation. A commenter noted, however, that the proposed rule added a new § 121.402(c)(2)(ii) when it appears that a revision to § 121.402(c)(2)(i) might be more appropriate. SBA agrees and has revised § 121.402(c)(2)(i) in this final rule to clarify that orders must reflect a NAICS code assigned to the underlying MAC.

In addition, the rule makes a minor change to § 121.402(e) by removing the passive voice in the regulatory text. The rule also clarifies that in connection with a size determination or size appeal, SBA may supply an appropriate NAICS code designation, and accompanying size standard, where the NAICS code identified in the solicitation is prohibited, such as for set-aside procurements where a retail or wholesale NAICS code is identified.

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. 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 long-term small business set-aside contracts 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 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. 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. 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.

In considering the issue, SBA looked at the data for orders that were awarded as small business set-asides under unrestricted base multiple award vehicles in FY 2018. In total, 8,666 orders were awarded as small business set-asides under unrestricted MACs in FY 2018. Of those set-aside orders, 10 percent are estimated to have been awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order award. Further, it is estimated that 7.0 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (510 out of 7,266 orders). That amounted to 12.6 percent of the dollars set-aside for small business under the FSS ($129.6 million to firms that were no longer small in SAM out of a total of $1.0723 billion in small business set-aside orders). Whereas, it is estimated that 49.4 percent of small business set-aside orders under government-wide acquisition contracts (GWACs) were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (261 out of 528 orders). That amounted to 67 percent of the dollars set-aside for small business under GWACs ($119.6 million to firms that were no longer small in SAM 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 under 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 6.4 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM at the time of the order (468 out of 7,266 orders). That amounted to 11.3 percent of the dollars set-aside for small business under the FSS ($120.7 million to firms that were no longer small in SAM out of a total of $1.0723 billion in small business set-aside orders). Considering exceptions for set-aside orders under GWACs, it is estimated that 11.6 percent were awarded to firms that were no longer small in SAM at the time of the order (61 out of 528 orders). That amounted to 39.5 percent of the dollars set-aside for small business under GWACs ($70.5 million to firms that were no longer small in SAM 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 under the FSS, between 11.3 percent and 12.1 percent of the order dollars set-aside for small business were awarded to firms that were no longer small in SAM. This amounted to somewhere between $120.7 million and $129.6 that were awarded to firms that were no longer small in SAM. 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 percent and 67.0 percent of the order dollars set-aside for small business under GWACs were awarded to firms that were no longer small in SAM. This amounted to somewhere between $70.5 million and $119.6 million that were awarded to firms that were no longer small in SAM.

Because discretionary set-asides under the FSS programs have proven effective in making awards to small business under the program and SBA did not want to add unnecessary burdens to the program that might discourage the use of set-asides, the proposed rule provided that, 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.

SBA received a significant number of comments on this issue. Many commenters supported the proposed language as a needed approach to ensure that firms that are not small do not receive orders set-aside for small businesses and procuring agencies do not inappropriately take credit for awards to small business when the awardees are not in fact small. Many of these commenters believed that it was not fair to them as small businesses to have to compete for small business set-aside orders under unrestricted MACs with concerns that did not currently qualify as small and may not have done so for several years. Other commenters opposed the proposal for various reasons. Some believed that the regulations should be intended to foster and promote growth in small businesses and that the recertification requirement could stifle that growth. Others believed that the proposal undermines the general rule that a concern maintains its small business status for the life of a contract. SBA does not believe that a rule that requires a concern to actually be what it claims to be (*i.e.,* a small business) in any way stifles growth. Of course, SBA supports the growth of small businesses generally. SBA encourages concerns to grow naturally and permits concerns that have been awarded small business set-aside contracts to continue to perform those contracts as small businesses throughout the life of those contracts (*i.e.,* for the base and up to four additional option years). This rule merely responds to perceptions that SBA has permitted small business awards to concerns that do not qualify as small. As noted above, it is intended to apply only to unrestricted procurements where size and status were not relevant to the award of the underlying MAC. SBA also disagrees that this provision is inconsistent with the general rule that once a concern qualifies as small for a contract it can maintain its status as a small business throughout the life of that contract. SBA does not believe that a representation of size or status that does not affect the concern's eligibility to be awarded a contract should have the same significance as one that does.

Several commenters agreed with SBA's intent but believed that the rule needed to more accurately take into account today's complex acquisition environment. These commenters noted that many MACs now seek to make awards to certain types of business concerns (*i.e.,* small, 8(a), HUBZone, WOSB, SDVO) in various reserves or ''pools,'' and that concerns may be excluded from a particular pool if they do not qualify as eligible for the pool. These commenters recommended that a concern being awarded a MAC for a particular pool should be able to carry the size and/or status of that pool to each order made to the pool. SBA agrees. As noted above, SBA proposed recertification in connection with orders set-aside for small business under an unrestricted MAC because 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 and/or status. However, where a MAC solicitation seeks to make awards to reserves or pools of specific types of small business concerns, the concerns represent that they are small or qualify for the status designated by the pool and having that status or not determines whether the firm does or does not qualify for the award of a MAC contract for the pool. In such a case, SBA believes that size and status should flow from the underlying MAC to individual orders issued under that MAC, and the firm can continue to rely on its representations for the MAC itself unless a contracting officer requests recertification of size and/or status with respect to a specific order. SBA makes that revision in this final rule.

Many commenters also believed that there was no legitimate programmatic reason for excluding the FSS program from this recertification requirement. The commenters, however, miss that the FSS program operates under a separate statutory authority and that set-asides are discretionary, not mandatory under this authority. SBA and GSA worked closely together to stand up and create this discretionary authority and it has been very successful. This discretionary set-aside authority was authorized by the Small Business Jobs Act of 2010 (Pub. L. 111–240) and implemented in FAR 8.405–5 in November 2011. As a result, benefits to small businesses have been significant. The small business share of GSA Schedule sales rose from 30% in fiscal year 2010 (the last full fiscal year before the authority was implemented) to 39% in fiscal year 2019. That equates to an additional $1 billion going to small businesses in fiscal year 2019. Although SBA again considered applying the recertification requirement to the FSS program (and allow the FSS, as with any other MAC, to establish reserves or pools for business concerns with a specified size or status), SBA believes that is unworkable at this time. Consequently, consistent with the proposed rule, this final rule does not apply the modified recertification requirement to the FSS program. Doing so would pose an unnecessary risk to a program currently yielding good results for small business.

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 rule generally sets 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 will 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 under 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.

This final rule makes 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.

Several commenters voiced concern with allowing the set-aside of orders to a smaller group of firms than all holders of a MAC. They noted that bid and proposal preparation costs can be significant and a concern that qualified for the underlying MAC as a small business or some other specified type of small business could be harmed if every order was further restricted to a subset of small business. For example, where a MAC is set-aside for small business and every order issued under that MAC is set-aside for 8(a) small business concerns, SDVO small business concerns, HUBZone small business concerns and WOSBs, those firms that qualified only as small business concerns would be adversely affected. In effect, they would be excluded from competing for every order. SBA agrees that is a problem. That is not what SBA intended when it authorized orders issued under small business set-aside contracts to be further set-aside for a specific type of small business. SBA believes that an agency should not be able to set-aside all of the orders issued under a small business set-aside MAC for a further limited specific type of small business. As such, this final rule provides that where a MAC is set-aside for small business, the procuring agency can set-aside orders issued under the MAC to a more limited type of small business. Contracting officers are encouraged to review the award dollars under the MAC and to aim to make available for award at least 50 percent of the award dollars under the MAC to all contract holders of the underlying MAC.

In addition, a few commenters asked for further clarification as to whether orders issued under a MAC set-aside for 8(a) Participants, HUBZone small business concerns, SDVO small business concerns or WOSBs/EDWOSBs could be further set aside for a more limited type of small business. These commenters specifically did not believe that allowing the further set-aside of orders issued under a multiple award set-aside contract should be permitted in the 8(a) context. The commenters noted that the 8(a) program is a business development program of limited duration (*i.e.,* nine years), and felt that it would be detrimental to the business development of 8(a) Participants generally if an agency could issue an order set-aside exclusively for 8(a) HUBZone small business concerns, 8(a) SDVO small business concerns, or 8(a) WOSBs. The current regulatory text of § 125.2(e)(6)(i) provides that a ''contracting officer has the authority to set aside orders against Multiple Award Contracts, including contracts that were set aside for small business,'' for small and subcategories of small businesses. SBA intended to allow a contracting officer to issue orders for subcategories of small businesses only under small business set-aside contracts. This rule clarifies that intent.

Section 121.404

In addition to the revision to § 121.404(a)(1) identified above, the rule makes several other changes or clarifications to § 121.404. In order to make this section easier to use and understand, the rule adds headings to each subsection, which identify the subject matter of the subsection.

The proposed rule amended § 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 proposed rule eliminated references to SBA's small disadvantaged business (SDB) program as obsolete, and added a reference to the WOSB program. SBA received no comments on these edits and adopts them as final in this rule.

The proposed rule also amended § 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. Several commenters misconstrued this to be a change in policy or believed that this would be a departure from the snapshot in time rule for determining size as of the date a concern submits its initial offer including price. As noted, SBA has intended this to be the current policy and is merely clarifying it in the regulatory text. In addition, SBA does not view this as a departure from the snapshot in time rule. The receipts/employees are determined at one specific point in time—the date on which a concern submits its initial offer including price. SBA believes that compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements can justifiably change during the negotiation process. If an offer changes during negotiations in a way that would make a large business mentor joint venture partner be in control of performance, for example, SBA does not believe that the joint venture should be able to point back to its initial offer in which the small business protégé partner to the joint venture appeared to be in control.

The proposed rule also added 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. SBA received positive comments on this change and adopts it as final in this rule.

The proposed rule made 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. The proposed rule clarified 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. Commenters generally supported this revision. One commenter believed that a joint venture should be required to recertify its size only where the managing venture, or the small business concern upon which the joint venture's eligibility for the contract was based, is acquired by, is acquiring, or has merged with another business entity. SBA disagrees. SBA seeks to make the size rules pertaining to joint ventures similar to those for individual small businesses. Where an individual small business awardee grows to be other than small, its performance on a small business contract continues to count as an award to small business. Similarly, where a joint venture partner grows to be other than small naturally, that should not affect the size of the joint venture. However, under SBA's size rules, in order for a joint venture to be eligible as small, each partner to the joint venture must individually qualify as small. Size is not determined solely by looking at the size of the managing venture. Just as an individual small business awardee must recertify its size if it is acquired by, is acquiring, or has merged with another business entity, so too should the partner to a joint venture that is acquired by, is acquiring, or has merged with another business entity. As such, SBA adopts the proposed language as final in this rule.

Additionally, the proposed rule clarified 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 the 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. SBA received comments on both sides of this issue. Some commenters supported the proposed provision as a way to ensure that procuring agencies do not make awards to firms who are other than small. They thought that such awards could be viewed as frustrating the purpose of small business set-asides. Other commenters opposed the proposed change. A few of these commenters believed that a firm should remain small if it was small at the time it submitted its proposal. SBA wants to make it clear that is the general rule. Size is generally determined only at the date of offer. If a concern grows to be other than small between the date of offer and the date of award (*e.g.,* another fiscal year ended and the revenues for that just completed fiscal year render the concern other than small), it remains small for the award and performance of that contract. The proposed rule dealt only with the situation where a concern merged with or was acquired by another concern after offer but before award. As stated in the supplementary information to the proposed rule, SBA believes that situation is different than natural growth. Several other commenters opposing the proposed rule believed such a policy could adversely affect small businesses due to the often lengthy contract award process. Contract award can often occur 18 months or more after the closing date for the receipt of offers. A concern could submit an offer and have no plans to merge or sell its business at that time. If a lengthy amount of time passes, these commenters argued that the concern should not be put in the position of declining to make a legitimate business decision concerning the possible merger or sale of the concern simply because the concern is hopeful of receiving the award of a contract as a small business. Several commenters recommended an intermediate position where recertification must occur if the merger or acquisition occurs within a certain amount of time from either the concern's offer or the date for the receipt of offers set forth in the solicitation. This would allow SBA to prohibit awards to concerns that may appear to have simply delayed an action that was contemplated prior to submitting their offers, but at the same time not prohibit legitimate business decisions that could materialize months after submitting an offer. Commenters recommended requiring recertification when merger or acquisition occurs within 30 days, 90 days and 6 months of the date of an offer. SBA continues to believe that recertification should be required when it occurs close in time to a concern's offer, but agrees that it would not be beneficial to discourage legitimate business transactions that arise months after an offer is submitted. In response, the final rule continues to provide that if a 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 merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer, the concern will be ineligible for the award of the contract. If it occurs after 180 days, award can be made, but it will not count as an award to small business.

The proposed rule also clarified that recertification is not required when the ownership of a concern that is at least 51 percent 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. Commenters overwhelmingly supported this change, and SBA adopts it as final in this rule. The rule makes this same change to § 121.603 for 8(a) contracts as well.

Finally, the proposed rule sought to 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. Several commenters opposed this provision, believing that it would undermine the general rule that a concern's size status should be determined as of the date of its initial offer. They believe that establishing size at one point in time provides predictability and consistency to the procurement process. SBA agrees that size for a single award contract that does not exceed five years should not be reexamined during the life of a contract. SBA believes, however, that the current regulations allow a contracting officer to seek recertifications with respect to MACs. Pursuant to § 121.404(g), ''if a business concern is small at the time of offer for a Multiple Award Contract . . ., then it will be considered small for each order issued against the contract with the same NAICS code and size standard, *unless* a contracting officer requests a new size certification in connection with a specific order.'' (Emphasis added). The regulations at § 121.404(g)(3) also provide that for a MAC with a duration of more than five years, a contracting officer must request that a business concern recertify its small business size 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 thereafter. Under this provision, a business concern is not required to recertify its size status until prior to the end of the fifth year of that contact. However, SBA also interprets § 121.404(g)(3) as not prohibiting a contracting officer from requesting size recertification prior to the 120-day point in the fifth year of the long-term contract. As noted above, the general language of § 121.404(g) allows a contracting officer to request size recertification with respect to each order. SBA believes that the regulations permit a contracting officer the discretion to request size recertification at the contract level prior to the end of the fifth year if explicitly requested for the contract at issue and if requested of all contract holders. In this respect, the authority to request size recertification at the contract level prior to the fifth year is an extension of the authority to request recertification for subsequent orders. As such, this final rule clarifies that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point only for a long-term MAC.

Section 121.406

The rule merely corrects a typographical error by replacing the word ''provided'' with the word ''provide.''

Section 121.702

The proposed rule clarified 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 merely sought to 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. Comments favored this proposal and SBA adopts it as final in this rule.

Section 121.1001

SBA proposed to amend § 121.1001 to provide authority to SBA's Associate General Counsel for Procurement Law to independently initiate or file a size protest, where appropriate. Commenters supported this provision, and SBA adopts it as final in this rule. In response to a comment, the final rule also revises § 121.1001(b) to reflect which entities can request a formal size determination. Specifically, a commenter pointed out that although § 121.1001(b) gave applicants for and participants in the HUBZone and 8(a) BD programs the right to request formal size determinations in connection with applications and continued eligibility for those programs, it did not provide that same authority to WOSBs/EDWOSBs and SDVO small business concerns in connection with the WOSB and SDVO programs. The final rule harmonizes the procedures for SBA's various programs as part of the Agency's ongoing effort to promote regulatory consistency.

Sections 121.1004, 125.28, 126.801, and 127.603

This rule adds 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. This 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 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 added 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 or renewal 8(a) acquisitions or for 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, 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 proposed rule defined the term ''follow-on requirement or contract''. The definition identified certain factors that must be considered in determining 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. These considerations should 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. Such an 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 in this scenario 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.

SBA received a significant number of comments regarding what a follow-on requirement is and how SBA's rules regarding what a follow-on contract is should be applied to the three situations identified above. Many commenters believed that the proposed language was positive because it will help alleviate confusion in determining whether a requirement should be considered a follow-on or not. In terms of taking requirements or parts of requirements that were previously performed through the 8(a) program out of the program, commenters overwhelmingly supported SBA's involvement in the release process. Commenters were concerned that agencies have increased the value of procurement requirements marginally by 25 percent merely to call the procurements new and remove them from the 8(a) program without going through the release process. These commenters were particularly concerned where the primary and vital requirements of a procurement remained virtually identical and an agency merely intended to add ancillary work in order to freely remove the procurement from the 8(a) BD program. A few commenters also recommended that SBA provide clear guidance when the contract term of the previously awarded 8(a) contract is different than that of a successor contracting action. Specifically, these commenters believed that an agency should not be able to compare a contract with an overall $2.5 million value (consisting of a one year base period and four one-year options each with a $500,000 value) with a successor contract with an overall value of $1.5 million (consisting of a one year base period and two one-year options each with a $500,000 value) and claim it to be new. In such a case, the yearly requirement is identical and commenters believed the requirement should not be removed without going through the release process. SBA agrees. The final rule clarifies that equivalent periods of performance relative to the incumbent or previously-competed 8(a) requirement should be compared.

Many commenters agreed that the 25 percent rule should not be applied rigidly, as that may open the door for the potential for (more) contracts to be taken out of the 8(a) BD program. Commenters also believed that SBA should be more involved in the process, noting that firms currently performing 8(a) contracts often do not discover a procuring agency's intent to reprocure that work outside the 8(a) BD program by combining it with other work and calling it a new requirement until very late in the procurement process. Once a solicitation is issued that combines work previously performed through an 8(a) contract with other work, it is it difficult to reverse even where SBA believes that the release process should have been followed. Several commenters recommended adding language that would require a procuring agency to obtain SBA concurrence that a procurement containing work previously performed through an 8(a) contract does not represent a follow-on requirement before issuing a solicitation for the procurement. Although SBA does not believe that concurrence should be required, SBA does agree that a procuring activity should notify SBA if work previously performed through the 8(a) program will be performed through a different means. A contracting officer will make the determination as to whether a requirement is new, but SBA should be given the opportunity to look at the procuring activity's strategy and supply input where appropriate. SBA has added such language to § 124.504(d) in this final rule.

Several commenters supported the proposed definition of a follow-on procurement for release purposes where they agreed that a procuring agency should not be able to remove two requirements from the 8(a) program merely by combining them and calling the consolidated requirement new because it exceeds the 25 percent increase in magnitude. These commenters, however, recommended that the 25 percent change in magnitude be a ''bright-line rule'' with respect to whether a requirement should be considered a follow-on requirement 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. SBA understands the desire to have clear, objective rules. However, as noted previously, SBA opposes a bright-line 25 percent change in magnitude rule in connection with release. In addition, because SBA does not believe that it is good policy to have one definition of what a follow-on requirement is for one purpose and have a different definition for another purpose, SBA opposes having a bright-line 25 percent change in magnitude rule in determining whether to allow a sister company to perform a particular sole source 8(a) contract and then provide discretion only in the context of whether certain work can be removed from the 8(a) program. SBA continues to believe that the language as proposed that allows discretion when appropriate is the proper alternative. In the context of determining whether to allow a sister company to perform a particular sole source 8(a) contract, SBA agrees that a 25 percent change in magnitude should be sufficient for SBA to approve a sole source contract to a sister company. It would be the rare instance where that is not the case.

Section 124.105

The proposed rule amended § 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 rules prevented 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, SBA proposed 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 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. Commenters generally supported this change. A few commenters supported the provision but believed that an additional basis for disallowing a new immediate family member applicant into the 8(a) BD program should be where the applicant shared common facilities with a current or former Participant owned and controlled by an immediate family member. SBA agrees that an applicant owned by an immediate family member of a current or former Participant should not be permitted to share facilities with that current or former Participant. This rule adds that situation as a basis for declining an applicant. Several commenters sought further clarification as to whether a presumption against immediate family members in the same or similar line of business would continue from the previous regulations into this revised provision, and whether some sort of waiver will be needed to allow an immediate family member applicant to be certified into the 8(a) BD program. In particular, a few commenters were concerned that if an immediate family member attempted to certify an applicant concern in the same primary NAICS as the current or former Participant and the individual applying for certification has no management or technical experience in that NAICS code, that the owner/manager of the current or former Participant would play a significant role in the applicant concern even though a formal role was not identified. As noted above, SBA believes that the rules pertaining to immediate family members seeking to participate in the 8(a) BD program have been too harsh. The rule seeks to allow an applicant owned and controlled by an immediate family member of current or former Participant into the program, even in the same or similar line of business, provided certain conditions do not exist. SBA agrees with the comments that an individual seeking to certify an applicant concern in a primary NAICS code that is the same primary NAICS code of a current or former Participant operated by an immediate family member must have management or technical experience in that primary NAICS code. SBA agrees that without such a requirement, there is a risk that the owner/manager of the current or former Participant would have some role in the management or control of the applicant concern. This rule adds a requirement that an individual applying in the same primary NAICS code as an immediate family member must have management or technical experience in that primary NAICS code, which would include experience acquired from working for an immediate family member's current or former Participant. Aside from that refinement, there is no presumption against such an applicant. The applicant must, however, demonstrate that there is no common ownership, control or shared facilities with the current or former Participant, and that any contractual relations between the two companies are arm's length transactions. One commenter questioned whether the revised requirement in proposed § 124.105(g)(2) that SBA would annually assess whether the two firms continue to ''operate independently'' of one another after being admitted to the program was inconsistent with the language in § 124.105(g)(1) that allows fair market contractual relations between the two firms. That language was not meant to imply that those arm's length transactions cannot occur once the second firm is admitted to the program. As part of an annual review, SBA will determine that ownership, management, and facilities continue to be separate and that any contractual relations are at fair market value. SBA would not initiate termination proceedings merely because the two firms entered into fair market value contracts after the second firm is admitted to the program. One commenter recommended that SBA should place a limit on the amount of contractual, arm's length transactions that have occurred between the firms (either dollar value or percentage of revenue). SBA disagrees. SBA does not believe a firm should be penalized for having an immediate family member participate in the 8(a) BD program. It does not make sense that a business concern owned by one family member cannot hire the business concern owned by another family member as a subcontractor at the same rate that it could hire any other business concern. Business relationships are often built upon trust. If a subcontractor has done a good job at a fair price, it is likely that the prime contractor will hire that firm again when the need arises to do that kind of work. Based upon the comments received in response to proposed § 121.103(f) (which loosened the presumption of economic dependence where one concern derived at least 70 percent of its revenues from one other business concern), most commenters believed there should not be a hard restriction on the amount of work one business concern should be able to do with another. SBA believes the same should apply in the immediate family member context as long as a clear line of fracture exists between the two business concerns. As such, SBA does not adopt this recommendation in this final rule.

The proposed rule also amended the 8(a) BD change of ownership requirements in § 124.105(i). First, the proposed rule lessened 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 is a change from the previous 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 permits Participants to make minor changes in ownership more frequently without requiring them to wait for SBA approval.

In addition, the proposed rule eliminated 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) provided 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 if SBA determined that an individual or entity owned and controlled a Participant before a change in ownership and the change in ownership only increases the ownership interest of that individual or entity, there could be no question as to whether the Participant continues to meet the program's ownership and control requirements. This change will decrease the amount of times and the time spent by Participant firms seeking SBA approval of a change in ownership. SBA received unanimous support on these provisions and adopts them as final in this rule.

Section 124.109

In order to eliminate confusion, this rule clarifies several provisions relating to tribally-owned (and ANC-owned) 8(a) applicants and Participants. First, SBA amends § 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 will relieve Participants owned by tribes and ANCs from this unnecessary burden and allow them to proactively conduct normal business operations without interruption.

Second, the rule amends § 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 rule adds two subparagraphs and an example to § 124.109(c)(3)(ii) for ease of use and understanding. In addition, SBA clarifies that if the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe could immediately 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. Commenters supported these provisions, and SBA adopts them as final.

The rule also clarifies SBA current policy that 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. This flows directly from the statutory provision which allows an individual to manage two tribally-owned firms. Commenters supported this change, noting that if statutory and regulatory requirements explicitly allow an individual to manage two 8(a) firms, then it would be illogical to impose the full-time work requirement on such a manager. This rule adopts the proposed language as final.

Finally, the proposed rule clarified 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 previously permitted 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. The proposed rule permitted a tribally-owned applicant to satisfy the potential for success requirements by submitting a letter of support from the tribe itself, a tribally-owned economic development corporation or another 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. Commenters supported this change. They noted that an economic development corporation or tribally-owned holding company is authorized to act on behalf of the tribe and is essentially an economic arm of the tribe, and that oftentimes due to the size of the tribe it can be difficult and take significant amounts of time and resources to obtain a commitment letter from the tribe itself. SBA adopts this provision as final in this rule.

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 made the same change for CDCs and CDC-owned firms as for tribes and ANCs mentioned above. It clarified 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 also subdivided the current subparagraph (d) into three smaller paragraphs for ease of use and understanding, and clarified 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. SBA did not receive any comments in response to these changes. As such, SBA adopts them as final in this rule.

Section 124.112

SBA proposed to amend § 124.112(d)(5) regarding excessive withdrawals in connection with entity-owned 8(a) Participants. The proposed rule permitted an 8(a) Participant that is owned at least 51 percent by a tribe, ANC, NHO or CDC to 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. Commenters supported this change as a needed clarification to allow an entity-owned firm to increase its distribution to the tribe, ANC, NHO or CDC, and thus enable it to provide additional resources to the tribal or disadvantaged community. A few commenters were concerned with having dollar numbers in the examples set forth in the regulatory text. They were concerned that $1 million would become the default unless done in pro rata share. SBA believes these commenters misunderstood the intent of this provision. The example in the regulation provides that where a tribally-owned Participant pays $1,000,000 to a non-disadvantaged manager that was not part of a pro rata distribution to all shareholders, SBA would consider that to be an excessive withdrawal. SBA continues to believe that a $1 million payout to a non-disadvantaged individual in that context is excessive. If a tribe, ANC, NHO, or CDC owns 100 percent of an 8(a) Participant and wants to give back to the native or underserved community, nothing in this regulation would prohibit it from doing so. That Participant could give a distribution of $1 million or more back to the tribe, ANC, NHO, or CDC in order to ensure that the native or underserved community receives substantial benefits. The clarification regarding pro rata distributions was intended to allow greater distributions to tribal communities, not to restrict such distributions. The final rule adopts that provision.

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. The proposed rule authorized 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. Commenters supported this provision and SBA adopts it as final in this rule.

Section 124.201

The proposed rule did not amend § 124.201. However, SBA sought comments as to whether SBA should add 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. Commenters were split on this proposal. Some felt it would be helpful to those firms who did not have a clear understanding of the expectations of participating in the 8(a) BD program. Others thought it would merely delay their participation in the program needlessly. Some commenters were concerned that there might be time commitments and travel expenses if a live course were required and recommended having the option to provide such training via a web-based platform. Commenters also noted that for entity-owned applicants, this requirement should not apply beyond the entity's first company to enter the 8(a) BD program. After reviewing the comments, SBA believes that such a preparatory course should be an option, but not a requirement. As such, SBA does not believe that the regulatory text needs to be revised in this final rule.

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. SBA proposed to 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) because not having the Form readily available when needed has unduly delayed the application process for those affected applicants. In addition, SBA believed that requiring Form 4506T in every case would serve as a deterrent to firms that may think it is not necessary to fully disclose all necessary financial information.

However, during the comment period SBA determined that neither Form is a viable option for independent personal income verification purposes at this time. On July 1, 2019, the IRS removed the third-party mailing option from the Form 4506T after it was determined that this delivery method presents a risk to sensitive taxpayer information. As a result, the IRS will no longer send tax return transcripts directly to SBA; rather, transcripts must be mailed to the taxpayer's address of record. Because SBA may not receive tax return transcripts directly from the IRS under Form 4506T, the Agency no longer believes it is an effective tool for independent income verification. In addition, current IRS guidance indicates that Form 4506C is available only to industry lenders participating in the Income Verification Express Service program.

SBA nevertheless continues to recognize the importance of obtaining authorization to receive taxpayer information at the time of application. It is SBA's understanding that the IRS is currently developing a successor form or program through which SBA and other Federal agencies may directly receive a taxpayer's tax return information for income verification purposes. As such, the final rule provides that each individual claiming disadvantaged status must authorize SBA to request and receive tax return information directly from the IRS if such authorization is required. Although SBA does not anticipate using this authorization often 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 this required authorization will help to maintain the integrity of the program.

Section 124.204

This rule provides that SBA will 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. This is not a change in policy, but rather a clarification of existing policy. Commenters did not have any issue with this change, believing that it already is SBA's existing practice and that the regulatory change will simply clarify/formalize this practice. As such, SBA adopts it as final in this rule.

Sections 124.205, 124.206 and 124.207

The proposed rule amended § 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. Under the current regulations, a firm is required to wait 12 months from the date of the final agency decision to reapply. SBA believes that this change will 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. In addition, because a firm that is declined could submit a new application 90 days after the decline decision, SBA requested comments on whether the current reconsideration process should be eliminated. Commenters enthusiastically supported the proposed change to allow firms to remedy eligibility deficits and reapply after 90 days instead of one year. In conjunction with this proposed change, many commenters supported eliminating the reconsideration process as unnecessary due to the shorter reapplication time period. A few commenters supported both the reduction in time to reapply and elimination of the reconsideration process, but asked SBA to ensure that SBA provide comprehensive denial letters to fully apprise applicants of any issues or shortcomings with their applications. SBA agrees that denial letters must fully inform applicants of any issues with their applications, and will continue to explain as specifically as possible the shortcomings in any declined application. Several commenters opposed changing the current reconsideration process because they believed that it could take longer for an applicant to ultimately be admitted to the program if all it had to do was change one or two minor things, and that doing so during reconsideration would be quicker than SBA looking at a re-application anew. Contrary to what some commenters believed, SBA looks at all eligibility criteria during reconsideration and may find additional reasons to decline an application during reconsideration that were not clearly identified in the initial application process. Where that occurs, a firm may be entitled to an additional reconsideration process which may potentially prolong the review process even further. SBA believes reducing the timeframe to address identified deficits and reapply from one year to 90 days will obviate the need for a separate, possibly drawn-out reconsideration process. One commenter believed that allowing the shortened 90-day waiting period to re-apply to the 8(a) BD program would encourage concerns that are clearly ineligible to repeatedly apply for certification. Although SBA does not believe that this would be a significant problem, SBA does understand that its limited resources could be overburdened if clearly ineligible business concerns are able to re-apply to the program every 90 days. As such, this final rule amends § 124.207 to incorporate a 90-day wait period to reapply generally, but adds language that provides that where a concern has been declined three times within 18 months of the date of the first final agency decision finding the concern ineligible, the concern cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decline decision. The final rule also amends § 124.205 to eliminate a separate reconsideration process and § 124.206 to delete paragraph (b) as unnecessary.

Section 124.300 and 124.301

The proposed rule redesignated the current § 124.301 (which discusses the various ways a business may leave the 8(a) BD program) as § 124.300 and added a new § 124.301 to specifically enunciate the voluntary withdrawal and early graduation procedures. The rule 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, the Participant may elect to voluntarily early graduate from the 8(a) BD program. That too is SBA's current policy, and the proposed rule merely captured it in SBA's regulations.

The proposed rule, however, changed the level at which voluntary withdrawal and voluntary early graduation could be finalized by SBA. Prior to this final rule, a firm submitted its request to voluntarily withdraw or early graduate to its servicing SBA district office. Once the district office concurs, the request was 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. SBA proposed 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 will eliminate unnecessary delay in processing these actions. Commenters supported giving voluntary withdrawal and voluntary early graduation decisions to the district office level, agreeing with SBA that the change will assist in reducing processing times. As such, SBA adopts the proposed changes as final.

Section 124.304

The proposed rule clarified 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 clarified that where the AA/BD issues a decision terminating or early graduating a Participant, the Participant would be immediately ineligible for additional program benefits. SBA does not believe that it would 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, SBA would treat the amount of time between the AA/BD's decision and OHA's decision on appeal similar to how it treats a suspension. Upon OHA's decision overruling the AA/BD's determination, the Participant would immediately be eligible for program benefits and the length of time between the AA/BD's decision and OHA's decision on appeal would be added to the Participant's program term. Commenters generally supported this clarification. One commenter opposed the change, believing ineligibility or suspension should not be automatic, but rather, occur only where SBA ''determines that suspension is needed to protect the interests of the Federal Government, such as because where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists'' as set forth in § 124.305(a). SBA believes this comment misses the point. The suspension identified in § 124.305(a) is an interim determination pending a final action by the AA/BD as to whether a Participant should be terminated from the program. The suspension identified here flows from the AA/BD's final decision that termination is appropriate. As noted above, SBA believes it is contradictory to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. As such, SBA adopts the proposed language as final in this rule.

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. The proposed rule amended § 124.402(b) to eliminate the provision that a Participant cannot receive any 8(a) BD benefits until SBA has approved its business plan. Instead, the proposed rule provided 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. A firm coming in to the 8(a) BD program with commitments from one or more procuring agencies will immediately be able to be awarded one or more 8(a) contracts. Commenters appreciated SBA's recognition of the delays and possible missed opportunities caused by the current requirements and supported this change. They believed that the change will enable Participants to start receiving the benefits of the program in a more timely manner and enjoy their full nine-year term. A few commenters recommended that a new Participant should not be suspended where it has submitted its business plan within 60 days of being certified into the program but SBA has not approved it within that time. These commenters believed that a Participant should be suspended in this context only for actions within the Participant's control (*i.e.,* where the Participant did not submit its business plan within 60 days, not where SBA has not approved it within that time). That is SBA's intent. The proposed rule provided that 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. As long as a Participant has submitted its business plan to SBA within the 60-day timeframe, it will not be suspended. SBA believes that is clear in the regulatory text as proposed and that no further clarification is needed. As such, SBA adopts the proposed language as final in this rule.

This rule also corrects 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. Finally, one commenter questioned why SBA required a suspension action to generally be initiated simultaneous with or after the initiation of a BD program termination action. The commenter believed that if the Government's interests needed to be protected quickly, SBA should be able to suspend a particular Program Participant without also simultaneously initiating a termination proceeding. The commenter argued that the Government should be able to stop inappropriate or fraudulent conduct immediately. Although SBA envisions initiating a termination proceeding simultaneously with a suspension action in most cases, SBA concurs that immediate suspension without termination may be needed in certain cases. As such, the final rule amends § 124.305(a) to allow the AA/BD to immediately suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government.

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 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 moved the eligibility determination procedures for competitive 8(a) contracts from § 124.507(b)(2) to the general provisions of § 124.501 and specifically addressed eligibility determinations for sole source 8(a) contracts. To accomplish this, the proposed rule revised current § 124.501(g). Commenters did not object to this clarification. One commenter sought further clarification regarding eligibility for 8(a) sole source contracts. The commenter noted that for a sole source 8(a) procurement, SBA determines eligibility of a nominated 8(a) firm at the time of acceptance. The commenter recommended that the regulation clearly notify 8(a) firms and procuring agencies that if a firm graduates from the program before award occurs, the award cannot be made. Although SBA believes that is currently included within § 124.501(g), this final rule adds additional clarifying language to remove any confusion. One commenter also sought further clarification for two-step competitive procurements to be awarded through the 8(a) BD program. The commenter noted that the solicitation has two dates, and asked SBA to clarify which date controls for eligibility for the 8(a) competitive award. In response, this final rule adds a new § 124.507(d)(3) that provides that for a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

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 moved those procedures to a new § 124.501(k) to 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 removes any doubt or confusion. Commenters did not object to these changes and SBA adopts them as final in this rule.

In response to concerns raised by Participants, the proposed rule also imposed 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, SBA proposed to 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 also requested 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. Commenters supported imposing time limits in the regulations for SBA to process requests to establish bona fide places of business. Commenters also supported Participants being able to presume approval and submit an offer as an eligible Participant where SBA has not issued a decision within the specified time limits. One commenter asked SBA to clarify what happens if a Participant submits an offer based on this presumption and SBA later does not verify the Participant's bona fide place of business. SBA does not believe that verification will not occur before award. The final rule allows a Participant to presume that SBA has approved its request for a bona fide place of business if SBA does not respond in the time identified. This allows a Participant to submit an offer where a bona fide place of business is required. However, clarification is added at 124.501(k)(2)(iii)(B) that in order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not acted prior to the time that a Participant is identified as the apparent successful offeror, SBA will make such a determination within 5 days of receiving a procuring activity's request for an eligibility determination unless the procuring activity grants additional time for review.

Several commenters recommended that SBA broaden the geographic boundaries as to what it means to have a bona fide place of business within a particular area. As identified above, the bona fide place of business concept evolved from the statutory requirement that to the maximum extent practicable 8(a) construction contracts must be awarded within the county or State where the work is to be performed. Commenters believed that strict state line boundaries may not be appropriate where a given area is routinely served by more than one state. A commenter recommended that SBA use Metropolitan Statistical Areas (MSAs) to better define the area within which a business should be located in order to be deemed to have a bona fide place of business in the area. The Office of Management and Budget has defined an MSA as ''A Core Based Statistical Area associated with at least one urbanized area that has a population of at least 50,000. The MSA comprises the central county or counties containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county or counties as measured through commuting.'' 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 FR 37246–37252 (June 28, 2010). The commenter noted that metropolitan areas frequently do not fit within one state and believed that a state does not always represent a single geography or economy. As an example, the commenter pointed to the Philadelphia, Pennsylvania MSA, which includes counties in four states, Delaware, Maryland, New Jersey and Pennsylvania. This MSA represents one regional economy, but is serviced by four different SBA District Offices: Baltimore, Philadelphia, Delaware and New Jersey. SBA believes that such an expansion makes sense in today's complex business environment. However, the use of MSAs will mostly impact the more densely populated coasts of the country, and not necessarily more rural or less populated areas. SBA believes the same rationale could be used in those areas, but instead use contiguous counties. A Participant located on the other side of a state border may be closer to the construction site than a Participant located in the same state as the construction site. It does not make sense to exclude a Participant immediately across the border from where construction work is to be done merely because that Participant is serviced by a different SBA district office, but to allow another Participant that may be located on the other side of the state where construction work is to be done (and be hundreds of miles further away from the construction site than the Participant in the other state) to be eligible because it is serviced by the correct SBA district office. As such this final rule defines bona fide place of business to be the geographic area serviced by the SBA district office, a MSA, or a contiguous county to (whether in the same or different state) where the work will be performed.

Section 124.503

The proposed rule amended § 124.503(e) to clarify SBA's current policy regarding what happens if after SBA accepts a sole source requirement on behalf of a particular Participant the procuring agency determines, prior to award, that the Participant cannot do the work or the parties cannot agree on price. In such a case, SBA allows the agency to substitute one 8(a) Participant for another if it believes another Participant could fulfill its needs. If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency may withdraw the original offering letter and fulfill its needs outside the 8(a) BD program. This change to the regulatory text was merely an attempt to codify existing procedures to make the process more transparent. No one objected to this provision, and SBA adopts it as final in this rule.

Currently, § 124.503(g) provides that a Basic Ordering Agreement (BOA) is not a contract under the Federal Acquisition Regulation (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 under FAR part 13 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. This rule amends § 124.503 to merely specifically recognize that BPAs are also not contracts and should be afforded the same treatment as BOAs.

Section 124.504

SBA proposed several changes to § 124.504.

The proposed rule amended § 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 because a follow-on requirement must be procured through the 8(a) program, such offer and SBA's acceptance were not required. 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 adversely affect an agency's procurement strategy in a significant way 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. Commenters supported this change as a logical remedy to an unintended consequence, and SBA adopts it as final in this rule.

The proposed rule clarified 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 Government Accountability Office. Some agencies have attempted to remove a follow-on procurement from the incumbent 8(a) contractor and re-procure the requirement through a different contract vehicle (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 other contract vehicle. In other words, because the order under a 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 may be 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 under 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 under 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.

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, would have no opportunity to demonstrate that it would be adversely impacted or to try to dissuade SBA from agreeing to release the procurement. Commenters believe that this directly contradicts the business development purposes of the 8(a) BD program. In response, the rule provides that a procuring activity must notify SBA where it seeks to re-procure a follow-on 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 re-procure a current 8(a) requirement as a competitive 8(a) award for a new 8(a) MAC or GWAC vehicle, SBA's concurrence will not be required because such a competition would be available to all 8(a) BD Program Participants.

The proposed rule also clarified 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 sought comments as to whether this long-standing policy should also be incorporated into the regulations. Although SBA did not receive many comments on this issue, those who did comment believed it made sense to clarify this in the regulatory text. This final rule does so.

Section 124.505

As noted above, SBA received a significant number of comments recommending more transparency in the process by which procuring agencies seek to remove follow-on requirements from the 8(a) BD program. In particular, commenters believed SBA should be able to question whether a requirement is new or a follow-on to a previously awarded contract. In response, the final rule adds language to § 124.505(a) authorizing SBA to appeal 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).

Section 124.509

The proposed rule revised § 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 substituted 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.

The current regulation also requires the SBA Administrator on a non-delegable basis 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 so 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 changed the Administrator from making these determinations to SBA. Commenters believed that waiver requests should be processed at the district office level, as adding additional layers of review significantly delays the processing time, which harms both the Participant and the procuring agency and causes additional work for SBA. SBA has adopted these changes as final in this rule. This should allow these requests to be processed more quickly.

SBA also received a few comments regarding the business activity targets contained in § 124.509. Commenters supported the proposed revisions that changed requiring Participants to make ''maximum efforts'' to obtain business outside the 8(a) BD program, and ''substantial and sustained efforts'' to attain the targeted dollar levels of non-8(a) revenue, to requiring them to make good faith efforts. These commenters also felt that the non-8(a) business activity target percentages for firms in the transitional stage of program participation are too high. The commenters noted that the Small Business Act did not require any specific percentages of non-8(a) work and believed that SBA was free to adjust them in order to promote the business development purposes of the program. They also believed that the current rules rigidly apply sole source restrictions without taking into account extenuating circumstances such as a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, and having prime contractors award less work to small business subcontractors than originally contemplated. They recommended that the sole source restrictions should be discretionary, depending upon circumstances and efforts made by the Participant to obtain non-8(a) revenues. SBA first notes that although the Small Business Act itself does not establish specific non-8(a) business activity targets, the conference report to the Business Opportunity Development Reform Act of 1988, Public Law 100–656, which established the competitive business mix requirement, did recommend certain non-8(a) business activity targets. That report noted that Congress intended that the non-8(a) business activity targets should generally require about 25 percent of revenues from sources other than 8(a) contracts in the fifth and sixth years of program participation and about 50 percent in the seventh and eighth years of program participation. H. Rep. No. 100–1070, at 63 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5485, 5497. In response to the comments, this rule slightly adjusts the non-8(a) business activity targets to be more in line with the Congressional intent. In addition, SBA believes that the strict application of sole source restrictions may be inappropriate in certain extenuating circumstances. That same conference report provides that SBA ''should consider a full range of options to encourage firms to achieve the competitive business targets,'' and that these options might ''include conditioning the award of future sole-source contracts or business development assistance on the firm's taking specified steps, such as changes in marketing or financing strategies.'' *Id.* In addition, the conference report provides that SBA should take appropriate remedial actions, ''including reductions in sole-source contracting,'' to ensure that firms complete the program with optimum prospects for success in a competitive business environment. *Id.* Thus, Congress intended SBA to place conditions on firms to allow then to continue to receive one or more future 8(a) contracts and that sole source ''reductions'' should be an alternative. It appears that a strict ban on receiving any future 8(a) contracts is not appropriate in all instances. SBA believes that may make sense as a remedial measure if a particular Participant has made no efforts to seek non-8(a) awards, but it should not automatically occur if a firm fails to meet its applicable non-8(a) business activity target. The final rule recognizes that a strict prohibition on a Participant receiving new sole source 8(a) contracts should be imposed only where the Participant has not made good faith efforts to meet its applicable non-8(a) business activity target. Where a Participant has not met its applicable non-8(a) business activity target, however, SBA will condition the eligibility for new sole source 8(a) contracts on the Participant taking one or more specific actions, which may include obtaining business development assistance from an SBA resource partner such as a Small Business Development Center. The final rule also rearranges several current provisions for ease of use.

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 believes that the size protest process could work similarly for competitive 8(a) contracts. As such, the proposed rule eliminated the need for 8(a) Participants to seek and receive approval from SBA of every initial joint venture agreement and each addendum to a joint venture agreement for competitive 8(a) contracts. Commenters supported this change, noting that this will eliminate an unnecessary burden and noting that this will also eliminate the significant expense firms often incur during the SBA approval process. SBA believes that this will significantly lessen the burden imposed on 8(a) small business Participants. Participants will not be required to submit additional paperwork to SBA and will not have to wait for SBA approval in order to seek competitive 8(a) awards. This rule finalizes that change.

Section 124.515

The proposed rule amended § 124.515 regarding the granting of a waiver to the statutorily mandated termination for convenience requirement where the ownership or control of an 8(a) Participant performing an 8(a) contract changes. The statute and regulations allow the ownership and control of an 8(a) Participant performing one or more 8(a) contracts to pass to another 8(a) Participant that would otherwise be eligible to receive the 8(a) contracts directly. Specifically, the proposed rule amended § 124.515(d) to provide that SBA determines the eligibility of an acquiring Participant 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. A few commenters objected to this last provision in the context of an entity-owned firm seeking to acquire an 8(a) Participant currently performing one or more 8(a) contracts. These commenters believed that this provision should not apply to entity-owned Participants because prior performance in a specific industry is not required for entity-owned firms seeking to enter the program. SBA disagrees. Those are two entirely separate requirements. In the case of program entry, SBA allows an entity-owned applicant to be eligible for the program where the entity (tribe, ANC, NHO or CDC) demonstrates a firm commitment to back the applicant concern. In other words, SBA will waive the general potential for success provision requiring an applicant to have at least two years of business in its primary NAICS code where the entity represents that it will support the applicant concern. In such case, SBA is assured that the applicant concern will be able to survive despite having little or no experience in its designated primary NAICS code. The termination for convenience and waiver provisions are statutory and serve an entirely different purpose. The general rule is that an 8(a) contract must be performed by the 8(a) Participant to which that contract was initially awarded. Where the ownership or control of the Participant awarded an 8(a) contract changes, the statute requires a procuring agency to terminate that contract unless the SBA Administrator grants a waiver based on one of five statutory reasons. One of those reasons is where the ownership and control of an 8(a) Participant will pass to another otherwise eligible 8(a) Participant. The proposed rule merely clarifies SBA's current policy that in order to be an ''eligible'' Participant, the acquiring firm must be responsible to perform the contract, and responsibility is determined prior to the transfer, just as responsibility is determined prior to the award of any contract. This has nothing to do with the entity-owned firm's potential for success in the program, but, rather, whether that firm would be deemed a responsible contractor and whether a procuring agency contracting officer would find the firm capable of performing the work required under the contract before any change of ownership or control occurs. Because SBA believes that this responsibility issue is relevant of all Participants acquiring another Participant that has been awarded one or more 8(a) contracts, the final rule adopts the language as proposed.

Section 124.518

The final rule clarifies when one 8(a) Participant can be substituted for another in order to complete performance of an 8(a) contract without receiving a waiver to the termination for convenience requirement set forth in of § 124.515. Specifically, the rule provides that SBA may authorize another Participant to complete performance of an 8(a) contract and, in conjunction with the procuring activity, permit novation of the contract where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded an 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

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 provided 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 proposed rule clarified that in determining whether a Participant has reached the $100 million limit, SBA would consider only 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 amended 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 applicable 8(a) revenue limit. The proposed rule replaced the $100,000 amount with a reference to the Simplified Acquisition Threshold (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 merely aligned the 8(a) revenue limit with that authority. Commenters generally supported each of these changes. SBA adopts them as final in this rule.

Section 125.2

The proposed rule added a new paragraph (g) requiring contracting officers to consider the capabilities and past performance 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 the substantial bundling threshold of the Federal agency (15 U.S.C. 644(q)(1)(B)). Following the statutory provisions, the proposed rule required a contracting officer to consider the past performance and experience of first tier subcontractors in those two categories of contracts. The proposed rule did 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 provided discretion to contracting officers to consider such past performance, capabilities and experience of each first tier subcontractor where appropriate. SBA specifically requested 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. The comments overwhelmingly supported the same treatment for all contracts. Most commenters believed that there was a valid policy reason to consider the capabilities and past performance of first tier subcontractors in every case since it is clear that those identified subcontractors will be responsible for some performance of the contract should the corresponding prime contractor be awarded the contract. Some commenters believed that small businesses may have the necessary capabilities, past performance and experience to perform smaller, non-bundled contracts on their own. Therefore, these commenters felt that it may not be necessary for an agency to consider the capabilities and past performance of first tier subcontractors in all cases. SBA believes that first tier subcontractors should be considered if the capabilities and past performance of the small business prime contractor does not demonstrate capabilities and past performance for award. As such this final rule adds language requiring a procuring agency to consider the capabilities and past performance of first tier subcontractors where the first-tier subcontractors are specifically identified in the proposal and the capabilities and past performance of the small business prime do not independently demonstrate capabilities and past performance necessary for award.

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 proposed to add clarifying language to § 125.3(b) to clear up any confusion. The proposed rule clarified 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, are not be required to submit subcontracting plans. Commenters supported this provision and this rule adopts it as final.

The final rule also fixes typographical errors contained in paragraphs 125.3(c)(1)(viii) and 125.3(c)(1)(ix).

Section 125.5

The proposed rule clarified 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). SBA did not receive any comments on this provision and adopts it as final in this rule.

Section 125.6

The final rule first fixes a typographical error contained in the introductory text of § 125.6(a). It also amends § 125.6(b). 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 rule merely recognized 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. SBQ did not receive any comments on this change, and adopts it as final in this rule.

SBA also asked for comments in the proposed rule 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 percent 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 percent of the value of the items not subject to a waiver, or $495,000 (50 percent 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 percent 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 percent). In other words, in the above example, $500,000 (50 percent 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, thus requiring $5,000 less from small business manufacturers. The proposed rule asked for comments on whether this approach makes sense. Several commenters supported the change outlined in the proposed rule, believing that implementation of the change will provide less confusion to both small businesses and procuring agencies as the math is easier to understand. One commenter believed that was how the nonmanufacturer rule was already being applied in multiple item procurements, was concerned others too may have misinterpreted the rule, and, thus, supported the change. The final rule provides that a procurement should be set aside where at least 50 percent of the value of the contract comes from either small business manufacturers or from any business where a nonmanufacturer rule waiver has been granted (or, in other words, a set aside should occur where small plus waiver equals at least 50 percent).

Section 125.8

The proposed rule made 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. The comments supported these changes, and those changes are finalized in this rule.

Proposed § 125.8(b)(2)(iv) permitted 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. Although several commenters questioned whether mentors would be willing to agree to distribute profits in such a manner, most commenters supported this proposed change. As such, SBA adopts it as final in this rule.

In response to the proposed rule, SBA also received comments seeking clarification of certain other requirements applicable to joint ventures. First, commenters sought guidance regarding the performance of work or limitation on subcontracting requirements in § 125.8(c). Specifically, commenters questioned whether the same rules as those set forth in § 125.6 apply to the calculation of work performed by a protégé in a joint venture and whether the 40 percent performance requirement for a protégé firm could be met through performance of work by a similarly situated subcontractor. SBA has always intended that the same rules as those set forth in § 125.6 should generally apply to the calculation of a protégé firm's workshare in the context of a joint venture. This means that the rules concerning supplies, construction and mixed contracts apply to the joint venture situation and certain costs are excluded from the limitation on subcontracting calculation. For instance, the cost of materials would first be excluded in a contract for supplies or products before determining whether the joint venture is not subcontracting more than 50 percent of the amount paid by the Government. However, SBA has never intended that a protégé firm could subcontract its 40 percent performance requirement to a similarly situated entity. In other words, SBA has always believed that the protégé itself must perform at least 40 percent of the work to be performed by a joint venture between the protégé firm and its mentor, and that it cannot subcontract such work to a similarly situated entity. The only reason that a large business mentor is able to participate in a joint venture with its protégé for a small business contract is to promote the business development of the protégé firm. Where a protégé firm would subcontract some or all of its requirement to perform at least 40 percent of the work to be done by the joint venture to a similarly situated entity, SBA does not believe that this purpose would be met. The large business mentor is authorized to participate in a joint venture as a small business only because its protégé is receiving valuable business development assistance through the performance of at least 40 percent of the work performed by the joint venture. Thus, although a similarly situated firm can be used to meet the 50 percent performance requirement, it cannot be used to meet the 40 percent performance requirement for the protégé itself. For example, if a joint venture between a protégé firm and its mentor were awarded a $10 million services contract and a similarly situated entity were to perform $2 million of the required services, the joint venture would be required to perform $3 million of the services (*i.e.,* to get to a total of $5 million or 50 percent of the value of the contract between the joint venture and the similarly situated entity). If the joint venture were to perform $3 million of the services, the protégé firm, and only the protégé firm, must perform at least 40 percent of $3 million or $1.2 million. The final rule clarifies that rules set forth in § 125.6 generally apply to joint ventures and that a protégé cannot meet the 40 percent performance requirement by subcontracting to one or more similar situated entities.

Comments also requested further guidance on the requirement in § 125.8(b)(2)(ii) that a joint venture must designate an employee of the small business managing venture as the project manager responsible for performance of the contract. These commenters pointed out that many contracts do not have a position labeled ''project manager,'' but instead have a position named ''program manager,'' ''program director,'' or some other term to designate the individual responsible for performance. SBA agrees that the title of the individual is not the important determination, but rather the responsibilities. The provision seeks to require that the individual responsible for performance must come from the small business managing venture, and this rule makes that clarification. For consistency purposes, SBA has made these same changes to § 124.513(c) for 8(a) joint ventures, to § 125.18(b)(2) for SDVO small business joint ventures, to § 126.616(c) for HUBZone joint ventures, and to § 127.506(c) for WOSB joint ventures.

Several commenters sought additional clarification to the rules pertaining to joint ventures for the various small business programs. Specifically, these commenters believed that the rules applicable to small business set-asides in § 125.8(a) were not exactly the same as those set forth in §§ 125.18(b)(1)(i) (for SDVO joint ventures), 126.616(b)(1) (for WOSB joint ventures) and 127.506(a)(1) (for HUBZone joint ventures), and that a mentor-protégé joint venture might not be able to seek the same type of contract, subcontract or sale in one program as it can in another. In response, SBA has added language to § 125.9(d)(1) to make clear that a joint venture between a protégé and mentor may seek a Federal prime contract, subcontract or sale as a small business, HUBZone small business, SDB, SDVO small business, or WOSB provided the protégé individually qualifies as such.

One commenter recommended a change to proposed § 125.8(e) regarding the past performance and experience of joint venture partners. The proposed rule provided that when evaluating the past performance and experience of a joint venture submitting an offer for a contract set aside or reserved for small business, 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. The commenter agreed with that provision, but recommended that it be further refined to prohibit a procuring activity from requiring the protégé to individually meet any evaluation or responsibility criteria. SBA understands the concern that some procuring activities have required unreasonable requirements of protégé small business partners to mentor-protégé joint ventures. SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract. However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor. The reason that any small business joint ventures with another business entity, whether a mentor-protégé joint venture or a joint venture with another small business concern, is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner. SBA believes that a solicitation provision that requires both a protégé firm and a mentor to each have the same level of past performance (*e.g.,* each partner to have individually previously performed 5 contracts of at least $10 million) is unreasonable, and should not be permitted. However, SBA disagrees that a procuring activity should not be able to require a protégé firm to individually meet any evaluation or responsibility criteria. SBA intends that the protégé firm gain valuable business development assistance through the joint venture relationship. The protégé must, however, bring something to the table other than its size or socio-economic status. The joint venture should be a tool to enable it to win and perform a contract in an area that it has some experience but that it could not have won on its own.

Section 125.9

This final rule first reorganizes some of the current provisions in § 125.9 for ease of use and understanding. The rule reorganizes and clarifies § 125.9(b). It 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 rule amends this provision to specify that SBA will decline an application if SBA determines that the mentor does not possess good character. The rule also clarifies 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. Commenters generally supported these clarifications. One commenter asked SBA to clarify the provision prohibiting a mentor that has more than one protégé from submitting competing offers in response to a solicitation for a specific procurement. Specifically, the commenter noted that many multiple award procurements have separate pools of potential awardees. For example, an agency may have a single solicitation that calls for awarding indefinite delivery indefinite quantity (IDIQ) contracts in unrestricted, small business, HUBZone, 8(a), WOSB, and SDVO small business pools. All offerors submit proposals in response to the same solicitation and indicate the pool(s) for which they are competing. The commenter sought clarification as to whether a mentor with two different protégés could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool. SBA first notes that in order for SBA to approve a second mentor-protégé relationship for a specific mentor, the mentor must demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm. In particular, the mentor must show that the second protégé will not be a competitor of the first protégé. Thus, the mentor has already assured SBA that the two protégés would not be competitors. If the two mentor-protégé relationships were approved in the same NAICS code, then the mentor must have already made a commitment that the two firms would not compete against each other. This could include, for example, a commitment that the one mentor-protégé relationship would seek only HUBZone and small business set-aside contracts while the second would seek only 8(a) contracts. That being the case, the same mentor could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool on the same solicitation because they would not be deemed competitors with respect to that procurement. SBA does not believe, however, that a change is needed from the proposed regulatory text since that is merely an interpretation of what ''competing offers'' means. SBA adopts the proposed language as final in this rule.

The proposed rule also sought comments as to whether SBA should 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. This proposal was in response to 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. This was the single most commented-on issue in the proposed rule. SBA received more than 150 comments in response to this alternative. The vast majority of commenters strongly opposed this proposal. Commenters agreed with SBA's stated intent that the focus of the mentor-protégé program should be on the protégé firm, and how best valuable business development assistance can be provided to a protégé to enable that firm to more effectively compete on its own in the future. They believed that such a restriction would harm small businesses, as it would restrict the universe of potential mentors which could provide valuable business assistance to them. Commenters believed that the size of the mentor should not matter as long as that entity is providing needed business development assistance to its protégé. Commenters believed that SBA's priority should be to ensure that needed business development assistance will be provided to protégé firms though a mentor-protégé agreement, and the size of the mentor should not be a relevant consideration. All that should matter is whether the proposed mentor demonstrates a commitment and the ability to assist small business concerns. Several commenters believed that larger business entities actually serve as better mentors since they are involved in the program to help the protégé firm and not to gain further access to small business contracting (through joint ventures) for themselves. In response, SBA will not adopt the proposal, but rather will continue to allow any business entity, regardless of size, that demonstrates a commitment and the ability to assist small business concerns to act as a mentor.

This rule also implements 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 rule amends § 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-protege relationships if such relationships are with a small business that has its principal office located in the Commonwealth of Puerto Rico. As such, § 125.9(b)(3)(ii) provides 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 will 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 rule also adds 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, § 125.9(d)(6) provides 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. Commenters supported these provisions, and SBA adopts them as final in this rule. A few commenters asked for clarification as to whether these provisions applied to entity-owned firms located in Puerto Rico. The statute and proposed regulatory text notes that it applies to any business concern that has its principal office in Puerto Rico. If a tribally-owned or ANC-owned firm has its principal office in Puerto Rico, then the provision applies to it. SBA does not believe further clarification is needed. The principal office requirement should be sufficient. One commenter also questioned the provision in the proposed rule allowing mentor training costs to count toward a mentor's small subcontracting goals, believing that training costs should never be allowed as subcontracting costs. That is not something SBA proposed on its own. That provision was specifically authorized by Section 861 of NDAA 2019. As such, that provision is unchanged in this final rule.

A few commenters also recommended that SBA allow a mentor to have more than three protégés at a time generally (*i.e.,* not only where small businesses in Puerto Rico are involved). These commenters noted that very large business concerns operate under multiple NAICS codes and have the capability to mentor a large number of small protégé firms that are not in competition with each other. Although SBA understands that many large businesses have the capability to mentor more than three small business concerns at one time, SBA does not believe it is good policy for anyone to perceive that one or more large businesses are unduly benefitting from small business programs. The rules allow a mentor to joint venture with its protégé and be deemed small for any contract for which the protégé individually qualifies as small, and to perform 60 percent of whatever work the joint venture performs. Moreover, a mentor can also own an equity interest of up to 40 percent in the protégé firm. If a large business mentor were able to have five (or more) protégés at one time, it could have a joint venture with each of those protégés and perform 60 percent of every small business contract awarded to the joint venture. It also could (though unlikely) have a 40 percent equity interest in each of those small protégé firms. In such a case, SBA believes that it would appear that the large business mentor is unduly benefitting from contracting programs intended to be reserved for small businesses. As such, this rule does not increase the number of protégé firms that one mentor can have.

The proposed rule clarified 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 has always intended that a firm seeking to be a protégé could choose to establish a mentor-protégé relationship to assist its business development in any business area in which it has performed work as long as the firm qualifies as small for the work targeted in the mentor-protégé agreement. The proposed rule highlighted SBA's belief that a firm must have performed some work in a secondary industry or NAICS code in order for SBA to approve such a mentor-protégé relationship. SBA does not want a firm that has 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 proposed rule clarified 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. Several commenters sought further clarification of this provision. Commenters noted that a procuring activity may assign different NAICS codes to the same basic type of work. These commenters questioned whether a firm needed to demonstrate that it performed work in a specific NAICS code or could demonstrate that it has performed the same type of work, whatever NAICS code was assigned to it. Similarly, other commenters again questioned whether a firm must demonstrate previous work performed in a specific NAICS code, or whether similar work that would logically lead to work in a different NAICS code would be permitted. SBA agrees with these comments. SBA believes that similar work performed by the prospective protégé to that for which a mentor-protégé relationship is sought should be sufficient, even if the previously performed work is in a different NAICS code than that for which a mentor-protégé agreement is sought. In addition, if the NAICS code in which a mentor-protégé relationship is sought is a logical progression from work previously performed by the intended protégé firm, that too should be permitted. SBA's intent is to encourage business development, and any relationship that promotes a logical business progression for the protégé firm fulfills that intent.

The proposed rule also responded 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 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. However, SBA did not want to impose additional burdens on protégé firms that would require them to document and demonstrate that they did not receive benefits through their mentor-protégé relationships. In order to eliminate any disagreements as to whether a firm did or did not receive any assistance under its mentor-protégé agreement, SBA proposed to establish an easily understandable and objective basis for counting or not counting a mentor-protégé relationship. Specifically, the proposed rule amended § 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. The vast majority of commenters supported a specific, objective amount of time within which a protégé could end a mentor-protégé relationship without having it count against the two in a lifetime limit. Commenters pointed out, however, that the supplementary information to and the regulatory text in the proposed rule were inconsistent (*i.e.,* the supplementary information saying 18 months and the regulatory text saying one year). Several comments recommended increasing the lifetime number of mentor-protégé relationships that a small business concern could have. Finally, a few commenters opposed the proposed exemption to the two-in-lifetime rule because allowing protégé firms such an easy out within 18 months, whether or not the protégé received beneficial business development assistance, could act as a detriment to firms that would otherwise be willing to serve as mentors. One commenter was concerned that if a bright line 18-month test is all that is required, nothing would prevent an unscrupulous business from running through an endless chain of relatively short-lived mentor-protégé relationships. SBA does not believe that will be a frequent occurrence. Nevertheless, in response, the final rule provides that if a specific small business protégé appears to use the 18-month test as a means of using many short-term mentor-protégé relationships, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

The proposed rule also eliminated 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. Most commenters supported this change, agreeing that a separate reconsideration process is unnecessary. A few commenters disagreed, believing that requiring a small business to wait 60 days to submit a revised mentor-protégé agreement and then start SBA's processing time instead of submitting a revised agreement within a few days of a decline decision could add an additional two months of wait time to an ultimate approval. SBA continues to believe that the small amount of time a small business must wait to resubmit a new/revised mentor-protégé agreement to SBA for approval makes the reconsideration process unnecessary. As such, this rule finalizes the elimination of a separate reconsideration process.

The proposed rule added 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. Several commenters were also concerned about mentors that did not live up to their commitments. A few commenters recommended that a protégé firm should be able to ask SBA to intervene if it thought it was not receiving the assistance promised by the mentor or if it thought that the assistance provided was not of the quality it anticipated. SBA believes that makes sense and this rule adds a provision allowing a protégé to request SBA to intervene on its behalf with the mentor. Such a request would cause SBA to notify the mentor that SBA had received adverse information regarding its participation as a mentor and allow the mentor to respond to that information. If the mentor did not overcome the allegations, SBA would terminate the mentor-protégé agreement. The final rule also adds a provision that allows a protégé to substitute another firm to be its mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit. If two years had already elapsed in the mentor-protégé agreement, the protégé could substitute another firm to be its mentor for a total of four years.

Prior to the proposed rule, SBA had 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. The proposed rule asked for comments about the possibility of adding a provision requiring a joint venture between a protégé and its mentor to recertify its size if the mentor prematurely ended the mentor-protégé relationship. Commenters did not support this possible approach, believing that such a recertification requirement would have a much more serious impact on the protégé than on the mentor. In effect, such a provision would punish a protégé for its mentor's failure to meet its obligations under the mentor-protégé agreement. Upon further review, SBA believes that better options are provided in current § 125.9(h), which 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 terminating mentor-protégé agreements early.

Section 125.18

In addition to the revision to § 125.18(c) identified above, this rule amends 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.

Section 126.602

On November 26, 2019, SBA published a final rule amending the HUBZone regulations. 84 FR 65222. As part of that rule, SBA revised 13 CFR 126.200 by reorganizing the section to make it more readable. However, SBA inadvertently overlooked a cross-reference to section 126.200 contained in § 126.602(c). This rule merely fixes the cross-reference in § 126.602(c).

Section 126.606

The final rule amends § 126.606 to make it consistent with the release requirements of § 124.504(d). Current § 126.606 authorizes SBA to release a follow-on requirement previously performed through the 8(a) BD program for award as a HUBZone contract only where neither the incumbent nor any other 8(a) Participant can perform the requirement. SBA believes that is overly restrictive and inconsistent with the release language contained in § 124.504(d). As such, the final rule provides that a procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

Sections 126.616 and 126.618

This rule makes 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 proposed rule made other changes or clarifications to § 127.504. The proposed rule renamed and revised § 127.504 for better understanding and ease of use. It changed the section heading to ''What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB contract?''. SBA received no comments on these changes and adopts them as final in this rule.

This rule also moves the recertification procedures for WOSBs from § 127.503(h) to § 127.504(e).

Sections 134.318 and 121.1103

This rule amends § 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. As such, this rule simply requires 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 rule revises § 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.

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 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 making 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. This rule makes 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?

This rule seeks to address or clarify several issues, which will provide clarity to small businesses and contracting personnel. Further, SBA is eliminating the burden that 8(a) Participants seeking to be awarded a competitive 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 4,500 8(a) BD Participants in the portfolio. Of those, about 10 percent 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 to the initial joint venture review and approval process, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum. Not every joint venture is awarded more than one contract, but those that do are often awarded the maximum allowed of three contracts. SBA estimates that Participants submit an additional 300 addendum actions, with each action taking about 1.5 hours for the Participant. That equates to approximately 450 hours at an estimated rate of $44.06 per hour for an annual total cost savings to 8(a) Participants of about $19,800. Between both initial and addendum actions, this equates to an annual total cost savings to 8(a) Participants of about $79,300.

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. In a similar vein, eliminating the manual review and approval process for 8(a) BD Mentor-Protégé Program applications will provide cost savings to the Federal government. As previously noted, an 8(a) Participant seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD program must submit an application manually to its servicing district office. The servicing district office likewise conducts a manual review of each application for completeness and for regulatory compliance. This review process can be cumbersome since the analyst must first download and organize all application materials by hand. In contrast, the on-line, electronic application system available to prospective protégés in the All Small Mentor-Protégé Program has significantly streamlined SBA's review process in two ways. First, it logically organizes application materials for the reviewer, resulting in a more efficient and consistent review of each application. Second, all application materials are housed in a central document repository and are accessible to the reviewer without the need to download files. In the Agency's best professional judgment, this streamlined application review process delivers estimated savings of 30 percent per application as compared to the manual application review process under the 8(a) BD Mentor-Protégé Program. SBA further estimates that it takes approximately three hours to review an application for the All Small Mentor Protégé Program. That equates to approximately 135 hours (*i.e.,* 150 applications multiplied by three hours multiplied by 30 percent) at an estimated rate of $44.06 per hour for an annual total cost savings to the Federal government of about $5,900 per year. The elimination of manual application process creates a total cost savings of $18,900 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 between the two programs for firms seeking a mentor-protégé relationship. 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 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 $26,400.

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 $45,300 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, but are certainly significant to the firms missing out on specific contract opportunities. 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 will also eliminate the requirement that any specific joint venture can be awarded no more than three contracts over a two year period, but will 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 will 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 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, will save small businesses significant legal costs in establishing new joint ventures and ensuring that those entities meet all applicable regulatory requirements.

This rule also makes 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 rule clarifies that a concern that is at least 51 percent 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 rule also provides 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 changes will save entity-owned small business concerns time and money. Similarly, the rule provides 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 rule will 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 changes the current rule which requires a concern to wait 12 months from the date of the final Agency decision to reapply. This will 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. 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 clarifies 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 rule requires 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 rule requires 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. The rule does not require recertification, however, if the agency issues the order under a pool or a reserve, and the pool or reserve already was set aside in the same category as the order.

If the firm's size and status in SAM is current and accurate when the firm submits its offer, the concern will 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 will 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 2019, agencies set aside 1,800 orders under unrestricted MACs, excluding orders under FSS contracts. Agencies also set aside 15 pools or reserves using already-established MACs other than FSS contracts. SBA adopts the assumption from FAR Case 2014–002 that on average there are three offers per set-aside order. SBA also assumes that agencies will award five orders from each set-aside pool or set-aside reserve per year, using the same set-aside category as the pool or reserve. These pool or reserve orders do not require recertification at time of order; therefore, SBA subtracts the pool or reserve orders from the number of orders subject to the rule, leaving 1,725 orders subject to the rule.

The annual number of set-aside orders under unrestricted MACs, excluding FSS orders and orders under set-aside pools or reserves, therefore is calculated as 1,725 orders × 3 offers per order = 5,175. The ease of complying with the rule varies depending on the size of a firm. If the firm's size is not close to the size standard, compliance is simple; the firm merely confirms that it has a SAM registration. SBA estimates those firms spend 5 minutes per offer to comply with this rule. For a firm whose size is close to the size standard, compliance requires determining whether the firm presently qualifies for the set-aside—primarily, whether the firm is presently a small business. SBA adopts the estimate from OMB Control No. 9000–0163 that these firms spend 30 minutes per offer to comply with this rule.

The share of small businesses that are within 10 percent of the size standard is 1.3 percent. Therefore, the annual public burden of requiring present size and socioeconomic status is (5,175 offers × 98.7 percent × 5 minutes × $44.06 cost per hour) + (5,175 offers × 1.3 percent × 30 minutes × $44.06 cost per hour) = $20,250.

FPDS–NG indicates that, in Fiscal Year 2019, agencies set aside about 130 orders under set-aside MACs (other than FSS contracts) in the categories covered by this rule. These categories are WOSB or EDWOSB set-aside/sole-source orders under small business set-aside MACs; SDVOSB set-aside/sole-source orders under small business set-aside MACs; and HUBZone set-aside/sole source orders set-aside/sole-source orders under small business set-aside MACs. The ease of complying on these set-aside within set-asides varies depending on whether the firm has had any of these recent actions: (i) An ownership change, (ii) a corporate change that alters control of the firm, such as change in bylaws or a change in corporate officers, or (iii) for the HUBZone program, a change in the firm's HUBZone certification status under SBA's recently revised HUBZone program procedures. Although data is not available, SBA estimates that up to 25 percent of firms would have any of those recent actions. Firms in that category will spend 30 minutes per offer determining whether the firm presently qualifies for a set-aside order. The remaining 75 percent of firms will spend 5 minutes merely confirming that the firm has an active SAM registration.

Following the same calculations, the annual cost of requiring present socioeconomic status on set-aside orders under set-aside MACs is calculated as (130 orders × 3 offers/order × 75 percent × 5 minutes × $44.06 cost per hour) + (130 orders × 3 offers/order × 25 percent × 30 minutes × $44.06 cost per hour). This amounts to an annual cost of about $3,220.

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 regulation 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 Federal Government, however, will receive greater accuracy from renewed certification which will enhance transparency in reporting and making awards.

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 minimal. Further, checking SAM at the time of order award replaces the check of the offeror's contract level certification. SBA also recognizes that an agency's market research for the order level may be impacted where the agency intends to issue a set-aside order under an unrestricted vehicle (or a socioeconomic set-aside under a small business set-aside vehicle) except under FSS contracts. 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.

Using the same set-aside order data, the annual cost of checking certifications and conducting additional market research efforts is calculated as (1725 orders off unrestricted + 130 orders off set-asides) × 30 minutes × $44.06/hours = $46,600 in annual government burden.

Currently, recertification at the contract level for long term contracts is specifically identified only at specific points. This rule makes clear that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point for a long-term MAC. FPDS–NG indicates that, in Fiscal Year 2019, agencies awarded 399 MACs to small businesses. SBA estimates that procuring activities will use their discretion to request recertification at any point in a long term contract approximately 10% of the time. SBA adopts the estimate from OMB Control No. 9000–0163 that procuring activities will spend 30 minutes to comply with this rule. The annual cost of allowing recertification at any point on a long-term contract to procuring activities is calculated as (399 MACs × 10%) × 30 minutes × $44.06 cost per hour. This amounts to an estimated annual cost of $880. Where requested, this recertification would impose a burden on small businesses. Following this same calculation, SBA estimates that the impact to firms will also be $880 ((399 number of MACs × 10%) × 30 minutes × $44.06 per hour). The total cost is $880 × 2 = $1,760.

The annual cost is partially offset by the cost savings that result from other changes in this rule. This change goes more to accountability and ensuring that small business contracting vehicles truly benefit small business concerns. In addition, commenters responding to the costs associated with recertification supported the proposed rule that requires a firm to recertify its size and/or socioeconomic status for set-aside task orders under unrestricted MACs. These commenters agreed that certifying in the System for Award Management (*sam.gov*) should meet this requirement.

3. What are the alternatives to this rule?

As noted above, this rule makes a number of changes intended to reduce unnecessary or excessive burdens on small businesses, and clarifies 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 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; namely, 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.

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 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 rule. This rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule, discounted at 7% relative to 2016 over a perpetual time horizon, is $37,166 in 2016 dollars with a net present value of $530,947 in 2016 dollars.

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
1	Eliminating SBA approval of initial and addendums to joint venture agreements to perform competitive 8(a) contracts and eliminating approval for two additional contracts which would require additional submissions and explanations for any such joint venture addendum.	($79,300)
2	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of manual application process.	(18,900)
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.	(26,400)
4	Requiring recertification for set-aside orders issued under unrestricted Multiple Award Contracts	20,250

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
5	Requiring recertification for set-aside orders issued under set-aside Multiple Award Contracts	3,220
6	Additional Government detailed market research to identify qualified sources for set-aside orders and verify status.	46,600
7	Contracting officer discretion to request size recertification at any point for a long-term MAC	1,760

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
1	*Regulatory change:* SBA is eliminating 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. In addition, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum.	
	Estimated number of impacted entities: There are currently approximately 4,500 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. There are approximately 300 addendums per year.	450 entities and 300 additional addendums.
	Estimated average impact (labor hour):* 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. Each addendum requires 1.5 hours of time.	3 hours and 1.5 hours per additional addendum.
	*2018 Median Pay** (per hour):* Most 8(a) firms use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	($79,300).
2	*Regulatory change:* SBA is merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program and eliminating the manual application process. This will reduce the burden on 8(a) Participants seeking a mentor-protégé agreement and on SBA to no longer process paper applications.	
	Estimated number of impacted entities: SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually.	150 entities.
	Estimated average impact (labor hour):* 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. For SBA employees, reviewing the manual mentor-protégé agreements takes 3 hours and this change is expected to save SBA 30% of the time required.	2 hours for applicants and less than 1 hour for SBA.
	*2018 Median Pay** (per hour):* Most 8(a) firms use an accountant or someone with similar skills for this task..	44.06 per hour.
	Estimated Cost/(Cost Saving)	($18,900).
3	*Regulatory change:* SBA is merging 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.	
	Estimated number of impacted entities: 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.	600 entities.
	Estimated average impact (labor hour):* SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship.	1 hour.
	*2018 Median Pay** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	($26,400).
4	*Regulatory change:* SBA is requiring that a firm be accurately certified and presently qualified as to size and/or status for set-aside orders issued under Multiple Award Contracts that were not set aside or set aside in a separate category, except for the Federal Supply Schedule.	
	Estimated number of impacted entities: Approximately 1,725 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, including the Federal Supply Schedule, outside of set-aside pools. SBA estimates that three offers are submitted for each order.	5,175 offers.
	Estimated average impact (labor hour):* SBA estimates that a small business that is close to its size standard will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer. A small business that is not close to its size standard will spend an average of 5 minutes confirming that it has a SAM registration.	0.5 hours for firms within 10 percent of size standard (1.3% of firms); 5 minutes otherwise (98.7% of firms).
	*2018 Median Pay** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$20,250.
5	*Regulatory change:* SBA is requiring that a firm be accurately certified and presently qualified as to socioeconomic status for set-aside orders issued under Multiple Award Contracts that were set aside in a separate category, except for the Federal Supply Schedule contracts.	

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

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
	Estimated number of impacted entities: Approximately 130 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 for a total of 390 offers.	390 offers.
	*Estimated average impact * (labor hour):* SBA estimates that a small business will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer, if it has had a change in ownership, control, or certification. Otherwise, the small business will spend an average of 5 minutes confirming that it has a SAM registration.	0.5 hours for firms with a change in ownership, control, or HUBZone certification (25% of firms); 5 minutes otherwise (75% of firms).
	*2018 Median Pay ** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$3,220.
6	*Regulatory change:* SBA is requiring that firms be accurately certified and presently qualified as to size and socioeconomic status for certain set-aside orders issued under 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 and whether the awardee is qualified for award.	
	Estimated number of impacted entities: Approximately 2,115 set-aside orders are issued annually as described in the rule.	2,115 orders.
	Estimated average impact (labor hour):* SBA estimates that ordering activities applying the Rule of Two will spend an average of 30 additional minutes to locate contractors awarded Multiple Award Contracts, looking up the current business size for each of the contractors in SAM to determine if a set-aside order can be pursued, and confirming the status of the awardee.	0.5 hours.
	*2018 Median Pay ** (per hour):* Contracting officers typically perform the market research for the acquisition plan.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$46,600.
7	*Regulatory Change: Contracting officer discretion to request size recertification at any point for a long-term MAC.*	
	Estimated number of impacted entities: Approximately 400 long term MACs are awarded annually to small businesses. SBA estimates that contracting officers will exercise this discretion 10% of the time.	40 contracts.
	*Estimated average impact * (labor hour):* SBA estimates that ordering activities will spend an average of 30 additional minutes to request this recertification. Contractors will spend an average of 30 additional minutes to respond to the request.	0.5 hours for agencies; 0.5 hours for businesses.
	*2018 Median Pay ** (per hour):* Contracting officers will request this recertification	$44.06.
	Estimated Cost/(Cost Saving)	$1,760.

* 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 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 rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13175

As part of this rulemaking process, SBA held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, 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. *See* 84 FR 66647. These consultations were in addition to those held by SBA in Anchorage, AK (*see* 83 FR 17626), Albuquerque, NM (*see* 83 FR 24684), and Oklahoma City, OK (*see* 83 FR 24684) before issuing a proposed rule. 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 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 initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289. All comments received were posted on *www.regulations.gov* to provide transparency into the rulemaking process. In addition, SBA submitted the final 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 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 rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule is $37,166 in 2016 dollars with a net present value of $530,947 over perpetuity, in 2016 dollars. 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 rule imposes 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 82 total hours ($3,625), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 165.
Responses per respondent: 1.
Total annual responses: 165.
Preparation hours per response: 0.5 (30 min).
Total response burden hours: 82.
Cost per hour: $44.06.
Estimated cost burden to the public: $3,625.

Additionally, the rule adds procuring agency discretion to request recertification at any point for long term MACs. The annual total public reporting burden for this collection of information is estimated to be 20 total hours ($880), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 40.
Responses per respondent: 1.
Total annual responses: 40.
Preparation hours per response: 0.5 (30 min).
Total response burden hours: 20.
Cost per hour: $44.06.
Estimated cost burden to the public: $880.This added information collection burden will be officially reflected through OMB Control Number 9000–0163 when the rule is implemented. SBA received no comments on the PRA analysis set forth in the proposed rule.

SBA also has an information collection for the Mentor-Protégé Program, OMB Control Number 3245–0393. This collection is not affected by these amendments.

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 rule concerns aspects of SBA's 8(a) BD program, the All Small Mentor-Protégé Program, and various other small business programs. 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 4,500 8(a) BD Participants in the portfolio. Most of the changes are clarifications 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 rule eliminates confusion regarding perceived differences between the two Programs, removes unnecessary duplication of functions within SBA, and establishes 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 rule.

SBA is also requiring 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 under MACs per year from FY 2014 to FY 2018. Around 199,000, or 84.3 percent, were awarded under 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 under unrestricted MACs. These orders were issued to approximately 2,600 firms. The 9,000 new orders awarded with a small business set-aside under a MAC without a small business set aside were 4.0 percent of the 236,000 new orders under MACs in a year (Table 3).

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

	FY014	FY015	FY016	FY017	FY018	AVG
Total new orders under MACs in FY	244,664	231,694	245,978	234,304	223,861	236,100
Orders awarded with SB set aside under unrestricted MAC	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 under a MAC that was not itself set aside for small business were adversely affected by the 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 non-FSS small business set-aside orders under MACs not set aside for small business would impact only 0.47 percent of annual new MAC orders. The proposed rule sought comments as to whether the rule would have a significant economic impact on a substantial number of small entities. SBA did not receive any comments responding to such request. As such, SBA certifies that this 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 changes are being made, the objectives and basis for the rule, a description of the number of small entities to which the 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 amends 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), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by:
■ a. Revising the first sentence of paragraphs (b)(6) and (9);
■ b. Revising paragraph (f)(2)(i) and Example 2 to paragraph (f);
■ c. Revising the first sentence of paragraph (g);
■ d. Revising paragraph (h) introductory text and Examples 1, 2, and 3 to paragraph (h) introductory text;
■ e. Removing paragraphs (h)(1) and (h)(2);
■ f. Redesignating paragraphs (h)(3) through (h)(5) as paragraphs (h)(1) through (h)(3), respectively;
■ g. Revising the paragraph heading for the newly redesignated paragraph (h)(1) and adding two sentences to the end of newly redesignated paragraph (h)(1)(ii);

■ h. Removing newly redesignated paragraph (h)(1)(iii);
■ i. Adding a paragraph heading for redesignated paragraph (h)(2);
■ j. Revising newly redesignated paragraph (h)(3); and
■ k. Adding paragraph (h)(4).

The revisions and additions 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.

* * * * *

Example 2 to paragraph (f). Firm A has been in business for five years and has approximately 200 contracts. Of those contracts, 195 are with Firm B. The value of Firm A's contracts with Firm B is greater than 70% of its revenue over the previous three years. Unless Firm A can show that its contractual relations with Firm B do not restrict it from selling the same type of products or services to another purchaser, SBA would most likely find the two firms affiliated.

(g) *Affiliation based on the newly organized concern rule.* Except as provided in § 124.109(c)(4)(iii), 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 intending 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. On May 27, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 1. On July 22, 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.

Example 2 to paragraph (h) introductory text. Joint Venture XY receives a contract on August 10, year 1. It may receive two additional contracts through August 10, year 3. On March 19, year 2, XY receives a second contract. It receives no other contract awards through August 10, year 3 and has submitted no additional offers prior to August 10, year 3. Because two years have passed since the date of the first contract award, after August 10, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Example 3 to paragraph (h) introductory text. Joint Venture XY receives a contract on December 15, year 1. On May 22, year 3 XY submits an offer for Solicitation S. On December 8, year 3, XY submits a novation package for contracting officer approval for

Contract C. In January, year 4 XY is found to be the apparent successful offeror for Solicitation S and the relevant contracting officer seeks to novate Contract C to XY. Because both the offer for Solicitation S and the novation package for Contract C were submitted prior to December 15 year 3, both contract award relating to Solicitation S and novation of Contract C may occur without a finding of general affiliation.

(1) *Size of joint ventures.* (i) * * *

(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.

* * * * *

(2) *Ostensible subcontractors.* * * *

(3) *Receipts/employees attributable to joint venture partners.* 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 the calculation of receipts, 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. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee count.

Example 1 to paragraph (h)(3). 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.

(4) *Facility security clearances.* A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.

(i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.

(ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

* * * * *

■ 3. Amend § 121.402 by revising the first sentence of paragraph (b)(2), and paragraphs (c)(1)(i), (c)(2)(i), and (e) to 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) * * *

(i) 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 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 NAICS code corresponding to the principal purpose of the order is not contained in the underlying Multiple Award Contract, the contracting officer may not use the Multiple Award Contract to issue that order.

* * * * *

(e) When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited, SBA may clarify, complete, or supply a NAICS code designation or size standard, as appropriate, in connection with a formal size determination or size appeal.

* * * * *

■ 4. In § 121.404:

■ a. Amend paragraph (a) by:

■ i. Revising paragraphs (a) introductory text and (a)(1); and

■ ii. Adding a paragraph heading to paragraph (a)(2);

■ b. Revising paragraph (b);

■ c. Adding a paragraph heading to paragraph (c);

■ d. Revising paragraph (d);

■ e. Adding a paragraph heading to paragraph (e) and a sentence at the end of the paragraph;

■ f. Adding a paragraph heading to paragraph (f);

■ g. Amend paragraph (g) by:

■ i. Redesignating paragraph (g)(2)(ii)(D) as paragraph (g)(2)(iii);

■ ii. Revising paragraphs (g) introductory text, (g)(2)(ii)(C) and newly redesignated paragraph(g)(2)(iii); and

■ iii. Adding paragraph (g)(2)(iv) and a new third sentence to paragraph (g)(3) introductory text; and

■ h. Adding a paragraph 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) of this section.

(A) *Unrestricted Multiple Award Contracts.* For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) 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. 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. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific 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-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) 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 a business concern submits its 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 the business concern submits an offer and represents that it qualifies as small for the Multiple Award Contract, unless the business concern was required to recertify under paragraph (g)(1), (2), or (3) of this section. If the business concern (including a joint venture) 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 (including a joint venture) 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. 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. However, where the underlying Multiple Award Contract for discrete categories has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific 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-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) 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 it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract. Similarly, a concern that represents itself as a small business and qualifies as small after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business until 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.

(iii) 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 merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract. If the merger, sale or acquisition (including agreements in principal) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

(iv) 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 multiple award 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), (a)(9)(iv), (b)(7), and (b)(12) 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.

(b) * * *

(7) In connection with initial or continued eligibility for the WOSB program, the following may request a formal size determination:

(i) The applicant or WOSB/EDWOSB; or

(ii) The Director of Government Contracting or the Deputy Director, Program and Resource Management, for the Office of Government Contracting.

* * * * *

(12) In connection with eligibility for the SDVO program, the following may request a formal size determination:

(i) The SDVO business concern; or

(ii) The Director of Government Contracting or designee.

* * * * *

■ 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 requirement or contract is a follow-on includes consideration of whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and 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. However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.

* * * * *

■ 13. Amend § 124.105 by revising paragraph (g) and paragraphs (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;

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

(iii) The concerns share common facilities; or

(iv) The concerns operate in the same primary NAICS code and the individual seeking to qualify the applicant concern does not have management or technical experience in that primary NAICS code.

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. B 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 60 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. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. 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. However, a tribally-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(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. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. 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. However, an NHO-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(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. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. 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. However, a CDC-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program.

(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. If that was not part of a pro rata distribution to all shareholders, 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 authorize SBA to request and receive tax return information directly from the Internal Revenue Service. * * *

■ 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 screening or 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 § 124.205 to read as follows:

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

There is no reconsideration process for applications that have been declined. An applicant which has been declined may file an appeal with SBA's Office of Hearings and Appeals pursuant to § 124.206, or reapply to the program pursuant to § 124.207.

§ 124.206 [Amended]

■ 21. Revise § 124.206 by removing and reserving paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

■ 22. 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. However, a concern that has been declined three times within 18 months of the date of the first final Agency decision finding the concern ineligible cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decision to decline.

§ 124.301 [Redesignated as § 124.300]

■ 23. Redesignate § 124.301 as § 124.300.

■ 24. 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.

■ 25. Amend § 124.304(d) by revising the paragraph 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 ineligible to receive further program assistance. If OHA overrules the AA/BD's decision on appeal, the length of time between the AA/BD's decision and OHA's decision on appeal will be added to the Participant's program term.

* * * * *

■ 26. Amend § 124.305 by:

■ a. Revising paragraph (a);

■ b. Revising the introductory text of paragraph (d);

■ c. Revising paragraph (d)(3);

■ d. Revising the introductory text of paragraph (h)(1);

■ d. Revising paragraphs (h)(1)(ii) and (iv);

■ e. Adding paragraph (h)(1)(v);

■ f. Redesignating paragraph (h)(6) as (h)(7); and

■ g. Adding a new paragraph (h)(6).

The revisions and additions read as follows:

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

(a) Except as set forth in paragraph (h) of this section, the AA/BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

* * * * *

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension.

* * * * *

(3) OHA's review is limited to determining whether the Government's interests need to be protected, unless a termination action has also been initiated and the Administrative Law Judge consolidates the suspension and termination proceedings. In such a case, OHA will also consider the merits of the termination action.

* * * * *

(h)(1) Notwithstanding paragraph (a) of this section, SBA will suspend a Participant from receiving further 8(a) BD program benefits where:

* * * * *

(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.

* * * * *

(6) Where a Participant is suspended pursuant to paragraph (h)(1)(iii) or paragraph (h)(1)(v) of this section, the length of the suspension will be added to the concern's program term.

* * * * *

■ 27. 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.

* * * * *

■ 28. Amend § 124.501 by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, by adding new paragraphs (g) and (k), and by revising newly redesignated paragraph (h) 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;

(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.

(h) For a sole source 8(a) procurement, a concern must be a current Participant in the 8(a) BD program at the time of award. If a firm's term of participation in the 8(a) BD program ends (or the firm otherwise exits the program) before a sole source 8(a) contract can be awarded, award cannot be made to that firm. This applies equally to sole source orders issued under multiple award contracts. For a competitive 8(a) procurement, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation as provided in § 124.507(d).

* * * * *

(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, a Metropolitan Statistical Area (MSA), or a contiguous county to (whether in the same or different state) where the work will be performed. SBA may determine that a Participant with a bona fide place of business anywhere within the state (if the state is serviced by more than one SBA district office), one or more other SBA district offices (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 the 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.

(A) Where SBA does not provide a determination within the identified time limit, a Participant may presume that SBA has approved its request for a bona fide place of business and submit an offer for a competitive 8(a) procurement that requires a bona fide place of business in the requested area.

(B) In order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not provided a determination prior to the time that a Participant is identified as the apparent successful offeror, SBA will make the bona fide place of business determination as part of the eligibility determination set forth in paragraph (g)(4) of this section within 5 days of receiving a procuring activity's request for an eligibility determination, unless the procuring activity grants additional time for review. If, due to deficiencies in a Participant's request, SBA cannot make a determination, and the procuring activity does not grant additional time for review, SBA will be unable to verify the Participant's eligibility for award and the Participant will be ineligible for award.

(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) Except as provided in paragraph (k)(2)(iii) of this section, 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.

■ 29. 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 newly redesignated paragraph (g);

■ e. Revising the introductory text of the newly redesignated paragraph (h);

■ f. Adding the phrase ''or BPA'' after the phrase ''BOA'', wherever it appears, in the newly redesignated paragraphs (h)(1) through (4);

■ g. Revising newly redesignated paragraph (i)(1)(iii);

■ h. Adding a sentence at the end of newly redesignated paragraph (i)(1)(iv); and

■ i. Revising newly redesignated paragraphs (i)(2)(ii) and (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).

* * * * *

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

(1) This enables SBA to determine:

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

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

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

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

(2) Where a procuring agency seeks to reprocure a follow-on requirement through an 8(a) contracting vehicle which is not available to all 8(a) BD Program Participants (*e.g.,* a multiple award or Governmentwide acquisition contract that is itself an 8(a) contract), and the previous/current 8(a) award was not so limited, SBA will consider the business development purposes of the program in determining how to accept the requirement.

* * * * *

(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 13.303 and 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 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. A procuring agency may seek to award an order only to a concern that is a current Participant in the 8(a) program at the time of the order. In such a case, the procuring agency will announce its intent to limit the award of the order to current 8(a) Participants and verify a contract holder's 8(a) BD status prior to issuing the order. Where a procuring agency seeks to award an order to a concern that is a current 8(a) Participant, a concern 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) * * *

(ii) The order must be competed exclusively among only the 8(a) awardees of the underlying multiple award contract;

* * * * *

(iv) 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.

* * * * *

■ 30. 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. Adding a paragraph (c)(4); and

■ e. Revising the paragraph heading for paragraph (d) and paragraphs (d)(1) introductory text and (d)(4).

The revisions and addition 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.

* * * * *

(c) * * *

(4) 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.

(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. Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency must notify SBA that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new. Additionally, a procuring agency must notify SBA where it seeks to reprocure a follow-on requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants 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(48 CFR subparts 8.6 and 8.7)). In such a case, the procuring agency should notify SBA at least 30 days prior to the end of the contract or order.

■ 31. 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

* * * * *

■ 32. 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;

■ f. Revising newly redesignated paragraph (c)(1); and

■ g. Adding a new paragraph (d)(3).

The revisions and addition 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.

* * * * *

(d) * * *

(3) For a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

■ 33. 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);

■ c. Revising the table in paragraph (b)(2);

■ d. Revising paragraph (d); and

■ e. Revising paragraph (e).

The revisions read as follows:

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

* * * * *

(b) * * *

TABLE 1 TO PARAGRAPH (b)

Participants year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

* * * * *

(d) *Consequences of not meeting competitive business mix targets.* (1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year must demonstrate to SBA the specific efforts it made during that year to obtain non-8(a) revenue.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA will increase its monitoring of the Participant's contracting activity during the ensuing program year.

(3) As a condition of eligibility for new 8(a) sole source contracts, SBA may require a Participant that fails to achieve the non-8(a) business activity targets to take one or more specific actions. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling from an SBA resource partner or otherwise, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation. Where any such condition is imposed, SBA will not accept a sole source requirement offered to the 8(a) BD program on behalf of the Participant until the Participant demonstrates to SBA that the condition has been met.

(4) If SBA determines that a Participant has not made good faith efforts to meet its applicable non-8(a) business activity target, the Participant will be ineligible for sole source 8(a) contracts in the current program year. SBA will notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in paragraphs (d)(4)(i) and (ii) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

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

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

Example 1 to paragraph (d)(4). Firm A had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of $8.5 million and non-8(a) revenues of $1.5 million (15 percent). Based on total revenues of $10 million, Firm A should have had at least $2.5 million in non-8(a) revenues. Thus, Firm A missed its target by $1 million (its target ($2.5 million) minus its actual non-8(a) revenues ($1.5 million)). Because Firm A did not achieve its non-8(a) business activity target and SBA determined that it did not make good faith efforts to obtain non-8(a) revenue, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling $1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(4). Firm B had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which $8.5 million were 8(a) revenues and $1.5 million were non-8(a) revenues, and SBA determined that Firm B did not make good faith efforts to meet its non-8(a) business activity target. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least $1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

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

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

(e) *Waiver of sole source prohibition.* (1) Despite a finding by SBA that a Participant did not make good faith efforts to meet its non-8(a) business activity target, SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts 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 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.

■ 34. Amend § 124.513 by revising paragraphs (c)(2) and (4), the second sentence of paragraph (c)(5), and paragraph (e) to read as follows:

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

* * * * *

(c) * * *

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the 8(a) Participant at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the 8(a) Participant if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the 8(a) Participant for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(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);

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(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 (*but see* § 124.501(g) for SBA's determination of Participant eligibility).

(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.

* * * * *

■ 35. Amend § 124.514 by revising paragraph (b) to read as follows:

§ 124.514 Exercise of 8(a) options and modifications.

* * * * *

(b) *Priced options.* Except as set forth in § 124.521(e)(2), the procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

* * * * *

■ 36. 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.

* * * * *

■ 37. Amend § 124.518 by revising paragraph (c) to read as follows:

§ 124.518 How can an 8(a) contract be terminated before performance is completed?

* * * * *

(c) *Substitution of one 8(a) contractor for another.* SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of an 8(a) contract without invoking the termination for convenience or waiver provisions of § 124.515 where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded the 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

■ 38. 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.

* * * * *

■ 39. 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).

■ 40. Amend § 124.521 by revising the last sentence of paragraph (e)(1) to read as follows:

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

* * * * *

(e) *Recertification.* (1) * * * Except as set forth in paragraph (e)(2) of this section, where a concern later fails to qualify as an 8(a) Participant, the procuring agency may exercise options and still count the award as an award to a Small Disadvantaged Business (SDB).

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 41. 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), and 657r.

■ 42. Amend § 125.2 by revising paragraph (e)(6)(i) and adding a new 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?

* * * * *

(e) * * *

(6) * * *

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 4106(c), a contracting officer may set aside orders for small businesses, eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against full and open Multiple Award Contracts. In addition, a contracting officer may set aside orders for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against total small business set-aside Multiple Award Contracts, partial small business set-aside Multiple Award Contracts, and small business reserves of Multiple Award Contracts awarded in full and open competition. Although a contracting officer can set aside orders issued under a small business set-aside Multiple Award Contract or reserve to any subcategory of small businesses, contracting officers are encouraged to review the award dollars under the Multiple Award Contract and aim to make available for award at least 50% of the award dollars under the Multiple Award Contract to all contract holders of the underlying small business set-aside Multiple Award Contract or reserve. However, a contracting officer may not further set aside orders for specific types of small business concerns against Multiple Award Contracts that are set-aside or reserved for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs (*e.g.,* a contracting officer cannot set-aside an order for 8(a) Participants that are also certified HUBZone small business concerns against an 8(a) Multiple Award Contract).

*　　*　　*　　*　　*

(g) *Capabilities, past performance, and experience.* When an offer of a small business prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the head of the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

■ 43. Amend § 125.3 by adding a sentence to the end of paragraph (b)(2), and by revising the first sentence of paragraph (c)(1)(viii) and paragraph (c)(1)(ix) 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)).

*　　*　　*　　*　　*

(c) * * *

(1) * * *

(viii) The contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) for which a small business concern received a preference. * * *

(ix) As a best practice, the contractor may provide the pre-award written notification cited in paragraph (c)(1)(viii) of this section to unsuccessful and small business offerors on subcontracts at or below the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) and should do so whenever practical; and

*　　*　　*　　*　　*

■ 44. Amend § 125.5 by:

■ a. Revising the third sentence of paragraph (a)(1);

■ b. Redesignating paragraphs (f)(2) and (f)(3) as paragraphs (f)(3) and (f)(4) respectively;

■ c. Adding a new paragraph (f)(2);

■ d. Removing the phrase ''$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures'' and adding in its place the phrase ''Less than or equal to the Simplified Acquisition Threshold'' in paragraph (g);

■ e. Removing the phrase ''Between $100,000 and $25 million'' and adding in its place the phrase ''Above the Simplified Acquisition Threshold and less than or equal to $25 million'' in paragraph (g);

■ f. Removing the term ''$100,000'' and adding in its place ''the simplified acquisition threshold'' in paragraphs (h) and (i).

The revision and addition read 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. * * *

*　　*　　*　　*　　*

(f) * * *

(2) An offeror seeking a COC has the burden of proof to demonstrate that it possesses all relevant elements of responsibility and that it has overcome the contracting officer's objection(s).

*　　*　　*　　*　　*

■ 45. Amend § 125.6 by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising paragraph (a)(2)(ii)(B);

■ c. Revising Examples 2, 3 and 4 to paragraph (a)(2);

■ d. Revising the paragraph (b) introductory text; and

■ e. Adding Example 3 to paragraph (b).

The revisions and addition read as follows:

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

(a) *General.* In order to be awarded a full or partial small business set-aside contract with a value greater than the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101), an 8(a) contract, an SDVO SBC contract, a HUBZone contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

*　　*　　*　　*　　*

(2) * * *

(ii) * * *

(B) For a multiple item procurement where a waiver as described in § 121.406(b)(5) of this chapter is granted for one or more items, compliance with the limitation on subcontracting requirement will be determined by combining the value of the items supplied by domestic small business manufacturers or processors with the value of the items subject to a waiver. As such, as long as the value of the items to be supplied by domestic small business manufacturers or processors plus the value of the items to be supplied that are subject to a waiver account for at least 50% of the value of the contract, the limitations on subcontracting requirement is met.

*　　*　　*　　*　　*

Example 2 to paragraph (a)(2). A procurement 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. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the item for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the one item for which class waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 3 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that only four of these items are manufactured by small businesses. The value of the items manufactured by small business is estimated to be $400,000. The contracting officer seeks and is granted contract specific waivers on the other six items. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the items for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the six items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 4 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that three of the items can be sourced from small business manufacturers at this particular time, and the estimated value of these items is $300,000. There are no class waivers subject to the remaining seven items. In order for this procurement to be set aside for small business, a contracting officer must seek and be granted a contract specific waiver for one or more items totaling $200,000 (so that $300,000 plus $200,000 equals 50% of the value of the entire procurement). Once a contract specific waiver is received for one or more items, at least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or processors or by manufacturers or processors of the items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

* * * * *

(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.

* * * * *

■ 46. Amend § 125.8 by:

■ a. Revising paragraphs (b)(2)(ii) and (iv), the second sentence of paragraph (b)(2)(v), and paragraphs (b)(2)(xi) and (xii);

■ b. Adding a new sentence at the end of paragraph (c)(1);

■ c. Adding paragraph (c)(4); and

■ d. Revising paragraphs (e), and (h)(2).

The revisions and additions 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) * * *

(ii) Designating a small business as the managing venturer of the joint venture, and designating a named employee of the small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(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, and that at the conclusion of the joint venture contract(s) and/or the termination of a joint venture, any funds remaining in the joint venture bank account shall distributed at the discretion of the joint venture members according to percentage of ownership;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(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.

* * * * *

(c) * * *

(1) * * * Except as set forth in paragraph (c)(4) of this section, the 40% calculation for protégé workshare

follows the same rules as those set forth in § 125.6 concerning supplies, construction, and mixed contracts, including the exclusion of the same costs from the limitation on subcontracting calculation (*e.g.,* cost of materials excluded from the calculation in construction contracts).

* * * * *

(4) Work performed by a similarly situated entity will not count toward the requirement that a protégé must perform at least 40% of the work performed by a joint venture.

* * * * *

(e) *Capabilities, past performance and experience.* When evaluating the capabilities, 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. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

* * * * *

(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 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 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.

* * * * *

■ 47. 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) introductory text, (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)'' in paragraph (e)(1) introductory text, 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)''.

■ f. Revising paragraphs (e)(1)(i) and (e)(5);

■ g. Redesignating paragraphs (e)(6) through (8) as paragraphs (e)(7) through (9), respectively;

■ h. Adding new paragraph (e)(6);

■ i. Revising paragraph (f);

■ j. Revising paragraph (g) introductory text;

■ k. Revising paragraph (g)(4);

■ l. Adding paragraph (g)(5); and

■ m. Revising paragraph (h)(1) introductory text.

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 concern seeks to qualify as a protégé in a secondary NAICS code, the concern must demonstrate how the mentor-protégé relationship will help it 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 small business concern has no prior experience. SBA may approve a mentor-protégé relationship where the small business concern can demonstrate that it has performed work in one or more similar NAICS codes or where the NAICS code in which the small business concern seeks a mentor-protégé relationship is a logical business progression to work previously performed by the concern.

(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) A protégé and mentor may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (*i.e.,* small business set-aside, 8(a), HUBZone, SDVO, or

WOSB) for which the protégé firm qualifies (*e.g.,* a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor). Similarly, a joint venture between a protégé and mentor may seek a subcontract as a HUBZone small business, small disadvantaged business, SDVO small business, or WOSB provided the protégé individually qualifies as such.

* * * * *

(iii) A joint venture between a protégé and its mentor will qualify as a small business for any procurement for which the protégé individually qualifies as small. 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 no longer be able to seek additional contracts or subcontracts as a small business for any NAICS code having the same or lower size standard. A joint venture between a protégé and its mentor could seek additional contract opportunities in NAICS codes having a size standard for which the protégé continues to qualify as small. 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.

* * * * *

(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 protege 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) The term of a mentor-protégé agreement may not exceed six years. If an initial mentor-protégé agreement is for less than six years, it may be extended by mutual agreement prior to the expiration date for an additional amount of time that would total no more than six years from its inception (*e.g.,* if the initial mentor-protégé agreement was for two years, it could be extended for an additional four years by consent of the two parties; if the initial mentor-protégé agreement was for three years, it could be extended for an additional three years by consent of the two parties). 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 last for no more than six years, as set forth in paragraph (e)(5) of this section.

(ii) If a mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement, that mentor-protégé relationship will generally not count as one of the two mentor-protégé relationships that a small business may enter as a protégé. However, where a specific small business protégé appears to enter into many short-term mentor-protégé relationships as a means of extending its program eligibility as a protégé, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

(iii) If during the evaluation of the mentor-protégé relationship pursuant to paragraphs (g) and (h) of this section SBA determines that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided was not satisfactory, SBA may allow the protégé to substitute another mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit.

* * * * *

(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. At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

* * * * *

(4) At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

(5) 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).

(h) *Consequences of not providing assistance set forth in the mentor-protégé agreement.* (1) Where SBA determines that a mentor may not have provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided may not have been satisfactory, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The mentor must respond within 30 days of the notification, presenting information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement or explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not adequately provide information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

* * * * *

■ 48. Amend § 125.18 by:

■ a. Revising paragraph (a);

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

■ c. Removing ''§ 124.520 or § 125.9 of this chapter'' in paragraph (b)(2) introductory text and adding in its place ''§ 125.9'';

■ d. Revising paragraphs (b)(2)(ii) and (iv) and the second sentence of paragraph (b)(2)(v);

■ e. Removing ''or § 124.520 of this chapter'' in paragraph (b)(3)(i);

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

■ g. Adding a new paragraph (d)(1).

The revisions 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.

* * * * *

(b) * * *

(2) * * *

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and designating a named employee of the SDVO SBC managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the SDVO SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the SDVO SBC if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the SDVO SBC for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(iv) Stating that the SDVO SBC must receive profits from the joint venture commensurate with the work performed by the SDVO SBC, or a percentage agreed to by the parties to the joint venture whereby the SDVO SBC receives profits from the joint venture that exceed the percentage commensurate with the work performed by the SDVO SBC;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(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. 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 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. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which SDVO small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the SDVO small business pool, concerns need not recertify their status as SDVO small business concerns (unless a contracting officer requests size certifications with respect to a specific 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.

* * * * *

■ 49. 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, for an order or a Blanket Purchase Agreement that is set-aside for SDVO small business under a Multiple Award Contract that is not itself set aside for SDVO small business or have a reserve 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

■ 50. 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.

§ 126.500 [Amended]

■ 51. Amend § 126.500 by removing the words ''(whether by SBA or a third-party certifier)'' in paragraph (b) introductory text.

§ 126.602 [Amended]

■ 52. Amend 126.602 in paragraph (c) by removing ''§ 126.200(a)'' and adding in its place ''§ 126.200(c)(2)(ii)''.

■ 53. Revise § 126.606 to read as follows:

§ 126.606 May a procuring activity request that SBA release a requirement from the 8(a) BD program for award as a HUBZone contract?

A procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

■ 54. 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), and by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible to perform on a HUBZone contract?

* * * * *

(c) * * *

(2) Designating a certified HUBZone small business concern as the managing venturer of the joint venture, and designating a named employee of the certified HUBZone small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified HUBZone small business concern at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified HUBZone small business concern if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified HUBZone small business concern for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(4) Stating that the certified HUBZone small business concern must receive profits from the joint venture commensurate with the work performed by the certified HUBZone small business concern, or a percentage agreed to by the parties to the joint venture whereby the certified HUBZone small business concern receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified HUBZone small business concern;

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

§ 126.618 [Amended]

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

■ 56. 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) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contact, in connection with an order or an Agreement that is set-aside for a certified HUBZone small business concern under a Multiple Award Contract that is not itself set aside for certified HUBZone small business concerns or have a reserve for certified HUBZone small business concerns, (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

■ 57. 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]

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

■ 59. 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 requirement?

(a) *General.* In order for a concern to submit an offer on a specific EDWOSB or WOSB set-aside requirement, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract, and either be a certified EDWOSB or WOSB pursuant to § 127.300, or represent that it has submitted a complete application for WOSB or EDWOSB certification to SBA or a third-party certifier and has not received a negative determination regarding that application from SBA or the third party certifier.

(1) If a concern becomes the apparent successful offeror while its application for WOSB or EDWOSB certification is pending, either at SBA or a third-party certifier, the contracting officer for the particular contract must immediately inform SBA's D/GC. SBA will then prioritize the concern's WOSB or EDWOSB application and make a

determination regarding the firm's status as a WOSB or EDWOSB within 15 calendar days from the date that SBA received the contracting officer's notification. Where the application is pending with a third-party certifier, SBA will immediately contact the third-party certifier to require the third-party certifier to complete its determination within 15 calendar days.

(2) If the contracting officer does not receive an SBA or third-party certifier determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer may presume that the apparently successful offeror is not an eligible WOSB or EDWOSB and may make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(b) *Sole source EDWOSB or WOSB requirements.* In order for a concern to seek a specific sole source EDWOSB or WOSB requirement, the concern must be a certified EDWOSB or WOSB pursuant to § 127.300 and qualify as small under the size standard corresponding to the requirement being sought.

(c) *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.

(d) *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. 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. However, where the underlying Multiple Award Contract has been awarded to a pool of WOSB or EDWOSB concerns for which WOSB or EDWOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the WOSB or EDWOSB pool, concerns need not recertify their status as WOSBs or EDWOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase 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 a business concern submits its 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.

(e) *Limitations on subcontracting.* A business concern seeking an EDWOSB or WOSB requirement must also meet the applicable limitations on subcontracting requirements as set forth in § 125.6 of this chapter for the performance of EDWOSB or WOSB contracts (both sole source and those 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.

(f) *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.

(g) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside service contract, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside service contract, the prime contractor is not eligible for award of a WOSB or EDWOSB contract.

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a WOSB or EDWOSB status protest, as described in subpart F of this part. When the subcontractor is other than small or alleged to be other than small for the size standard assigned to the procurement, this issue may be a ground for a size protest, as described at § 121.103(h)(4) of this chapter.

(2) SBA will find that a prime WOSB or EDWOSB contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

(h) *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 (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it does not qualify as an EDWOSB or WOSB, (or qualify as a certified EDWOSB or WOSB for a WOSB contract) within 30 days of the novation approval. If the concern cannot recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), 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 status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it no longer qualifies as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a

WOSB contract). If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), 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 status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) 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 (or qualify as a certified EDWOSB or WOSB for a WOSB contract), 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 (or qualify as a certified EDWOSB or WOSB for a WOSB contract) 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.

■ 60. Amend § 127.506 by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

* * * * *

(c) * * *

(2) Designating a WOSB or EDWOSB as the managing venturer of the joint venture, and designating a named employee of the WOSB or EDWOSB managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the WOSB or EDWOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the WOSB or EDWOSB if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the WOSB or EDWOSB for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

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

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

■ 61. 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 contact, for an order or a Blanket Purchase Agreement that is set-aside for EDWOSB or WOSB small business under a Multiple Award Contract that is not itself set aside for EDWOSB or WOSB small business or have a reserve 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

■ 62. 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), 657t, 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).

■ 63. Amend § 134.318 by adding a paragraph 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.

* * * * *

Jovita Carranza,

Administrator.

[FR Doc. 2020–19428 Filed 10–15–20; 8:45 am]

BILLING CODE 8026–03–P