

and economically disadvantaged individuals.

(b) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. All current Participants in the 8(a) BD program qualify as SDBs.

[85 FR 27292, May 8, 2020]

## PART 125—GOVERNMENT CONTRACTING PROGRAMS

Sec.

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AUTHORITY: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657b, and 657r.

SOURCE: 61 FR 3312, Jan. 31, 1996, unless otherwise noted.

### § 125.1 What definitions are important to SBA's Government Contracting Programs?

*Chief Acquisition Officer* means the employee of a Federal agency designated as such pursuant to section 16(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(a)).

*Commercial off-the-shelf item* has the same definition as set forth in 41 U.S.C. 101 (as renumbered) and Federal Acquisition Regulation (FAR) 2.101 (48 U.S.C. 2.101).

2.101).

*Consolidation of contract requirements, consolidated contract, or consolidated requirement* means a solicitation for a single contract or a Multiple Award Contract to: (1) Satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds \$2 million (including options); or (2) Satisfy requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

*Contract*, unless otherwise noted, has the same definition as set forth in FAR 2.101 (48 U.S.C. 2.101) and includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (e.g., a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).

*Contract bundling, bundled requirement, bundled contract, or bundling* means the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract or a Multiple Award Contract that is likely to be unsuitable for award to a small business concern (but may be suitable for award to a small business with a Small Business Teaming Arrangement) due to:

- (1) The diversity, size, or specialized nature of the elements of the performance specified;
- (2) The aggregate dollar value of the anticipated award;
- (3) The geographical dispersion of the contract performance sites; or
- (4) Any combination of the factors described in paragraphs (e)(1), (2), and (3) of this section.

*Cost of materials* means costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), commercial off-the-shelf items (and similar common supply items or commercial items that require additional

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manufacturing, modification or integration to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, cost of materials includes the acquisition of services or products from outside sources following normal commercial practices within the industry.

*Covered territory business* means a small business concern that has its principal office located in one of the following:

- (1) The United States Virgin Islands;
- (2) American Samoa;
- (3) Guam; or
- (4) The Commonwealth of the Northern Mariana Islands.

*General Services Administration (GSA) Schedule Contract* means a Multiple Award Contract issued by GSA and includes the Federal Supply Schedules and other Multiple Award Schedules.

*Multiple Award Contract* means a contract that is:

- (1) A Multiple Award Schedule contract issued by GSA (*e.g.*, GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.*, Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4;
- (2) A multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or
- (3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

*Office of Small and Disadvantaged Business Utilization (OSDBU) or the Office of Small Business Programs (OSBP)* means the office in each Federal agency having procurement powers that is responsible for ensuring that small businesses receive a fair proportion of Federal contracts in that agency. The office is managed by a Director, who is responsible and reports directly to the head of the agency or deputy to the agency (except that for DoD, the Director reports to the Secretary or the Secretary's designee).

*Partial set-aside (or partially set-aside)* means, for a Multiple Award Contract, a contracting vehicle that can be used

when; market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price.

*Reserve* means, for a Multiple Award Contract,

- (1) An acquisition conducted using full and open competition where the contracting officer makes—

- (i) Two or more contract awards to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the “rule of two” or any alternative set-aside requirements provided in the small business program have been met;

- (ii) Several awards to several different types of small businesses (*e.g.*, one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the “rule of two” has been met; or

- (iii) One contract award to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

- (2) An award on a bundled contract to one or more small businesses with a Small Business Teaming Arrangement.

“*Rule of Two*” refers to the requirements set forth in §§124.506, 125.2(f), 125.19(c), 126.607(c) and 127.503 of this chapter that there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

*Senior Procurement Executive (SPE)* means the employee of a Federal agency designated as such pursuant to section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c)).

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*Separate contract* means a contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery, indefinite quantity contract) that has previously been performed by any business, including an other-than-small business or small business concern.

*Separate smaller contract* means a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.

*Similarly situated entity* means a subcontractor that has the same small business program status as the prime contractor. This means that: For a HUBZone contract, a subcontractor that is a certified HUBZone small business concern; for a small business set-aside, partial set-aside, or reserve, a subcontractor that is a small business concern; for a SDVOSB contract, a subcontractor that is a certified SDVOSB; for a VOSB contract, a subcontractor that is a certified VOSB; for an 8(a) contract, a subcontractor that is a certified 8(a) BD Program Participant; for a WOSB or EDWOSB contract, a subcontractor that is a certified WOSB or EDWOSB. In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.

*Single contract* means any contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery, indefinite quantity contract) resulting in one or more award-ee(s).

*Subcontract or subcontracting* means, except for purposes of §125.3, that portion of the contract performed by a business concern, other than the business concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available commercial off-the-shelf items, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcon-

tracting costs. Where the prime contractor has been directed by the Government as part of the contract to use any specific source for parts, supplies, or components subassemblies, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

*Substantial bundling* means any bundling that meets or exceeds the following dollar amounts (if the acquisition strategy contemplates Multiple Award Contracts or multiple award orders issued against a GSA Schedule Contract or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including options):

(1) \$8.0 million or more for the Department of Defense;

(2) \$6.0 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(3) \$2.5 million or more for all other agencies.

[78 FR 61134, Oct. 2, 2013, as amended at 81 FR 34261, May 31, 2016; 84 FR 65239, Nov. 26, 2019; 87 FR 50927, Aug. 19, 2022; 87 FR 73412, Nov. 29, 2022]

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

(a)(1) *General.* The objective of the SBA's contracting programs is to assist small business concerns, including 8(a) BD Participants, HUBZone small business concerns, Service-Disabled Veteran-Owned Small Business Concerns, Women-Owned Small Businesses and Economically Disadvantaged Women-Owned Small Businesses, in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales. Therefore, these regulations apply to all types of Federal Government contracts, including Multiple Award Contracts, and contracts for architectural and engineering services, research, development, test and evaluation. Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or

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contract, part of any such award or contract, any contract for the sale of Government property, or any contract resulting from a reverse auction, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:

- (i) Maintaining or mobilizing the Nation's full productive capacity;
- (ii) War or national defense programs;
- (iii) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or
- (iv) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(2) *One acceptable offer.* If the contracting officer receives only one acceptable offer from a responsible small business concern in response to any small or socioeconomic set-aside, the contracting officer should make an award to that firm.

(b) *SBA's responsibilities in the acquisition planning process—*(1) *SBA Procurement Center Representative (PCR) Responsibilities—*

(i) *PCR Review—*(A) SBA has PCRs who are generally located at Federal agencies and buying activities which have major contracting programs. At the SBA's discretion, PCRs may review any acquisition to determine whether a set-aside or sole-source award to a small business under one of SBA's programs is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement. PCRs also advocate for the maximum practicable utilization of small business concerns in Federal contracting, including by advocating against the consolidation or bundling of contract requirements, as defined in § 125.1, and reviewing any justification provided by the agency for consolidation or bundling. This review includes acquisitions that are Multiple Award Contracts where the agency has not set-aside all or part of the acquisition or reserved the acquisition for small businesses. It also includes acquisitions where the agency has not set-aside orders placed against Multiple Award

Contracts for small business concerns. Unless the contracting agency requests a review, PCRs will not review an acquisition by or on behalf of the Department of Defense if the acquisition is conducted for a foreign government pursuant to section 22 of the Arms Control Export Act (22 U.S.C. 2762), is humanitarian or civic assistance provided in conjunction with military operations as defined in 10 U.S.C. 401(e), is for a contingency operation as defined in 10 U.S.C. 101(a)(13), is to be awarded pursuant to an agreement with the government of a foreign country in which Armed Forces of the United States are deployed, or where both the place of award and place of performance are entirely outside of the United States and its territories.

(B) PCRs will work with the cognizant Small Business Specialist (SBS) and agency OSDDBU or OSBP as early in the acquisition process as practicable to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams and Small Business Teaming Arrangements, as prime contractors.

(C) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs may identify small businesses that are capable of performing particular requirements.

(D) PCRs will also ensure that any Federal agency decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with maximum opportunities to participate as prime contractors and subcontractors in the acquisition or sale of real property.

(E) PCRs will review whether, for bundled and consolidated contracts that are recompeted, the amount of savings and benefits was achieved under the prior bundling or consolidation of contract requirements, that such savings and benefits will continue to be realized if the contract remains bundled or consolidated, or such savings and benefits would be greater if

the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(F) PCRs also advocate competitive procedures and recommend the break-out for competition of items and requirements which previously have not been competed when appropriate. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures in paragraph (b)(2) of this section. PCRs also review restrictions and obstacles to competition and make recommendations for improvement.

(ii) *PCR recommendations.* The PCR must recommend to the procuring activity alternative procurement methods that would increase small business prime contract participation if a PCR believes that a proposed procurement includes in its statement of work goods or services currently being performed by a small business and is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely; will render small business prime contract participation unlikely (*e.g.*, ensure geographical preferences are justified); or is for construction and seeks to package or consolidate discrete construction projects. If a PCR does not believe a bundled or consolidated requirement is necessary or justified the PCR shall advocate against the consolidation or bundling of such requirement and recommend to the procuring activity alternative procurement methods which would increase small business prime contract participation. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements, especially construction acquisitions that can be procured as separate projects;

(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate;

(C) Reserving one or more awards for small businesses when issuing Multiple Award Contracts;

(D) Using a partial set-aside;

(E) Stating in the solicitation for a Multiple Award Contract that the orders will be set-aside for small businesses; and

(F) Where the bundled or consolidated requirement is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business contract participation to the maximum extent practicable.

(iii) *PCR Recommendations for Small Business Teaming Arrangements and Subcontracting.* The PCR will work to ensure that small business participation is maximized both at the prime contract level such as through Small Business Teaming Arrangements and through subcontracting opportunities. This may include the subcontracting considerations in source selections set forth in §125.3(g), as well as the following:

(A) Reviewing an agency's oversight of its subcontracting program, including its overall and individual assessment of a contractor's compliance with its small business subcontracting plans. The PCR will furnish a copy of the information to the SBA Commercial Market Representative (CMR) servicing the contractor;

(B) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals that are expected of the contractor awardee;

(C) Recommending that the small business subcontracting goals be based on total contract dollars in addition to goals based on a percentage of total subcontracted dollars;

(D) Recommending that separate evaluation factors be established for evaluating the offerors' proposed approach to small business subcontracting participation in the subject procurement, the extent to which the offeror has met its small business subcontracting goals on previous contracts; and/or the extent to which the offeror actually paid small business subcontractors within the specified number of days;

(E) Recommending that a contracting officer include an evaluation factor in a solicitation which evaluates an offeror's commitment to pay small business subcontractors within a specified number of days after receipt of payment from the Government for goods and services previously rendered by the small business subcontractor.

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The contracting officer will comparatively evaluate the proposed timelines. Such a commitment shall become a material part of the contract. The contracting officer must consider the contractor's compliance with the commitment in evaluating performance, including for purposes of contract continuation (such as exercising options);

(F) For bundled and consolidated requirements, recommending that a separate evaluation factor with significant weight be established for evaluating the offeror's proposed approach to small business utilization, the extent to which the offeror has met its small business subcontracting goals on previous contracts; and the extent to which the other than small business offeror actually paid small business subcontractors within the specified number of days;

(G) For bundled or consolidated requirements, recommending the solicitation state that the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities and past performance of all proposed subcontractors. It may also include recommending that the agency reserve at least one award to a small business prime contractor with a Small Business Teaming Arrangement;

(H) For Multiple Award Contracts and multiple award requirements above the substantial bundling threshold, recommending or requiring that the solicitation state that the agency will solicit offers from small business concerns and small business concerns with Small Business Teaming Arrangements;

(I) For consolidated contracts, ensuring that agencies have provided small business concerns with appropriate opportunities to participate as prime contractors and subcontractors and making recommendations on such opportunities as appropriate; and

(J) Recommending paragraphs (B) through (I) above apply to an ordering agency placing an order against a Multiple Award Contract or Agreement.

(iv) PCRs will consult with the agency OSDBU regarding agency decisions to convert an activity performed by a small business concern to an activity performed by a Federal employee.

(v) PCRs may receive unsolicited proposals from small business concerns and will transmit those proposals to the agency personnel responsible for reviewing such proposals. The agency personnel shall provide the PCR with information regarding the disposition of such proposal.

(2) *Appeals of PCR recommendations.* In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, partial set-aside or reserve, whether or not the acquisition is a bundled, substantially bundled or consolidated requirement, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the Secretary of the Department or head of the agency. The time limits for such appeals are set forth in FAR subpart 19.5 (48 CFR 19.5).

(c) *Procuring Agency Responsibilities—*

(1) *Requirement to Foster Small Business Participation.* The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government regardless of the place of performance of the contract. In addition, Federal agencies must ensure that all bundled and consolidated contracts contain the required analysis and justification and provide small business concerns with appropriate opportunities to participate as prime contractors and subcontractors. Agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns, 8(a) BD small business concerns (including those owned by ANCs, Indian Tribes and NHOs), and small business concerns owned and controlled by women;

(ii) Avoid unnecessary and unjustified bundling of contracts or consolidation of contract requirements that inhibits or precludes small business participation in procurements as prime contractors;

(iii) Follow the limitations on use of consolidated contracts;

(iv) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under 15 U.S.C. 694b, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work;

(v) Provide SBA the necessary information relating to the acquisition under review at least 30 days prior to issuance of a solicitation. This includes providing PCRs (to the extent allowable pursuant to their security clearance) copies of all documents relating to the acquisition under review, including, but not limited to, the performance of work statement/statement of work, technical data, market research, hard copies or their electronic equivalents of Department of Defense (DoD) Form 2579 or equivalent, and other relevant information. The DoD Form 2579 or equivalent must be sent electronically to the PCR (or if a PCR is not assigned to the procuring activity, to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located);

(vi) Provide opportunities for the participation of small business concerns during acquisition planning processes and in acquisition plans; and

(vii) Invite the participation of the appropriate Director of Small and Disadvantaged Business Utilization in acquisition planning processes and provide that Director with access to acquisition plans.

(2) *Requirement for market research.* Each agency, as part of its acquisition planning, must conduct market research to determine the type and extent of foreseeable small business participation in the acquisition. In addition, each agency must conduct market research and any required analysis and justifications before proceeding with an acquisition strategy that could lead to a bundled, substantially bun-

dled, or consolidated contract. The purpose of the market research and analysis is to determine whether the bundling or consolidation of the requirements is necessary and justified and all statutory requirements for such a strategy have been met. Agencies should be as broad as possible in their search for qualified small businesses, using key words as well as NAICS codes in their examination of the System for Award Management (SAM) and the Dynamic Small Business Search (DSBS), and must not place unnecessary and unjustified restrictions when conducting market research (*e.g.*, requiring that small businesses prove they can provide the best scientific and technological sources) when determining whether to set-aside, partially set-aside, reserve or sole source a requirement to small businesses. During the market research phase, the acquisition team must consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located) and the activity's Small Business Specialist.

(3) *Proposed Acquisition Strategy.* A procuring activity must provide to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance:

(i) A copy of a proposed acquisition strategy (*e.g.*, DoD Form 2579, or equivalent) whenever a proposed acquisition strategy:

(A) Includes in its description goods or services the magnitude of the quantity or estimated dollar value of which would render small business prime contract participation unlikely;

(B) Seeks to package or consolidate discrete construction projects;

(C) Is a bundled or substantially bundled requirement; or

(D) Is a consolidation of contract requirements;

(ii) A written statement explaining why, if the proposed acquisition strategy involves a bundled or consolidated requirement, the procuring activity believes that the bundled or consolidated

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requirement is necessary and justified; the analysis required by paragraph (d)(2)(i) of this section; the acquisition plan; any bundling information required under paragraph (d)(3) of this section; and any other relevant information. The PCR and agency OSDBU or OSBP, as applicable, must then work together to develop alternative acquisition strategies identified in paragraph (b)(1) of this section to enhance small business participation;

(iii) All required clearances for the bundled, substantially bundled, or consolidated requirement; and

(iv) A written statement explaining why—if the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects—

(A) The proposed acquisition cannot be divided into reasonably small lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage small business participation;

(C) The proposed acquisition cannot be offered so as to make small business participation likely; or

(D) Construction cannot be procured through separate discrete projects.

(4) *Procuring Agency Small Business Specialist (SBS) Responsibilities.*

(i) As early in the acquisition planning process as practicable—but no later than 30 days before the issuance of a solicitation, or prior to placing an order without a solicitation—the procuring activity must coordinate with the procuring activity's SBS when the acquisition strategy contemplates an acquisition meeting the dollar amounts set forth for substantial bundling. If the acquisition strategy contemplates Multiple Award Contracts or orders under the GSA Multiple Award Schedule Program or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including

options. The procuring activity is not required to coordinate with its SBS if the contract or order is entirely set-aside for small business concerns, or small businesses under one of SBA's small business programs, as authorized under the Small Business Act.

(ii) The SBS must notify the agency OSDBU or OSBP if the agency's acquisition strategy or plan includes bundled or consolidated requirements that the agency has not identified as bundled, or includes unnecessary or unjustified bundling of requirements. If the strategy involves substantial bundling, the SBS must assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.

(iii) The SBS must coordinate with the procuring activity and PCR on all required determinations and findings for bundling and/or consolidation, and acquisition planning and strategy documentation.

(5) *OSDBU and OSBP Oversight Functions.* The Agency OSDBU or OSBP must:

(i) Conduct annual reviews to assess the:

(A) Extent to which small businesses are receiving their fair share of Federal procurements, including contract opportunities under programs administered under the Small Business Act;

(B) Adequacy of the bundling or consolidation documentation and justification; and

(C) Adequacy of actions taken to mitigate the effects of necessary and justified contract bundling or consolidation on small businesses (*e.g.*, review agency oversight of prime contractor subcontracting plan compliance under the subcontracting program);

(ii) Provide a copy of the assessment under paragraph (c)(5)(i) of this section to the agency head and SBA's Administrator;

(iii) Identify proposed solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the SBA to revise the procurement strategies for such proposed solicitations to increase the probability of participation by small businesses as prime contractors through Small Business Teaming Arrangements;



(iv) Facilitate small business participation as subcontractors and suppliers, if a solicitation for a substantially bundled contract is to be issued;

(v) Assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of Title 31 or any other protection for contractors or subcontractors (including suppliers) that is included in the FAR or any individual agency supplement to such Government-wide regulation;

(vi) Cooperate, and consult on a regular basis with the SBA with respect to carrying out these functions and duties;

(vii) Make recommendations to contracting officers as to whether a particular contract requirement should be awarded to any type of small business. The Contracting Officer must document any reason not to accept such recommendations and include the documentation in the appropriate contract file; and

(viii) Coordinate on any acquisition planning and strategy documentation, including bundling and consolidation determinations at the agency level.

(6) *Communication on Achieving Goals.* All Senior Procurement Executives, senior program managers, Directors of OSDBU or Directors of OSBP must communicate to their subordinates the importance of achieving small business goals and ensuring that a fair proportion of awards are made to small businesses.

(d) *Contract Consolidation and Bundling—(1) Limitation on the Use of Consolidated Contracts.* (i) An agency may not conduct an acquisition that is a consolidation of contract requirements unless the Senior Procurement Executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy:

(A) Conducts adequate market research;

(B) Identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;

(C) Makes a written determination, which is coordinated with the agency's

OSDBU/OSBP, that the consolidation of contract requirements is necessary and justified;

(D) Identifies any negative impact by the acquisition strategy on contracting with small business concerns; and

(E) Ensures that steps will be taken to include small business concerns in the acquisition strategy.

(ii) A Senior Procurement Executive or Chief Acquisition Officer may determine that an acquisition strategy involving a consolidation of contract requirements is necessary and justified.

(A) A consolidation of contract requirements may be necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified under paragraph (d)(1)(i)(B).

(B) The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to: benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is \$94 million or less; or benefits equivalent to 5 percent of the contract or order value (including options) or \$9.4 million, whichever is greater, where the contract or order value exceeds \$94 million.

(C) Savings in administrative or personnel costs alone do not constitute a sufficient justification for a consolidation of contract requirements in a procurement unless the expected total amount of the cost savings, as determined by the Senior Procurement Executive or Chief Acquisition Officer, is expected to be substantial in relation to the total cost of the procurement. To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(iii) Each agency must ensure that any decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with opportunities to participate as

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prime contractors and subcontractors in the acquisition.

(iv) If the consolidated requirement is also considered a bundled requirement, then the contracting officer must instead follow the provisions regarding bundling set forth in paragraphs (d)(2) through (7) of this section.

(v) Not later than 7 days after making a determination that an acquisition strategy involving a consolidation of contract requirements is necessary and justified under subparagraph (d)(1)(i) of this section, the Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO), or designee, shall publish a notice on the Government Point of Entry (GPE) that such determination has been made. Any solicitation for a procurement related to the acquisition strategy shall not be issued earlier than 7 days after such notice is published. Along with the publication of the solicitation, the SPE or CAO (or designee) must publish in the GPE the justification for the determination, which shall include the information in paragraphs (d)(1)(i)(A) through (E) of this section.

(2) *Limitation on the Use of Contract Bundling.*(i) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(ii) A bundled requirement is necessary and justified if, as compared to the benefits that the procuring activity would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

(A) Benefits equivalent to 10 percent of the contract or order value (including options), where the contract or order value is \$94 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or \$9.4 million, whichever is greater, where the contract or order value exceeds \$94 million.

(iii) Notwithstanding paragraph (d)(2)(ii) of this section, the Senior Procurement Executives or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis, determine that a bundled requirement is necessary and justified when:

(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(2)(ii) of this section but, in the aggregate, are critical to the agency's mission success; and

(B) The procurement strategy provides for maximum practicable participation by small business.

(iv) The reduction of administrative or personnel costs alone must not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be bundled (including options). To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(v) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could be charged by small businesses for the work not previously performed by small business.

(vi) The substantial benefit analysis set forth in paragraph (d)(2)(ii) of this section is still required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A-76.

(3) *Limitations on the Use of Substantial Bundling.* Where a proposed procurement strategy involves a Substantial Bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraph (d)(2)(i) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement;

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements; and

(v) The identification of the alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives (*i.e.*, consider the strategies under paragraph (b)(1)(ii) of this section).

(4) *Significant Subcontracting Opportunities in Justified Consolidated, Bundled and Substantially Bundled Requirements.*

(i) Where a justified consolidated, bundled, or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a contract qualifies as a small business concern, the procuring agency must give

to the offeror the highest score possible for the evaluation factors identified above.

(5) *Notification to Current Small Business Contractors of Intent to Bundle.* The procuring activity must notify each small business which is performing a contract that it intends to bundle that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located). This notification must be documented in the contract file.

(6) *Notification to Public of Rationale for Bundled Requirement.* The head of a Federal agency must publish on the agency's Web site a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification must be made within 30 days of the agency's data certification regarding the validity and verification of data entered in that Federal Procurement Data Base to the Office of Federal Procurement Policy. However, to foster transparency in Federal procurement, the agency is encouraged to provide such notification before issuance of the solicitation.

(7) *Notification to public of rationale for substantial bundling.* If the head of a contracting agency determines that an acquisition plan for a procurement involves a substantial bundling of contract requirements, the head of a contracting agency shall publish a notice on the GPE that such determination has been made not later than 7 days after making such determination. Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published. Along with the publication of the solicitation, the head of a contracting agency shall publish in the GPE a justification for the determination, which shall include the following information:

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(i) The specific benefits anticipated to be derived from the bundling of contract requirements and a determination that such benefits justify the bundling;

(ii) An identification of any alternative contracting approaches that would involve a lesser degree of bundling of contract requirements;

(iii) An assessment of the specific impediments to participation by small business concerns as prime contractors that result from the bundling of contract requirements; and

(iv) The specific actions designed to maximize participation of small business concerns as subcontractors (including suppliers) at various tiers under the contract or contracts that are awarded to meet the requirements.

(8) *Notification to SBA of Recompeted Bundled or Consolidated Requirement.* For each bundled or consolidated contract that is to be recompeted (even if additional requirements have been added or deleted) the procuring agency must notify SBA's PCR as soon as possible but no later than 30 days prior to issuance of the solicitation of:

(i) The amount of savings and benefits achieved under the prior bundling or consolidation of contract requirements;

(ii) Whether such savings and benefits will continue to be realized if the contract remains bundled or consolidated; and

(iii) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(e) *Multiple Award Contract—(1) General.*(i) The contracting officer must set-aside a Multiple Award Contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs.

(ii) The contracting officer in his or her discretion may partially set-aside or reserve a Multiple Award Contract, or set aside, or preserve the right to set aside, orders against a Multiple Award Contract that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given

procurement action is a decision of the contracting agency.

(iii) The procuring agency contracting officer must document the contract file and explain why the procuring agency did not partially set-aside or reserve a Multiple Award Contract, or set-aside orders issued against a Multiple Award Contract, when these authorities could have been used.

(2) *Total Set-aside of Multiple Award Contracts.*(i) The contracting officer must conduct market research to determine whether the "rule of two" can be met. If the "rule of two" can be met, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section.

(ii) The contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order pursuant to § 121.402(c) of this chapter. See § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) When drafting the solicitation for the contract, agencies should consider an "on-ramp" provision that permits the agency to refresh the awards by adding more small business contractors throughout the life of the contract. Agencies should also consider the need to "off-ramp" existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (e.g., termination for convenience).

(iv) A business must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable, during each performance period of the contract (e.g., the base term and each subsequent option period). However, the contracting officer, in his or her discretion, may require the contractor perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Partial Set-asides of Multiple Award Contracts.*(i) A contracting officer may partially set-aside a multiple award contract when: market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions

or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price. A contracting officer has the discretion, but is not required, to set-aside the discrete portions or categories for different small businesses participating in SBA's small business programs (e.g., CLIN 0001, 8(a) set-aside; CLIN 0002, HUBZone set-aside; CLIN 0003, SDVO SBC set-aside; CLIN 0004, WOSB set-aside; CLIN 0005 EDWOSB set-aside; CLIN 0006, small business set-aside). If the contracting officer decides to partially set-aside a Multiple Award Contract, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section for the part or parts of the contract that have been set-aside.

(ii) The contracting officer must assign a NAICS code and corresponding size standard to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. See § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that the small business will not compete against other-than-small businesses for any order issued against that part or parts of the Multiple Award Contract that are set-aside.

(iv) A contracting officer must state in the solicitation that the small business will be permitted to compete against other-than-small businesses for an order issued against the portion of the Multiple Award Contract that has not been partially set-aside if the small business submits an offer for the non-set-aside portion. The business concern will not have to comply with the limitations on subcontracting (see § 125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is com-

peted and awarded under the portion of the contract that is not set-aside.

(v) When drafting the solicitation for the contract, agencies should consider an "on ramp" provision that permits the agency to refresh these awards by adding more small business contractors to that portion of the contract that was set-aside throughout the life of the contract. Agencies should also consider the need to "off ramp" existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (e.g., termination for convenience).

(vi) The small business must submit one offer that addresses each part of the solicitation for which it wants to compete. A small business (or 8(a) Participant, HUBZone SBC, SDVO SBC or ED/WOSB) is not required to submit an offer on the part of the solicitation that is not set-aside. However, a small business may choose to submit an offer on the part or parts of the solicitation that have been set-aside and/or on the parts that have not been set-aside.

(vii) A small business must comply with the applicable limitations on subcontracting provisions (see § 125.6) and the nonmanufacturer rule (see § 121.406(b)), if applicable, during each performance period of the contract (e.g., during the base term and then during option period thereafter). However, the contracting officer, in his or her discretion, may require the contractor perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(4) *Reserves of Multiple Award Contracts Awarded in Full and Open Competition.* (i) A contracting officer may reserve one or more awards for small business where:

(A) The market research and recent past experience evidence that—

(1) At least two small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete portions or discrete categories by utilizing individual Contract Line Items (CLINs), Special Item

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Numbers (SINs), Functional Areas (FAs), or other equivalent; or

(2) At least one small business, 8(a) BD Participant, HUBZone SBC, SDVO SBC, WOSB or EDWOSB can perform the entire requirement, but there is not a reasonable expectation of receiving at least two offers from small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs at a fair market price for all the work contemplated throughout the term of the contract; or

(B) The contracting officer makes:

(1) Two or more contract awards to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the “rule of two” or any alternative set-aside requirements provided in the small business program have been met;

(2) Several awards to several different types of small businesses (*e.g.*, one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the “rule of two” has been met; or

(3) One contract award to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

(ii) If the contracting officer decides to reserve a multiple award contract established through full and open competition, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to §121.402(c) of this chapter. *See* §121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that if there are two or more contract awards to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may compete any orders solely amongst the specified types of small business concerns if the “rule of two”

or an alternative set-aside requirement provided in the small business program have been met.

(iv) A contracting officer must state in the solicitation that if there are several awards to several different types of small businesses (*e.g.*, one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB), the agency may compete any orders solely amongst all of the small business concerns if the “rule of two” has been met.

(v) A contracting officer must state in the solicitation that if there is only one contract award to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may issue orders directly to that concern for work that it can perform.

(vi) A contracting officers may, but is not required to, set forth targets in the contract showing the estimated dollar value or percentage of the total contract to be awarded to small businesses.

(vii) A small business offeror must submit one offer that addresses each part of the solicitation for which it wants to compete.

(viii) Small businesses are permitted to compete against other-than-small businesses for an order issued against the Multiple Award Contract if agency issued the small business a contract for those supplies or services.

(ix) A business must comply with the applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule (*see* §121.406(b)), if applicable, for any order issued against the Multiple Award Contract if the order is set aside or awarded on a sole source basis. However, a business need not comply with the limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst small and other-than-small business concerns.

(5) *Reserve of Multiple Award Contracts that are Bundled.*

(i) If the contracting officer decides to reserve a multiple award contract established through full and open competition that is a bundled contract, the contracting officer must assign a NAICS code to the solicitation for the

Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(ii) The Small Business Teaming Arrangement must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the non-manufacturer rule (*see* § 121.406(b)), if applicable, on all orders issued against the Multiple Award Contract, although the cooperative efforts of the team members will be considered in determining whether the subcontracting limitations requirement is met (*see* § 125.6(j)).

(iii) Team members of the Small Business Teaming Arrangement will not be affiliated for the specific solicitation or contract (*see* § 121.103(b)(8)).

(6) *Set-aside of orders against Multiple Award Contracts.*

(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).

(ii) The contracting officer may state in the solicitation and resulting contract for the Multiple Award Contract that:

(A) Based on the results of market research, orders issued against the Multiple Award Contract will be set-aside for small businesses or any subcategory of small businesses whenever the “rule of two” or any alternative set-aside requirements provided in the small business program have been met; or

(B) The agency is preserving the right to consider set-asides using the “rule of two” or any alternative set-aside requirements provided in the small business program, on an order-by-order basis.

(iii) For the acquisition of orders valued at or below the simplified acquisition threshold (SAT), the contracting officer may set-aside the order for small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs in accordance with the relevant program’s regulations. For the acquisition of orders valued above the SAT, the contracting officer shall first consider whether there is a reasonable expectation that offers will be obtained from at least two 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs in accordance with the program’s regulations, before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs.

(iv) The contracting officer must assign a NAICS code to the solicitation for each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404

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for further determination on size status for each order issued against that contract.

(v) A business must comply with applicable limitations on subcontracting provisions (*see* §125.6) and the non-manufacturer rule (*see* §121.406(b)), if applicable in the performance of each order that is set-aside against the contract.

(7) *Tiered evaluation of offers, or cascading.* An agency cannot create a tiered evaluation of offers or “cascade” unless it has specific statutory authority to do so. This is a procedure used in negotiated acquisitions when the contracting officer establishes a tiered or cascading order of precedence for evaluating offers that is specified in the solicitation, which states that if no award can be made at the first tier, it will evaluate offers at the next lower tier, until award can be made. For example, unless the agency has specific statutory authority to do so, an agency is not permitted to state an intention to award one contract to an 8(a) BD Participant and one to a HUBZone SBC, but only if no awards are made to 8(a) BD Participants.

(f) *Contracting Among Small Business Programs—(1) Acquisitions Valued At or Below the Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micro-purchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.

(2) *Acquisitions Valued Above the Simplified Acquisition Threshold.* (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition

Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror’s certifications in the System for Award Management (SAM) (or successor system) and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(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



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the small business prime does not independently demonstrate capabilities and past performance necessary for award.

[61 FR 3312, Jan. 31, 1996, as amended at 63 FR 31908, June 11, 1998; 64 FR 57370, Oct. 25, 1999; 65 FR 45833, July 26, 2000; 68 FR 60012, Oct. 20, 2003; 74 FR 46887, Sept. 14, 2009; 75 FR 62281, Oct. 7, 2010; 76 FR 63547, Oct. 12, 2011; 77 FR 1860, Jan. 12, 2012; 78 FR 61135, Oct. 2, 2013; 81 FR 34261, May 31, 2016; 81 FR 48585, July 25, 2016; 84 FR 65239, Nov. 26, 2019; 84 FR 65662, Nov. 29, 2019; 85 FR 66191, Oct. 16, 2020]

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

(a) *General.* The purpose of the subcontracting assistance program is to provide the maximum practicable subcontracting opportunities for small business concerns, including small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns, certified small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The subcontracting assistance program implements section 8(d) of the Small Business Act, which includes the requirement that, unless otherwise exempt, other than small business concerns awarded contracts that offer subcontracting possibilities by the Federal Government in excess of \$650,000, or in excess of \$1,500,000 for construction of a public facility, must submit a subcontracting plan to the appropriate contracting agency. The Federal Acquisition Regulation sets forth the requirements for subcontracting plans in 48 CFR 19.7, and the clause at 48 CFR 52.219-9.

(1) Subcontract under this section means a legally binding agreement between a contractor that is already under contract to another party to perform work and a third party (other than one involving an employer-employee relationship), hereinafter referred to as the subcontractor, for the subcontractor to perform a part or all of the work that the contractor has undertaken.

(i) Subcontract award data reported by prime contractors and subcontractors

shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made beyond the immediate next-tier, except as follows:

(A) The contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian Tribe; or

(B) Purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor are not included in the subcontracting base. Subcontracts by first-tier affiliates shall be treated as subcontracts of the prime.

(C) Where the prime contractor has an individual subcontracting plan, the prime contractor shall establish two sets of small business subcontracting goals, one goal for the first tier and one goal for lower tier subcontracts awarded by other than small subcontractors with individual subcontracting plans. Under individual subcontracting plans the prime contractor shall receive credit for small business concerns performing as first tier subcontractors (first tier goal) and subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns (lower tier goal). Other-than-small, lower tier subcontractors must have their own individual subcontracting plans if the subcontract is at or above the subcontracting plan threshold, and are required to make a good faith effort to meet their subcontracting plan goals. The prime contractor and any subcontractor with a subcontracting plan are responsible for reporting on subcontracting performance under their contracts or subcontracts at their first tier. The prime contractor's performance under its individual subcontracting plan will be calculated using its own reporting at the first tier for its first tier goal and its subcontractors' first tier reports under their plans for the lower tier subcontracting goals. The prime contractor's performance under the individual subcontracting plan must be

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evaluated based on its combined performance under the first tier and lower tier goal.

(D) Other-than-small prime contractors and subcontractors with subcontracting plans shall report on their subcontracting performance on the Summary Subcontracting report (SSR) at their first tier only.

(ii) Only subcontracts involving performance in the United States or its outlying areas should be included, with the exception of subcontracts under a contract awarded by the U.S. Department of State or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas and subcontracts for foreign military sales unless waived in accordance with agency regulations.

(iii) The following should not be included in the subcontracting base: internally generated costs such as salaries and wages; employee insurance; other employee benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; Original Equipment Manufacturer relationships during warranty periods (negotiated up front with product); utilities such as electricity, water, sewer, and other services purchased from a municipality or solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Utility companies may be eligible for additional exclusions unique to their industry, which may be approved by the contracting officer on a case-by-case basis. Exclusions from the subcontracting base include but are not limited to those listed above.

(2) Subcontracting goals required under paragraph (c) of this section must be established in terms of the total dollars subcontracted and as a percentage of total subcontract dollars. However, a contracting officer may establish additional goals as a percentage of total contract dollars.

(3) A prime contractor has a history of unjustified untimely or reduced payments to subcontractors if the prime contractor has reported itself to a contracting officer in accordance with

paragraph (c)(5) of this section on three occasions within a 12 month period.

(b) *Responsibilities of prime contractors.*

(1) Prime contractors (including small business prime contractors) selected to receive a Federal contract that exceeds the simplified acquisition threshold, that will not be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, and that is not for services which are personal in nature, are responsible for ensuring that small business concerns have the maximum practicable opportunity to participate in the performance of the contract, including subcontracts for subsystems, assemblies, components, and related services for major systems, consistent with the efficient performance of the contract.

(2) A small business cannot be required to submit a formal subcontracting plan or be asked to submit a formal subcontracting plan, a small-business prime contractor is encouraged to provide maximum practicable opportunity to other small businesses to participate in the performance of the contract, consistent with the efficient performance of the contract. 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)).

(3) Efforts to provide the maximum practicable subcontracting opportunities for small business concern may include, as appropriate for the procurement, one or more of the following actions:

(i) Breaking out contract work items into economically feasible units, as appropriate, to facilitate small business participation;

(ii) Conducting market research to identify small business subcontractors and suppliers through all reasonable means, such as performing online searches via the System for Award Management (SAM) (or any successor system), posting Notices of Sources Sought and/or Requests for Proposal on

SBA's SUB-Net, participating in Business Matchmaking events, and attending pre-bid conferences;

(iii) Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract;

(iv) Providing interested small businesses with adequate and timely information about the plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract;

(v) Negotiating in good faith with interested small businesses;

(vi) Directing small businesses that need additional assistance to SBA;

(vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services;

(viii) Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations; and

(ix) Participating in a formal mentor-protégé program with one or more small-business protégés that results in developmental assistance to the protégés.

(c) *Additional responsibilities of other than small contractors.* (1) In addition to the responsibilities provided in paragraph (b) of this section, a prime contractor selected for award of a contract or contract modification that exceeds \$750,000, or \$1,500,000 in the case of construction of a public facility, is responsible for the following:

(i) Submitting and negotiating before award an acceptable subcontracting plan that reflects maximum practicable opportunities for small businesses in the performance of the contract as subcontractors or suppliers at all tiers of performance. A prime contractor may submit a commercial plan, described in paragraph (c)(2) of this section, instead of an individual subcontracting plan, when the product or service being furnished to the Government meets the definition of a commercial item under 48 CFR 2.101;

(ii) Making a good-faith effort to achieve the dollar and percentage goals

and other elements in its subcontracting plan;

(iii) The contractor may not prohibit a subcontractor from discussing any material matter pertaining to payment or utilization with the contracting officer;

(iv) When developing an individual subcontracting plan (also called individual contract plan), the contractor must decide whether to include indirect costs in its subcontracting goals. If indirect costs are included in the goals, these costs must be included in the Individual Subcontract Report (ISR) in *www.esrs.gov* (eSRS) or Subcontract Reports for Individual Contracts (the paper SF-294, if authorized). If indirect costs are excluded from the goals, these costs must be excluded from the ISRs (or SF-294 if authorized); however, these costs must be included on a prorated basis in the Summary Subcontracting Report (SSR) in the eSRS system. A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its subcontracting goals and in its SSR;

(v) The contractor must assign to each subcontract, and to each solicitation, if a solicitation is utilized, the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see § 121.410 of this chapter). A formal solicitation is not required for each subcontract, but the contractor must provide some form of written notice of the NAICS code and size standard assigned to potential offerors prior to acceptance and award of the subcontract. The prime contractor (or subcontractor) may rely on a subcontractor's electronic representations and certifications, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are current, accurate and complete as of the date of the offer for the subcontract. Electronic submission may include any method acceptable to the prime contractor (or subcontractor) including, but not limited to, size or socioeconomic representations and certifications made in SAM (or any successor system). A prime contractor

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(or subcontractor) may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract;

(vi) The contractor must submit timely and accurate ISRs and SSRs in eSRS (or any successor system), or if information for a particular procurement cannot be entered into eSRS (or any successor system), submit a timely SF-294, Subcontracting Report for Individual Contract. When a report is rejected by the contracting officer, the contractor must make the necessary corrections and resubmit the report within 30 days of receiving the notice of rejection;

(vii) The contractor must cooperate in the reviews of subcontracting plan compliance, including providing requested information and supporting documentation reflecting actual achievements and good-faith efforts to meet the goals and other elements in the subcontracting plan;

(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. The written notification must include the name and location of the apparent successful offeror and if the successful offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business;

(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;

(x) Except when subcontracting for commercial items, the prime contractor must require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,500,000 in the case of a subcontract for the construction of any public facility, or in excess of \$750,000 in the case

of all other subcontracts, and which offer further subcontracting possibilities, to adopt a subcontracting plan of their own consistent with this section, and must ensure at a minimum that all subcontractors required to maintain subcontracting plans pursuant to this paragraph will review and approve subcontracting plans submitted by their subcontractors; monitor their subcontractors' compliance with their approved subcontracting plans; ensure that subcontracting reports are submitted by their subcontractors when required; acknowledge receipt of their subcontractors' reports; compare the performance of their subcontractors to their subcontracting plans and goals; and discuss performance with their subcontractors when necessary to ensure their subcontractors make a good-faith effort to comply with their subcontracting plans;

(xi) The prime contractor must provide a written statement of the types of records it will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan established in accordance with paragraph (c)(1)(x) of this section, including the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women; the efforts to identify and award subcontracts to such small business concerns; and size or socioeconomic certifications or representations received in connection with each subcontract; and

(xii)(A) The prime contractor, upon request from a first-tier small business subcontractor, shall provide the subcontractor with a rating of the subcontractor's past performance. The prime contractor must provide the small business subcontractor the requested rating within 15 calendar days of the request. The rating provided by the prime contractor to the first-tier

small business subcontractor shall utilize the five-scale ratings system found in FAR 42.1503 (48 CFR 42.1503): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. If the subcontractor will use the rating for an offer on a prime contract, it must include, at a minimum, the following evaluation factors in the requested rating:

- (1) Technical (quality of product or service);
- (2) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);
- (3) Schedule/timeliness;
- (4) Management or business relations; and
- (5) Other (as applicable).

(B) The requirement in paragraph (c)(1)(xii)(A) of this section is not subject to the flow-down in paragraph (c)(1)(x) of this section.

(C) A first-tier small business subcontractor must make the request for a performance rating from the prime contractor within 30 calendar days after the completion of the period of performance for the prime contractor's contract with the Government. The prime contractor and the first-tier small business subcontractor may negotiate a later deadline for the request for a performance rating, but in no case can the prime contractor impose a deadline earlier than 30 calendar days after the completion of the period of performance for the prime contractor's contract with the Government.

(D) The rating provided by the prime contractor to the first-tier small business subcontractor shall utilize the five-scale ratings system found in FAR 42.1503 (48 CFR 42.1503): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory.

(2) A commercial plan, also referred to as an annual plan or company-wide plan, is the preferred type of subcontracting plan for contractors furnishing commercial items. A commercial plan covers the offeror's fiscal year and applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line). Once approved, the plan remains in effect during the contractor's fiscal year for all Federal government contracts in

effect during that period. The contracting officer of the agency that originally approved the commercial plan will exercise the functions of the contracting officer on behalf of all agencies that award contracts covered by the plan.

(3) An offeror must represent to the contracting officer that it will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the bid or proposal, in the same scope, amount, and quality used in preparing and submitting the bid or proposal. Merely responding to a request for a quote does not constitute use in preparing a bid or offer. An offeror used a small business concern in preparing the bid or proposal if:

- (i) The offeror references the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan;
- (ii) The offeror has a subcontract or agreement in principle to subcontract with the small business concern to perform a portion of the specific contract; or
- (iii) The small business concern drafted any portion of the bid or proposal or the offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including email) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract.

(4) If a prime contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in (c)(3), the prime contractor must provide the contracting officer with a written explanation. This written explanation must be submitted to the contracting officer prior to the submission of the invoice for final payment and contract close-out.

(5) A prime contractor shall notify the contracting officer in writing if upon completion of the responsibilities of the small business subcontractor (i.e., the subcontractor is entitled to

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payment under the terms of the subcontract), the prime contractor pays a reduced price to a small business subcontractor for goods and services provided for the contract or the payment to a small business subcontractor is more than 90 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor. "Reduced price" means a price that is less than the price agreed upon in a written, binding contractual document. The prime contractor shall include the reason for the reduction in payment to or failure to pay a small business subcontractor in any written notice.

(6) If at the conclusion of a contract the prime contractor did not meet all of the small business subcontracting goals in the subcontracting plan, the prime contractor shall provide the contracting officer with a written explanation as to why it did not meet the goals of the plan so that the contracting officer can evaluate whether the prime contractor acted in good faith as set forth in paragraph (d)(3) of this section.

(7) The additional prime contractor responsibilities described in paragraph (c)(1) of this section do not apply if:

- (i) The prime contractor is a small business concern;
- (ii) The prime contract or contract modification is a personal services contract; or
- (iii) The prime contract or contract modification will be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) A prime contractor that identifies a small business by name as a subcontractor in a proposal, offer, bid or subcontracting plan must notify those subcontractors in writing prior to identifying the concern in the proposal, bid, offer or subcontracting plan.

(9) Anyone who has a reasonable basis to believe that a prime contractor or a subcontractor may have made a false statement to an employee or representative of the Federal Government, or to an employee or representative of the prime contractor, with respect to subcontracting plans

must report the matter to the SBA Office of Inspector General. All other concerns as to whether a prime contractor or subcontractor has complied with SBA regulations or otherwise acted in bad faith may be reported to the Government Contracting Area Office where the firm is headquartered.

(d) *Contracting officer responsibilities.* The contracting officer (or administrative contracting officer if specifically delegated in writing to accomplish this task) is responsible for evaluating the prime contractor's compliance with its subcontracting plan, including:

(1) Ensuring that all contractors submit their subcontracting reports into the eSRS (or any successor system) or, if applicable, the SF-294, Subcontracting Report for Individual Contracts, within 30 days after the report ending date (e.g., by October 30th for the fiscal year ended September 30th).

(2) Reviewing all ISRs, and where applicable, SSRs, in eSRS (or any successor system) within 60 days of the report ending date (e.g., by November 30th for a report submitted for the fiscal year ended September 30th) and either accepting or rejecting the reports in accordance with the Federal Acquisition Regulation (FAR) provisions set forth in 48 CFR subpart 19.7, 52.219-9, and the eSRS instructions ([www.esrs.gov](http://www.esrs.gov)). The authority to acknowledge or reject SSRs for commercial plans resides with the contracting officer who approved the commercial plan. If a report is rejected, the contracting officer must provide an explanation for the rejection to allow prime contractors the opportunity to respond specifically to perceived deficiencies.

(3) Evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan.

(i) Evidence that a large business prime contractor has made a good faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

(A) The contractor performed one or more of the actions described in paragraph (b) of this section, as appropriate for the procurement;

(B) Although the contractor may have failed to achieve its goal in one

socioeconomic category, it over-achieved its goal by an equal or greater amount in one or more of the other categories; or

(C) The contractor fulfilled all of the requirements of its subcontracting plan.

(ii) Examples of activities reflective of a failure to make a good faith effort to comply with a subcontracting plan include, but are not limited, to:

(A) Failure to submit the acceptable individual or summary subcontracting reports in eSRS by the report due dates or as provided by other agency regulations within prescribed time frames;

(B) Failure to pay small business concern subcontractors in accordance with the terms of the contract with the prime;

(C) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan;

(D) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flow-down requirements;

(E) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan;

(F) Failure to correct substantiated findings from federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the government;

(G) Failure to conduct market research identifying potential small business concern subcontractors through all reasonable means including outreach, industry days, or the use of federal database marketing systems such as SBA's Dynamic Small Business Search (DSBS) or SUBNet Systems or any successor federal systems;

(H) Failure to comply with regulations requiring submission of a written explanation to the contracting officer to change small business concern subcontractors that were used in preparing offers; or

(I) Falsifying records of subcontracting awards to SBCs.

(4) Evaluating the prime contractor's written explanation concerning the prime contractor's failure to use a small business concern in performance

in the same scope, amount, and quality used in preparing and submitting the bid or proposal, and considering that information when rating the contractor for past performance purposes.

(5) Evaluating the prime contractor's written explanation concerning its payment of a reduced price to a small business subcontractor for goods and services upon completion of the responsibilities of the subcontractor or its payment to a subcontractor more than 90 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor, and considering that information when rating the contractor for past performance purposes.

(6) Evaluating whether the prime contractor has a history of unjustified untimely or reduced payments to subcontractors, and if so, recording the identity of the prime contractor in the Federal Awardee Performance and Integrity Information System (FAPIS), or any successor database.

(7) In his or her discretion, requiring the prime contractor (other than a prime contractor with a commercial plan) to update its subcontracting plan when an option is exercised.

(8) Requiring the prime contractor (other than a contractor with a commercial plan) to submit a subcontracting plan if the value of a modification causes the value of the contract to exceed the subcontracting plan threshold and to the extent that subcontracting opportunities exist.

(9) In his or her discretion, requiring a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.

(10) Where a subcontracting plan is amended in connection with an option, or added as a result of a recertification or modification, the changes to any existing plan are for prospective subcontracting opportunities and do not apply retroactively. However, since achievements must be reported on the ISR (or the SF-294, if applicable) on a cumulative basis from the inception of the contract, the contractor's achievements prior to the modification or option will be factored into its overall

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achievement on the contract from inception.

(11) Evaluating whether the contractor or subcontractor complied in good faith with the requirement to provide periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the contractor or subcontractor with the subcontracting plan. The contractor or subcontractor's failure to comply with this requirement in good faith shall be a material breach of such contract or subcontract and may be considered in any past performance evaluation of the contractor.

(e) *CMR Responsibilities.* Commercial Market Representatives (CMRs) are SBA's subcontracting specialists. CMRs are responsible for:

(1) Facilitating the matching of large prime contractors with small business concerns;

(2) Counseling large prime contractors on their responsibilities to maximize subcontracting opportunities for small business concerns;

(3) Instructing large prime contractors on identifying small business concerns by means of SAM (or any successor system), SUB-Net, Business Matchmaking events, and other resources and tools;

(4) Counseling small business concerns on how to market themselves to large prime contractors;

(5) Maintaining a portfolio of large prime contractors and conducting Subcontracting Orientation and Assistance Reviews (SOARs). SOARs are conducted for the purpose of assisting prime contractors in understanding and complying with their small business subcontracting responsibilities, including developing subcontracting goals that reflect maximum practicable opportunity for small business; maintaining acceptable books and records; and periodically submitting reports to the Federal government; and

(6) Conducting periodic reviews, including compliance reviews in accordance with paragraph (f) of this section.

(f) *Compliance reviews.* (1) A prime contractor's performance under its subcontracting plan is evaluated by means of on-site compliance reviews and fol-

low-up reviews, as a supplement to evaluations performed by the contracting agency, either on a contract-by-contract basis or, in the case of contractors having multiple contracts, on an aggregate basis. A compliance review is a surveillance review that determines a contractor's achievements in meeting the goals and other elements in its subcontracting plan for both open contracts and contracts completed during the previous twelve months. A follow-up review is done after a compliance review, generally within six to eight months, to determine if the contractor has implemented SBA's recommendations.

(2) All compliance reviews begin with a validation of the prime contractor's most recent ISR (or SF-294, if applicable) or SSR. A compliance review includes:

(i) An evaluation of whether the prime contractor assigned the proper NAICS code and corresponding size standard to a subcontract, and a review of whether small business subcontractors qualify for the size or socioeconomic status claimed;

(ii) Validation of the prime contractor's methodology for completing its subcontracting reports; and

(iii) Consideration of whether the prime contractor is monitoring its other than small subcontractors with regard to their subcontracting plans, determining achievement of their proposed subcontracting goals, and reviewing their subcontractors' ISRs (or SF-294s, if applicable).

(3) Upon completion of the review and evaluation of a contractor's performance and efforts to achieve the requirements in its subcontracting plans, the contractor's performance will be assigned one of the following ratings: Exceptional, Very Good, Satisfactory, Marginal or Unsatisfactory. The factors listed in paragraph (c) of this section will be taken into consideration, where applicable, in determining the contractor's rating. However, a contractor may be found Unsatisfactory, regardless of other factors, if it cannot substantiate the claimed achievements under its subcontracting plan.

(4) Any contractor that receives a marginal or unsatisfactory rating must provide a written corrective action



plan to SBA, or to both SBA and the agency that conducted the compliance review if the agency conducting the review has an agreement with SBA, within 30 days of its receipt of the official compliance report.

(5) Any contractor that fails to comply with paragraph (f)(4) of this section, or any contractor that fails to demonstrate a good-faith effort, as set forth in paragraph (d) of this section:

(i) May be considered for liquidated damages under the procedures in 48 CFR 19.705–7 and the clause at 52.219–16; and

(ii) Shall be in material breach of such contract or subcontract, and such failure to demonstrate good faith must be considered in any past performance evaluation of the contractor. This action shall be considered by the contracting officer upon receipt of a written recommendation to that effect from the CMR. The CMR's recommendation must include a copy of the compliance report and any other relevant correspondence or supporting documentation. Furthermore, if the CMR has a reasonable basis to believe that a contractor has made a false statement to an employee or representative of the Federal Government, or to an employee or representative of the prime contractor, the CMR must report the matter to the SBA Office of Inspector General. All other concerns as to whether a prime contractor or subcontractor has complied with SBA regulations or otherwise acted in bad faith may be reported to the Area Government Contracting Office where the firm is headquartered.

(6) Reviews and evaluations of contractors with commercial plans are identical to reviews and evaluations of other contractors, except that contractors with commercial subcontracting plans do not submit the SF-294, Subcontracting Report for Individual Contracts. Instead, goal achievement is determined by comparing the goals in the approved commercial subcontracting plan against the cumulative achievements on the SF-295, Summary Subcontract Report, for the same period. The same ratings criteria set forth in paragraph (f)(3) of this section apply to contractors with commercial plans.

(7) SBA is authorized to enter into agreements with other Federal agencies or entities to conduct compliance reviews and otherwise further the objectives of the subcontracting program. Copies of these agreements will be published on <http://www.sba.gov/GC>. SBA is the lead agency on all joint compliance reviews with other agencies.

(8) The head of the contracting agency shall ensure that:

(i) The agency collects and reports data on the extent to which contractors of the agency meet the goals and objectives set forth in subcontracting plans; and

(ii) The agency periodically reviews data collected and reported pursuant to paragraph (f)(8)(i) of this section for the purpose of ensuring that such contractors comply in good faith with the requirements of this section.

(g) *Subcontracting consideration in source selection.* (1) A contracting officer may include an evaluation factor in a solicitation which evaluates:

(i) An offeror's proposed approach to small business subcontracting participation in the subject procurement;

(ii) The extent to which the offeror has met its small business subcontracting plan goals on previous covered contracts; and/or

(iii) The extent to which the offeror timely paid its small business subcontractors under covered contracts.

(2) A contracting officer may include an evaluation factor in a solicitation which evaluates an offeror's commitment to pay small business subcontractors within a specific number of days after receipt of payment from the Government for goods and services previously rendered by the small business subcontractor.

(i) The contracting officer will comparatively evaluate the proposed timelines.

(ii) Such a commitment shall become a material part of the contract.

(iii) The contracting officer must consider the contractor's compliance with the commitment in evaluating performance, including for purposes of contract continuation (such as exercising options).

(3) A small business concern submitting an offer shall receive the maximum score, credit or rating under an

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evaluation factor described in paragraph (g) of this section without having to submit any information in connection with this factor.

(4) A contracting officer shall include a significant evaluation factor for the criteria described in paragraphs (g)(1)(i) and (g)(1)(ii) of this section in a bundled contract or order as defined in § 125.2.

(5) Paragraph (g) of this section may apply to solicitations for orders against multiple award contracts, (including a Federal Supply Schedule or Multiple Award Schedule contract, a Government-wide acquisition contract (GWAC), or a multi-agency contract (MAC)), blanket purchase agreements or basic ordering agreements.

(h) *Multiple award contracts.* (1) Except where a prime contractor has a commercial plan, the contracting officer shall require a subcontracting plan for each multiple award indefinite delivery, indefinite quantity contract (including Multiple Award Schedule), where the estimated value of the contract exceeds the subcontracting plan thresholds in paragraph (a) of this section and the contract has subcontracting opportunities.

(2) Contractors shall submit small business subcontracting reports for individual orders to the contracting agency on an annual basis.

(3) The agency funding the order shall receive credit towards its small business subcontracting goals. More than one agency may not receive credit towards its subcontracting goals for a particular subcontract.

(4) The agency funding the order may in its discretion establish small business subcontracting goals for individual orders, blanket purchase agreements or basic ordering agreements.

(i) *Subcontracting consideration in bundled and consolidated contracts.* (1) For bundled requirements, the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities of all proposed subcontractors.

(2) For substantial bundling, the agency must design actions to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or con-

tracts that may be awarded to meet the requirements.

(3) For significant subcontracting opportunities in consolidated contracts, bundled requirements, and substantially bundled requirements, see § 125.2(d)(4).

[69 FR 75824, Dec. 20, 2004, as amended at 74 FR 46887, Sept. 14, 2009; 78 FR 42403, July 16, 2013; 78 FR 59798, Sept. 30, 2013; 78 FR 61142, Oct. 2, 2013; 81 FR 34262, May 31, 2016; 81 FR 94250, Dec. 23, 2016; 83 FR 12852, Mar. 26, 2018; 84 FR 65239, Nov. 26, 2019; 84 FR 65663, Nov. 29, 2019; 85 FR 66192, Oct. 16, 2020; 86 FR 61672, Nov. 8, 2021; 87 FR 43739, July 22, 2022]

### § 125.4 What is the Government property sales assistance program?

(a) The purpose of SBA's Government property sales assistance program is to:

(1) Insure that small businesses obtain their fair share of all Federal real and personal property qualifying for sale or other competitive disposal action; and

(2) Assist small businesses in obtaining Federal property being processed for disposal, sale, or lease.

(b) SBA property sales assistance primarily consists of two activities:

(1) Obtaining small business set-asides when necessary to insure that a fair share of Government property sales are made to small businesses; and

(2) Providing advice and assistance to small businesses on all matters pertaining to sale or lease of Government property.

(c) The program is intended to cover the following categories of Government property:

(1) Sales of timber and related forest products;

(2) Sales of strategic material from national stockpiles;

(3) Sales of royalty oil by the Department of Interior's Minerals Management Service;

(4) Leases involving rights to minerals, petroleum, coal, and vegetation; and

(5) Sales of surplus real and personal property.

(d) SBA has established specific small business size standards and rules for the sale or lease of the different kinds of Government property. These provisions are contained in §§ 121.501 through 121.514 of this chapter.

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

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)). 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. The COC Program is applicable to all Government procurement actions, 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. With respect to Multiple Award Contracts, contracting officers generally determine responsibility at the time of award of the contract. However, if a contracting officer makes a responsibility determination as set forth in paragraph (a)(2) of this section for an order issued against a Multiple Award Contract, the contracting officer must refer the matter to SBA for a COC. The COC procedures apply to all Federal procurements, regardless of the location of performance or the location of the procuring activity.

(2) A contracting officer must refer a small business concern to SBA for a possible COC, even if the next apparent successful offeror is also a small business, when the contracting officer:

(i) Denies an apparent successful small business offeror award of a contract or order on the basis of responsibility (including those bases set forth in paragraphs (a)(1)(ii) and (iii) of this section);

(ii) Refuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a non-comparative basis (e.g., a pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance); or

(iii) Refuses to consider a small business concern for award of a contract or

order because it failed to meet a definitive responsibility criterion contained in the solicitation.

(3) A small business offeror referred to SBA as nonresponsible may apply to SBA for a COC. Where the applicant is a non-manufacturing offeror on a supply contract, the COC applies to the responsibility of the non-manufacturer, not to that of the manufacturer.

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review. (i) To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter.

(ii) To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter, and must have agreed to comply with the applicable limitations on subcontracting and the nonmanufacturer rule, where applicable.

(2) SBA will determine a concern ineligible for a COC if the concern, or any of its principals, appears in the "Parties Excluded From Federal Procurement Programs" section found in the U.S. General Services Administration Office of Acquisition Policy Publication: List of Parties Excluded From Federal Procurement or Nonprocurement Programs. If a principal is unable to presently control the applicant concern, and appears in the Procurement section of the list due to matters not directly related to the concern itself, responsibility will be determined in accordance with paragraph (f)(2) of this section.

(3) An eligibility determination will be made on a case-by-case basis, where a concern or any of its principals appears in the Nonprocurement Section of the publication referred to in paragraph (b)(2) of this section.

(c) *Referral of nonresponsibility determination to SBA.* (1) The contracting officer must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. The referral must include a copy of the following:

(i) Solicitation;

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(ii) Offer submitted by the concern whose responsibility is at issue for the procurement (its Best and Final Offer for a negotiated procurement);

(iii) Abstract of Bids, where applicable, or the Contracting Officer's Price Negotiation Memorandum;

(iv) Preaward survey, where applicable;

(v) Contracting officer's written determination of nonresponsibility;

(vi) Technical data package (including drawings, specifications, and Statement of Work); and

(vii) Any other justification and documentation used to arrive at the nonresponsibility determination.

(2) Contract award must be withheld by the contracting officer for a period of 15 working days (or longer if agreed to by SBA and the contracting officer) following receipt by the appropriate Area Office of a referral which includes all required documentation.

(3) The COC referral must indicate that the offeror has been found responsive to the solicitation, and also identify the reasons for the nonresponsibility determination.

(d) *Application for COC.* (1) Upon receipt of the contracting officer's referral, the Area Office will inform the concern of the contracting officer's negative responsibility determination, and offer it the opportunity to apply to SBA for a COC by a specified date.

(2) The COC application must include all information and documentation requested by SBA and any additional information which the firm believes will demonstrate its ability to perform on the proposed contract. The application should be returned as soon as possible, but no later than the date specified by SBA.

(3) Upon receipt of a complete and acceptable application, SBA may elect to visit the applicant's facility to review its responsibility. SBA personnel may obtain clarification or confirmation of information provided by the applicant by directly contacting suppliers, financial institutions, and other third parties upon whom the applicant's responsibility depends.

(e) *Incomplete applications.* If an application for a COC is materially incomplete or is not submitted by the date specified by SBA, SBA will close the

case without issuing a COC and will notify the contracting officer and the concern with a declination letter.

(f) *Reviewing an application.* (1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer. SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but it may presume responsibility exists as to elements other than those cited as deficient. SBA may deny a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(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).

(3) A small business will be rebuttably presumed nonresponsible if any of the following circumstances are shown to exist:

(i) Within three years before the application for a COC, the concern, or any of its principals, has been convicted of an offense or offenses that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part 9, subpart 9.4), and the matter is still under the jurisdiction of a court (e.g., the principals of a concern are incarcerated, on probation or parole, or under a suspended sentence); or

(ii) Within three years before the application for a COC, the concern or any of its principals has had a civil judgment entered against it or them for any reason that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part, subpart 9.4).

(4) Where a contracting officer finds a concern to be non-responsible for reasons of financial capacity on an indefinite delivery or indefinite quantity task or delivery order contract, the Area Director will consider the firm's maximum financial capacity. If the Area Director issues a COC, it will be for a specific amount that is the limit of the firm's financial capacity for that contract. The contracting officer may subsequently determine to exceed the amount, but cannot deny the firm award of an order or contract on financial grounds if the firm has not reached

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the financial maximum the Area Director identified in the COC letter.

(g) *Decision by Area Director* (“Director”). After reviewing the information submitted by the applicant and the in-

formation gathered by SBA, the Area Director will make a determination, either final or recommended as set forth in the following chart:

Contracting actions	SBA official or office with authority to make decision	Finality of decision; options for contracting agencies
Less than or equal to the Simplified Acquisition Threshold.	Director may approve or deny .....	Final. The Director will notify both applicant and contracting agency in writing of the decision.
Above the Simplified Acquisition Threshold and less than or equal to \$25 million.	(1) Director may deny .....	(1) Final.
	(2) Director may approve, subject to right of appeal and other options.	(2) Contracting agency may proceed under paragraph (h) or paragraph (i) of this section.
Exceeding \$25 million .....	(1) Director may deny .....	(1) Final.
	(2) Director must refer to SBA Headquarters recommendation for approval.	(2) Contracting agency may proceed under paragraph (j) of this section.

(h) *Notification of intent to issue on a contract or order with a value between the simplified acquisition threshold and \$25 million.* Where the Director determines that a COC is warranted, he or she will notify the contracting officer (or the procurement official with the authority to accept SBA’s decision) of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer or the procurement official with the authority to accept SBA’s decision has the following options:

(1) Accept the Director’s decision to issue the COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale of the decision; or

(2) Ask the Director to suspend the case for one of the following purposes:

(i) To forward a detailed rationale for the decision to the contracting officer for review within a specified period of time;

(ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file;

(iii) To submit any information which the contracting officer believes SBA has not considered (at which time, SBA will establish a new suspense date mutually agreeable to the contracting officer and SBA); or

(iv) To permit resolution of an appeal by the contracting agency to SBA

Headquarters under paragraph (i) of this section.

(i) *Appeals of Area Director determinations.* For COC actions with a value exceeding the simplified acquisition threshold, contracting agencies may appeal a Director’s decision to issue a COC to SBA Headquarters by filing an appeal with the Area Office processing the COC application. The Area Office must honor the request to appeal if the contracting officer agrees to withhold award until the appeal process is concluded. Without such an agreement from the contracting officer, the Director must issue the COC. When such an agreement has been obtained, the Area Office will immediately forward the case file to SBA Headquarters.

(1) The intent of the appeal procedure is to allow the contracting agency the opportunity to submit to SBA Headquarters any documentation which the Area Office may not have considered.

(2) SBA Headquarters will furnish written notice to the Director, OSDBU or OSBP of the procuring agency, with a copy to the contracting officer, that the case file has been received and that an appeal decision may be requested by an authorized official. If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its Director, OSDBU, within 10 working days (or a time period agreed upon by both agencies) of its receipt of the notice under paragraph (h) of this section. The appeal and any supporting documentation must be filed within 10

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working days (or a different time period agreed to by both agencies) after SBA receives the request for a formal appeal.

(3) The SBA Director, Office of Government Contracting (D/GC) will make a final determination, in writing, to issue or to deny the COC.

(j) *Decision by SBA Headquarters where contract value exceeds \$25 million.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency at the secretariat level or agency equivalent and afford it the following options:

(i) Ask SBA Headquarters to suspend the case so that the agency can meet with Headquarters personnel and review all documentation contained in the case file; or

(ii) Submit to SBA Headquarters for evaluation any information which the contracting agency believes has not been considered.

(2) After reviewing all available information, the AA/GC will make a final decision to either issue or deny the COC. If the AA/GC's decision is to deny the COC, the applicant and contracting agency will be informed in writing by the Area Office. If the decision is to issue the COC, a letter certifying the responsibility of the firm will be sent to the contracting agency by Headquarters and the applicant will be informed of such issuance by the Area Office. Except as set forth in paragraph (1) of this section, there can be no further appeal or reconsideration of the decision of the AA/GC.

(k) *Notification of denial of COC.* The notification to an unsuccessful applicant following either an Area Director or a Headquarters denial of a COC will briefly state all reasons for denial and inform the applicant that a meeting may be requested with appropriate SBA personnel to discuss the denial. Upon receipt of a request for such a meeting, the appropriate SBA personnel will confer with the applicant and explain the reasons for SBA's action. The meeting does not constitute an opportunity to rebut the merits of the SBA's decision to deny the COC, and is for the sole purpose of giving the applicant the opportunity to correct deficiencies so as to improve its ability to obtain future contracts either di-

rectly or, if necessary, through the issuance of a COC.

(l) *Reconsideration of COC after issuance.* (1) An approved COC may be reconsidered and possibly rescinded, at the sole discretion of SBA, where an award of the contract has not occurred, and one of the following circumstances exists:

(i) The COC applicant submitted false or omitted materially adverse information;

(ii) New materially adverse information has been received relating to the current responsibility of the applicant concern; or

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the business concern's current circumstances and the reason why the contract has not been issued).

(2) Where SBA reconsiders and reaffirms the COC the procedures under paragraph (h) of this section do not apply.

(m) *Effect of a COC.* By the terms of the Act, a COC is conclusive as to responsibility. Where SBA issues a COC on behalf of a small business with respect to a particular contract, contracting officers are required to award the contract without requiring the firm to meet any other requirement with respect to responsibility. Where SBA issues a COC with respect to a referral in paragraph (a)(2)(ii) or (a)(2)(iii) of this section, the contracting officer is not required to issue an award to that offeror if the contracting officer denies the contract for reasons unrelated to responsibility.

(n) *Effect of Denial of COC.* Denial of a COC by SBA does not preclude a contracting officer from awarding a contract to the referred firm, nor does it prevent the concern from making an offer on any other procurement.

(o) *Monitoring performance.* Once a COC has been issued and a contract awarded on that basis, SBA will monitor contractor performance.

[61 FR 3312, Jan. 31, 1996; 61 FR 7987, Mar. 1, 1996, as amended at 72 FR 50041, Aug. 30, 2007; 78 FR 61142, Oct. 2, 2013; 81 FR 34262, May 31, 2016; 81 FR 48585, July 25, 2016; 85 FR 66192, Oct. 16, 2020]

**§ 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 SDVOSB contract, a VOSB contract, a HUBZone contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

(1) In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases. In addition, work performed overseas on awards made pursuant to the Foreign Assistance Act of 1961 or work required to be performed by a local contractor, is excluded.

(2)(i) In the case of a contract for supplies or products (other than from a nonmanufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(ii) In the case of a contract for supplies from a nonmanufacturer, it will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in § 121.406(b)(5) of this chapter is granted.

(A) For a multiple item procurement where a waiver as described in § 121.406(b)(5) of this chapter has not been granted for one or more items, more than 50% of the value of the prod-

ucts to be supplied by the nonmanufacturer must be the products of one or more domestic small business manufacturers or processors.

(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.

(C) For a multiple item procurement, the same small business concern may act as both a manufacturer and a non-manufacturer.

*Example 1 to paragraph (a)(2).* A contract calls for the supply of one item valued at \$1,000,000. The market research shows that there are no small business manufacturers that produce this item, and the contracting officer seeks and is granted a contract specific waiver for this item. In this case, a small business nonmanufacturer may supply an item manufactured by a large business.

*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

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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.

(3) In the case of a contract for general construction, it will not pay more than 85% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(4) In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime may be paid to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 75% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(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 1 to paragraph (b).* A procuring agency is acquiring both services and supplies through a small business set-aside. The total value of the requirement is \$3,000,000, with the supply portion comprising \$2,500,000, and the services portion comprising \$500,000. The contracting officer appropriately assigns a manufacturing NAICS code to the requirement. The cost of material is \$500,000. Thus, because the services portion of the contract and the cost of materials are excluded from consideration, the relevant amount for purposes of calculating the performance of work requirement is \$2,000,000 and the prime and/or similarly situated entities must perform at least \$1,000,000 and the prime contractor may not subcontract more than \$1,000,000 to non-similarly situated entities.

*Example 2 to paragraph (b).* A procuring agency is acquiring both services and supplies through a small business set-aside. The total value of the requirement is \$3,000,000, with the services portion comprising \$2,500,000, and the supply portion comprising \$500,000. The contracting officer appropriately assigns a services NAICS code to the requirement. Thus, because the supply portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the performance of work requirement is \$2,500,000 and the prime and/or similarly situated entities must perform at least \$1,250,000 and the prime contractor may not subcontract more than \$1,250,000 to non-similarly situated entities.

*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



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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.

(c) *Subcontracts to similarly situated entities.* A small business concern prime contractor that receives a contract listed in paragraph (a) of this section and spends contract amounts on a subcontractor that is a similarly situated entity shall not consider those subcontracted amounts as subcontracted for purposes of determining whether the small business concern prime contractor has violated paragraph (a) of this section, to the extent the subcontractor performs the work with its own employees. Any work that the similarly situated subcontractor does not perform with its own employees shall be considered subcontracted SBA will also exclude a subcontract to a similarly situated entity from consideration under the ostensible subcontractor rule (§121.103(h)(4)). A prime contractor may no longer count a similarly situated entity towards compliance with the limitations on subcontracting where the subcontractor ceases to qualify as small or under the relevant socioeconomic status.

*Example 1 to paragraph (c):* An SDVO SBC sole source contract is awarded in the total amount of \$500,000 for hammers. The prime contractor is a manufacturer and subcontracts 51% of the total amount received, less the cost of materials (\$100,000) or \$204,000, to an SDVO SBC subcontractor that manufactures the hammers in the U.S. The prime contractor does not violate the limitation on subcontracting requirement because the amount subcontracted to a similarly situated entity (less the cost of materials) is excluded from the limitation on subcontracting calculation.

*Example 2 to paragraph (c):* A competitive 8(a) BD contract is awarded in the total amount of \$10,000,000 for janitorial services. The prime contractor subcontracts \$8,000,000 of the janitorial services to another 8(a) BD certified firm. The prime contractor does not violate the limitation on subcontracting for services because the amount subcontracted to a similarly situated entity is excluded from the limitation on subcontracting.

*Example 3 to paragraph (c):* A WOSB set-aside contract is awarded in the total amount of \$1,000,000 for landscaping services. The prime contractor subcontracts \$500,001 to an SDVO SBC subcontractor that is not also a WOSB under the WOSB program. The prime contractor is in violation of the limitation on subcontracting requirement because it has subcontracted more than 50% of the contract amount to an SDVO SBC subcontractor, which is not considered similarly situated to a WOSB prime contractor.

(d) *Determining compliance with applicable limitation on subcontracting.* The period of time used to determine compliance for a total or partial set-aside contract will be the base term and then each subsequent option period. For an order set aside under a full and open contract or a full and open contract with reserve, the agency will use the period of performance for each order to determine compliance unless the order is competed among small and other-than-small businesses (in which case the subcontracting limitations will not apply).

(1) The contracting officer, in his or her discretion, may require the concern to comply with the applicable limitations on subcontracting and the non-manufacturer rule for each order awarded under a total or partial set-aside contract.

(2) Compliance will be considered an element of responsibility and not a component of size eligibility.

(3) Work performed by an independent contractor shall be considered a subcontract, and may count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.

(e) *Inapplicability of limitations on subcontracting.* The limitations on subcontracting do not apply to:

(1) Small business set-aside contracts with a value that is greater than the micro-purchase threshold but less than or equal to the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101); or

(2) Subcontracts (except where a prime is relying on a similarly situated entity to meet the applicable limitations on subcontracting).

(3) For contracts where an independent contractor is not otherwise treated as an employee of the concern

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for which he/she is performing work for size purposes under §121.106(a) of this chapter, work performed by the independent contractor shall be considered a subcontract. Such work will count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.

(4) Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(f) *Request to change applicable limitation on subcontracting.* SBA may use different percentages if the Administrator determines that such action is necessary to reflect conventional industry practices among small business concerns that are below the numerical size standard for businesses in that industry group. Representatives of a national trade or industry group or any interested SBC may request a change in subcontracting percentage requirements for the categories defined by six digit industry codes in the North American Industry Classification System (NAICS) pursuant to the following procedures:

(1) *Format of request.* Requests from representatives of a trade or industry group and interested SBCs should be in writing and sent or delivered to the Director, Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416. The requester must demonstrate to SBA that a change in percentage is necessary to reflect conventional industry practices among small business concerns that are below the numerical size standard for businesses in that industry category, and must support its request with information including, but not limited to:

(i) Information relative to the economic conditions and structure of the entire national industry;

(ii) Market data, technical changes in the industry and industry trends;

(iii) Specific reasons and justifications for the change in the subcontracting percentage;

(iv) The effect such a change would have on the Federal procurement process; and

(v) Information demonstrating how the proposed change would promote the purposes of the small business, 8(a), SDVOSB, VOSB, HUBZone, WOSB, or EDWOSB programs.

(2) *Notice to public.* Upon an adequate preliminary showing to SBA, SBA will publish in the FEDERAL REGISTER a notice of its receipt of a request that it considers a change in the subcontracting percentage requirements for a particular industry. The notice will identify the group making the request, and give the public an opportunity to submit information and arguments in both support and opposition.

(3) *Comments.* SBA will provide a period of not less than 30 days for public comment in response to the FEDERAL REGISTER notice.

(4) *Decision.* SBA will render its decision after the close of the comment period. If SBA decides against a change, SBA will publish notice of its decision in the FEDERAL REGISTER. Concurrent with the notice, SBA will advise the requester of its decision in writing. If SBA decides in favor of a change, SBA will propose an appropriate change to this part.

(g) *Penalties.* Whoever violates the requirements set forth in paragraph (a) of this section shall be subject to the penalties prescribed in 15 U.S.C. 645(d), except that the fine shall be treated as the greater of \$500,000 or the dollar amount spent, in excess of permitted levels, by the entity on subcontractors. A party's failure to comply with the spirit and intent of a subcontract with a similarly situated entity may be considered a basis for debarment on the grounds, including but not limited to, that the parties have violated the terms of a Government contract or subcontract pursuant to FAR 9.406-2(b)(1)(i) (48 CFR 9.406-2(b)(1)(i)).

[81 FR 34262, May 31, 2016, as amended at 81 FR 67093, Sept. 30, 2016; 83 FR 12852, Mar. 26, 2018; 84 FR 65239, Nov. 26, 2019; 84 FR 65664, Nov. 29, 2019; 85 FR 66192, Oct. 16, 2020; 87 FR 73412, Nov. 29, 2022]

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EDITORIAL NOTE: At 81 FR 48585, July 25, 2016, § 125.6 was amended; however, the amendment could not be incorporated due to inaccurate amendatory instruction.

### **§ 125.7 Acquisition-related dollar thresholds.**

The Federal Acquisition Regulatory Council (FAR Council) has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. Acquisition-related dollar thresholds are defined as dollar thresholds that are specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency as determined by the FAR Council. 41 U.S.C. 431a(c). Part 125, Government Contracting Programs, contains acquisition-related dollar thresholds subject to inflationary adjustments. The FAR Council shall publish a notice of the adjusted dollar thresholds in the FEDERAL REGISTER. The adjusted dollar thresholds shall take effect on the date of publication.

[74 FR 46887, Sept. 14, 2009]

### **§ 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?**

(a) *General.* A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, or qualify as small under one of the exceptions to affiliation set forth in § 121.103(h)(3) of this chapter.

(b) *Contents of joint venture agreement.* (1) A joint venture agreement between two or more entities that individually qualify as small need not be in any specific form or contain any specific conditions in order for the joint venture to qualify as a small business.

(2) Every joint venture agreement to perform a contract set aside or reserved for small business between a protégé small business and its SBA-approved mentor authorized by § 125.9 or

§ 124.520 of this chapter must contain a provision:

(i) Setting forth the purpose of the joint venture;

(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;

(iii) Stating that with respect to a separate legal entity joint venture, the small business must own at least 51% of the joint venture entity;

(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

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the joint venture bank account shall distributed at the discretion of the joint venture members according to percentage of ownership;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. 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. All payments due the joint venture for performance on a contract set aside or reserved for small business will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint ven-

ture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(viii) Obligating all parties to the joint venture to ensure performance of a contract set aside or reserved for small business and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the small business managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the small business managing venturer upon completion of any contract set aside or reserved for small business that was performed by the joint venture;

(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) *Performance of work.* (1) For any contract set aside or reserved for small business that is to be performed by a joint venture between a small business protégé and its SBA-approved mentor authorized by §125.9, the joint venture must perform the applicable percentage of work required by §125.6, and the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture. 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).

(2) The work performed by the small business partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(3) The amount of work done by the partners will be aggregated and the work done by the small business protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a small business protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(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.

(d) *Certification of compliance.* Prior to the performance of any contract set aside or reserved for small business by a joint venture between a protégé small business and a mentor authorized by § 125.9, the small business partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(1) The parties have entered into a joint venture agreement that fully complies with paragraph (b) of this section;

(2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (c) of this section.

(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 ven-

ture 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.

(f) *Contract execution.* The procuring activity will execute a contract set aside or reserved for small business in the name of the joint venture entity or a small business partner to the joint venture, but in either case will identify the award as one to a small business joint venture or a small business mentor-protégé joint venture, as appropriate.

(g) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(h) *Performance of work reports.* In connection with any 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, the small business partner must describe how it is meeting or has met the applicable performance of work requirements for each contract set aside or reserved for small business that it performs as a joint venture.

(1) The small business partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each contract set aside or reserved for small business that is performed during the year.

(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

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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.

(i) *Basis for suspension or debarment.* For any joint venture between a protégé small business and a mentor authorized by §125.9, the Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (b) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (c) of this section; or

(3) Failure to submit the certification required by paragraph (d) of this section or comply with paragraph (g) of this section.

(j) *Compliance with performance of work requirements.* Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

[81 FR 48585, July 25, 2016, as amended at 81 FR 94941, Dec. 27, 2016; 85 FR 66193, Oct. 16, 2020]

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

(a) *General.* The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (ei-

ther from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.

(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 covered territory business, or 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 protégés that a mentor can have at one time.

(c) *Protégés.* (1) In order to initially qualify as a protégé firm, a concern must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code.

(i) A firm may self-certify that it qualifies as small for its primary or identified secondary NAICS code.

(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:

(i) The second relationship pertains to an unrelated NAICS code; or

(ii) The protégé firm is seeking to acquire a specific expertise that the first mentor does not possess.

(3) SBA may authorize a small business to be both a protégé and a mentor at the same time where the small business can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

(d) *Benefits.* (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.

(i) SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.

(ii) In order to receive the exclusion from affiliation, the joint venture must meet the requirements set forth in § 125.8(b)(2), (c), and (d).

(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

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venture between the protégé and its mentor.

(A) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(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.

(2) In order to raise capital, the protégé firm may agree to sell or otherwise convey to the mentor an equity interest of up to 40% in the protégé firm.

(3) Notwithstanding the mentor-protégé relationship, a protégé firm may qualify for other assistance as a small business, including SBA financial assistance.

(4) No determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé agreement or any assistance provided pursuant to the agreement. However, affiliation may be found for other reasons set forth in §121.103 of this chapter.

(5) Where appropriate, procuring activities may provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm.

(6) A mentor that provides a subcontract to its protégé that is a covered territory business, or that has its principal office located in the Commonwealth of Puerto Rico, may:

(i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for

providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor.

(ii) [Reserved]

(e) *Written agreement.* (1) The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs (*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). The mentor-protégé agreement must:

(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;

(ii) Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor-protégé agreement; and

(iii) Provide that the mentor will provide such assistance to the protégé firm for at least one year.

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA.

(i) The small business mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

(ii) A firm seeking SBA's approval to be a protégé may terminate a mentor-protégé relationship it has through another agency and use any not yet provided assistance identified in the other mentor-protégé agreement as part of the assistance that will be provided through the small business mentor-



protégé relationship. Any assistance that has already been provided through another mentor-protégé relationship cannot be identified as assistance that will be provided through the small business mentor-protégé relationship.

(3) The written agreement must be approved by the Associate Administrator for Business Development (AA/BD) or his/her designee. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts.

(4) The agreement must provide that either the protégé or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor-protégé relationship and to SBA.

(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. How-

ever, 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.

(7) SBA must approve all changes to a mentor-protégé agreement in advance, and any changes made to the agreement must be provided in writing. If the parties to the mentor-protégé relationship change the mentor-protégé agreement without prior approval by SBA, SBA shall terminate the mentor-protégé relationship and may also propose suspension or debarment of one or both of the firms pursuant to paragraph (h) of this section where appropriate.

(8) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégé agreement and certifies that it will continue to abide by its terms.

(9) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not benefiting from the relationship or that the parties are not complying with any term or condition of the mentor-protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

(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.

(1) Within 30 days of the anniversary of SBA's approval of the mentor-protégé agreement, the protégé must report to SBA for the preceding year:

(i) All technical and/or management assistance provided by the mentor to the protégé;

(ii) All loans to and/or equity investments made by the mentor in the protégé;

(iii) All subcontracts awarded to the protégé by the mentor and all subcontracts awarded to the mentor by the protégé, and the value of each subcontract;

(iv) All federal contracts awarded to the mentor-protégé relationship as a joint venture (designating each as a small business set-aside, small business reserve, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and

the percentage of revenue accruing to each party to the joint venture; and

(v) A narrative describing the success such assistance has had in addressing the developmental needs of the protégé and addressing any problems encountered.

(2) The protégé must report the mentoring services it receives by category and hours.

(3) The protégé must annually certify to SBA whether there has been any change in the terms of the agreement.

(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:

(i) SBA will terminate the mentor-protégé agreement;

(ii) 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; and

(iii) 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 in order to encourage the mentor to comply with its mentor-protégé agreement. Where a protégé firm is able to independently complete performance of any such contract, SBA may recommend to the procuring agency to authorize a substitution of the protégé firm for the joint venture.

(2) SBA may consider a mentor's failure to comply with the terms and conditions of an SBA-approved mentor-protégé agreement as a basis for debarment on the grounds, including but not limited to, that the mentor has not complied with the terms of a public agreement under 2 CFR 180.800(b).

(i) *Results of mentor-protégé relationship.* (1) In order to assess the results of a mentor-protégé relationship upon its completion, the protégé must report to SBA whether it believed the mentor-protégé relationship was beneficial and describe any lasting benefits to the protégé.

(2) Where a protégé does not report the results of a mentor-protégé relationship upon its completion, SBA will not approve a second mentor-protégé relationship either under this section or under § 124.520 of this chapter.

[81 FR 48585, July 25, 2016, as amended at 85 FR 66194, Oct. 16, 2020; 87 FR 50927, Aug. 19, 2022]

**§ 125.10 Mentor-Protégé programs of other agencies.**

(a) Except as provided in paragraph (c) of this section, a Federal department or agency may not carry out a mentor-protégé program for small

business unless the head of the department or agency submits a plan to the SBA Administrator for the program and the SBA Administrator approves the plan. Before starting a new mentor protégé program, the head of a department or agency must submit a plan to the SBA Administrator. Within one year of the effective date of this section, the head of a department or agency must submit a plan to the SBA for any previously existing mentor-protégé program that the department or agency seeks to continue.

(b) The SBA Administrator will approve or disapprove a plan submitted under paragraph (a) of this section based on whether the proposed program:

(1) Will assist protégés to compete for Federal prime contracts and subcontracts; and

(2) Complies with the provisions set forth in §§ 125.9 and 124.520 of this chapter, as applicable.

(c) Paragraph (a) of this section does not apply to:

(1) Any mentor-protégé program of the Department of Defense;

(2) Any mentoring assistance provided under a Small Business Innovation Research Program or a Small Business Technology Transfer Program; and

(3) A mentor-protégé program operated by a Department or agency on January 2, 2013, for a period of one year after the effective date of this section.

(d) The head of each Federal department or agency carrying out an agency-specific mentor-protégé program must report annually to SBA:

(1) The participants (both protégé firms and their approved mentors) in its mentor-protégé program. This includes identifying the number of participants that are:

(i) Small business concerns;

(ii) Small business concerns owned and controlled by service-disabled veterans;

(iii) Small business concerns owned and controlled by socially and economically disadvantaged individuals;

(iv) Small business concerns owned and controlled by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations; and

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(v) Small business concerns owned and controlled by women;

(2) The assistance provided to small businesses through the program; and

(3) The progress of protégé firms under the program to compete for Federal prime contracts and subcontracts.

[81 FR 48585, July 25, 2016]

### § 125.11 Past performance ratings for certain small business concerns.

(a) *General.* In accordance with sections 15(e)(5) and 8(d)(17) of the Small Business Act, agencies are required to consider the past performance of certain small business offerors that have been members of joint ventures or have been first-tier subcontractors. The agencies shall consider the small business' past performance for the evaluated contract or order similarly to a prime-contract past performance.

(b) *Small business concerns that have been members of joint ventures—(1) Joint venture past performance.* (i) When submitting an offer for a prime contract, a small business concern that has been a member of a joint venture may elect to use the experience and past performance of the joint venture (whether or not the other joint venture partners were small business concerns) where the small business does not independently demonstrate past performance necessary for award. The small business concern, when making such an election, shall:

(A) Identify to the contracting officer the joint venture of which the small business concern is or was a member;

(B) Identify the contract or contracts of the joint venture that the small business elects to use for its experience and past performance for the prime contract offer; and

(C) Inform the contracting officer what duties and responsibilities the concern carried out or is carrying out as part of the joint venture.

(ii) A small business cannot identify and use as its own experience and past performance work that was performed exclusively by other partners to the joint venture.

(2) *Evaluation.* When evaluating the past performance of a small business concern that has submitted an offer on a prime contract, the contracting officer shall consider the joint venture

past performance that the concern elected to use under paragraph (b)(1) of this section, giving due consideration to the information provided under paragraph (b)(1)(i)(C) of this section for the performance of the evaluated contract or order. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System, or successor system used by the Federal Government to monitor or rate contractor past performance.

(c) *Small business concerns that have performed as first-tier subcontractors—(1) Responsibility of prime contractors.* A small business concern may request a rating of its subcontractor past performance from the prime contractor for a contract on which the concern was a first-tier subcontractor and which included a subcontracting plan. The prime contractor shall provide the rating to the small business concern within 15 calendar days of the request. The rating provided by the prime contractor to the first-tier small business subcontractor shall utilize the five-scale ratings system found in FAR 42.1503 (48 CFR 42.1503): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. The prime contractor must include, at a minimum, the following evaluation factors in the requested rating:

(i) Technical (quality of product or service);

(ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);

(iii) Schedule/timeliness;

(iv) Management or business relations; and

(v) Other (as applicable).

(2) *Responsibility of first-tier small business subcontractors.* A first-tier small business subcontractor must make the request for a performance rating from the prime contractor within 30 days after the completion of the period of performance for the prime contractor's contract with the Government. However, the prime contractor and the first-tier small business subcontractor may negotiate a later deadline for the request for a performance rating, but in no case can the prime contractor impose a deadline earlier than 30 days

after the completion of the period of performance for the prime contractor's contract with the Government. The subcontractor may notify the contracting officer in the event that the prime contractor does not comply with its responsibility to submit a timely rating.

(3) *Joint ventures that performed as first-tier subcontractors.* A small business member of a joint venture may request a past performance rating under paragraph (c)(1) of this section, where a joint venture performed as a first-tier subcontractor. The joint venture member may then submit the subcontractor past performance rating to a procuring agency in accordance with paragraph (b) of this section.

(4) *Evaluation.* When evaluating the past performance of a small business concern that elected to use a rating for its offer on a prime contract, a contracting officer shall consider the concern's experience and rating of past performance as a first-tier subcontractor. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System (CPARS), or successor system used by the Federal Government to monitor or rate contractor past performance.

[87 FR 43739, July 22, 2022]

## PART 126—HUBZONE PROGRAM

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