



## **SMALL BUSINESS ADMINISTRATION**

**13 CFR Parts 121, 124, 125, 126, 127, 129, and 134**

**RIN 3245-AG86**

### **National Defense Authorization Acts of 2016 and 2017, Recovery Improvements for Small Entities after Disaster Act of 2015, and Other Small Business Government Contracting**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Small Business Administration (SBA or Agency) is amending its regulations to implement several provisions of the National Defense Authorization Acts (NDAA) of 2016 and 2017 and the Recovery Improvements for Small Entities After Disaster Act of 2015 (RISE Act), as well as to clarify existing regulations. This rule clarifies that contracting officers have the authority to request information in connection with a contractor's compliance with applicable limitations on subcontracting clauses; provides exclusions for purposes of compliance with the limitations on subcontracting for certain contracts performed outside of the United States, for environmental remediation contracts, and for information technology service acquisitions that require substantial cloud computing; requires a prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals; establishes that failure to provide timely subcontracting reports may constitute a material breach of the contract; clarifies the requirements for size and status recertification; and limits the scope of Procurement Center Representative (PCR) reviews of Department of Defense acquisitions performed

outside of the United States and its territories. This rule also authorizes agencies to receive double credit for small business goaling achievements as announced in SBA's scorecard for local area small business set-asides in connection with a disaster. Finally, SBA is removing the kit assembler exception to the non-manufacturer rule.

**DATES:** This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

**SUPPLEMENTARY INFORMATION:**

**Introduction**

SBA published a proposed rule regarding these changes in the Federal Register on December 4, 2018 (83 FR 62516), inviting the public to submit comments on or before February 4, 2019. SBA received extensive responses on the proposed rule from 38 entities, which comprised almost 250 specific comments. One commenter requested additional time to submit comments. SBA declined to provide an extension of the comment period on grounds of administrative efficiency, since this rule implements statutory requirements and makes other changes of critical importance to small businesses. SBA's discussion below summarizes the proposed rule, the comments related to each section of the proposed rule, and SBA's responses.

## **Summary of Proposed Rule, Comments, and SBA's Responses**

### **I. National Defense Authorization Act for Fiscal Year 2016, Public Law 114-92, 129 Stat. 726, November 25, 2015 (NDAA of 2016).**

#### **Posting Notice of Substantial Bundling**

Section 863 of the NDAA of 2016 amended section 15(e)(3) of the Small Business Act (15 U.S.C. 644(e)(3)) to provide that if the head of a contracting agency determines that an acquisition plan involves a substantial bundling of contract requirements, the head of the contracting agency shall publish a notice of such determination on a public website within 7 days of making such determination. Section 863 also amended section 44(c)(2) of the Small Business Act (15 U.S.C. 657q(c)(2)) to provide that upon determining that a consolidation of contract requirements is necessary and justified, the Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO) shall publish a notice on a public website that such determination has been made. An agency may not issue the solicitation any earlier than 7 days after publication of the notice. The SPE or CAO must also publish the justification along with the solicitation. The requirement may be delegated. SBA proposed to amend § 125.2(d) by adding new paragraphs (d)(1)(v) and (d)(7) to implement these changes. Specifically, SBA proposed that the notice be published on the contracting agency's website. SBA received three comments on these proposed new paragraphs and all three supported the proposal to require public notification of a consolidation determination. Based on agency comments, SBA is adopting a final rule that requires publication of the notice on the Government Point of Entry website because this will be a more efficient and effective mechanism to notify the public. Notice provided through one Government website, which already

serves as the means for most procurement-related notices, will likely be viewed by a larger portion of the public than through an individual agency website.

II. National Defense Authorization Act for Fiscal Year 2017, Public Law 114-328, 130 Stat. 2000, December 23, 2016 (NDAA of 2017).

Procurement Center Representative Reviews

Section 1811 of the NDAA of 2017 amended section 15(l) of the Small Business Act (15 U.S.C. 644(l)) to provide that PCRs may review any acquisition, even those where the acquisition is set aside, partially set aside, or reserved for small business. SBA's current rules provide that PCRs will review all acquisitions that are not set aside or reserved for small business. These rules were intended to focus limited resources on acquisitions that were not already going to small business, but were not intended to prohibit a PCR from reviewing any acquisition as part of the PCR's role as an advocate for small business. SBA proposed to amend § 125.2(b)(1)(i) to provide that PCRs may review any acquisition regardless of whether it is set aside, partially set aside, or reserved for small business or other socioeconomic categories. SBA believes that this change will enable PCRs to advocate for total set-asides or partial set-asides when appropriate and necessary. This provision merely gives to the SBA PCR the authority to review set-aside actions where he or she deems it appropriate. It is not the intent that this will be done in every case. In fact, SBA believes that such a review will not generally be done. Where a PCR seeks to review a set-aside action, the PCR will notify the contracting officer. SBA expects its review to generally be limited to the issue presented, and SBA does not believe this will adversely affect the acquisition timeline. SBA received two comments on this proposed change. One supported the change and one opposed it. The commenter

who opposed the proposed rule based his opposition on the perception that PCRs favor 8(a) firms over other small businesses. SBA deduced from this comment that the commenter was concerned that a PCR looking at all acquisitions will not assess whether a particular acquisition is appropriate for all of SBA's government contracting programs, but will instead default to assuming it should be awarded to an 8(a) firm. SBA disagrees that PCRs favor one small business program over another. PCRs seek to ensure that contracting officers consider all of SBA's small business programs, and that the market research performed supports the contracting officer's decision to use a particular program. This final rule adopts the proposed change, as it clarifies SBA's current position that PCRs may review any acquisition, which promotes more awards to small businesses.

Section 1811 of the NDAA of 2017 also amended section 15(l) of the Small Business Act to limit the scope of PCR review of solicitations for contracts or orders by or for the Department of Defense if the acquisition is conducted pursuant to the Arms Control Export Act (22 U.S.C. 2762), is a humanitarian operation 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 outside of the United States and its territories. SBA proposed to amend § 125.2(b)(1)(i) to implement these amendments. Under the proposed rule, PCRs would still be able to review acquisitions awarded in the United States and its territories but performed outside of the United States and its territories, or awarded outside of the United States and its territories for performance in the United States or its territories, if

the acquisition is not a foreign military sales, or in connection with a contingency operation, humanitarian and civic assistance provided in conjunction with military operations, or status of forces agreement. The proposed rule clarified that SBA considers performance to be outside of the United States and its territories if the acquisition is awarded and performed or delivered outside of the United States and its territories. If the acquisition is awarded in the United States and its territories or some performance or delivery occurs in the United States and its territories, SBA considers that to be performed in the United States and its territories. SBA received one comment in support of the proposed change. SBA continues to believe that the proposed language properly captures the intent of the statutory provision. As such, SBA adopts the proposed change in this final rule.

#### Material Breach of Subcontracting Plan

Section 1821 of the NDAA of 2017 amended section 8(d)(9) of the Small Business Act (15 U.S.C. 637(d)(9)) to provide that it shall be a material breach of a contract or subcontract when the contractor or subcontractor with a subcontracting plan fails to comply in good faith with the requirement to provide assurances that the offeror shall submit such periodic reports or 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 offeror with the subcontracting plan. Such a breach may be considered in any past performance evaluation of the contractor. SBA proposed to revise § 125.3(d) to implement this provision.

SBA also proposed revising § 125.3(d) to reflect Section 1821's requirement that SBA must provide examples of activities that would be considered a failure to make a

good faith effort to comply with a small business subcontracting plan. Good faith effort considers a totality of the contractor's actions to provide the maximum practicable opportunity to small businesses to participate as subcontractors (including those in the socio-economic small business areas), consistent with the information and assurances provided in the subcontracting plan. A failure to exert good faith effort is predicated upon evidence that an other than small Federal prime contractor, required to have a subcontracting plan with negotiated small business concern goals approved by a Federal contracting officer, has failed to attain these goals as outlined in the plan, and that this failure may be attributable to a lack of good faith effort by the other than small prime contractor. The term SBC for purposes of this rule includes all categories of small business, including small disadvantaged businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, women-owned small businesses, small businesses in historically underutilized business zones, Historically Black Colleges and Universities (HBCU/Minority Institutions (MI)) (NASA only) and any successor small business designations. A failure to exert good faith efforts must take into account all actions, or lack thereof, the contractor took to promote subcontracting opportunities to small businesses to the extent agreed upon in the approved subcontracting plan. SBA also proposed to reorganize this section to reflect these new examples in § 125.3(d)(3)(ii).

SBA received eight comments regarding the proposed changes to clarify what good faith means. Six comments supported the proposed change and two comments opposed it. The six comments in support expressed appreciation for SBA's attempt to implement the statutory requirement as clearly and thoroughly as possible. Additionally, commenters noted that the proposed changes will provide greater protection to small

businesses by outlining explicitly what they can expect from a large business that is making a good faith effort to comply with a small business subcontracting plan.

Commenters also noted that the proposed changes will help agencies hold large business prime contractors accountable if they breach their small business subcontracting plans.

The two commenters opposing the proposed change expressed wariness about holding contractors to a precise definition of good faith because other factors, besides those outlined in the proposed language, may affect a contractor's ability to meet its goals. While SBA understands these concerns, Congress's clear intent was that SBA implement a more robust and detailed definition of compliance. SBA does not intend, nor believe, that the expanded definition of good faith will be overly burdensome for contractors. In addition, the examples set forth in the rule are not intended to be inclusive. Factors beyond those identified in the rule may be considered in determining whether good faith efforts were made. One commenter specifically expressed concern that the examples would allow contractors to be found to have acted in bad faith without due process. SBA does not believe the proposed changes put contractors at risk of specious or capricious findings of bad faith. Contractors have the opportunity to correct substantiated findings of subcontracting compliance reviews, per the new § 125.3(d)(3)(ii)(F). Further, contractors retain their right to rebut and appeal determinations of non-compliance that would result in liquidated damages, a breach of contract finding, or an adverse past performance assessment. Both commenters in opposition suggested that SBA use the FAR language on good faith rather than drafting their own regulations. SBA's proposed changes mirror the FAR's language but primarily seek to implement Congress's intent.

SBA is making one change to the proposed rule in response to a comment noting that § 125.3(d)(3)(ii)(H) incorrectly states that a failure of good faith may be found if a contractor does not get a contracting officer's approval prior to changing small business subcontractors. Prime contractors must provide contracting officers with a written explanation of why they are changing a small business subcontractor, but the regulations do not require a contracting officer's prior approval. SBA has revised the regulation to reflect this correction.

The rule renumbers current § 125.3(d)(3)(i-iii) as § 125.3(d)(3)(i)(A-C) to better organize this section for clarity and ease of understanding. The final rule includes examples of good faith in the revised § 125.3(d)(3)(i), while examples of activities that would be considered a failure to make a good faith effort are included in the revised § 125.3(d)(3)(ii).

III. Recovery Improvements for Small Entities After Disaster Act of 2015, Public Law 114-88, 129 Stat. 686, November 25, 2015 (RISE Act).

Section 2108 of the RISE Act authorizes SBA to establish contracting preferences for small business concerns located in disaster areas and provide agencies with double credit for awards to small business concerns located in disaster areas. To implement the changes made by section 2108 of the RISE Act, SBA proposed to add a new part 129 to title 13 of the Code of Federal Regulations. SBA will implement section 2105, "Use of Federal surplus property in disaster areas," in a separate rulemaking.

Section 2108 of the RISE Act amends section 15 of the Small Business Act (15 U.S.C. 644) by adding a subsection (f), which authorizes procuring agencies to provide contracting preferences for small business concerns located in areas for which the

President has declared a major disaster, during the period of the declaration. Section 2108 provides that this contracting preference shall be available for small business concerns located in disaster areas if the small business will perform the work required under the contract in the disaster area. Under § 6.208 of Federal Acquisition Regulation (FAR), contracting officers may set aside solicitations to allow only offerors residing or doing business in the area affected by a major disaster. Under existing FAR 26.202-1, such local area set-asides may be further set aside for small business concerns. SBA proposed to use the existing FAR definitions to provide that an agency will receive credit for an “emergency response contract” awarded to a “local firm” that qualifies as a small business concern under the applicable size standard for a “Major disaster or emergency area.” FAR 26.201.

Section 2108 also provides that if an agency awards a contract to a small business located in a disaster area through a contracting preference, the value of the contract shall be doubled for purposes of determining compliance with the small business contracting goals described in section 15(g)(1)(A) of the Small Business Act. Proposed § 129.300 provided that agencies would receive double credit for awarding a contract through the use of a local small business or socioeconomic set-aside authorized by § 129.200 (i.e., a set-aside restricted to SBCs, 8(a) Business Development (BD) Program Participants, Women-Owned Small Business (WOSB), Service-Disabled Veteran-Owned (SDVO) or HUBZone SBCs located in a disaster area). SBA believes that agencies will enter accurate data into the Federal Procurement Data System (FPDS). SBA will provide the extra credit through the agency scorecard process. Local area set-aside and small

business contract designations already exist in FPDS, and implementation has already occurred in FY 2017.

SBA received nine comments regarding the proposed addition of part 129. Eight of the comments support the proposed amendments. They supported Congress's intent to encourage small business contracting in areas adversely affected by disasters and believed that SBA's proposed part 129 accomplished Congress's intent. One commenter stated that it would be confusing to discern which type of procurement goal credit is subject to double credit, especially if the information provided in the SBA Procurement Scorecard differs from that in the Federal Procurement Database System (FPDS) or from the information on <https://www.usaspending.gov>, which tracks Federal procurement spending. While the amount of procurement goal credit for such awards will differ in the SBA Procurement Scorecard as compared to FPDS, the same contract identification information will be present. FPDS will identify those awards that are subject to double credit because they were awarded to firms in a disaster area. Although SBA understands the commenter's concern that implementing this double credit may be confusing, SBA believes that it is constrained by the statute which requires this double credit. As such, the final rule adopts part 129 as proposed.

#### IV. Other Small Business Government Contracting Amendments.

##### Clarification that the Non-Manufacturer 500 Employee Size Standard Does Not Apply to Information Technology Value Added Resellers

On September 10, 2014, SBA proposed to eliminate the information technology value added reseller (ITVAR) exception to NAICS 541519, which had a size standard of 150 employees. 79 FR 53646. In the proposed rule, SBA specifically noted that

elimination of the exception would result in these acquisitions, which are primarily for supplies, being subject to the non-manufacturer rule (NMR), which has a size standard of 500 employees. As a result of public comment, SBA altered the language in the ITVAR exception (13 CFR 121.201, footnote 18) to make it clear that the manufacturing performance or limitations on subcontracting requirements and the NMR apply to acquisitions under the ITVAR exception, but retained the 150 employee size standard. 81 FR 4436 (January 26, 2016). By definition, contractors under the ITVAR exception are non-manufacturers, and it would make no sense for SBA to retain a 150-employee size standard if concerns could also qualify under the NMR 500 employee size standard. In a size appeal before the SBA Office of Hearings and Appeals, a firm tried to argue that the size standard under the ITVAR exception was the 500 employee non-manufacturer size standard. *Size Appeal of York Telecom Corporation*, SBA No. SIZ-5742 (May 18, 2016). The appeal was denied. *Id.* In response, SBA proposed to amend § 121.406(b)(1)(i) to clarify that the NMR size standard of 500 employees does not apply to acquisitions that have been assigned the ITVAR NAICS code 541519 exception, footnote 18. The size standard for any acquisition under 541519, footnote 18, is 150 employees for all offerors. SBA received six comments related to this proposed amendment: five supported the clarification and one opposed it. The commenter opposed to the change suggested that SBA should increase the size standard for NAICS code 541519 from 150 to 500 employees because an increased number of ITVARs would lead to cost savings and a reduction of the Federal deficit. SBA does not agree with this analysis and is adopting the amendment as proposed. SBA does not believe that a non-manufacturer with close to 500 employees should be considered small.

### Setting Aside an Order Under a Multiple Award Set-Aside Contract

On October 2, 2013, SBA published a final rule implementing 15 U.S.C. 644(r). 78 FR 61114. In that rule, SBA contemplated the set aside of orders for certain types of SBCs, such as HUBZone SBCs, 8(a) BD Program Participants, SDVO SBCs, or WOSBs. 78 FR 61114, 61124. SBA noted that at the time, the small business programs had major differences with respect to the application of the limitations on subcontracting and NMR requirements, and therefore it would be difficult for SBCs and agencies to determine the rules that applied to a particular order. SBA was also concerned about the possibility that SBCs could be deprived of an opportunity to compete for orders under a set-aside contract if an agency repeatedly set aside orders for other socioeconomic categories. Since that time, SBA has attempted to harmonize the application of the limitations on subcontracting and NMR requirements for each of the various types of small business contracts. The concerns identified in the 2013 final rule have since been addressed to enable fair and proper implementation of order set-asides. Specifically, on May 31, 2016, SBA published a final rule to standardize the limitations on subcontracting and NMR requirements across socioeconomic programs. 81 FR 34243. In addition, some agencies have pursued the strategy of allowing order set-asides against set-aside multiple award contracts (MACs), including notification and incorporation of the clause at FAR 52.219-13, and agencies have reported that they have not encountered any industry concerns. In connection with this rule, SBA requested comment on whether SBA should allow agencies to set aside orders for a socioeconomic small business program (8(a), HUBZone, SDVO, WOSB) under a MAC that was awarded under a total small business set-aside. Because SBA believes that a change is appropriate at this time, SBA proposed

to remove the term “Full and Open” from § 125.2(e)(6) to specifically afford discretion to an agency to set-aside one or more particular orders for HUBZone SBCs, 8(a) BD SBCs, SDVO SBCs or WOSBs, as appropriate, where the underlying MAC was initially set aside for small business. Set-asides under multiple award set-aside contracts may be implemented by agencies in different ways, including: (1) establishing set-asides to socioeconomic programs at the order solicitation level under multiple award small business set-aside contracts, and (2) establishing socioeconomic set-aside pools at the master contract solicitation level for a multiple award small business set-aside contract. SBA requested comments on any burden or adverse impact associated with each of these two approaches. In addition, SBA was specifically interested in whether these two approaches could impact the ability for all types of small businesses (e.g., 8(a), HUBZone, WOSB, SDVOSB) to compete and receive orders.

SBA received twenty-two comments regarding this proposed change. Twelve of the comments support the proposed change and ten oppose the change. The comments that oppose the proposed amendment note that it is unfair to the original small business awardees of a MAC to allow socioeconomic small business program set-asides under those contracts where it was not originally contemplated. Additionally, those who oppose this proposed change note that allowing such set-asides under small business MACs will reduce the number of offerors for the orders that are set-aside for socioeconomic small business program participants. The comments in opposition also note that small businesses would be discouraged from bidding on MACs because they would have no way of knowing if any future orders would be set aside for their socioeconomic status. SBA believes these concerns should be assuaged by the fact that

the rule would not affect already-awarded MACs, unless set-asides were already contemplated in the solicitation. Going forward, small businesses would know at the time of offer what kind of set-asides, if any, were available at the time of award and on future orders. SBA believes this type of forecasting and notification to offerors would also address the concerns of commenters opposed to the proposed change because they do not believe it is fair to the “original” small businesses that submit offers on a MAC. The rule would apply only to future contracts and thus potential offerors will know in advance if it is worthwhile to submit an offer.

SBA received one comment requesting clarification on whether a contracting officer can set aside orders for a contract if the contract was not set aside for small businesses. SBA’s current regulation at § 125.2(e)(6)(i) provides that contracting officers can “set-aside orders against Multiple Award Contracts that were competed on a full and open basis.” The proposed rule revised this provision to say that contracting officers can “set aside orders against Multiple Award Contracts, including contracts that were set aside for small businesses.” SBA is adopting the amendment as proposed.

SBA received one comment regarding the two alternative approaches discussed in the proposed rule for implementing this change: using small business pools or small business set-asides at the order level. The commenter supports both proposed approaches but notes that category management has a negative impact on small businesses. No comments were received which identify any burdens associated with either approach. SBA is adopting the amendment as proposed.

### Recertification of Size and Status

SBA's rules require recertification of size and status for all long-term (over 5 years) contracts. This includes indefinite delivery contracts under which orders will be placed at a future date and contracts that had not been set aside for small business but were awarded to a small business. Thus, SBA proposed to amend §§ 125.18(f), 126.601(i), and 127.503(h) to clarify that a concern must recertify its status on full and open contracts. In addition, SBA added a new paragraph to §§ 124.521 and 124.1015 to reflect the status eligibility and recertification requirements for 8(a) participants and SDB concerns, which are already present in the SDVO, HUBZone, and WOSB regulations. This change provides greater consistency among the status recertification requirements for small business program contracts. One result of these changes is that a prime contractor relying on similarly situated entities (an SDVOSB prime with an SDVOSB subcontractor, for example) to meet the applicable performance requirements may not count the subcontractor towards its performance requirements if the subcontractor recertifies as an entity other than that which it had previously certified.

SBA received 32 comments on the proposed change to certification requirements. Twenty-five opposed, three supported, and four sought clarification. Many of the comments that opposed this provision expressed concerns that the requirement would be overly burdensome and would add "complexities to an already difficult compliance system." Several commenters specifically disagreed with the proposed change to the 8(a) and SDB certification requirements. One commenter noted it takes firms up to four years to demonstrate satisfactory past performance and thus by the time they were eligible for a contract, they would not be able to perform on any options. Several others pointed out

that the 8(a) program is different from SBA's other government contracting programs. SBA recognizes these concerns but does not believe that this provision fails to acknowledge the unique features of the 8(a) program. Congress intended that 8(a) program participation be limited to nine years. SBA already permits long-term contracts to extend for up to five years past the completion of a Participant's program term in the 8(a) program. Allowing firms to work on options indefinitely would conflict with Congress's clear desire for 8(a) Participants to leave the program and go on to successfully and independently participate in the government contracting arena. Further, SBA did not contemplate the proposed rules as a forced attempt to bring the 8(a) program requirements into alignment with the other programs, but rather as an opportunity to consider all the programs holistically. SBA respectfully disagrees with commenters who do not believe consistency between programs is a worthy goal. Consistency better enables small businesses and contracting officers to understand and comply with SBA's requirements, ensuring that eligible small businesses are equipped to bid on contracts that have been appropriately set aside. SBA is adopting the proposed changes as final.

#### Indirect Costs in Commercial Subcontracting Plans

Other than small business concerns that have a commercial subcontracting plan report on performance through a summary subcontract report (SSR), and SBA's rules currently require that a contractor using a commercial subcontracting plan must include all indirect costs in its SSR. However, SBA's rules do not require contractors to include indirect costs in their commercial subcontracting plan goals, which leads to inconsistencies when comparing the SSR to the commercial subcontracting plan. SBA proposed to revise § 125.3(c)(1)(iv) to require that prime contractors with commercial

subcontracting plans must include indirect costs in the commercial subcontracting plan goals. This will allow agencies to negotiate more realistic commercial subcontracting plans and monitor performance through the SSR. SBA received one comment in support of this change and is adopting the proposed rule as final.

#### Subcontracting Compliance Reviews

SBA proposed revisions to the nomenclature it uses regarding subcontracting compliance reviews in order to better align title 13 of the CFR with the FAR. Currently, the rating terminology differs between SBA's rating system under § 125.3(f)(3) (for an SBA Compliance Review) and that used pursuant to FAR 42.1503 (for a past performance evaluation including small business subcontracting under FAR 52.219-9). SBA believes the difference in terminology leads to confusion for Government personnel and industry partners attempting to ascertain the value of a rating. As such, in § 125.3(f)(3), SBA proposed to revise the terms used to rate firms from "Outstanding," "Highly Successful," or "Acceptable" to "Exceptional," "Very Good," and "Satisfactory," respectively. SBA received three comments in support of this change and, therefore, is adopting the proposed revisions as final.

#### Independent Contractors - Employees/Subcontractors

SBA's size regulations provide that SBA considers "all individuals employed on a full-time, part-time, or other basis" to be employees of the firm whose size is at issue. 13 CFR 121.106(a). "This includes employees obtained from a temporary employee agency, professional employee organization, or leasing concern." *Id.* Further, "SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern."

*Id.* In determining what it means to be employed on an “other” basis, SBA issued Size Policy Statement No. 1. 51 FR 6099 (February 20, 1986). The Size Policy Statement sets forth 11 criteria SBA will consider in determining whether an individual should be treated as an employee. If an individual meets one or more of the criteria, he or she may be treated as an employee. Pursuant to this guidance, an individual contractor paid through a 1099 may be properly treated as an employee for purposes of SBA’s regulations (including SBA’s regulations governing performance of work or limitations on subcontracting requirements). The reason for such treatment was to prevent a firm that exceeded an applicable employee-based size standard from “firing” a specific number of employees in order to get below the size standard, but to then hire them back or “subcontract” to them as independent contractors. SBA did not want to encourage firms to attempt to evade SBA’s size regulations.

Historically, SBA has said that if an individual qualifies as an “employee” under part 121 of SBA’s regulations for purposes of determining size, then SBA should consider that individual to be an employee of the firm for the performance of work (or now limitations on subcontracting) requirements of 13 CFR 125.6 (or 124.510). It would not be equitable to say that a given individual counts against a firm in determining size (because he/she is considered an “employee” of the firm) and then to say that that same individual also counts against the firm for the limitations on subcontracting requirements (because he/she is not considered an “employee” of the firm). Thus, for a contract that is assigned a NAICS code having an employee-based size standard, an independent contractor could be deemed an “employee” of the concern for which he/she is doing

work. If such an individual is considered an employee for size purposes, he/she would also be considered an employee for limitations on subcontracting purposes.

SBA's regulation at 13 CFR 125.6(e)(3) has caused some confusion as to how to properly treat independent contractors for purposes of the limitations on subcontracting provisions. That provision provides that, "Work performed by an independent contractor shall be considered a subcontract, and may count toward meeting the applicable limitations on subcontracting where the independent contractor qualifies as a similarly situated entity." (Emphasis added). This provision was meant to apply to service or construction contracts. For service contracts, work performed by an independent contractor would be considered a subcontract, so that a service contractor could not claim that a non-similarly situated entity independent contractor should be considered an employee of the service contractor. For example, for a WOSB service contract, SBA did not want a WOSB prime contractor to pass performance of the contract to one or more independent contractors that would not themselves qualify as WOSBs. The provision identifies that an independent contractor could qualify as a "similarly situated entity" and meet the limitations on subcontracting that way, but would not permit a service contractor to effectively avoid meeting the limitations on subcontracting by claiming that independent contractors were in fact employees of the firm.

The proposed rule revised § 125.6(e)(3) to clarify SBA's intent regarding both contracts assigned a NAICS code with an employee-based size standard and those assigned a NAICS code with a receipts-based size standard. Under the proposed rule, where a contract is assigned a NAICS code with an employee-based size standard, an independent contractor would be deemed an employee of the firm under the terms of the

Size Policy Statement. Where a contract is assigned a NAICS code with a receipts-based size standard, an independent contractor could not be considered an employee of the firm for which he or she is performing work, but, rather, would be deemed a subcontractor. In either case, as a subcontractor, an independent contractor may be considered a “similarly situated entity” and work performed by the independent contractor would then count toward meeting the applicable limitation on subcontracting.

SBA received thirteen comments on the proposed change. Ten opposed, two sought clarification, and one was supportive. The comments in opposition all expressed concern that the proposed rule was confusing, and that SBA’s intent was unclear and could be viewed as contradictory. Several pointed out that small businesses would need to devote unnecessary time and effort towards assessing whether an independent contractor counted as an employee or a subcontractor for a procurement. One commenter pointed out the difficulty for businesses performing contracts under both employee-based and revenue-based NAICS codes. SBA recognizes these concerns and concludes that it would be needlessly time-consuming and difficult for small businesses, especially those performing under multiple NAICS codes, to apply the rule consistently. SBA agrees with the commenters who pointed out that looking to § 121.106(a), which lays out the analysis of whether an individual is an employee or a sub-contractor, makes sense for all NAICS codes and contracts. As such, SBA has revised the proposed rule to clarify that contractors should apply the analysis in § 121.106(a) to determine whether independent contractors are employees or subcontractors, and that in situations where the independent contractor is a subcontractor, their work may be counted toward the applicable limitation on subcontracting if they are a similarly situated entity.

### Limitation on Subcontracting Compliance

Congress has expressed its strong support for small business government contracting, and has provided agencies with numerous tools to set aside acquisitions for exclusive competition among, or in some cases award contracts on a sole source basis to, SBCs, 8(a) BD Program Participants, HUBZone SBCs, WOSBs, Economically Disadvantaged Women-Owned (EDWOSB) SBCs, and SDVO SBCs. 15 U.S.C. 631(a), 637(a), (m), 644(a), (j), 657a, 657f. As a condition of these preferences, small businesses are limited in their ability to subcontract to other than small business concerns, so that small businesses perform a certain percentage of the work. These limitations on subcontracting appear in solicitations and contract clauses for small business set-aside and sole-source awards. As with all contract administration, it is the responsibility of the contracting officer to monitor compliance with the terms and conditions of a contract. (FAR 1.602-2, including the limitations on subcontracting clause). SBA proposed language to clarify that contracting officers have the discretion to request information from contractors to demonstrate compliance with limitations on subcontracting clauses. The Government Accountability Office (GAO) has noted in reports that contracting officers have not been monitoring compliance with the limitations on subcontracting. “Contract Management: Increased Use of Alaska Native Corporations’ Special 8(a) Provisions Calls for Tailored Oversight,” GAO-06-399, April 2006; “8(a) Subcontracting Limitations: Continued Noncompliance with Monitoring Requirements Signals Need for Regulatory Change,” GAO-14-706, September 2014; and “Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention,” GAO-12-84, January 2012. The type of information that small business prime contractors may be requested to

provide to demonstrate compliance with the limitations on subcontracting could be copies of subcontracts for a particular procurement or an email that lists the amount that the prime contractor has paid to its subcontractors for a particular procurement and whether those subcontractors are similarly situated entities. In addition, SBA proposed to require information demonstrating compliance with the applicable limitations on subcontracting from all prime contractors performing set-aside and sole source contracts awarded through SBA's small business programs when the prime contractor intends to rely on similarly situated subcontractors to comply with the limitations on subcontracting. 79 FR 77955 (December 29, 2014). SBA did not adopt such a requirement in the final rule but indicated that it intended to seek comment on this issue. 81 FR 34243 (May 31, 2016).

SBA proposed adding new § 125.6(e)(4) to clarify that contracting officers may request information regarding limitations on subcontracting compliance, and to clarify that it is not required for every contract. SBA requested comment on whether all small business prime contractors performing set-aside or sole source contracts should be required to demonstrate compliance with limitations on subcontracting to the contracting officer, and if so, how often should this be required, such as annually or quarterly.

SBA received 17 comments with a range of suggestions. Nine commenters opposed regular mandatory reporting requirements. Five comments supported a requirement that contractors must demonstrate limitations on subcontracting compliance annually. One commenter thought compliance should be demonstrated once per base period. Another suggested once during the base period, once during each subsequent option period, and at completion. A third suggested that contracting officers should ask for evidence of compliance if they believe "there is reason for additional evidence to be

submitted.” Comments about what type of evidence would suffice similarly ranged among several options. Two commenters suggested using the same type of evidence required for mentor-protégé joint venture performance of work requirements. Two others suggested copies of subcontracting agreements or a list of subcontractors paid that note which subcontractors are similarly situated. Several commenters, both those in favor of a mandatory reporting rule and those opposed, thought if and when such evidence was required, contracting officers should have discretion to request the documents they deem relevant. On balance, SBA agrees that contracting officers are best positioned to assess if, how, and when additional scrutiny of contractors’ limitations on subcontracting compliance would be helpful. As such, the final rule does not require limitations on subcontracting compliance reporting but, rather, indicates that contracting officers have the discretion to request demonstration of compliance at any point during performance or upon completion of a contract. The rule includes examples of what documentation could adequately demonstrate compliance but is not intended to be an exhaustive list.

#### Exclusions from the Limitations on Subcontracting

SBA’s limitations on subcontracting regulations provide that for a set-aside service contract, the prime contractor must agree that it will not pay more than 50% of the amount paid from the Government to firms that are not similarly situated. 13 CFR 125.6(a)(1). Unlike supply and construction contracts, where materials are excluded, no costs are specifically excluded under a service contract, other than for mixed contracts where the non-service portion, such as incidental supplies, are excluded. SBA has received several requests from industry for exclusions related to specific types of contracts, and one related to all industries. Some have advocated that certain other direct

costs, such as airline tickets and hotel costs, be excluded from the calculation of the amount paid under the contract. In addition, in certain types of contracts or industries, there are factors that may complicate compliance with the limitations on subcontracting, potentially hindering agencies from setting aside acquisitions for small business concerns.

For example, for certain contracts performed outside of the United States, contractors must use non-U.S. local organizations or independent contractors to perform consulting services regarding a particular foreign country. These individuals are not located in the United States, do not reside in the United States, and are not likely to be employees of a United States small business concern. SBA proposed to clarify how to determine whether work performed by certain required contractors should be considered. Specifically, SBA proposed that work performed by an independent contractor under a contract that was awarded pursuant to the Foreign Assistance Act of 1961 could be excluded from determining limitations on subcontracting compliance. 22 U.S.C. 2151 et seq. SBA received one comment on this provision. The commenter disagreed with the proposed language in § 125.6(a)(1) because it allowed but did not mandate that work performed by individuals on contracts outside the United States pursuant to the Foreign Assistance Act of 1961 could be excluded from determining limitations on subcontracting compliance. The commenter suggested using language indicating that such exclusion is mandatory. In addition, the commenter noted that not all work performed outside the United States for which some portion of local performance is required is done under the Foreign Assistance Act of 1961. SBA agrees that any work required to be done by local foreign contractors should be excluded from any limitations

on subcontracting determination (i.e., should be excluded from the “total value of the contract” in determining whether a small business did not subcontract more than the limitations on subcontracting percentage) and has changed the text of § 125.6(a)(1) to reflect that.

In the environmental remediation industry (NAICS 562910), a large part of the cost of the contract is tied to the transportation and disposal of hazardous, toxic, and radiological waste. According to some SBCs in this industry that have contacted SBA, given the fact that these services are highly regulated and capital intensive, these particular transportation services can generally be performed only by other than small business concerns. For example, all the disposal facilities in the United States are large businesses, and most railroads and shipping companies that transport hazardous waste are other than small business concerns. This rule proposed to exclude transportation and disposal services from the limitations on subcontracting compliance determination where small business concerns cannot provide the disposal or transportation services. Similarly, where the Government acquires media services from small business concerns, the placement of the content in the media may require large payments to the other than small business concerns, even though that is not the principal purpose of the acquisition. SBA proposed to exclude these media purchases from the limitations on subcontracting determination.

In a prior rulemaking, SBA determined that remote hosting on servers or networks, or cloud computing, should be considered a service and therefore the NMR would not apply. 13 CFR 121.1203(d)(3). Due to the costs and scale involved, cloud computing is generally provided by other than small business concerns. SBA proposed to

exclude cloud computing from the limitations on subcontracting calculation, where the small business concern will perform other services that are the primary purpose of the acquisition. Of course, where cloud computing itself is the primary purpose of the procurement, the limitations on subcontracting could not be met by a small business, and, therefore, such a procurement should not be set aside or reserved for small business.

Of the 17 comments received regarding excluding direct costs to the extent they are not the principal purpose of the acquisition, nearly all supported SBA's intent behind the proposed rule. Eleven commenters supported the proposed language without additional change. Four commenters supported the categories SBA included in the proposed rule, but opposed the rule on the basis that it was not broad enough and requested that SBA exclude all other direct costs from limitations on subcontracting compliance calculations. SBA does not believe that all direct costs should be excluded from the limitations on subcontracting determination. In addition, SBA does not believe that the statutory language would support such a change.

Based on the positive feedback from industry, the final rule at 125.6(a)(1) adopts the language that specifies that the above-mentioned industries are excluded from limitations on subcontracting compliance calculations. The regulatory text provides that 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" in the four identified industries (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). The regulatory text is not meant to be inclusive. It allows a small business in another industry in a similar situation to the four

identified to also demonstrate that certain direct costs should be excluded because they are not the principal purpose of the acquisition and small business concerns do not provide the service.

One commenter requested clarification as to whether SBA intended for only services to be excluded. As discussed, supply and construction contracts already have industry-specific exclusions, so this provision is intended to bridge a gap that SBA saw regarding service contracts.

Subcontracting to a Small Business under a Socioeconomic Program Set-Aside

In the context of socioeconomic set-aside or sole-source service contracts, the ostensible subcontractor rule applies when a small business is unduly reliant on an other than small business subcontractor, or when the other than small subcontractor will perform primary and vital parts of the contract. In such cases, assuming that an exception to joint venture affiliation does not apply, SBA will treat the small business prime contractor and its subcontractor as joint venturers. If the subcontractor is other than small, the prime contractor is ineligible for award due to this affiliation. SBA has become aware of service contract set-asides for the SDVO, HUBZone, 8(a) or WOSB programs where the prime contractor subcontracts most or all of the actual performance to a small business that is small for the applicable NAICS code but not eligible to compete for award of the prime contract and thus not a similarly situated entity as that term is defined at § 125.1.

Under SBA's joint venture rules, 13 CFR 121.103(h)(3)(i)), a joint venture can qualify as small if each member of the joint venture is small. In the scenario described above, the size regulation would not prevent the joint venture from being eligible for the

contract (i.e., where both parties to a joint venture are small, the joint venture itself is small). There is no existing regulatory mechanism for an unsuccessful offeror, the SBA, or a contracting officer to protest a socioeconomic set-aside or sole-source award to a prime contractor that is unduly reliant on a small, but not similarly situated entity, subcontractor. The underlying premise that ostensible subcontractors and their prime contractors should be treated as joint ventures is still SBA's policy. Firms that are performing contracts in a manner more consistent with a joint venture than a prime/sub relationship should follow the requirements of SBA's regulations regarding socioeconomic joint ventures.

The performance of a set-aside or sole source service contract by a small business concern that is not eligible to compete for the prime contract is contrary to the intent and purpose of the statutory authorities for socioeconomic category set-aside and sole source procurements. Thus, SBA proposed language at §§ 124.503(c)(1)(v), 124.507(b)(2), 125.18(f), 125.29(c), 126.601(i), 126.801(a), 127.504(c), and 127.602 to allow SBA to make a determination concerning a small business program participant's overreliance on a non-similarly situated subcontractor as part of an eligibility or status protest determination. SBA's intent was to evaluate these contractor relationships under the established ostensible subcontractor test. If SBA finds that the subcontractor is an ostensible subcontractor, SBA will treat the arrangement between the contractors as a joint venture that does not comply with the formal requirements necessary to receive and perform the socioeconomic program set-aside or sole-source award as a joint venture.

SBA received 32 comments on the proposed change to the rules on subcontracting to a small business under a socioeconomic set-aside. Several commenters opposed the

change because they believed that subcontracting to a small business, even if it is not a similarly situated entity, still benefits the small business community. While SBA encourages benefits that accrue to the small business community as a whole, Congress's clear intent in authorizing separate and distinct Government contracting programs was to bolster specific socioeconomic groups' ability to successfully compete for and perform on Government contracts. SBA would be subverting Congress's intent if it focused on rules that benefit the overall small business community at the expense of the groups identified by Congress as meriting focus. As such, SBA continues to believe that it is constrained by statute to ensure that the eligible prime contractor together with one or more other similarly situated small businesses is performing the primary and vital requirements of a contract by meeting the applicable limitation of subcontracting percentage.

Other commenters protested on the basis that requiring small business prime contractors to ensure that their subcontractors are similarly situated entities would be overly burdensome. Again, SBA appreciates this concern, but it does not outweigh SBA's mandate to protect the interests of participants in its Government contracting programs.

Another commenter recommended that instead of applying the ostensible subcontractor standard in this context, SBA should merely require that the 8(a)/HUBZone/WOSB/SDVOSB contractor be able to demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions. SBA agrees that if the awardee together with similarly situated entities will meet the limitations on subcontracting provisions, SBA would not have to look further to

determine who is doing the primary and vital parts of a contract. The final rule adopts the proposed language recognizing that where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside or sole-source service contract or order, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside service or sole-source contract or order, the prime contractor is not eligible for award of an SDVO, WOSB, HUBZone or 8(a) contract. However, the final rule also specifies that SBA will not find that a prime contractor is unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in §125.6.

Finally, one commenter recommended a comparable change to § 134.1003 with respect to protests of SDVO eligibility for contracts awarded by the Department of Veterans Affairs (VA). Specifically, the commenter believed that similar treatment should be afforded to a firm that was verified as an SDVO small business by VA's Center for Verification and Evaluation (CVE), received a VA contract that was restricted to CVE-verified SDVO small business concerns, and then subcontracted primary and vital portions of the contract to a non-CVE-verified business concern, whether or not small. SBA agrees, and has added a new paragraph to § 134.1003 that would authorize a protest challenging whether the prime contractor is unusually reliant on a subcontractor that is not CVE verified, or a protest alleging that such subcontractor is performing the primary and vital requirements of a VA procurement contract.

### Kit Assemblers

SBA proposed to remove specific rules related to kit assemblers and the NMR, which are currently contained at 13 CFR 121.406(c). The existing kit assembler rule requires that 50 percent of the total value of the items in the kit must be manufactured by small business concerns, but excludes items manufactured by other than small business concerns if the contracting officer specifies the item for the kit. This rule has led to confusion concerning how to calculate total value, and whether a waiver of the non-manufacturer rule can or must be requested in order to supply items manufactured by other than small concerns. If the majority of items in a kit are made by small business concerns, then the acquisition can be set aside for small business without the need to request a waiver. If the majority of items in a kit are not made by small business concerns, then an individual or class waiver of one or more of the items is necessary for the acquisition to be set aside for small business concerns for acquisitions above the simplified acquisition threshold or for all other socioeconomic set-asides, regardless of value. In connection with this rule, SBA proposed to delete the kit assembler exception and instead apply the multiple item rule in § 121.406(e) to kit assembler acquisitions. Like all other acquisitions, the NMR will not apply to small business set-asides with a value at or below the simplified acquisition threshold. SBA received four comments on this proposed change, evenly split between those opposed and those in support. The comments opposed did so because they believe kit assemblers should be excluded from the limitations on subcontracting compliance calculation, along with the other identified groups in the proposed rule at § 125.6. The proposed rule did not contemplate exclusions beyond those already identified. The commenters supporting the change believe that

applying the multiple item rule in § 121.406(e) to kit assemblers makes sense and makes a separate rule for kit assemblers unnecessary. The rule adopts the proposed language as final.

#### Clarification on Size Determinations

SBA proposed to remove language that has caused confusion on when size is determined. The general rule is that size is determined at the time of initial offer including price, with the understanding that there are some exceptions such as architecture and engineering procurements, and certain unpriced indefinite delivery indefinite quantity (IDIQ) contracts. However, § 121.404(a) also contains the parenthetical, “(or other formal response to the solicitation).” Some parties have misread this to mean formal responses that are after the initial offer, such as final proposal revisions. The clear intent of SBA’s general rule is to give both firms and the Government certainty that size will be determined at the time of the initial response, including price. Offer covers bids and proposals, and SBA recognizes that in simplified acquisitions the initial response may be acceptance of the Government’s offer. Thus, SBA proposed adding a paragraph at § 121.404(a)(1)(iv), to articulate an exception to the general rule for when size is determined. When an agency uses an IDIQ multiple award contract that does not require offers for the contract to include price, size will be determined on the date of initial offer for the IDIQ contract, which may not include price. This proposed change reflects the statutory change found at section 825 of the National Defense Authorization Act for Fiscal Year 2017, 114 Pub. L. 328, (December 23, 2016), and section 876 of the John S. McCain National Defense Authorization Act for Fiscal

Year 2019, 115 Pub. L. 232, (August 13, 2018). SBA also amended 121.404(g)(5) to reflect the proposed change to 121.103(h)(4) (removing “and therefore affiliates”).

SBA received 13 comments on the proposed changes to § 121.404. Three of these opposed the changes, but all three referenced SBA’s current rule requiring recertification at the time of a merger or acquisition at § 121.404(g)(2)(i). SBA did not propose to revise that provision. Of the ten comments that pertained to the proposed changes, all ten were supportive of the changes. Commenters appreciated the clarification and believe that the proposed language will reduce confusion and uncertainty for small businesses. SBA is adopting the proposed language as final.

SBA proposed to amend § 121.103(h)(4) to clarify that when two or more small businesses either form a joint venture or are treated as joint venturers due to their relationship as prime and subcontractor, the joint venture exception to affiliation found at § 121.103(h)(3)(i) applies if both firms are considered small for the size standard associated with the procurement. SBA proposed to remove the phrase “and therefore affiliates” from the ostensible subcontractor rule at § 121.103(h)(4) to clarify this point. To allow affiliation between firms that are considered joint venturers because of their ostensible subcontracting relationship, even when each firm is individually small for the size standard associated with the procurement, would negate the purpose of § 121.103(h)(3)(i), which explicitly provides an exception to affiliation for such joint ventures.

The purpose of the ostensible subcontractor rule is to treat the relationship between a prime contractor and its subcontractor as a joint venture where the subcontractor performs primary and vital work for the procurement. SBA’s current joint

venture rules do not aggregate the partners to a joint venture in determining the size of the joint venture, but rather permit a joint venture to qualify as small as long as each partner to the joint venture is individually small. Thus, a rule that equates a prime-sub relationship to that of a joint venture because the subcontractor is performing primary and vital work and then affiliates the two parties (i.e., requiring them to aggregate their revenues or employees) is inconsistent with the joint venture size rules themselves. The phrase “and therefore affiliates” that SBA proposed to delete was a holdover from previous regulations that aggregated the receipts or employees of joint venture partners when determining whether a joint venture qualified as a small business. When SBA changed its size regulations to broaden the exclusion from affiliation for small business to allow two or more small businesses to joint venture for any procurement without being affiliated (i.e., the joint venture would be considered small provided each of the joint venture partners individually qualified as small and SBA would not aggregate the receipts or employees of joint venture partners), SBA amended § 121.103(h)(3), but did not make a correspondingly similar change in § 121.103(h)(4). See 81 FR 34243, 34258 (May 31, 2016).

All 12 comments on § 121.103(h)(4) expressed confusion at the current disconnect between the ostensible subcontractor rule at § 121.103(h)(4) and the exception to affiliation for joint venture language at § 121.103(h)(3)(i). Commenters supported a clarification. SBA believes removing “and therefore affiliates” from § 121.103(h)(4) will clear up this confusion and is adopting the proposed change as final.

### Clarification Where One Acceptable Offer is Received on a Set-Aside

SBA proposed to add new § 125.2(a)(2) to clarify that a contracting officer may make an award under a small business or socioeconomic set-aside where only one acceptable offer is received. The decision to conduct a set-aside is grounded in the contracting officer's expectation based on market research that he or she will obtain two or more fair market price offers from capable small business concerns. Pursuant to the FAR, the contracting officer must perform market research before issuing a solicitation to determine whether there are small businesses (including 8(a), HUBZone, SDVO SBCs, WOSBs) that can perform the requirement. 48 CFR 10.001(a)(2); 19.202-2. A contracting officer's "rule of two" determination is prospective. Whether there appear to be at least two small businesses that can perform a procurement at a fair price is an analysis that is done during acquisition planning and prior to the issuance of a solicitation. As long as the market research leads a contracting officer to conclude that the agency will receive acceptable offers from at least two small business concerns and award will be made at a fair market price, the "rule of two" is satisfied, no matter how many offers are actually received or how many offers remain after evaluations are conducted, a competitive range is established, or offerors are eliminated in some other fashion.

The FAR currently addresses small business set-asides below \$150,000, and provides, "If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm." FAR 19.502-2(a). There is no reason this policy should not apply to all set-asides above or below \$150,000. The contracting officer must determine that an

offeror is responsible, and price is fair and reasonable before awarding any contract. FAR 9.103(a); 9.104-1; 14.408-2; and 15.304(c)(1). It would be inefficient and detrimental to the Government and offerors to arbitrarily prevent an award where a competition was conducted but only one offer was received. Such a policy would unreasonably prolong the procurement process, requiring a procuring agency to cancel one solicitation and re-procure using another where only one small business offer is received, and could cause contracting officers to limit the use of set-asides. SBA received no comments opposing this proposed change and adopts it as final in this rule.

**Compliance with Executive Orders 12866, 13563, 12988, 13132, 13771, the Unfunded Mandates Reform Act of 1995, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)**

**Executive Order 12866**

The Office of Management and Budget (OMB) has determined that this rule is a “significant” regulatory action for purposes of Executive Order 12866. The benefits to small business from this rule far outweigh any associated costs. The rule makes several other changes needed to clarify ambiguities in or remedy perceived problems with the current regulations. These changes should make SBA’s regulations easier for SBCs to use and understand. The change to § 121.404 clarifies when size for a Government contract is determined, which will reduce confusion for small business concerns. The change to § 121.406 clarifies that the size standard for information technology value added resellers is 150 employees, again to eliminate confusion among small business concerns. The changes to § 125.2(a) will benefit small business by clarifying that a contracting officer can award a contract to a small business under a set-aside if only one

offer is received. The changes to § 125.2(b) implement section 1811 of the NDAA of 2017 and govern what acquisitions PCRs can review and would not impact small business concerns. The changes to § 125.2(d) implement section 863 of the NDAA of 2016 and direct contracting officers on how to notify the public about consolidation and substantial bundling and will not impact small business concerns. The changes to § 125.2(e) authorize agencies to set aside orders for socioeconomic programs where the contract was set aside for small business and will benefit firms that qualify for those set-asides. The changes to § 125.3 implement section 1821 of the NDAA of 2017 by providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, and will benefit small businesses by providing such examples so that contracting officers can hold other than small prime contractors accountable for failing to make a good faith effort to comply with their small business subcontracting plan. The changes to § 125.3 also implement section 1821 by providing that the contracting officer should evaluate whether an other than small business complied with the requirement to report on small business subcontracting plan performance. The changes to § 125.6(a) will benefit small business concerns by allowing small businesses to exclude certain costs from the calculation of the limitations on subcontracting. Without these changes, some agencies will not be able to set contracts aside for small business, because certain costs attributable to other than small concerns are too high. The changes to § 125.6 also help small businesses by clarifying the difference between an employee and an independent contractor. The changes to § 125.6 will impose some requirements on small business concerns to demonstrate compliance with the limitations on subcontracting, but only to the extent the information is not already in the possession

of the government. Contractors may have this information readily available since it pertains to contract performance and subcontracting of that performance. These information requests are not mandatory, as the contracting officer simply has the discretion to request such information. Contracting officers already have the authority to request information on performance, and this change simply clarifies that the authority exists. Finally, the benefits to small business concerns of this rule substantially outweigh any minor costs imposed by the exercise of existing contracting authority. The addition of part 129 implements section 2108 of the RISE Act and benefits small businesses by providing agencies with an incentive to set aside contracts for small business concerns located in a disaster area. Accordingly, the next section contains SBA's Regulatory Impact Analysis. However, this is not a major rule under the Congressional Review Act, 5 U.S.C. 801, et seq.

Regulatory Impact Analysis:

1. Is there a need for the regulatory action?

The rule implements section 863 of the National Defense Authorization Act of 2016, Public Law 114-92, 129 Stat. 726 (15 U.S.C. 644(e)(3)); section 2108 of the Recovery Improvements for Small Entities After Disaster Act of 2015 (RISE Act), Public Law 114-88, 129 Stat. 686 (15 U.S.C. 644(f)); and sections 1811 and 1821 of the National Defense Authorization Act of 2017, Public Law 114-328, 130 Stat. 2000 (15 U.S.C. 637(d), 644(l)). In addition, it makes several other changes needed to clarify ambiguities in or remedy perceived problems with the current regulations. These changes should make SBA's regulations easier to use and understand. With respect to contractors demonstrating compliance with the limitations on subcontracting, for decades

the general rule has been that on a set-aside contract, a small business or socioeconomic small business must generally perform some of the work (services, construction, or manufacturing). This helps ensure that the benefits of a small business set-aside contract flow to the recipients whom Congress intends to help by creating the set-aside authority. If performance of a set-aside contract is passed through to other than small business concerns, there may not be a need for set-asides in the first place, and the Government may be paying more for a good or service without any value added. These limitations on subcontracting appear as a clause in a set-aside contract and help to ensure that the intended beneficiaries of set-aside contracts are receiving those benefits. The contracting officer is responsible for monitoring compliance with clauses in a contract. FAR 1.602. Nothing in SBA's regulations or the FAR prohibits a contracting officer from requesting documents demonstrating compliance with the limitations on subcontracting clause. It is SBA's view that such authority exists, but that the authority is not clear or express. Without clarifying the authority or process, some contracting officers simply are not monitoring compliance. The result is that there may be increased fraud, waste, and abuse in the performance of contracts that are set aside for small business concerns, because subcontractors that are not eligible to receive the prime contract may be performing more work than section 46 of the Small Business Act (15 U.S.C. 657s), SBA regulations at 13 CFR 125.6, and FAR clause 52.219-14 permit. This type of fraud frustrates the policy goals associated with awarding contracts set aside for small business concerns.

In this rule, SBA clarifies that the contracting officer may request information to demonstrate a contractor's compliance with the limitations on subcontracting clause. SBA also clarifies that it is within the contracting officer's discretion to request such a

showing of compliance, because in some cases it will not be necessary, such as when a small business performs the contract itself without the use of subcontractors or when information regarding compliance is already available to the Government. Through this rule, SBA intends to deter and reduce potential fraud, waste, and abuse, due to noncompliance with the limitations on subcontracting. Additionally, clarifying a contracting officer's authority to request that a small business concern demonstrate compliance with the limitations on subcontracting is consistent with recommendations made by the U.S. Government Accountability Office (GAO) in several reports: "Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight," GAO-06-399, April 2006; "8(a) Subcontracting Limitations: Continued Noncompliance with Monitoring Requirements Signals Need for Regulatory Change," GAO-14-706, September 2014; and "Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention," GAO-12-84, January 2012.

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

The majority of the changes in this rule will have de minimis costs and qualitative benefits that are difficult to quantify: protecting the integrity of the small business procurement system. The rule will provide exceptions to the limitations on subcontracting in certain service contracts where small businesses must use the services of other than small subcontractors in substantial amounts in order to fully perform a set-aside service contract. This will help small business by making acquisitions available for small business set-asides that would not otherwise be available. Many of the other clarifications in this rule will benefit small businesses by reducing confusion in the

marketplace, but this benefit is difficult to quantify. The provision allowing agencies to receive double credit toward their small business procurement goals for awards to local small business concerns in the event of a disaster is intended to benefit local small businesses and provide employment and revenue to concerns located in an area devastated by a disaster. While the authority for contracting preferences for businesses located in a disaster area already exists in FAR subpart 26.2, small businesses located in these areas may receive a greater benefit under this rule due to the incentive for the procuring agency to receive double credit toward its small business procurement goals by utilizing this authority.

We believe that, pursuant to FAR 1.602-2, contracting officers already possess the authority to request information from a contractor concerning compliance with a clause in the contract at issue. In addition, on some contracts, compliance can already be reviewed or monitored by reviewing invoices. This rule clarifies that contracting officers have the authority to request information in connection with a contractor's compliance with applicable limitations on subcontracting clauses. Approximately 53,000 firms received approximately 185,000 sole-source or set-aside awards in FY 2018. SBA is clarifying that a contracting officer may request information regarding compliance with prime contractors' limitations on subcontracting. In some cases, this information may not be necessary based on the nature of the contract and the invoices submitted. SBA estimates that less than ten percent of small business concerns and contracts will be subject to a request for this information (5,300 small business concerns and 18,500 contracts), and compliance should take on average less than an hour. Small businesses that do not issue subcontracts will not have anything to report. Small businesses may be able to easily

report on any subcontracts, as information on subcontracting and paying subcontractors is routinely compiled as part of the normal accounting procedures for any business concern. Accounting or contract management personnel should be able to determine whether the firm issued any subcontracts in connection with the prime contract. SBA estimates an overall annual cost of approximately \$815,110 for small businesses to provide information on compliance with the limitations on subcontracting, as requested by the contracting officer. The difference between this figure and the \$600,120 figure cited in the rule reflects an adjustment in the hourly wage rate included as part of the calculation of the overall annual cost. After adding approximately 30% to the hourly wage rate to account for the cost of benefits, SBA arrived at \$815,110 as more accurately reflecting the estimated overall annual cost.

This rule will require an other than small prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals. Based on data from the Electronic Subcontracting Reporting System (eSRS), in FY 2018, approximately 1200 firms had commercial subcontracting plans. SBA estimates that approximately 95% of those 1200 firms include indirect costs in their subcontracting goals. Thus, this rule will impact approximately 60 firms. The burden will be de minimis, as the accounting or contract manager will know the firm's indirect costs. The benefit of requiring that indirect costs be included in subcontracting goals where a commercial subcontracting plan is utilized, is that it will increase the small business subcontracting goal and thus increase the amount of funds the prime contractor will subcontract to small business concerns. Increasing the value and number of awards to small business concerns provides financial benefits to those firms, who may hire more staff and invest in

more resources to support the increased demand. Furthermore, increasing the number and value of awards to small business concerns has macroeconomic and qualitative benefits to the national economy because small businesses are the foundation of the country's economic success.

This rule will establish that failure to provide timely subcontracting reports may constitute a material breach of the contract. These reports are already required by law at 13 CFR 125.3(a). This rule will make failure to provide the report a material breach of the contract, which could subject other than small business concerns to liquidated damages. SBA is not aware of any case where a firm has been subject to liquidated damages for failure to comply with a subcontracting plan. Thus, any costs will be de minimis. The benefit of this rule is that it will assist SBA and contracting officers with oversight of prime contractor compliance with subcontracting plans and should result in increased compliance with subcontracting plans.

This final rule requires recertification of status on full and open contracts. SBA intended for recertification to occur whenever an agency receives credit for an award towards its goals, and this rule is merely a clarification that socioeconomic recertification is required on all contracts, including full and open contracts. We estimate that approximately 150 firms a year recertify on full and open contracts. This will only impact firms that are acquired, merged, or where there is a novation or the firm grows to be other than small on a long-term contract. Agencies have goals for the award of prime contractor dollars to small and socioeconomic concerns. The purpose of recertification is to ensure that an agency does not receive small business credit for an award to an other than small concern.

This rule will limit the scope of PCR reviews of Department of Defense acquisitions performed outside of the United States and its territories. This applies to the Government and will not impose costs or burdens on the public.

This rule will remove the kit assembler exception to the non-manufacturer rule. This clarification requires agencies to request a waiver of the non-manufacturer rule for kits, in accordance with existing regulations. This will reduce confusion by having only one non-manufacturer rule procedure for purposes of multi-item procurements.

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

Many of the provisions contained in this rule are required to implement statutory provisions, thus there are no apparent alternatives for these regulations. With respect to the provision clarifying that contracting officers may request information on compliance with the limitations on subcontracting, SBA considered whether prime contractors should be required to provide this information on compliance with the limitations on subcontracting on all set-aside or sole source contracts. However, SBA believed that would unnecessarily burden small businesses, if compliance is already readily apparent to the contracting officer based on the type of contract, invoicing, or observation. We estimate the alternative considered, having all small businesses provide information on compliance, would have an annual cost of \$1,867,040. SBA decided to clarify instead that the contracting officer has the discretion to request such information to the extent such information is not already available. This will enable the contracting officer to request this information as he or she sees fit, to ensure that the benefits of the small business programs are flowing to the intended recipients.

Executive Order 13563

As far as practicable or relevant, SBA considered the requirements below in developing this rule.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible, the Agency utilized the most recent data available in the Federal Procurement Data System – Next Generation, System for Award Management and Electronic Subcontracting Reporting System.

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

SBA published a proposed rule with a 60-day comment period, and the proposed rulemaking was posted on [www.regulations.gov](http://www.regulations.gov) to allow the public to comment meaningfully on its provisions. In addition, the proposed rule was discussed with the Small Business Procurement Advisory Council, which consists of the Directors of the Office of Small and Disadvantaged Business Utilization. SBA also submitted the rule to multiple agencies with representatives on the FAR Acquisition Small Business Team

prior to submitting the rule to OMB for interagency review. SBA received almost 250 specific comments to the proposed rule, which SBA considered in drafting this final rule.

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

Yes, this rule implements statutory provisions and clarifies certain SBA regulations, as requested by agencies and stakeholders. In addition, SBA clarifies that contracting officers may request information from their contractors to determine whether the contractor is complying with the limitations on subcontracting. This information may already be provided as part of invoicing under certain contracts, and in any event, the information should be readily provided by the contractor, as it simply pertains to what extent the prime contractor is subcontracting work under the contract. Clarifying that the contracting officer has the authority to request this information, instead of requiring all small businesses to submit reports, significantly reduces cost and burden.

Executive Order 12988

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

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

### Executive Order 13771

This rule is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this rule can be found in the rule's regulatory impact analysis.

### Unfunded Mandates Reform Act of 1995

This rule will not result in an unfunded mandate that will result in expenditures by State governments of \$100 million or more (adjusted annually for inflation since 1995).

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

Small businesses, such as 8(a) BD Program Participants, HUBZone SBCs, WOSBs, Economically Disadvantaged Women-Owned (EDWOSBCs), and SDVO SBCs, are eligible to receive set-aside or sole source contracts. 15 U.S.C. 631(a), 637(a), (m), 644(a), (j), 657a, 657f. As a condition of these preferences, and to help ensure that small businesses actually perform a certain percentage of the work on a contract, the recipients of set-aside or sole source contracts are limited in their ability to subcontract to other than small business concerns by the limitations on subcontracting clauses in the particular contract. See, 48 CFR 52.219-3, 52.219-4, 52.219-7, 52.219-14, 52.219-18, 52.219-27, 52.219-29, 52.219-30. Contracting officers are responsible for ensuring contractor compliance with the terms of a contract (FAR 1.602-2). This rule will provide express authority for contracting officers to request information on contractors' compliance with the limitations on subcontracting requirements. SBA did not receive any comments on this information collection.

SBA sought review and approval from OMB for this information collection, as discussed in the proposed rule. SBA received a Notice of Office of Management and Budget Action on June 10, 2019, certifying OMB pre-approval of the information

collection. SBA is not making any substantive changes to the information collection described in the proposed rule and submitted to OMB. The information collection is titled “Compliance with the Limitations on Subcontracting” and has been assigned OMB Control Number 3245-400.

A summary description of the reporting requirement, description of respondents, and estimate of the annual burden is provided below. Included in the estimate is the time for reviewing requirements, gathering and maintaining the data needed, and submitting the report to the contracting officer.

Title: Compliance with the Limitations on Subcontracting

OMB Control Number: 3245-0400

Summary Description of Compliance Information: In order to show that it is in compliance with the limitations on subcontracting terms that are included in its set-aside or sole source contract, a small business concern may be required to submit certain information to the contracting officer. The specific information relevant to a particular contract will be identified by the contracting officer but could include, where applicable, identification of subcontractor, dollar amount of subcontract, and costs to be excluded from the limitations on subcontracting calculation (e.g., for contracts for supplies, materials).

Description of and Estimated Number of Respondents: Small business concerns that are awarded set-aside or sole source contracts. Based on FPDS data, SBA estimates that approximately 53,000 concerns receive approximately 185,000 small business sole source or set-aside awards in a fiscal year and that no more than ten percent (5,300) of concerns will be asked to provide information on compliance with the limitations on

subcontracting for no more than ten percent (18,500) of the awards that have been received.

Estimated Annual Responses: 18,500

Estimated Response Time Per Respondent: 1 hour

Total Estimated Annual Hour Burden: 18,500

Estimated Costs Based on Respondent's Salary: \$44.06/hour (based on 2018 Median Pay for accountants and auditors, Bureau of Labor Statistics, plus an additional 30% to account for cost of benefits, as discussed in the Regulatory Impact Assessment)

Total Estimated Hour Annual Cost Burden: 18,500 hours x \$44.06/hour =  
\$815,110

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

Under the Regulatory Flexibility Act (RFA), this rule may have a significant on a substantial number of small businesses. Immediately below, SBA sets forth a final regulatory flexibility analysis (FRFA) addressing the impact of the rule in accordance with section 603, title 5, of the United States Code. The FRFA examines the objectives and legal basis for this rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this final rule; and whether there are any significant alternatives to this final rule.

#### 1. What are the need for and objective of the rule?

The rule implements section 863 of the National Defense Authorization Act of 2016, Public Law 114-92, 129 Stat. 726 (15 U.S.C. 644(e)(3)); section 2108 of the Recovery Improvements for Small Entities After Disaster Act of 2015 (RISE Act), Public

Law 114-88, 129 Stat. 686 (15 U.S.C. 644(f)); and sections 1811 and 1821 of the National Defense Authorization Act of 2017, Public Law 114-328, 130 Stat. 2000 (15 U.S.C. 637(d), 644(l)). In addition, the rule makes several other changes needed to clarify ambiguities in or remedy perceived problems with the current regulations. These changes should make SBA's regulations easier to use and understand. The rule will make it easier for agencies to award set-aside contracts to SBCs. Failure to promulgate this rule could result in a loss of set-aside opportunities for SBCs.

The change to § 121.404 clarifies when size for a Government contract is determined, which will reduce confusion for small business concerns. The change to § 121.406 clarifies that the size standard for information technology value added resellers is 150 employees, again to eliminate confusion among small business concerns. The changes to § 125.2(a) will benefit small business by clarifying that a contracting officer can award a contract to a small business under a set-aside if only one offer is received. The changes to § 125.2(b) implement section 1811 of the NDAA 2017 and govern what acquisitions PCRs can review and would not impact small business concerns. The changes to § 125.2(d) implement section 863 of the NDAA of 2016 and direct contracting officers on how to notify the public about consolidation and substantial bundling and will not impact small business concerns. The changes to § 125.2(e) authorize agencies to set aside orders for socioeconomic programs where the contract was set aside for small business and will benefit firms that qualify for those set-asides. The changes to § 125.3 implement section 1821 of the NDAA of 2017 by providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, and will benefit small businesses by providing such examples so that contracting

officers can hold other than small prime contractors accountable for failing to make a good faith effort to comply with their small business subcontracting plan. The changes to § 125.3 also implement section 1821 by providing that the contracting officer should evaluate whether an other than small business complied with the requirement to report on small business subcontracting plan performance. The changes to § 125.6(a) will benefit small business concerns by allowing small businesses to exclude certain costs from the calculation of the limitations on subcontracting. Without these changes, some agencies will not be able to set contracts aside for small business, because certain costs attributable to other than small concerns are too high. The changes to § 125.6 also help small businesses by clarifying the difference between an employee and an independent contractor. The changes to § 125.6 will impose some information production requirements on small business concerns, but only to the extent the information is not already in the possession of the Government. Further, this information is readily available since it pertains to contract performance and subcontracting of that performance. These reports are not mandatory, as the contracting officer simply has the discretion to request such reports. Contracting officers already have the authority to request information demonstrating performance, and this change simply clarifies that the authority exists. Finally, the benefits to small business concerns of this rule substantially outweigh any minor costs imposed by the reporting authority. The addition of part 129 implements section 2108 of the RISE Act and benefits small businesses by providing agencies with an incentive to set aside contracts for small business concerns located in a disaster area.

With respect to the limitation on subcontracting to an ineligible small business under a socioeconomic set-aside (the new 13 CFR 124.507(b)(2)(vi), 125.29(c), 126.601(i), and 127.504(c)), the rule will impact very few firms. The vast majority of small business prime contractors self-perform the required percentage of work, or will subcontract to a similarly situated entity, as is allowed under FAR 52.219-3 (Notice of HUBZone Set-Aside or Sole Source Award), 52-219-27 (Notice of Service-Disabled Veteran-Owned Small Business Set-Aside), and as will be allowed when SBA's rules on similarly situated entities (13 CFR 125.6) are implemented in the FAR. The benefits that will flow to the intended beneficiaries of a socio-economic set-aside far outweigh any impact on firms that have no intention of performing the contract or are not eligible to bid on that contract.

2. What are SBA's description and estimate of the number of small entities to which the rule will apply?

The rule will be applicable to all small business concerns participating in the Federal procurement market that seek to perform Government prime contracts or to perform subcontracts awarded by other than small concerns. SBA estimates that there are approximately 320,000 firms identified as small business concerns in the Dynamic Small Business Search database.

3. What are the projected reporting, recordkeeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

The rule does not impose new recordkeeping requirements. Contractors already keep records on contract performance and subcontracting. Information may be required,

but only to the extent the information is not available through invoices or existing progress reports. The rule clarifies that contracting officers may request access to information in connection with a contractor's compliance with applicable limitations on subcontracting clauses. Approximately 53,000 firms received sole source or set-aside awards in FY 2018. SBA is clarifying that a contracting officer may request information to ensure compliance with the limitations on subcontracting clause, and in some cases this information may not be necessary based on the nature of the contract and the invoices submitted. We estimate that less than ten percent of contracts would be subject to a request to provide this information (18,500), and compliance should take less than an hour for each of those contracts. Accounting or contract management personnel should be able to determine whether the firm issued any subcontracts in connection with the prime contract. We estimate an overall annual cost of approximately \$815,110. As discussed above in the Regulatory Impact Analysis, this figure differs from the figure included in the IRFA to reflect the increased hourly rate that is included as part of the cost analysis.

4. What are the relevant Federal rules which may duplicate, overlap or conflict with the rule?

We are not aware of any rules that duplicate, overlap or conflict with this rule. The FAR will have to be amended to implement portions of this rule. That will be done through a separate rulemaking.

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

Many of the changes are required to implement statute and impose requirements on contracting personnel, agencies or other than small concerns, and do not impact small business concerns. Further, many of the changes will benefit small business concerns by clarifying areas where there is confusion and by making it easier for agencies to set aside contracts and orders for small business and small socioeconomic concerns. As an alternative, SBA considered whether prime contractors should be required to provide information on compliance with the limitations on subcontracting on all set-aside or sole source contracts. However, that may unnecessarily burden small businesses, if compliance is already readily apparent to the contracting officer based on the type of contract, invoicing, or observation.

**List of Subjects**

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

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

13 CFR Part 125

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

13 CFR Part 126

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

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 129

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

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, and 127 and adds 13 CFR part 129 as follows:

**PART 121—SMALL BUSINESS SIZE REGULATIONS**

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

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

2. Amend § 121.103 by revising the first sentence of paragraph (h)(4) to read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(4) A contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. \* \* \*

\* \* \* \* \*

3. Amend § 121.404 by revising paragraph (a) introductory text, adding paragraph (a)(1)(iv), and revising paragraph (g)(5) to read as follows:

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

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price.

(1) \* \* \*

(iv) For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the IDIQ contract, size will be determined as of the date of initial offer, which may not include price.

\* \* \* \* \*

(g) \* \* \*

(5) If during contract performance a subcontractor that is not a similarly situated entity performs primary and vital requirements of a contract, the contractor and its ostensible subcontractor will be treated as joint venturers. *See* § 121.103(h)(4).

\* \* \* \* \*

4. Amend § 121.406 by:

- a. Revising paragraph (b)(1)(i);
- b. Removing paragraph (c); and
- c. Redesignating paragraphs (d) through (f) as paragraphs (c) through (e)

respectively.

The revision reads as follows:

**§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Does not exceed 500 employees (or 150 employees for the Information Technology Value Added Reseller exception to NAICS Code 541519, which is found at § 121.201, footnote 18);

\* \* \* \* \*

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

**BUSINESS STATUS DETERMINATIONS**

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

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

6. Amend § 124.503 by revising paragraphs (c)(1)(iii) and (iv) and adding paragraph (c)(1)(v) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(iii) The Participant is small for the size standard corresponding to the NAICS code assigned to the requirement by the procuring activity contracting officer;

(iv) The Participant has submitted required financial statements to SBA; and

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

\* \* \* \* \*

7. Amend § 124.507 by:

a. Removing the word “and” at the end of paragraph (b)(2)(iv);

b. Removing the period at the end of paragraph (b)(2)(v) and adding in its place “; and”; and

c. Adding paragraph (b)(2)(vi).

The addition reads as follows:

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

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

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

\* \* \* \* \*

8. Amend § 124.521 by adding paragraph (e) to read as follows:

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

\* \* \* \* \*

(e) *Recertification.* (1) Generally, a concern that is an eligible 8(a) Participant at the time of initial offer or response, which includes price, for an 8(a) contract, including a Multiple Award Contract, is considered an 8(a) Participant throughout the life of that contract. For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award 8(a) Contract, where concerns are not required to submit price as part of the offer for the contract, a concern that is an eligible 8(a) Participant at the time of initial offer, which may not include price, is considered an 8(a) Participant throughout the life of that contract. This means that if an 8(a) Participant is qualified at the time of initial offer for a Multiple Award 8(a) Contract, then it will be considered an 8(a) Participant for each order issued against the contract, unless a contracting officer requests a new 8(a) eligibility determination in connection with a specific order. Where a concern later fails to qualify as an 8(a) Participant, the procuring agency may exercise options and still count the award as an award to a Small Disadvantaged Business (SDB).

(i) Where an 8(a) contract is novated to another business concern, or where the concern performing the 8(a) contract is acquired by, acquires, or merges with another concern and contract novation is not required, the concern must comply with the process outlined at §§ 124.105(i) and 124.515.

(ii) Where an 8(a) Participant that was initially awarded a non-8(a) contract that is subsequently novated to another business concern, the concern that will continue performance on the contract must certify its SDB status to the procuring agency, or inform the procuring agency that it does not qualify as an SDB, within 30 days of the novation approval. If the concern is not an SDB, the agency can no longer count the

options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.

(iii) Where an 8(a) Participant receives a non-8(a) contract, and that Participant acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its SDB status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDB. If the contractor is no longer a current 8(a) Participant, the contractor is not eligible for orders limited to 8(a) awardees. If the contractor is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals. The agency and the contractor must immediately revise all applicable Federal contract databases for which they directly certify information to reflect the new status.

(2) For the purposes of 8(a) contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must verify in DSBS whether a business concern continues to be an eligible 8(a) Participant 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. Where a concern fails to qualify as an eligible 8(a) Participant during the 120 days prior to the end of the fifth year of the contract, the option shall not be exercised.

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

(4) Where the contracting officer explicitly requires concerns to qualify as eligible 8(a) Participants in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(5) A concern's status will be determined at the time of a response to a solicitation for a basic ordering agreement (BOA), basic agreement (BA), or blanket purchase agreement (BPA) and each order issued pursuant to the BOA, BA, or BPA.

9. Amend § 124.1015 by adding paragraph (f) to read as follows:

**§ 124.1015 What are the requirements for representing SDB status, and what are the penalties for misrepresentation?**

\* \* \* \* \*

(f) *Recertification.* (1) Generally, a concern that represents itself and qualifies as an SDB at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an SDB throughout the life of that contract. For an indefinite delivery indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of their offer for the contract, a concern that represents itself and qualifies as an SDB at the time of initial offer, which may not include price, is considered an SDB throughout the life of that contract. This means that if an SDB is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDB for each order issued against the contract, unless a contracting officer requests a new SDB certification in connection with a specific order. Where a concern later fails to qualify as an SDB, the procuring agency

may exercise options and still count the award as an award to an SDB. However, the following exceptions apply:

(i) Where a contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as an SDB to the procuring agency, or inform the procuring agency that it does not qualify as an SDB, within 30 days of the novation approval. If the concern is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.

(ii) Where a concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its SDB status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDB. If the contractor is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals. The agency and the contractor must immediately revise all applicable Federal contract databases for which they directly certify information to reflect the new status.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its SDB status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as an SDB, either initially or prior to an option being exercised, may recertify itself as an SDB for a subsequent option period if it meets the eligibility requirements at that time.

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

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

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

#### **PART 125—GOVERNMENT CONTRACTING PROGRAMS**

10. The authority citation for part 125 is revised to read as follows:

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

11. Amend § 125.2 by:

- a. Revising paragraph (a);
- b. In paragraph (b)(1)(i)(A):
  - i. Revising the second sentence; and
  - ii. Adding a sentence at the end of the paragraph;
- c. Adding paragraph (d)(1)(v);
- d. Redesignating paragraph (d)(7) as paragraph (d)(8);
- e. Adding new paragraph (d)(7); and
- f. Revising the paragraph (e)(6) subject heading and paragraph (e)(6)(i).

The revisions and additions read as follows:

**§ 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 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) \* \* \*

(1) \* \* \*

(i) \* \* \*

(A) \* \* \* 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. \* \* \* 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.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(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.

\* \* \* \* \*

(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:

(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.

\* \* \* \* \*

(e) \* \* \*

(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. 253j, the contracting officer has the authority to set aside orders against Multiple Award Contracts, including contracts that were set aside for small business. This includes order set-asides for 8(a) Participants, HUBZone SBCs, SDVO SBCs, and WOSBs (and where appropriate EDWOSBs).

\* \* \* \* \*

12. Amend § 125.3 by:

- a. Revising the last sentence of paragraph (c)(1)(iv);
- b. Revising paragraph (d)(3);
- c. Adding paragraph (d)(11); and
- d. Revising the first sentence of paragraph (f)(3).

The revisions and addition read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(iv) \* \* \* A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its subcontracting goals and in its SSR;

\* \* \* \* \*

(d) \* \* \*

(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.

\* \* \* \* \*

(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.

\* \* \* \* \*

(f) \* \* \*

(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. \* \* \*

\* \* \* \* \*

13. Amend § 125.6 by:

- a. Adding two sentences at the end of paragraph (a)(1);
- b. Adding a sentence at the end of paragraph (c) introductory text;
- c. Revising paragraph (e)(3); and
- d. Adding paragraph (e)(4).

The additions and revision read as follows:

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

(a) \* \* \*

(1) \* \* \* 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.

\* \* \* \* \*

(c) \* \* \* 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.

\* \* \* \* \*

(e) \* \* \*

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

\* \* \* \* \*

14. Amend § 125.18 by:

a. In paragraph (e)(1)(i), removing the phrase “an SDVO contract” and adding in its place the phrase “a contract”;

b. In paragraph (e)(1)(ii), removing the phrase “an SDVO SBC contract” and adding in its place the phrase “a contract”; and

c. Adding paragraph (f).

The addition reads as follows:

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

\* \* \* \* \*

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

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

(2) SBA will find that a prime SDVO contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it,

together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

15. Amend § 125.29 by adding paragraph (c) to read as follows:

**§ 125.29 What are the grounds for filing an SDVO SBC protest?**

\* \* \* \* \*

(c) *Ostensible subcontractor.* In cases where the prime contractor appears unduly reliant on a small, non-similarly situated entity subcontractor or where the small non-similarly situated entity is performing the primary and vital requirements of the contract, the Director, Office of Government Contracting will consider a protest only if the protester presents credible evidence of the alleged undue reliance or credible evidence that the primary and vital requirements will be performed by the subcontractor.

**PART 126—HUBZONE PROGRAM**

16. The authority citation for part 126 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a; Pub. L. 111-240, 24 Stat. 2504.

17. Amend § 126.601 by:

a. In paragraph (h)(1)(i), removing the phrase “HUBZone contract (or a HUBZone contract awarded through full and open competition based on the HUBZone price evaluation preference)” and adding in its place the word “contract”;

b. In paragraph (h)(1)(ii), removing the phrase “HUBZone contract” and adding in its place the word “contract”; and

c. Adding paragraph (i).

The addition reads as follows:

**§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?**

\* \* \* \* \*

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

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a HUBZone status protest, as described in subpart H of this part. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at § 121.103(h)(4) of this chapter.

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

18. Amend § 126.801 by adding a new fourth sentence to paragraph (a) to read as follows:

**§ 126.801 How does one file a HUBZone status protest?**

(a) \* \* \* SBA will also consider a protest challenging whether a HUBZone prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract. \* \* \*

\* \* \* \* \*

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

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

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

**§ 127.503 [Amended]**

20. Amend § 127.503 by removing the phrase “WOSB/EDWOSB contract” wherever it appears and adding in its place the word “contract” in paragraphs (h)(1)(i) and (ii).

21. Amend § 127.504 by adding paragraph (c) to read as follows:

**§ 127.504 What additional requirements must a concern satisfy to submit an offer on an EDWOSB or WOSB requirement?**

\* \* \* \* \*

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

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a WOSB or EDWOSB status protest, as

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

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

22. Amend § 127.602 by revising the second sentence and adding a third sentence to read as follows:

**§ 127.602 What are the grounds for filing an EDWOSB or WOSB status protest?**

\* \* \* SBA will also consider a protest challenging the status of a concern as an EDWOSB or WOSB if the contracting officer has protested because the WOSB or EDWOSB apparent successful offeror has failed to provide all of the required documents, as set forth in § 127.300. In addition, when sufficient credible evidence is presented, SBA will consider a protest challenging whether the prime contractor is unusually reliant on a small, non-similarly situated entity subcontractor, as defined in § 125.1 of this chapter, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set-aside or sole-source WOSB or EDWOSB contract.

23. Add part 129 to read as follows:

**PART 129—CONTRACTS FOR SMALL BUSINESSES LOCATED IN  
DISASTER AREAS**

Sec.

129.100 What definitions are important in this part?

129.200 What contracting preferences are available for small business concerns located in disaster areas?

129.300 What small business goaling credit do agencies receive for awarding an emergency response contract to a small business concern under this part?

129.400 What are the applicable performance requirements?

129.500 What are the penalties of misrepresentation of size or status?

Authority: 15 U.S.C. 636(j)(13)(F)(ii), 644(f).

### **§ 129.100 What definitions are important in this part?**

For the purposes of this part:

*Concern located in a disaster area* is a firm that during the last twelve months—

(1)(i) Had its main operating office in the area; and

(ii) Generated at least half of the firm's gross revenues and employed at least half of its permanent employees in the area.

(2) If the firm does not meet the criteria in paragraph (1) of this definition, factors to be considered in determining whether a firm resides or primarily does business in the disaster area include—

(i) Physical location(s) of the firm's permanent office(s) and date any office in the disaster area(s) was established;

(ii) Current state licenses;

(iii) Record of past work in the disaster area(s) (e.g., how much and for how long);

(iv) Contractual history the firm has had with subcontractors and/or suppliers in the disaster area;

(v) Percentage of the firm's gross revenues attributable to work performed in the disaster area;

(vi) Number of permanent employees the firm employs in the disaster area;

(vii) Membership in local and state organizations in the disaster area; and

(viii) Other evidence that establishes the firm resides or primarily does business in the disaster area. For example, sole proprietorships may submit utility bills and bank statements.

*Disaster area* means the area for which the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Assistance Act (42 U.S.C. 5170), during the period of the declaration.

*Emergency response contract* means a contract with private entities that supports assistance activities in a disaster area, such as debris cleanup, distribution of supplies, or reconstruction.

**§ 129.200 What contracting preferences are available for small business concerns located in disaster areas?**

Contracting officers may set aside solicitations for emergency response contracts to allow only small businesses located in the disaster area to compete.

**§ 129.300 What small business goaling credit do agencies receive for awarding an emergency response contract to a small business concern under this part?**

If an agency awards an emergency response contract to a local small business concern through the use of a local area set-aside that is also set aside under a small business or socioeconomic set-aside (8(a), HUBZone, SDVO, WOSB, EDWOSB), the value of the contract shall be doubled for purposes of determining compliance with the goals for procurement contracts under section 15(g)(1)(A) of the Small Business Act (15 U.S.C. 644(g)(1)(A)). The procuring agency shall enter the actual contract value, not the doubled contract value in the required contract reporting systems, and appropriately code

the contract action to receive the credit. SBA will provide the double credit as part of the Scorecard process.

**§ 129.400 What are the applicable performance requirements?**

The performance requirements of § 125.6 of this chapter apply to small and socioeconomic set-asides under this part. A similarly situated entity as that term is used in § 125.6 of this chapter must qualify as a concern located in a disaster area.

**§ 129.500 What are the penalties of misrepresentation of size or status?**

The penalties relevant to the particular size or socioeconomic status representation under 13 CFR 121.108, 125.32, 126.900, and 127.700 are applicable to set-asides under this part.

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

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

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

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

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

25. Amend § 134.1003 by redesignating paragraph (c) as paragraph (d) and by adding new paragraph (c) to read as follows:

**§ 134.1003 Grounds for filing a CVE Protest.**

\* \* \* \* \*

(c) *Unusual reliance.* SBA will consider a protest challenging whether the prime contractor is unusually reliant on a subcontractor that is not CVE verified, or a protest

alleging that such subcontractor is performing the primary and vital requirements of a VA procurement contract.

\* \* \* \* \*

Dated: November 19, 2019.

Christopher Pilkerton,  
Acting Administrator.

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