SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, 127, 128, 134

[Docket ID SBA–2024–0007]

RIN 3245–AH68

HUBZone Program Updates and Clarifications, and Clarifications to Other Small Business Programs

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) amends its regulations governing the Historically Underutilized Business Zone (HUBZone) Program to clarify certain policies. In 2019, SBA published a comprehensive revision to the HUBZone Program regulations, which implemented changes intended to make the HUBZone Program more efficient and effective. This rule clarifies and improves policies surrounding some of those changes. In particular, the rule requires any certified HUBZone small business to be eligible as of the date of offer for any HUBZone contract. The rule also makes several changes to SBA's size and 8(a) Business Development (BD) regulations, as well as some technical changes to the Women-Owned Small Business (WOSB) and Veteran Small Business Certification (VetCert) programs. Of note, the rule deletes the program specific recertification requirements contained separately in SBA's size, 8(a) BD, HUBZone, WOSB, and VetCert and moves them to a new section that covers all size and status recertification requirements. This should ensure that the size and status requirements will be uniformly applied.

DATES: This rule is effective on January 16, 2025.

FOR FURTHER INFORMATION CONTACT: Alison Amann, Chief HUBZone Counsel, Office of General Counsel, (202) 205–6841, *alison.amann@sba.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On August 23, 2024, SBA published in the **Federal Register** a proposed rule that primarily sought to amend the regulations relating to SBA's HUBZone program, but also proposed changes to SBA's size regulations and SBA's other small business contracting programs. 89 FR 68274.

The proposed rule first intended to clarify and amend several HUBZone regulations that were implemented in the November 26, 2019, final rule that was the first comprehensive revision of the HUBZone Program regulations since the program's implementation more than 20 years ago. *See* 87 FR 68274. In the time since SBA published the comprehensive revision, the Office of the HUBZone Program has received questions and information that prompted refinement and clarification of policies contained in that revision, which SBA published in ''Frequently Asked Questions'' in February 2020 and in subsequent updates. The proposed rule sought to incorporate some of those clarifications and make other refinements in the HUBZone regulations. This rule finalizes revisions to the HUBZone regulations, including requiring HUBZone firms to be eligible on the date of offer for a HUBZone contract and relieving the burden of annual recertification by moving to a triennial recertification requirement. In addition, this rule clarifies policies related to ''Governor-designated covered areas,'' which were authorized by the NDAA 2018 and implemented through a direct final rule published by SBA on November 15, 2019 (84 FR 62447), and makes several changes to definitions pertinent to the HUBZone program.

This final rule also makes several changes to SBA's size and 8(a) business development (BD) regulations, as well as some technical changes to the women-owned small business (WOSB) and the Veteran Small Business Certification (VetCert) programs. Of note, the rule deletes the program specific recertification requirements contained separately in SBA's size, 8(a) BD, HUBZone, WOSB, and VetCert and moves them to a new section that covers all size and status recertification requirements. Currently, there is some language contained in the program specific recertification rules that is not identical in each of the programs. This has caused some confusion as to whether SBA intended the rules to be different in certain cases. That was not SBA's intent. Moving all size and recertification to new § 125.12 should alleviate any confusion between the different programs and ensure that the size and status requirements will be uniformly applied.

During the proposed rule's 45-day comment period, SBA timely received over 650 comments from 261 commenters, with a high percentage of commenters favoring the proposed changes. A substantial number of commenters applauded SBA's effort to clarify and address ambiguities contained in the current rules. For the most part, the comments supported the substantive changes proposed by SBA.

II. Section-by-Section Analysis

Sections 121.103(a)(3), 124.106(h), 127.202(h) and 128.203(j)(6)

SBA proposed to amend its rules on affiliation in the size regulations and control in the 8(a) BD, WOSB and VetCert program regulations regarding negative control. Specifically, the proposed rule made the negative-control rules consistent across SBA's various programs. The negative control provision states that a concern may be deemed controlled by, and therefore affiliated with, a minority shareholder that has the ability to prevent a quorum or otherwise block action by the board of directors or shareholders. The rule does not include any specific exceptions, though some have developed through caselaw at SBA's Office of Hearings and Appeals (OHA). *See, e.g., Southern Contracting Solutions III, LLC,* SBA No. SIZ–5956 (Aug. 30, 2018).

The proposed rule amended § 121.103(a)(3) (for affiliation relating to size), § 124.106(h) (for control in the 8(a) BD program) and § 127.202(h) (for control in the WOSB program) by adding language currently contained in the VetCert rules that developed from OHA case law to clarify that there are certain ''extraordinary circumstances'' under which a minority shareholder may have some decision-making authority without a finding of negative control. Specifically, SBA will not find that a lack of control exists where a qualifying individual or business does not have the unilateral power and authority to make decisions regarding: (1) adding a new equity stakeholder; (2) dissolution of the company; (3) sale of the company or all assets of the company; (4) the merger of the company; (5) the company declaring bankruptcy; and (6) amendment of the company's governance documents to remove the shareholder's authority to block any of (1) through (5). These exceptions to negative control are being implemented to promote consistency with other SBA contracting programs. Finally, since the current VetCert regulations have only the first five exceptions for control and the proposed rule also added six to the size, 8(a) BD and WOSB regulations, the proposed rule added that same sixth exception to the VetCert regulations in a new § 128.203(j)(6).

SBA received ten comments in response to the proposed changes regarding extraordinary circumstances. All of the commenters agreed with identifying ''extraordinary circumstances'' under which a minority shareholder may have some decision-

making authority without a finding of affiliation or negative control. Several commenters, however, believed that there should also be some sort of a catch-all to allow similar treatment for another extraordinary circumstance not specifically identified. One commenter recommended that SBA adopt language stated in OHA size appeal cases that super majority provisions crafted to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's business as it chooses should be permitted. *See* Size Appeal of S. Contracting Sols. III, LLC, SBA No. SIZ–5956 (2018) (citing Size Appeal of EA Eng'g., Sci. & Tech., Inc., SBA No. SIZ–4973 (2008), Size Appeal of Carntribe-Clement 8AJV #1, LLC, SBA No. SIZ–5357 (2012)). SBA agrees and has adopted this catch all language in this final rule.

One commenter recommended that the extraordinary circumstance identified as adding ''a new equity stakeholder'' should be broadened to also allow increasing the investment amount of an equity stakeholder. Similarly, another commenter recommended that SBA add a separate extraordinary circumstance allowing issuing additional capital stock. SBA adopts the first recommendation in this final rule, but believes the second is unnecessary since that should be covered in a provision which allows adding a new equity stakeholder or increasing the investment amount of an equity stakeholder.

Section 121.103(h)

Section 121.103(h)(3) sets forth SBA's ''ostensible subcontractor'' rule, which may find a prime contractor ineligible for the award of any small business contract or order where a subcontractor that is not similarly situated (as that term is defined in § 125.1) performs primary and vital requirements of a contract, order, or agreement, or where the prime contractor is unusually reliant on such a subcontractor. Prior to this change, the regulatory text provided that a contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes, and as long as each concern is small under the size standard corresponding to the relevant North American Industry Classification System (NAICS) code or the prime contractor is small and the subcontractor is its SBA-approved mentor, the arrangement will qualify as a small business. The proposed rule sought to clarify SBA's intent, specifically in the context of a subcontractor that is an SBA-approved mentor of the prime contractor. There was some confusion that because a prime-subcontractor relationship was treated ''as a joint venture'', then that relationship would automatically be acceptable if the subcontractor were the mentor of the prime contractor. That was not what SBA intended. SBA intended to allow the relationship to qualify as a small business only if all the joint venture requirements were met. That would mean that the protégé and mentor must have an underlying joint venture agreement that meets the requirements of § 125.8(b), the protégé will direct and have ultimate responsibility for the contract, and the performance of work requirements set forth in § 125.8(c) will be met. In a prime-subcontractor relationship, those requirements are not present and SBA would aggregate the revenues/employees of such ''joint ventures'' in determining size. The proposed rule simplified § 121.103(h) by eliminating the reference to a joint venture and instead specified that an offeror is ineligible as a small business concern, an 8(a) small business concern, a certified HUBZone small business concern, a WOSB/EDWOSB, or a VO/SDVO small business concern where SBA determines there to be an ostensible subcontractor relationship. The proposed rule also added a new § 121.103(h)(3)(v) that provided that a joint venture offeror is ineligible as a small business concern, an 8(a) small business concern, a certified HUBZone small business concern, a WOSB/EDWOSB concern, or a VO/SDVO small business concern where SBA determines that the managing joint venture partner will not perform 40% of the work to be performed by the joint venture, where a joint venture partner that is not similarly situated to the managing venturer performs primary and vital requirements of a contract, or of an order, or where the managing venturer is unusually reliant on such a joint venture partner.

SBA received 14 comments in response to proposed § 121.103(h). Twelve commenters supported deleting the joint venture language from the introductory language of § 121.103(h)(3). Two commenters opposed the language in proposed § 121.103(h)(3)(v) that would find a joint venture to be ineligible where a joint venture partner that is not similarly situated to the managing venturer performs primary and vital requirements of a contract, or where the managing venturer is unusually reliant on such a joint venture partner. These commenters noted that a primary reason why companies joint venture is because the managing member is not able to perform the contract by itself and may not be able to perform a significant amount of the primary and vital work to be done under the contract. They believed that finding a joint venture to be ineligible merely because a non-similarly situated partner was performing primary and vital work is contrary to the entire purpose of a joint venture. SBA agrees and has amended the regulatory text in this final rule to eliminate the language finding a joint venture to be ineligible where a joint venture partner that is not similarly situated to the managing venturer performs primary and vital requirements of a contract, or of an order, or where the managing venturer is unusually reliant on such a joint venture partner.

A joint venture is not only permissible but encouraged where a concern lacks the necessary capacity to perform a contract on its own. It would be contradictory to say that a joint venture is permissible where the managing member cannot perform the contract by itself but then say it is ineligible if a non-managing member partner was performing primary and vital work.

The proposed rule also made a corresponding change to § 121.702(c)(7) for the SBIR program. That change provided that a concern with an other than small ostensible subcontractor cannot be considered a small business concern for SBIR and STTR awards. SBA received one comment regarding proposed § 121.702(c)(7). The commenter recommended that SBA add language to § 121.702(c)(7) to safeguard the SBIR and STTR programs from foreign capture. SBA believes that the language of proposed § 121.702(c)(7)(iii) provides the necessary safeguards. The commenter references an OHA size appeal where an ostensible subcontractor was a foreign company. *See* Size Appeal of NFRL LLC, SBA No. SIZ–6174 (28 September 2022). In that case, OHA found the prime ineligible because the ostensible subcontractor did not also meet the ownership and control requirements of § 121.702(a) and (b). Specifically, because the ostensible subcontractor was not more than 50% directly owned and controlled by one or more individuals who are citizens or permanent resident aliens of the United States the relationship, treated as a joint venture under the regulations in place at that time, was ineligible. In eliminating the joint venture verbiage from the ostensible subcontractor SBIR rule, SBA replaced it with language specifically stating that the prime and any small

business ostensible subcontractor both must comply individually with the ownership and control requirements. As such, SBA adopts the proposed language without revision in this final rule.

Section 121.104

Section 121.104 defines the term annual receipts to mean all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. It goes on to state that generally, receipts are considered ''total income'' plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms. The section also provides that Federal income tax must be used to determine the size status of a concern. There has been some confusion as to whether SBA is restricted in all circumstances to examining only a concern's tax returns or whether SBA may look at other information if it appears or there is other information suggesting that the tax returns do not adequately capture a concern's total revenue. The proposed rule provided that SBA will always consider a concern's tax returns, but may also consider other relevant information in appropriate circumstances in determining whether the concern qualifies as small.

SBA received seven comments regarding proposed § 121.104, five of which opposed the proposed language. Commenters believed that the proposed language afforded SBA limitless discretion to go outside of a firm's tax returns and was overly vague. One commenter noted that financial statements may not reflect revenue the same way that it is reported for tax purposes. The commenter believed that it would be unfair to include revenue identified on financial statements that were legally excluded on the firm's tax returns. SBA agrees. The final rule clarifies that SBA will consider a firm's tax returns in every case and that SBA will generally rely solely on those tax returns. The final rule also specifies that where a concern may legally exclude certain revenue for tax purposes, SBA will not include that revenue in its size determination analysis. However, the final rule specifies that SBA may consider other relevant information beyond the submitted tax returns where there is reasonable basis to believe the tax filings are false.

Section 121.404

SBA proposed to simplify and reorganize § 121.404, which addresses the date used to determine size for size certifications and determinations. The proposed changes sought to clarify the current rules and make them easier to understand and apply. In addition to these clarifications, SBA proposed substantive changes to the rules regarding size recertification and proposed to remove paragraph (g) on size recertification and relocate that paragraph to new section 125.12, which addresses size and small business program status recertification.

Generally, a concern (including its affiliates) must qualify as small under the NAICS code assigned to a contract as of the date the concern submits a self-certification that it is small to the procuring activity as part of its initial offer or response which includes price. Once awarded a contract as a small business, a concern is generally considered to be a small business throughout the life of that contract. For orders and agreements issued under multiple award contracts, the date that size is determined depends on whether the underlying multiple award contract was awarded on an unrestricted basis or whether it was set aside or reserved for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned/economically disadvantaged women-owned small business).

Where an order or agreement is to be set aside for small business under an unrestricted multiple award contract, size is determined as of the date of initial offer (or other formal response to a solicitation), including price, for each order or agreement placed against the multiple award contract. In that scenario, the order or agreement is the first time that size status is important to eligibility. That is the first time that only some contract holders will be eligible to compete for the order or agreement while others will be excluded from competition because of their size status. SBA never intended to allow a firm's self-certification for the underlying unrestricted multiple award contract to control whether a firm is small at the time an order or agreement is set-aside for small business years after the multiple award contract was awarded.

Where the underlying multiple award contract was set aside or reserved for small business, size status will generally flow down from the underlying contract to the order or agreement, unless recertification is requested by a contracting officer with respect to an agreement or order. As such, size status for an order or agreement under a multiple award contract that itself was set aside or reserved for small business is determined as of the date of initial offer, including price, for the multiple award contract, unless size recertification is requested by the contracting officer in connection with a specific order or agreement.

SBA also proposed to clarify that where a contracting officer requests size and/or status recertification with respect to a specific order or agreement, size/status will be determined as of the date of initial offer (or other formal response to a solicitation), including price, for that specific order or agreement only. The requirement to recertify applies only to the order or agreement for which a contracting officer requested recertification. The recertification does not apply to the underlying contract. Where an initially-small contract holder has naturally grown to be other than small and could not recertify as small for a specific order or agreement for which a contracting officer requested recertification, it may continue to qualify as small for other orders or agreements where a contracting officer does not request recertification. Similarly, where an initially-eligible 8(a), HUBZone, WOSB or SDVOSB contract holder on an 8(a), HUBZone, WOSB or SDVOSB set-aside or reserve cannot recertify its status for a specific order or agreement for which a contracting officer requested recertification, it may continue to qualify as eligible for other competitively awarded orders or agreements where a contracting officer does not request recertification.

If size recertification is triggered by a merger, sale, or acquisition, or because it is a long-term contract in the fifth year of performance, size will be determined as of the date of the merger, sale, or acquisition, or the date of the size recertification in the case of a recertification in the fifth year of a long-term contract. The impact of a disqualifying recertification, the events that require recertification, and the timing of recertification, are discussed in detail in 125.12, which is a new proposed section of SBA's regulations.

SBA received 25 comments in response to the proposed changes to § 121.404. Most of the comments responded to the effect of a disqualifying recertification. As noted above, the proposed rule moved regulatory provisions regarding recertification from § 121.404(g) to a new § 125.12. The effect of disqualifying recertifications is addressed in new

§ 125.12. As such, the comments to § 121.404 pertaining to the effect of a disqualifying recertification will be addressed with other comments to § 125.12. Several commenters supported SBA's efforts to simplify and clarify when size status is determined. Three commenters also supported SBA's clarification that where a contracting officer requests size recertification with respect to a specific order, size is determined only with respect to that order. This clarification allows a contract holder that has grown to be other than small and cannot recertify as small for a specific order for which a contracting officer requested recertification to continue to qualify as small for other orders issued under the contract where a contracting officer does not request recertification. SBA adopts those provisions as final in this rule.

Three commenters disagreed with the exception set forth in proposed § 121.404(c)(4)(i) stating that for orders or BPAs to be placed against the Federal Supply Schedule (FSS), size is determined as of the date the business concern submits its initial offer, which includes price, for the FSS contract and not with respect to each order set aside for small business under the FSS. The commenters noted that the FSS is an unrestricted contract and size is not relevant to the award of the underlying contract.

They recommended that the general rule applicable to set-aside orders under an unrestricted multiple award contract (*i.e.,* that size status for each such order placed against the multiple award contract be determined as of the date a business concern submits its initial offer which includes price for the order) should apply similarly to the FSS. The commenters believe that this exception does not adequately serve the interests of the small business community. SBA notes that GSA has the statutory authority to establish FSS contracts and the procedures used to order under them. As such, this rule adopts the proposed language as final.

Section 121.1001

Section 121.1001 identifies who may initiate a size protest or request a formal size determination in different instances. Paragraph 121.1001(b)(2)(ii) identifies who may request a formal size determination where SBA cannot verify that an 8(a) Participant is small for a specific sole source or competitive 8(a) contract. There have been a few cases where SBA initially determined that a Participant qualified as small for a sole source 8(a) contract, but later received information that questioned that determination. Under a strict reading of § 121.1001(b)(2)(ii), SBA could not then request a formal size determination because the wording of § 121.1001(b)(2)(ii) authorized such a request only where SBA ''cannot verify the eligibility of the apparent successful offeror because SBA finds the concern to be other than small.'' Since verification, albeit initial verification only, had already occurred, some have questioned whether SBA could request a formal size determination at all in that context. SBA notes that it was never SBA's intent to prohibit further analysis of an 8(a) Participant's size eligibility when new information becomes available to SBA that questions the firm's eligibility at any point prior to award. SBA seeks to ensure that only firms that qualify as small receive 8(a) contracts. The proposed rule added a new § 121.1001(b)(2)(iii) to specifically authorize SBA to request a formal size determination where SBA initially verified the eligibility of an 8(a) Participant for the award of an 8(a) contract but then subsequently receives specific information that the Participant may be other than small and consequently ineligible. SBA received two comments on this proposal, both supporting this clarification. One commenter recommended that SBA clarify that the request for a formal size determination contemplated here by SBA occurs prior to the award of the 8(a) contract at issue. SBA agrees and has made minor wording changes to clarify its intent in this rule.

SBA also proposed to add a new § 121.1001(b)(12) to specifically authorize requests for formal size determinations relating to size recertifications required by § 125.12. Section 125.12 requires a concern to recertify its size when there is a merger, acquisition, or sale and prior to the sixth year and every option thereafter of a long-term contract. Although SBA and the relevant contracting officer may file a size protest before or after the award of a contract (*see* § 121.1004(b)), the regulations do not currently specifically authorize a protest or a request for a formal size determination in connection with a size recertification. More importantly, there currently is no mechanism to allow a protest or request for a formal size determination from another interested small business concern who believes that a size recertification is incorrect. For example, on a multiple award contract, if after a merger or acquisition a concern re-certifies itself to be small, another contract holder on that multiple award contract could not currently challenge that recertification. Because this rule will render a concern ineligible for orders set aside for small business or set aside for a specific type of small business under a multiple award contract where the concern submits a disqualifying recertification (*see* § 125.12 below), SBA believes that other contract holders should have the ability to question a size recertification. The proposed rule specifically authorized the contracting officer, the relevant SBA program manager, or the Associate General Counsel for Procurement Law to request a formal size determination. The relevant SBA program manager is that individual overseeing the program relating to the contract at issue. For an 8(a) contract, that would be the Associate Administrator for Business Development; for a HUBZone contract, that would be the Director of HUBZone; and for a small business set-aside, WOSB/EDWOSB or SDVOSB contract, that would be the Director of Government Contracting. The proposed rule also specified that in connection with a size recertification relating to a multiple award contract, any contract holder on that multiple award contract could request a formal size determination in addition to the contracting officer, the relevant SBA program manager, or the Associate General Counsel for Procurement Law. As with a size protest, a request for a formal size determination questioning the size of a concern after its size recertification must be sufficiently specific to provide reasonable notice as to the grounds upon which the recertifying concern's size is questioned. SBA received five comments in response to proposed § 121.1001(b)(12). All five commenters supported the SBA's proposal to allow a mechanism to challenge a size recertification. One commenter, however, recommended that the challenge be a size protest in § 121.1001(a) as opposed to a request for a formal size determination in § 121.1001(b). The commenter believed that without this clarification, it is unclear if/whether the protest time limits apply. The final rule adopts this recommendation and moves proposed §§ 121.1001(b)(12) and (13) to a new § 121.1001(a)(11). In moving the proposed authority from a request from a formal size determination to a protest, the final rule eliminates the specific language contained in proposed § 121.1001(b)(13) requiring a challenge to a recertification to be specific. The requirement for specificity applies to all size protests currently. There is no need to repeat that requirement in new § 121.1001(a)(11).

The proposed rule also noted that SBA was considering allowing a size protest in connection with the award of an order issued under a multi-agency multiple award contract where the protest relates to the ostensible subcontractor rule. Whether a large business subcontractor will perform primary and vital requirements or whether a small business prime contractor will be unduly reliant on a large business subcontractor will not be an issue at the time of award of an underlying small business multiple award contract. It is at the order level where undue reliance may become an issue. SBA requested comments on this issue. Three commenters supported the inclusion of such a protest, while two opposed. Two commenters supported the addition of such a provision generally. One commenter noted that § 121.1001(a)(1) already authorized a size protest ''in connection with a particular . . . order.'' The commenter noted that if a protest is currently authorized for an order, then it can relate to any protest ground in SBA's regulations, including one based on the ostensible subcontractor rule. Although the commenter believed it was unnecessary to add language regarding the ostensible subcontractor rule to protests regarding orders, the commenter did not object to such inclusion if SBA thought it was necessary. The commenter also recommended that the language in § 121.1001(a)(1) authorizing a size protest in connection with a particular order be more clearly apparent in a separate paragraph. In response, SBA believes that it is not necessary to add specific language authorizing a protest of an order based on the ostensible subcontractor rule. SBA agrees that the language in § 121.1001(a)(1) authorizing a size protest in connection with a particular order generally allows a protest based on the ostensible subcontractor rule. SBA also agrees that this authority should be identified in a separate paragraph for clarity purposes, and adds a new § 121.1001(a)(10) to do so.

One commenter opposing such a provision believed that it would be difficult for competitors to know whether a contractor intends to use a subcontractor for a particular order since this information is not public or consistently reported, and that this would lead to speculative size protests. As with any size protest, the protest must be specific. If a competitor cannot identify a subcontractor that will perform primary and vital requirements or upon which the protested concern is alleged to be unduly reliant upon, the protest will be dismissed for lack of specific. The other commenter opposing adding specific language authorizing a size protest relating to the ostensible subcontractor rule with respect to an order believed that it would create significant additional work for contracting officers, small business specialists, and small businesses. As noted above, size protests relating to specific orders is already authorized by SBA's regulations and identifying or not identifying a specific ground upon which a protest could be made will not cause any additional burden on contracting officers, SBA or small businesses.

Section 121.1010

Section 121.1010 explains how a concern can become recertified as a small business after receiving an adverse size determination. The proposed rule made slight wording changes to § 121.1010(b) to make clear that size recertification is not required and the prohibition against future self-certification does not apply if the adverse SBA size determination is based solely on a finding of affiliation limited to a particular Government procurement or property sale, such as an ostensible subcontracting relationship or non-compliance with the nonmanufacturer rule. SBA received two comments supporting this provision and no comments opposing it. SBA adopts the proposed language as final in this rule.

Section 124.3

Section 124.3 sets forth the definitions that are important in the 8(a) BD program. Included within this section is the definition of the term Community Development Corporation or CDC. In 1981, Congress enacted the Omnibus Reconciliation Act. Included within Title VI of this Act was § 626(a)(2), codified at 42 U.S.C. 9815(a)(2), which required SBA to ''promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under section 8(a) of the Small Business Act.'' Pursuant to 42 U.S.C. 9802, a CDC is defined as a non-profit organization responsible to the residents of the area it serves which is receiving financial assistance under 42 U.S.C. 9805, *et seq.* Under 42 U.S.C. 9806 the Secretary of Health and Human Services (HHS) has the authority to provide financial assistance in the form of grants to nonprofit and for-profit community development corporations. The program authorized by 42 U.S.C. 9805, *et seq.* is the Department of Health and Human Services (HHS) Urban and Rural Special Impact Program. In 1998, as part of Community Opportunities, Accountability, and Training and Educational Act of 1998, Public Law 105–285, 202(b)(1), 112 Stat. 2702, 2755 (1998), Congress moved HHS' funding authority for the Urban and Rural Special Impact Program from 42 U.S.C. 9803 to 42 U.S.C. 9921. Thus, after that date CDCs could not receive funding under 42 U.S.C. 9805, *et seq.* CDCs that have been in existence for a long time may still be able to demonstrate that they have received funding under 42 U.S.C. 9805, *et seq.* However, those forming after 1998 could not do so. In order for such a CDC seeking to participate in the 8(a) BD program after that date, SBA has required the CDC to obtain a letter from HHS confirming that the CDC has received funding through the successor program to that authorized by 42 U.S.C. 9805, *et seq.* However, SBA's regulations have not been changed to acknowledge eligibility for a CDC-owned firm through that process. The proposed rule recognized that process.

The proposed rule also made the same change to the definition of the term Community Development Corporation or CDC contained in § 126.103 for the HUBZone program.

SBA received two comments supporting the clarifications for CDC 8(a) and HUBZone eligibility. SBA adopts the proposed language as final in this rule.

Sections 124.105(b), 127.202(d) and 128.202(c)

Sections 124.105(b) (for the 8(a) BD program), 127.202(d) (for the WOSB program), and 128.202(c) (for VetCert program) set forth ownership requirements pertaining to partnerships. The language of the three sections is not consistent. The proposed rule sought to harmonize the provisions so that a firm simultaneously applying to be certified in more than one program must meet the same requirements. SBA does not want possible contradictory determinations based on the same facts. In other words, SBA believes that it would be inappropriate to find that a qualifying individual controls a partnership firm for purposes of one certification program but not to control the same partnership firm for purposes of another certification program. This rule would revise the ownership requirements for partnership to be identical for the 8(a) BD, WOSB and VetCert programs. The final rule provides that in the case of a concern which is a partnership, one or more individuals determined by SBA to be

socially and economically disadvantaged must serve as general partners, with control over all partnership decisions. In addition, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged; and the ownership must be reflected in the concern's partnership agreement.

SBA received four comments supporting the proposed clarifications to create consistency between SBA's various programs, and no comments opposing the changes. SBA adopts the proposed language as final in this rule.

Section 124.105

Section 124.105 sets forth the ownership requirements that an applicant to or Participant in the 8(a) BD program must meet in order to be and remain eligible for the program. Paragraph 124.105(h) provides certain ownership restrictions that are applicable to non-disadvantaged individuals and concerns that seek to have an ownership interest in an applicant or Participant. The proposed rule increased the allowable ownership percentages for certain non-disadvantaged individuals and business concerns (those owning more at least ten percent in other 8(a) Participant and those in the same or similar line of business) from 10 percent to 20 percent in the developmental stage of program participation and from to 20 percent to 30 percent in the transitional stage of program participation.

SBA received five comments supporting the increases in non-disadvantage ownership. Commenters believed that these changes could help 8(a) Participants attract additional partners, offering greater opportunities for growth and development. One commenter supported the increase to 30% in the transitional stage saying that it will facilitate access to capital for 8(a) firms preparing to graduate, enhancing their ability to compete in the open market. That commenter also recommended, however, that SBA increase the percentage to 35% in the transitional stage. SBA does not adopt this recommendation. SBA does not want any one non-disadvantage individual or business entity to unduly benefit from the program. The higher the percentage that SBA allows a non-disadvantaged individual or business to own in multiple 8(a) Participants, the more it appears that non-disadvantaged individuals are benefitting from the program instead of disadvantaged individuals. Similarly, the restriction on ownership by an individual or business in the same or similar line of work as the 8(a) firm is intended to ensure that the disadvantaged individual(s) upon whom 8(a) eligibility was based control the 8(a) Participant. The higher the percentage that SBA allows a non-disadvantaged individual or business in the same or similar line of business to own in an 8(a) firm, the more it appears that the non-disadvantaged individual or business concern is controlling the 8(a) firm. SBA adopts the proposed language as final in this rule.

The proposed rule also aligned the language in § 124.105(f)(1) (for the 8(a) BD program) with that appearing in § 128.202(g) (for the VetCert program) regarding the distribution of profits. There was a slight wording difference in the 8(a) BD and VetCert regulations and the proposed rule made the wording consistent. The proposed rule also added the same language to § 127.201(g) for the WOSB program. SBA received three comments all supporting these proposed changes. Commenters noted that the revision more clearly states how profits should be distributed for the various for-profit entities instead of only referencing corporations, which is the case in the current regulations. SBA adopts the proposed language as final in this rule.

Paragraph (i) sets forth the requirements relating to changes of ownership. Generally, a Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. Section 124.105(i)(2) authorizes three exceptions as to when prior SBA approval of a change of ownership is not needed and provides four examples implementing the change of ownership requirements, one showing when prior SBA approval is required and three showing when it is not. Prior SBA approval is not needed where all non-disadvantaged individual (or entity) owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction. To be consistent with the change to § 124.105(h) above, the proposed rule required prior approval only where a non-disadvantaged individual owns more than a 30 percent interest in the 8(a) Participant either before or after the transaction. The proposed rule also added a fourth exception as to when prior SBA approval is not required. Specifically, the proposed rule provided that prior SBA approval is not required where the 8(a) Participant has never received an 8(a) contract. The proposed rule then clarified that where prior approval is not required, the Participant must notify SBA within 60 days of such a change in ownership, or before it submits an offer for an 8(a) contract, whichever occurs first. SBA must be able to determine the continued eligibility of the Participant before it accepts a sole source 8(a) procurement on behalf of or authorizes the award of a competitive 8(a) award to the Participant. Finally, the proposed rule made changes to the examples set forth in § 124.105(i)(2) to reflect the change from 20 percent to 30 percent and added a fifth example highlighting that prior SBA approval is not required where a Participant has never received an 8(a) contract.

SBA received 11 comments regarding the proposed revisions to the change of ownership requirements. The commenters generally supported the proposed revisions. One commenter believed that the exception to prior approval when the Participant has never received an 8(a) contract is an improvement because it reduces the regulatory burden of obtaining prior approval of an ownership change when the 8(a) Participant has not yet received benefits from the program. That commenter also believed that the notification requirement at § 124.105(i)(2)(i)(D)(iii) that requires a Participant to provide notice of the ownership change within 60 days of such a change, or before it submits an offer for an 8(a) contract, whichever occurs first, will serve as a sufficient safeguard to ensure that SBA has the opportunity to analyze ownership changes before a contract award. Two commenters recommended that SBA clarify § 124.105(i)(2)(i)(C) to make clear that an increase of any percentage of ownership by the disadvantaged individual obviates the need for SBA's prior approval, even if it is a small amount. The final rule makes that clarification. One commenter disagreed with allowing a change of ownership without SBA approval where the 8(a) firm has not received an 8(a) contract in all instances. Specifically, the commenter objected to allowing such a change of ownership where the individual(s) or entity upon whom eligibility would no longer own more than 50 percent of the Participant. The commenter noted that if the change in ownership were permitted to take effect without SBA's approval, the Participant could continue to market itself as an eligible 8(a) Participant. Although the proposed rule requires SBA approval before an 8(a) contract award, the commenter thought that the

Participant's self-marketing efforts could allow the Participant to advance far towards an award before contacting SBA and that either the Participant would receive an expedited eligibility review allowing the award to occur or an agency could be left without an eligible Participant and be forced to start the process over again. Particularly in the entity context, the commenter believed that this could allow a newly established NHO or Tribe that has not previously participated in the 8(a) program to acquire a Participant that has not yet received an 8(a) contract and obtain accelerated review of its 8(a) application, and that that review may not be as comprehensive as it would have been in the normal process. In order to alleviate any concern about possible expedited application processing, the final rule amends this provision to allow a change of ownership without SBA approval where the Participant has never received an 8(a) contract and the individual(s) or entity upon whom initial eligibility was based continues to own more than 50% of the Participant.

In order to align the 8(a) BD ownership requirements with those applicable in the WOSB and VetCert programs, SBA proposed to eliminate the requirement contained in § 124.105(k) that SBA consider State community property laws in determining ownership interests when an owner resides in a community property State. SBA received six comments in response to the proposal to eliminate current § 124.105(k). All six comments supported the proposal. Two commenters specifically addressed the statutory requirement that one or more disadvantaged individuals must unconditionally own an 8(a) applicant or Participant. Both believed that eliminating the requirement to consider community property laws would not in any way contradict the unconditional ownership requirement. One commenter also questioned SBA's authority to require transmutation agreements (*i.e.,* agreements between spouses relinquishing some percentage of his or her community property ownership rights in an applicant or Participant), and believed that even if that could be done it is a better policy not to require them since the commenter believed there was no specific statutory requirement for transmutation agreements. SBA adopts the proposed language as final in this rule.

The proposed rule added a new § 124.105(k) to allow a right of first refusal granting a non-disadvantaged individual the contractual right to purchase the ownership interests of a disadvantaged individual without affecting the unconditional nature of ownership, if the terms follow normal commercial practices. This aligns 8(a) ownership requirements with those set forth in the VetCert program. Of course, if those rights are exercised by a non-disadvantaged individual after certification that result in disadvantaged individuals owning less than 51% of the concern, SBA will initiate termination proceedings. The proposed rule added the same provision to § 127.201(b) to conform the WOSB unconditional ownership requirements as well. SBA received four comments supporting this provision. One commenter requested that SBA define what it believes normal commercial practices to be. SBA believes that any definition might inadvertently disallow a practice that could be deemed a normal commercial practice, and that it is better to allow an applicant or Participant to demonstrate to SBA that it has in fact followed normal commercial practices. Another commenter was concerned that a right of first refusal could be tied to allowing a non-disadvantaged individual to unduly benefit from the program. Specifically, the commenter posed a hypothetical where a non-disadvantaged individual owns a business concern and agrees to ''sell'' 51 percent of the business concern to a disadvantaged individual with the proviso that in nine years the disadvantaged individual would sell the 51 percent back to the non-disadvantaged individual through a right of first refusal provision in the corporate documents. SBA believes that such an arrangement would not be a right of first refusal that followed normal commercial practices, but rather a scheme to deceive SBA and allow greater participation in the program by a non-disadvantaged individual than would otherwise be permitted. If SBA were aware of such a right of first refusal provision, it would not approve the application for 8(a) certification. SBA adopts the proposed language as final.

Sections 124.106(e), 127.202(g) and 128.203(h)

Sections 124.106(e) (for the 8(a) BD program), 127.202(g) (for the WOSB program), and 128.203(h) (for VetCert program) address limitations on the involvement of non-qualifying individuals that can affect a business concern's eligibility for participation in the 8(a) BD, WOSB, and VetCert programs based on a qualifying individual's lack of control. Basically, each of these provisions generally prohibit a non-qualifying individual from unduly influencing the day-to-day management and control of qualifying individuals. The language of the three provisions, however, is not entirely consistent. This has led to questions as to whether SBA intended different application of the control requirements for different programs. In order to clear up any confusion, the proposed rule changed the wording of the three provisions to bring them more in line with each other to ensure that the control requirement is consistently applied. For example, the WOSB regulations did not previously contain a provision that generally required a qualifying woman to be the highest compensated individual in the business concern unless the concern demonstrates that the compensation to be received by a non-qualifying woman is commercially reasonable or that the qualifying woman has elected to take lower compensation to benefit the concern. Such a provision was contained previously in both the 8(a) BD and VetCert regulations, and the proposed rule added a similar provision for the WOSB program. In connection with the 8(a) BD program, SBA proposed to change the requirement that an 8(a) Participant must obtain the prior written consent of SBA before changing the compensation paid to the highest-ranking officer to be below that paid to a non-disadvantaged individual to a requirement that the Participant must notify SBA within 30 calendar days of such an occurrence. SBA believes that notification is preferable to prior approval because SBA does not want a Participant to lose an individual with a particular expertise where the approval process is lengthy. SBA would then have to determine that the compensation to be received by the non-disadvantaged individual is commercially reasonable or that the highest-ranking officer has elected to take lower compensation to benefit the Participant before SBA may determine that the Participant is eligible for an 8(a) award. SBA received six comments regarding the proposed changes relating to the involvement of non-qualifying individuals. Three commenters noted that the proposed provisions for the 8(a) program required an 8(a) Participant to notify SBA where the compensation paid to the highest-ranking officer fell below that paid to a non-disadvantaged individual and recommended that the same should apply to the WOSB and VetCert programs also. The final rule adds that same notification requirement to WOSBs/EDWOSBs and SDVOSBs.

Section 124.107

Section 124.107(a) currently provides that an applicant's income tax returns

for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification. The proposed rule revised this provision to require merely that an applicant's income tax returns for each of the two previous tax years must show operating revenues. Revenue on an income tax return may not be aligned by industry or NAICS code and SBA does not seek to deny entry to the 8(a) program to a firm that has performed work in its projected primary industry but that work may not have been properly captured on its tax return. SBA received five comments on this provision, with all of them supporting the change. The commenters believed that the change will make the 8(a) BD program more accessible and remove an unnecessary barrier to entry. One commenter supporting the change noted that it is burdensome for 8(a) applicants to demonstrate ''operating revenues in the primary industry'' on income tax returns, as IRS business activity codes often do not align with NAICS codes. Where NAICS codes and IRS business codes do not align, the commenter stated that applicants have been asked to obtain a letter from their tax preparers to clarify code discrepancies, which adds an unnecessary burden to applicants. SBA adopts the proposed language as final in this rule.

Section 124.107(e) requires that, as a condition to show an 8(a) applicant's potential for success, the applicant or individuals employed by the applicant must hold all requisite licenses if the concern is engaged in an industry requiring professional licensing (*e.g.,* public accountancy, law, professional engineering). Generally, the potential-for-success requirements carry out the requirement in section 8(a)(7)(A) of the Small Business Act, 15 U.S.C. 637(a)(7)(A), that SBA determine that an 8(a) applicant have reasonable prospects for success in competing in the private sector. That same statutory provision, however, requires SBA to determine that with contract, financial, technical, and management support the applicant will be able to perform contracts which may be awarded to it. As such, SBA believes that issues of current responsibility should not prevent an applicant from being eligible for the 8(a) BD program where SBA believes that the business concern will be able to perform contracts awarded to it with certain contract, financial, technical, or management support. Although a business concern applying to the 8(a) BD program that does not have a required professional license may not currently be responsible to be awarded certain 8(a) contracts, as long as SBA determines that the concern would be able to perform such contracts with appropriate support, SBA believes that the concern should be eligible for participation in the 8(a) BD program. SBA proposed to remove the professional-licensing requirement. It is not only inapplicable to most applicants, it also can be overcome before any 8(a) contract opportunity is sought by those concerns to which it applies. SBA received six comments on the proposal to eliminate the license requirement at the time of application. Four commenters supported the removal of the license requirement as it will streamline the application process. Two commenters opposed the proposal, with one believing that eliminating the license requirement will encourage unprepared firms to apply to the 8(a) program and waste limited time in the program. SBA notes that an applicant must generally demonstrate that it has been in business and received revenue for at least two years. In addition, once admitted to the program, a Participant can seek and be awarded any 8(a) contract that a procuring agency believes that it is responsible to perform. SBA believes that applicants know the industry or type of business activity they hope to receive contracts in when they apply to the 8(a) BD program, so eliminating the license requirement will not adversely impact them or the program. Two commenters also recommended requiring an applicant to certify that it will obtain a necessary license in an industry requiring such a license where it does not possess a license at the time of application. SBA dos not believe such a requirement would add anything substantive to the process. Whether the firm certifies that it will obtain a license or not, it must in fact have a license in order for a contracting officer to determine the firm responsible to perform a contract in that industry. The firm could not be awarded a contract without an affirmative finding of responsibility. SBA also notes that there have been times where applicants have disagreed with SBA as to whether a license was required for the type of work the firm sought to perform. Removing the license requirement at the time of application eliminates those disagreements, which may unnecessarily delay the application process and impose a burden on the applicant in demonstrating that a license in fact is not needed in the work that the firm does. SBA adopts the proposed language as final in this rule.

Section 124.108

Section 124.108 sets forth other eligibility requirements that apply to 8(a) applicants and Participants. One of those requirements is that SBA must determine that an applicant or Participant and all of its principals possess good character. The 8(a) BD program is one of several certification programs to help small businesses win Federal contracting awards, but the scope of the 8(a) BD program is different. For the WOSB and VetCert programs, SBA only determines whether a small business applicant is owned and controlled by one or more qualifying individuals. SBA does not look at character or business integrity in determining whether a small business is owned and controlled by qualifying individuals. Similarly, for the HUBZone program, SBA only determines whether the small business applicant is located in and employs residents of a historically underutilized business zone. SBA certification of these qualifications allows the certified small businesses to compete for certain Federal contracts. These are not business development programs. Although SBA determines whether an 8(a) small business applicant is owned and controlled by one or more qualifying individuals, the program is not limited to this certification. Its scope is broader and includes a multi-year business development program with eligibility for specific management and technical assistance from SBA to support the business's successful competition in the marketplace. SBA requires ''good character'' to be admitted to this development program.

SBA proposed to limit the grounds that would serve as an automatic, mandatory bar from participation in the 8(a) BD program based on good character (*i.e.,* either an application denied or possible termination action commenced against a current Participant). The proposed rule amended the lack of business integrity bar to a lack of business integrity as demonstrated by conduct that could be grounds for suspension or debarment. SBA received six comments to this proposal, with three favoring the change and three opposing the change as written. Those favoring the change generally agreed with removing ''possible criminal conduct'' as grounds for declining based on character. The comments opposing the change as written believed that lack of business integrity based solely on conduct that could be grounds for suspension or debarment did not go far enough. They noted that suspension and debarment

should be imposed only in the public interest for the Government's protection and not for purposes of punishment and that mitigating factors or remedial measures could affect a suspension or debarment decision despite a lack of business integrity. They believed that some of the language currently in the regulation should be retained. These comments misunderstand the proposed change. The proposal does not limit the lack of good character requirement to suspension or debarment. When the regulations state that a lack of business integrity that could be grounds for suspension or debarment is needed to find a lack of good character for 8(a) BD purposes, it does not mean to imply that suspension or debarment needs to be imposed before SBA could find a lack of good character. The underlying conduct alone which demonstrates grounds for suspension or debarment is sufficient for SBA to find a lack of good character. In addition, SBA does not believe that adding back language providing that a lack of business integrity can be demonstrated by information related to an indictment or guilty plea, conviction, civil judgment, or settlement would be useful. A demonstrated lack of business integrity in an indictment, guilty plea, conviction, civil judgment, or settlement are all conduct that can be a cause for suspension or debarment actions. Moreover, there are instances in which an indictment, guilty plea, conviction, civil judgment, or settlement has no bearing on business integrity. Given the lack of connection to business integrity, they should not serve as a barrier to program entry. As such, SBA does not believe that the language as proposed needs to be amended and adopts it as final.

SBA will continue to conduct internal checks related to an applicant's business integrity that includes the applicant's criminal history, and consider all factors in evaluating whether an applicant would be a good candidate to participate in the 8(a) BD program. SBA will consider each application individually. This rule does not change business integrity requirements of procuring agency contracting officers or any business integrity evaluations done by them. Procuring agency contracting officers evaluate offerors' responsibility to perform Federal contracts prior to award, a process that can include an evaluation of business integrity.

Sections 124.108(e), 126.200(h), 127.200(h), and 128.201(b)

Sections 124.108(e) (for the 8(a) BD program) and 128.201(b) (for the VetCert program) provide generally that a small business concern is ineligible for certification if the concern or any of its principals has failed to pay significant financial obligations owed to the Federal Government. A similar provision is not currently contained in the WOSB or HUBZone eligibility requirements. SBA proposed to apply that restriction to the WOSB and HUBZone programs as well. To ensure consistency among the programs, SBA also proposed to revise the language in §§ 124.108(e) and 128.201(b) so that the regulatory language applying to all four programs is the same. SBA received two comments supporting these revisions and no comments opposing them. SBA adopts the proposed language in this final rule.

Sections 124.204(d), 126.306(d), 127.304(d), and 128.302

Sections 124.204(d) (for the 8(a) BD program), 126.306(d) (for the HUBZone program), 127.304(d) (for the WOSB program), and 128.302 (for the VetCert program) set forth the date at which at applicant must be eligible for each certification program. The wording of the regulations is not consistent. Section 124.204(d) specifies that an applicant must be eligible as of the date SBA issues a decision. Section 126.306(d) specifies that an applicant must be eligible as of the date it submitted its application and at the time SBA issues a decision. Section 127.304(d) specifies that an applicant must be eligible as of the date it submitted its application and up until the time SBA issues a decision. Section 128.302 details how SBA processes applications for VOSB and SDVOSB certification, but does not specifically address the point at which eligibility is determined. SBA is in the process of establishing a uniform application processing system. That system will allow a firm to simultaneously apply for multiple certifications for which it believes it is eligible. SBA believes that it is critical that eligibility be determined at the same point in time for all certification programs. If, for example, a firm amends a corporate document to come into compliance with a specific control requirement after initially submitting its application for the 8(a) BD program and the WOSB program, the current regulations would support a finding that a qualifying individual did control the applicant for 8(a) BD purposes but did not control the applicant for WOSB purposes. SBA believes that would be an inappropriate result. Therefore, the proposed rule amended each of these sections to require consistent wording that an applicant must be eligible as of the date SBA issues a decision. Although the proposed rule specified that an applicant must be eligible as of the date SBA issues a decision, implicitly a small business must believe that it is eligible at the time it applies for certification for any program. For purposes of applying for HUBZone certification, an applicant must submit payroll records for the four-week period immediately prior to its application date. It would be impossible to require payroll records for some unknown future date. After submitting an application for any program, a concern must immediately notify SBA of any changes that could affect its eligibility and provide information and documents to verify the changes. Four commenters supported these changes without substantive comment. SBA adopts the proposed language as final in this rule.

Section 124.207

Section 124.207 provides that a concern which has been declined for 8(a) BD program participation may submit a new application for admission to the program at any time after 90 days from the date of the Agency's final decision to decline. It also provides that a concern that has been declined three times within 18 months of the date of the first final Agency decision finding the concern ineligible cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decision to decline. SBA proposed to remove that second provision. SBA believes it is unnecessary and does not seek to thwart firms who have made legitimate attempts to overcome deficiencies from again applying to the 8(a) BD program. Five comments supported the elimination of that provision, and no comments opposed it. One commenter, however, also recommended that SBA should eliminate the 90-day waiting period to reapply to the 8(a) program after being declined because it may cause firms to miss contracting opportunities. SBA first notes that prior to 2020, a business concern was required to wait 12 months from the date of SBA's final agency decision to reapply to the 8(a) BD program. SBA changed the waiting period to 90 days in a rulemaking published in the **Federal Register** on October 16, 2020. 85 FR 66146, 66185. The change to 90 days has been enthusiastically supported and has worked well in practice. SBA also notes that SBA works with business concerns during the application process to address deficiencies and allow those concerns to supplement and/or clarify their applications in order to attempt to meet SBA's requirements. As such, SBA does

not believe that further change is necessary and adopts the proposed language as final in this rule.

Sections 124.303(c), 126.503(c), 127.405(f), and 128.310(g)

SBA proposed to add a new provision to § 124.303(c) (for the 8(a) BD program), to § 126.503 (for the HUBZone program), to § 127.405(f) (for the WOSB program), and to § 128.310(g) (for the VetCert program) providing that a firm that is decertified or terminated from one SBA certification program due to the submission of false or misleading information may be removed from SBA's other small business contracting programs. In addition, SBA proposed to authorize SBA to require a firm to enter into an administrative agreement as a condition of admission or re-admission to one of the SBA certification programs. SBA believes that a firm that submits false information to obtain a certification in one program is more likely to submit false information to other SBA programs, and SBA needs a mechanism by which to investigate whether this has occurred and remove non-responsible firms from its programs expeditiously. SBA received 14 comments regarding these proposed changes. Commenters generally supported the provisions, but believed there were inconsistencies in some of the regulatory text. Commenters specifically pointed to the word ''knowingly'' submitting false or misleading information in § 126.900 and stating that the submission of ''inconsistent'' information 126.503(c) would be cause for decertification. SBA agrees that inconsistent or incorrect information that was provided in error should not warrant decertification or termination. SBA is concerned about the knowing submission of false or misleading information. As such, SBA has amended the regulatory text to provide that a firm may be decertified from the HUBZone, WOSB, or VetCert programs where SBA discovers that the firm or its representative knowingly submitted false or misleading information, and a firm that is decertified or terminated from the one SBA program due to the submission of false or misleading information may be decertified from another SBA program. The final rule amends § 127.405(d) (for the WOSB program) instead of adding a new § 127.405(f), and amends to § 128.310(d) (for the VetCert program) instead of adding a new § 128.310(g).

Section 124.503

Section 124.503 addresses how SBA will accept a procurement offered for award through the 8(a) BD program. An agency may offer a sole source procurement to SBA nominating a particular 8(a) Participant for performance based on the firm's self-marketing efforts, or may offer it as an open requirement (*i.e.,* an offering to the program generally, but not in support of a particular 8(a) Participant). SBA's acceptance policies for such offerings are contained in §§ 124.503(c) and (d), respectively. SBA has long recognized the importance of self-marketing in a Participant's business development and continued viability. Thus, where an agency offers a sole source 8(a) procurement in support of a particular Participant as a result of self-marketing and SBA deems it suitable for the program, SBA will normally accept it on behalf of the Participant recommended by the agency as long as specified eligibility criteria are met. This policy was first incorporated in SBA regulations in 1986, 51 FR 36132 at 36149, but had been previously part of the standard operating procedure for the 8(a) BD program.

Section 303 of the Business Opportunity Development Reform Act of 1988 (BODRA), Public Law No. 100–656, tit. III, sec. 303, 102 Stat. 3865 (1988), adopted and expanded SBA's sole source contract acceptance procedures, mandating that SBA shall award a sole source 8(a) contract to the 8(a) firm nominated by the offering agency, provided the following three statutory criteria are met: (i) the Program Participant is determined to be a responsible contractor with respect to performance of such contract opportunity; (ii) the award of such contract would be consistent with the Program Participant's business plan; and (iii) the award of the contract would not result in the Program Participant exceeding its 8(a) competitive business mix. This mandate is codified in Section 8(a)(16)(A) of the Small Business Act, 15 U.S.C. 637(a)(16)(A). BODRA also directed SBA to promote—to the maximum extent practicable—the equitable geographic distribution of sole source 8(a) contracts. In response to BODRA, SBA promulgated a rule stating that it would consider, among other things, equitable geographic distribution for open 8(a) sole source contracts offered to the 8(a) BD program. This policy is currently set forth in paragraph 124.503(d)(3).

There has been some confusion as to whether SBA considers equitable contract distribution for a follow-on to an 8(a) procurement offered to SBA on behalf of a specific 8(a) Participant. In SBA's view, the imperative statutory command of Section 8(a)(16)(A) restricts its authority to affirmatively deny a contract offering made on behalf of a specific Participant based on considerations related to the equitable distribution of sole source 8(a) contracts, irrespective of whether the procurement is a ''new'' or repetitive 8(a) requirement. The proposed rules sought to clarify this position by providing that § 124.503(g)(1)(iii) applies only to open sole source 8(a) offerings. SBA received four comments on this proposal, all of which were supportive. As such, the final rule adopts this clarification as proposed.

Sections 124.504(a)

Section 124.504 identifies several reasons why SBA will not accept a particular requirement for award through the 8(a) BD program. One of those reasons is where the procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to award a contract as a small business set-aside, or to use the HUBZone, VetCert, or WOSB programs prior to offering the requirement to SBA for award as an 8(a) contract. SBA proposed to authorize SBA to accept a requirement for the 8(a) program where the AA/BD determines that there is a reasonable basis to cancel the initial solicitation or, if a solicitation had not yet been issued, a reasonable basis for the procuring agency to change its initial clear expression of intent to procure outside the 8(a) BD program. This could happen, for example, where the procuring agency's needs have changed since the initial solicitation was issued such that the solicitation no longer represents its current need, or where appropriations are no longer available for the requirement as anticipated, and the solicitation must be cancelled until a following fiscal year where funds are available. A change in strategy only (*i.e.,* an agency seeks to solicit through the 8(a) BD program instead of through another previously identified program) would never constitute a reasonable basis for SBA to accept the requirement into the 8(a) BD program.

SBA received six comments in response to this clarification, and all six supported the proposal. One commenter recommended that the Associate Administrator for Business Development should consult with the head of the Government Contracting Office before accepting a requirement to ensure that another SBA program is not adversely affected. SBA believes that such coordination should not be required in all instances (*i.e.,* there will be clear instances where the Director of Government Contracting's involvement is not needed), and that coordination

between SBA offices routinely happens when necessary. Nevertheless, in response to the comment, the final rule adds a provision specifying that AA/BD may coordinate with the D/GC, where appropriate, before accepting a requirement into the 8(a) BD program to ensure that another SBA program is not adversely affected.

Section 124.509

Section 124.509 establishes non-8(a) business activity targets (BATs) to ensure that Participants do not develop an unreasonable reliance on 8(a) awards. The reason for requiring a certain percentage of non-8(a) revenue during a Participant's last five years in the 8(a) BD program is to strengthen the Participant's ability to prosper once it exits the program. Congress believed that firms that were totally reliant on the 8(a) BD program for their revenues would be ill prepared to survive as on-going business concerns after leaving the program. As such, Congress required a certain percentage of non-8(a) revenue during the transitional stage of program participation to bolster Participants' continued viability. SBA amended § 124.509 as part of a comprehensive final rule in October 2020. *See* 85 FR 66146, 66189 (Oct. 16, 2020). In that final rule, SBA recognized that a strict prohibition on a Participant receiving new sole source 8(a) contracts should be imposed only where the Participant has not made good faith efforts to meet its applicable non-8(a) business activity target. SBA sought to provide guidance regarding what SBA considers to be good faith efforts in a final rule published in April 2023. *See* 88 FR 26164, 26208 (April 27, 2023). The proposed rule incorporated additional guidance on how SBA considers unsuccessful offers in determining whether good faith efforts have been made. Specifically, in determining the projected revenue that SBA will consider in determining whether one or more unsuccessful offers submitted by a Participant would have given the Participant sufficient revenues to achieve the applicable non-8(a) business activity target, the proposed rule provided that SBA will consider only procurements for which the Participant had reasonable prospects of success. The proposed regulatory text included an example showing how revenue for an unsuccessful offer would be considered in this context. The example explained that where a Participant has never received a contract in excess of a relatively small amount (the example cites $5M), SBA would not count any revenue from an unsuccessful offer for a contract that greatly exceeds what the Participant has previously performed (the example points to a $100M contract). In such a case, the Participant would not have a reasonable prospect of success in submitting an offer for a contract that was substantially higher than anything it had performed in the past. The proposed rule also clarified that only the value of the base year of the contract for which the Participant's offer was unsuccessful would be considered in determining whether the Participant made good faith efforts to achieve its non-8(a) BAT. In this regard, there had been some confusion as to whether the value of the entire contract or only the value of the base year should be considered in determining whether the revenues from that contract, if received, would have brought the Participant back into compliance with its BAT. As explained in the proposed rule, had the Participant been successful and received that contract, pursuant to § 124.509(b)(3) SBA would measure the Participant's compliance with the applicable BAT by comparing the Participant's non-8(a) revenue to its total revenue during the program year just completed. This analysis considers only the non-8(a) revenues received, not the total value of the non-8(a) contract that a Participant is performing. The proposed rule noted SBA's belief that same analysis should occur when considering whether a Participant has made good faith efforts to meet its BAT. In other words, it would not be appropriate for SBA to consider projected revenue under a contract for which the Participant's offer was unsuccessful beyond the contract's base year of performance.

SBA received 17 comments in response to the proposed changes to § 124.509. Commenters were generally supportive of SBA's proposal to consider only projected revenue under procurements for which the Participant had reasonable prospects of success in the good faith efforts evaluation. However, the majority of these comments urged SBA to provide additional clarity as to how SBA will determine whether a Participant had reasonable prospects of winning a particular contract. According to the commenters, the value of a Participant's prior contracts is one of several relevant factors SBA should consider in determining whether a Participant had reasonable prospects of winning a contract. SBA agrees and notes that the business development assistance provided through the 8(a) BD program is intended to improve a Participant's capabilities and ability to pursue larger, more complex contracts. In proposing this amendment to the BAT regulations, SBA sought to discourage Participants from disingenuously submitting offers, particularly for large dollar-value procurements, for the clear purpose of circumventing the BAT policies; it certainly was not intended to suggest that SBA would consider only projected revenues from lost contract opportunities at or below its current capacity in determining whether a Participant made good faith efforts to obtain work outside the 8(a) BD program. Several commenters recommended that for an entity owned Participant, SBA should consider the past performance and experience of sister subsidiary companies. SBA disagrees. SBA would consider the past performance and experience of affiliated companies, but, under applicable statute and regulations, individual business concerns owned by a Tribe, ANC, NHO or CDC are not affiliated with each other. As SBA has stated previously, SBA believes that the past performance of a sister company can be considered only where that sister company is involved in the procurement under consideration (*i.e.,* as a subcontractor or joint venture partner). In response to the comments, the final rule restructures § 124.509(d)(1)(ii) and adds language clarifying that SBA will consider all relevant factors, to include contract magnitude, and past performance and experience of a joint venture partner and/or subcontractor.

Most commenters agreed with SBA's clarification that only the value of the base year of the contract for which the Participant's offer was unsuccessful would be considered in determining whether the Participant made good faith efforts to achieve its non-8(a) BAT. Two commenters, however, urged SBA to consider the projected revenue under subsequent periods of performance in determining whether the Participant made good faith efforts during the appropriate compliance period. For example, where a Participant made a good faith, but unsuccessful, effort to capture a contract in the first year of its transitional stage of program participation (*i.e.,* program year five), SBA would consider the projected revenue under the base year of the contract when evaluating the Participant's compliance with its non-8(a) BAT for program year five. According to the above commenters, SBA should also consider the projected revenue of the first option period of performance when evaluating the Participant's compliance with its non-8(a) BAT for program year six (and continue doing so for the contract's

entire period of performance). SBA disagrees with this approach. As SBA has previously explained, the non-8(a) BAT requirement ensures that 8(a) Participants do not become unreasonably reliant on 8(a) contract support and are prepared to compete in the open marketplace after exiting the 8(a) BD program. Recognizing a Participant's ''good faith efforts'' to obtain non-8(a) work furthers this purpose while also promoting the firm's business development through ongoing access to sole source contract support. However, SBA is concerned that considering projected non-8(a) revenues from a missed contract opportunity over the total period of performance contract could inadvertently incentivize Participants to submit fewer offers for non-8(a) procurements, especially in years where their non-8(a) BAT threshold is relatively higher. As previously explained, the BAT requirement reflects legislative intent to prepare 8(a) Participants for competition outside the 8(a) BD program. In the agency's best judgment, limiting consideration to the value of the base year of performance and only for the period of compliance in which the offer was submitted strikes the right balance between this goal and continued business development through sole source contract support. In addition, options are not a guarantee of future revenue. If a firm received a non-8(a) contract in year five, SBA would count the revenue received as non-8(a) revenue in determining compliance with its applicable BAT. If the relevant procuring agency did not exercise the first option after the base year, SBA would not count the anticipated, but not received, revenue in year six as non-8(a) revenue for BAT purposes. SBA adopts the proposed clarification in the final rule.

Section 124.514(a)(1)

Section 124.514 provides guidance regarding the exercise of 8(a) options and modifications. Paragraph 124.514(a)(1) currently states that if a concern has graduated or been terminated from the 8(a) BD program or is no longer small under the size standard corresponding to the NAICS code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised. Because the regulatory language specifies graduation and termination from the program, SBA has received a few inquiries as to whether this provision applies to firms that have voluntarily exited the program. SBA has always intended this provision to apply to all firms that are no longer active Participants in the program. The proposed rule merely made that intent clear by specifically providing that this provision applies to all firms whose term of participation in the 8(a) BD program has ended or who have otherwise exited the program through any means. Three commenters supported the clarification without substantive comment. As such, SBA adopts the proposed language as final in this rule.

Section 124.518

Section 124.518(c) provides that SBA may authorize another Participant to complete performance of an 8(a) contract and, in conjunction with the procuring activity, permit novation of that contract without invoking the termination for convenience or waiver provisions of § 124.515 where SBA determines that substitution would serve the business development needs of both 8(a) Participants. SBA has seen several instances where a joint venture between an 8(a) Participant and a non-8(a) business concern was awarded an 8(a) contract and for whatever reason the two firms seek to terminate the joint venture and novate the 8(a) contract individually to the 8(a) Participant that was the lead partner of the joint venture. If novation would occur, performance of the 8(a) contract would remain with an 8(a) Participant (*i.e.,* the 8(a) Participant that was the lead partner of the joint venture). As such the intent of the program would be furthered. It could be argued that the current § 124.518(c) authority could be used to novate the 8(a) contract in this instance; substitution would serve the business development needs of both the initial 8(a) awardee (the joint venture) and the substituting 8(a) Participant (the former lead 8(a) partner to the joint venture). The proposed rule added a new § 124.518(d) to specifically authorize such a substitution. SBA also requested comments on whether it should further define how substitution ''would serve the business development needs of both 8(a) Participants.'' For example, where a Participant was not in compliance with its applicable business activity target, sought to transfer an 8(a) contract to another eligible 8(a) Participant through the substitution process and then sought to perform a significant portion of that contract as a subcontractor to the new 8(a) Participant (to then count the revenue from the subcontract as non-8(a) revenue), SBA explained that it would not determine that such a transfer was in the best interests of the program or serve the business development needs of both 8(a) Participants.

SBA received six comments on the proposed additional of new § 124.518(d), all of which were supportive. SBA therefore adopts this language as proposed. SBA notes, however, that this substitution authority should not be construed as giving the managing 8(a) venturer the option to request a substitution without the consent of the other joint venture partners. While the 8(a) BD program regulations require that an 8(a) Participant, among other things, own at least 51% of the joint venture and serve as the managing venturer responsible for controlling the day-to-day management of the joint venture's contractual performance, nothing in SBA regulations or policy authorizes or gives to the managing 8(a) venturer the unilateral authority to transfer the joint venture's contracts to itself. SBA will consider these principles when reviewing a substitution request under § 124.518(d). Three commenters recommended that SBA provide examples or guidance on what SBA would consider when determining whether a proposed substitution ''would serve the business development needs of both 8(a) Participants.'' As explained in the proposed rule, SBA is concerned that some Participants could use the substitution authority to circumvent important program policies, such as the BAT requirement and the sole source follow-on contracting restriction applicable to sister subsidiaries owned by the same Tribe/ANC/NHO/CDC. In addition, SBA never intended for this substitution authority to allow Participants to sell or otherwise transfer prime 8(a) contracts when doing so would frustrate the program's interests or potentially violate other applicable Federal procurement rules. To this end, SBA has already received several substitution requests from contract holders on 8(a) multiple award contracts, such as the 8(a) Streamlined Technology Acquistion Resource for Services (STARS) III multiple award contract. The contract holders requesting a substitution have typically graduated from the 8(a) BD program or have exceeded the applicable size standard and are therefore no longer eligible to receive sole source orders under the 8(a) STARS III vehicle. Such firms have stated that a substitution would serve their business development needs by raising capital from the sale of STARS III contracting assets, and by eliminating the cost and burden of administering the contract. SBA does not believe a transfer under these and similar circumstances serves the programmatic business development

needs of the contract holder requesting a substitution. Participation in the competitive 8(a) procurement process has been and remains one of the most valuable forms of business development assistance available through the 8(a) BD program. Establishing and implementing a capture strategy, critically evaluating a Request for Proposals, and technical proposal writing are just some of the necessary skills for submitting a successful offer in the Federal marketplace. In SBA's view, losing the opportunity to acquire or hone these skills in the competitive 8(a) context would be antithetical to a firm's business development even where the transfer might provide other legitimate benefits. Additionally, SBA notes that 41 U.S.C. 6305, as implemented at Federal Acquisition Regulation (FAR) Subpart 42.1204, prohibits contractors from selling or transferring a prime Government contract to a third-party. The Government may novate a contract to recognize a third-party as a successor in interest to a Government contract where that interest arises out of the transfer of (1) all the contractor's assets; or (2) the entire portion of assets involved in performing the contract. Where a contract holder seeks to transfer an Indefinite Delivery, Indefinite Quantity 8(a) contract without any task order awards, this may not comply with the requirements of FAR Subpart 42.1204. SBA has and will continue to consider all these factors in determining whether to authorize a substitution on the grounds that doing so would serve the business development needs of both 8(a) Participants. The final rule adds clarifying language and examples to § 124.518(c) to better explain SBA's intent.

Sections 124.602 and 124.604

Section 124.602 sets forth the kind of annual financial statement an 8(a) BD Participant submits to SBA, depending upon its gross annual receipts. Prior to this rule, Participants with gross annual receipts of more than $10 million were required to submit to SBA audited annual financial statements prepared by a licensed independent public accountant; Participants with gross annual receipts between $2 million and $10 million were required to submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant; and Participants with gross annual receipts of less than $2 million were required to submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant. SBA believes that with the value of Federal contracts greatly increasing over the last few years, the top dollar threshold of $10 million is being met by most Participants far more frequently. Recognizing that requiring an audited financial statement can be a significant cost to many small businesses, SBA proposed to require audited financial statements for those Participants exceeding $20 million, reviewed financial statements for those Participants with gross annual receipts between $5 million and $20 million, and in-house financial statements for those Participants with less than $5 million in annual receipts. SBA received 11 comments responding to the proposed increases to the thresholds for the annual financial statement requirements for 8(a) Participants. Commenters overwhelmingly supported the increased thresholds. One commenter appreciated SBA's acknowledgment of the substantial expenses involved in obtaining audited and reviewed financial statements, especially since compliance costs can be a significant barrier for small businesses, particularly in the Federal contracting industry. One commenter recommended that SBA require only internal prepared financial statements. Two commenters supported the increases generally but requested that the threshold to require reviewed financial statements be raised so that the Participants with lower revenues do not have to incur the added cost of a reviewed financial statement. SBA does not believe that only internal prepared financial statements should be required regardless of a Participant's revenues. More sophisticated business concerns should have audited financial statements, which may be required for certain types of contracts as well. In response to the comments, the final rule increases the threshold at which reviewed financial statements are required from $5 million to $7.5 million.

In response to SBA's proposed changes to the financial statement reporting requirement, one commenter suggested that SBA also amend § 124.604, which provides that a Participant owned by a Tribe, ANC, NHO, or CDC must include with its annual financial statement submission information showing how the Tribe/ANC/NHO/CDC has provided benefits to its Native or underserved community through the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program. § 124.602 allows a Tribe/ANC/NHO/CDC to submit consolidated financial statements prepared by the parent entity with schedules for each 8(a) Participant instead of separate audited financial statements for each individual 8(a) Participant. According to this commenter, it would make sense to provide a similar consolidated reporting option for community benefits under § 124.604. While SBA did not specifically propose any changes to § 124.604, we note SBA has long permitted Tribes/ANCs/NHOs/CDCs to annually report consolidated community benefits. Because this commenter's suggested revision merely recognizes current program policy and the entity's discretion to consolidate benefits reporting but does not require such consolidation, the final rule adds language to § 124.604 to clarify that Tribes/ANCs/NHOs/CDCs may elect to submit a consolidated report showing how the applicable Native or underserved community has benefitted through the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program. Of course, as noted above, consolidated community benefits reporting is optional; Tribes, ANCs, NHOs, and CDCs may continue to submit separate annual community benefits reports through each 8(a) Participant.

Section 125.2

SBA's regulations currently make clear that a contracting activity cannot conduct a competition requiring multiple socioeconomic certifications. In this regard, § 124.501(b) prohibits a contracting activity from restricting an 8(a) competition to Participants that are also certified HUBZone small businesses, certified WOSBs or certified SDVO small businesses. There is a similar restriction for the HUBZone program in § 126.609, for the WOSB program in § 127.503(e), and for the VetCert program in § 128.404(d). However, there is no similar specific restriction for small business set-asides and reserves. Where a contracting activity seeks to require 8(a), HUBZone, WOSB or SDVO certification in addition to status as a small business, in essence the contracting activity would be soliciting as an 8(a), HUBZone, WOSB or SDVO small business contract. That is permissible. Similarly, current § 125.2(e)(6) specifies that a contracting officer may set aside orders for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against total small business set-aside multiple award contracts. As such, there should be no doubt that there can be an order or agreement set-aside or reserved for a specific type of small business (*i.e.,* 8(a), HUBZone,

WOSB/EDWOSB, or SDVO) under a multiple award contract that itself was set aside for small business. SBA has been asked whether a contracting activity could require multiple certifications through ''a small business set aside''. SBA believes that the current program specific regulations identified above would prohibit that. In order to eliminate any misinterpretation, the proposed rule added a new § 125.2(c)(6) that would clarify that a procuring activity cannot restrict a small business set-aside or reserve (for either a contract or order) to require multiple socioeconomic program certifications in addition to a size certification.

SBA received eight comments supporting this clarification. One commenter recommended that the regulatory text say ''multiple'' or ''various'' instead of ''one or more,'' since requiring size and one socioeconomic status (8(a), HUBZone, WOSB, or SDVO) is permitted. SBA agrees and has replaced the words one or more with the word multiple. Two commenters also questioned whether there can be a partial set-aside and a reserve on the same requirement. The commenters believe that it makes sense that both should be allowed and that it is currently permitted, but that the regulatory text should be clarified. SBA agrees that both can occur with respect to one procurement requirement. A partial set-side can be done for one or more CLINs that must be set-aside for small business and a reserve could also be done on the same procurement for other items or services where a contracting officer would have discretion to utilize the small business reserve or not. The final rule clarifies the regulatory text to eliminate any confusion as to whether there can be both a partial set-aside and a reserve on the same procurement requirement.

Section 125.3

Section 125.3 governs subcontracting plans and reporting of subcontracting achievements. SBA proposed to extend the due dates for subcontracting reports by 15 days, from 30 days to 45 days. SBA also proposed to extend the time period for reviewing such reports by 15 days, from 60 days to 75 days. These extended time periods recognize that prime contractors are under increased reporting burdens because of order-level subcontract reporting. SBA received three comments supporting these changes without substantive comment. SBA adopts the proposed language as final in this rule.

Section 125.6(d)

Section 125.6 sets forth the limitations on subcontracting that apply to a small business prime contractor. A small business prime contractor, together with any similarly situated entity, must perform a certain specified amount of a small business contract and cannot subcontract more than that amount to another business concern that is not similarly situated. Paragraph 125.6(d) provides that for a multi-agency set aside contract where more than one agency can issue orders under the contract, the ordering agency must use the period of performance for each order to determine compliance. A question has arisen as to who should monitor compliance with such an order, the contracting officer for the underlying multi-agency contract or the contracting officer for the ordering agency. SBA believes that the contracting officer for the ordering agency is in the best position to monitor compliance with the limitations on subcontracting for a specific order. As such, the ordering contracting officer should monitor compliance throughout performance. At the end of performance of the order, the ordering contracting officer should inform the contracting officer for the underlying multi-agency contract if the ordering contracting officer knows that the contractor has failed to meet the applicable limitations on subcontracting requirement.

Additionally, there has been some confusion as to how work performed by leased employees is considered in determining compliance with the applicable limitation on subcontracting. Paragraph 125.6(d)(3) explains that work performed by an independent contractor shall be considered a subcontract and will therefore count against the prime contractor's limitation on subcontracting unless the independent contractor qualifies as a similarly situated entity. Unlike independent contractors, employees obtained from a temporary employee agency, professional employee organization, or leasing concern perform work under the primary direction and control of the recipient concern. For this reason, such individuals are treated as employees of the recipient concern for purposes of determining that concern's employee count under Section 121.106(a). SBA believes the same logic should apply when determining a recipient prime contractor's compliance with the limitations on subcontracting. Work performed by employees leased to the small business prime contractor shall be considered the prime contractor's self-performance, and therefore will not count against the prime contractor's limitation on subcontracting. The proposed rule clarified this position in § 125.6(d)(3). The final rule recognizes an exception where a contract is a staffing contract. SBA believes that it does not make sense to treat leased employees as employees of the prime contractor where the prime contractor and the firm it is leasing from are basically in the same business—staffing.

SBA received 12 comments in response to the two proposed changes to § 125.6. Eight comments agreed that, for a multi-agency set-aside contract where multiple agencies can issue orders, the contracting officer of the ordering agency should be responsible for monitoring compliance with the limitations on subcontracting for a specific order. The commenters believed that the ordering agency contracting officer is in the best position to monitor compliance with the limitations on subcontracting and noted that this approach allows the ordering agency's contracting officer to more effectively oversee contract performance, rather than the contracting officer of the overarching multi-agency contract. One commenter recommended that the ordering agency contracting officer should report a perceived violation only where a concern exceeds the applicable limitation on subcontracting requirement by more than a certain percentage. SBA disagrees. SBA believes that the contracting officer for the underlying multi-agency contract should be made aware of all instances of a contractor's failure to comply with regulatory requirements, including here the limitation on subcontracting requirements. If there are mitigating reasons for a contractor's failure to comply with the applicable limitation on subcontracting (*e.g.,* the ordering changed made changes to the procurement that required more subcontracting than anticipated), the ordering agency contracting officer should identify those reasons to the contracting officer for the underlying multi-agency contract. SBA received six comments on the proposed language regarding leased employees. All six supported the proposal. One commenter requested clarification for an entity-owned Participant as to how leased employees from a holding company or another company owned by the entity will be treated, especially if assigned on an as needed basis. SBA does not believe that further clarification is needed in the regulatory text. If the other entity-owned company is a temporary employee agency,

professional employer organization, or leasing concern, then the work done by those individuals will be considered the prime contractor's self-performance, and therefore not count against the prime contractor's limitation on subcontracting. If not, the work done by those individuals would count as subcontracted work.

Section 125.8

Section 125.8(e) covers how agencies evaluate the capabilities, past performance, and experience of joint ventures, including SBA mentor-protégé joint ventures. For SBA mentor-protégé joint ventures, section 125.8(e) provides that a procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. This provision recognizes that protégés may be less experienced when submitting an offer but, if they win the award, will gain experience and capabilities while performing with the mentor. SBA does not require, however, that every contract competition include special evaluation criteria for protégés.

A recent decision by the Court of Federal Claims has caused some confusion as to what past performance a procuring activity can require of a protégé joint venture partner and how that past performance should be evaluated. *See* SH Synergy, LLC v. United States, 165 Fed. Cl. 745 (2023). The SBA's mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for Federal contracts. The program recognizes that many small businesses may not have the necessary past performance and experience to individually compete successfully for certain larger contracts. Thus, it allows joint ventures between a protégé firm and a large business mentor to qualify as small to allow protégé firms to gain valuable experience overseeing and performing larger contracts. While the joint venture as a whole must meet the applicable limitation on subcontracting (or in other words perform a certain percentage of the contract), the protégé firm must perform at least 40% of all the work done by the joint venture partners in the aggregate. Because of that 40% requirement, some procuring activities require protégé joint venture partners to demonstrate some level of past performance as part of a joint venture's offer. Although SBA's current regulation provides that a procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally, it does not provide guidance on what a procuring activity could require. SBA proposed to provide such guidance. Specifically, SBA proposed to permit a procuring activity to require some past performance at a dollar level below what would be required of joint venture mentor partners or of individual offerors. The proposed rule provided an example of how this could work. In the example, where offerors must generally demonstrate successful performance on five contracts with a value of at least $20 million, a procuring activity could require a protégé joint venture partner to demonstrate one or two contracts valued at $10 million or $8 million. In addition, if a procuring activity requires a protégé joint venture partner to demonstrate successful performance on two contracts valued at $10 million or more, successful performance by the protégé firm on those $10 million contracts shall be rated equivalently to successful performance by the mentor partner to the joint venture or any other individual offeror on $20 million contracts.

SBA received 26 comments in response to the proposed changes to § 125.8(e). Sixteen comments supported the proposed changes and ten opposed them. Commenters supported giving less stringent requirements for protege firms' past performance. Several commenters recommended that SBA should highlight that the change is intended to limit the type of past performance agencies can require of proteges rather than authorizing the imposition of greater or more complex past performance requirements. SBA agrees that the guidance provided is intended to ensure that procuring activities do not require the same full level of past performance and experience of protégé joint venture members as they do of other offerors generally. This logically means that if a procuring activity requires past performance of a protégé joint venture partner, it must be at a reduced level. The majority of the opposing comments objected to the ''change'' that allows the procuring activity discretion whether to require a protege´ member of a joint venture to demonstrate some level of past performance and/or experience, although one commenter recommended that protégés should always be required to demonstrate some level of individual past performance. SBA notes that that is not a change from current policy. Procuring agencies currently have the discretion to require some level of past performance and experience of protégé joint venture partners. If that were not the case, there would not be GAO and Court of Claims cases considering if a procuring agency required too much past performance and experience of the protégé firm. The proposed rule merely provided guidance on what a procuring activity could require. In response to the comments, the final rule clarifies that a procuring activity contracting officer may rely solely on the past performance and experience of the mentor joint venture partner in its discretion. The final rule also adds a provision to the regulatory text providing that if a procuring activity requires a protégé joint venture partner to demonstrate some successful performance and/or experience on fewer previous contracts of lower values than that required of other offerors generally, successful performance by the protégé firm on the contracts it identifies shall be rated equivalently to successful performance by the mentor partner to the joint venture or any other individual offeror on the higher valued contracts they identify. Although this was clearly set forth in the example to paragraph (e), SBA believes that it should be specified in a separate regulatory provision as well.

Where a joint venture is the apparent successful offeror for a contract set aside or reserved for small business, § 125.8(f) currently authorizes the procuring activity to execute a contract in the name of the joint venture entity or a small business partner to the joint venture. There has been some confusion as to whether a procuring activity can choose to either execute the contract in the name of the joint venture entity or to a small business partner to the joint venture. SBA did not intend such discretion. SBA's joint venture rules set forth in § 121.103(h)(1) provide that a joint venture may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity. Where a joint venture exists as a separate legal entity, SBA intended a contract to be executed in the name of the joint venture. SBA intended to allow contracts successfully won by a joint venture to be awarded in the name of the small business partner only where the joint venture was not a separate legal entity, but rather an informal arrangement that had a written joint venture agreement that complied with SBA's regulations. The proposed rule clarified SBA's intent. Two commenters supported this clarification, with one specifying that although they acknowledge that it has always been the SBA's intent, they support explicitly

clarifying that a contract awarded to a joint venture shall be executed in the name of the joint venture if the joint venture is a separate legal entity. SBA adopts the proposed language as final in this rule.

Section 125.9

Section 125.9 sets forth the requirements relating to SBA's mentor-protégé program. Paragraph 125.9(b) specifies rules pertaining to firms seeking to become mentors and to firms which have been approved as mentors in the program. The introductory language to that paragraph provides that any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor, including other than small businesses. There has been some confusion as to whether non-profit entities may act as mentors. The statutory authority for the mentor-protégé program specifies that the term ''mentor'' means a for-profit business concern, of any size, that has the ability to assist and commits to assisting a protege to compete for Federal prime contracts and subcontracts. 15 U.S.C. 657r(d). Although § 125.9(b) does not specifically state that a mentor must be a for-profit entity, it requires a mentor to be a ''concern'', and that term is defined in SBA's regulations as a business entity organized for profit under § 121.105(1)(1). To eliminate any confusion, the proposed rule clarified that only for-profit business concerns may be mentors. Two commenters supported the clarification, and SBA adopts the proposed language as final.

Paragraph 125.9(b)(3)(ii)(B) authorizes a mentor to purchase another business entity that is also an SBA-approved mentor of one or more protégé small business concerns where the purchasing mentor commits to honoring the obligations under the seller's mentor-protégé agreement. Paragraph 125.9(b)(3)(i) provides that a mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés. However, it is possible that the initial or selling mentor may be a contract holder as a joint venture with a protégé on the same multiple award contract where the acquiring mentor is also a contract holder as a joint venture with its protégé. In such a case, after the purchase and the purchasing mentor committing to fulfill the obligations of the selling mentor's mentor-protégé agreement, the purchasing mentor could then have two different joint ventures as contract holders on the same multiple award contract. This could allow the mentor to dictate which joint venture could compete for any specific order under the multiple award contract. SBA does not believe that the mentor should be able to choose one protégé over another to compete for an order. In order to clarify SBA's intent, the proposed rule provided that where a mentor purchases another business entity that is also an SBA-approved mentor that is a contract holder as a joint venture with a protégé small business and the mentor is also a contract holder with a protégé small business on that same multiple award contract, the mentor must exit one of those joint venture relationships. SBA understands that this could adversely affect one of the protégé firms involved in a joint venture. To alleviate harm to a protégé, the proposed rule also permitted the protégé firm connected to the joint venture from which the mentor exits to seek to acquire the new mentor's interest in the underlying multiple award contract or reserve and work with the contracting officer to determine whether novation of such contract or reserve to itself only may be appropriate. The protégé may also seek to continue performance under the contract by replacing the new mentor with another business in the joint venture such that the revised joint venture continues to qualify as small. Similarly, the proposed rule also added a new § 125.9(d)(1)(iv) to give a protégé firm a right of first refusal to purchase a mentor's interest in a mentor-protégé joint venture where the mentor seeks to sell its interest in the joint venture.

SBA received 14 comments on the proposed changes to § 125.9(b). Eight comments favored the proposed language, three questioned some of the language and three had comments outside the scope of this rulemaking. Those in favor believed that a protégé should be able to novate its joint venture contract to itself where its mentor is sold to another firm and that firm does not intend continue performance in that joint venture. They felt that to do otherwise would hurt the small business protégé and recommended that contracting officers should be encouraged to process such novation requests. One commenter supported prohibiting a mentor from having two different joint ventures as contract holders on the same multiple award contract since this situation could provide the mentor with an unfair advantage, create a conflict of interest, and potentially harm one or both protégés. One commenter questioned whether the proposed changes were intended to clarify existing guidance or introduce new restrictions. As noted in the proposed rule, SBA's current regulations provide that a mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés. Because of that regulatory provision, SBA believes that current regulations require a firm that becomes the mentor of two protégés on the same multiple award contract to end one of those mentor-protégé relationships. SBA views this change as a clarification of existing policy, not the imposition of a new requirement. Similarly, SBA's current regulations provide that SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship. If a protégé firm enters joint venture relationships with each of its two mentors, those joint ventures cannot compete against each other. They cannot be contract holders on the same multiple award contract. Although that is currently policy, SBA has clarified that point in this final rule. One commenter recommended that SBA clarify that novation would not be necessary where there is merely a change in ownership of the joint venture (*e.g.,* another business buys the minority interest of the new mentor in the joint venture). The commenter believed that as long as there was merely a change in the ownership of the joint venture entity, the joint venture could continue to perform the contract without the need for a novation. SBA agrees that where a joint venture continues to qualify as small and otherwise eligible after a change of ownership of the joint venture, the joint venture can continue to receive orders under the multiple award contract without requiring a novation. One commenter supported the changes but was concerned that SBA assumed that a protégé firm was financially positioned to buy out a mentor's interest in an underlying multiple award contract or buy a mentor's interest in a mentor-protégé joint venture. The commenter recommended that the SBA provide that any financing that the protégé receives from another entity in order to purchase the mentor's interest in a multiple award contract or mentor-protégé joint venture shall not be grounds for a finding of affiliation. SBA agrees that as long as financing is on commercially standard terms affiliation will not be found and makes that clarification in this final rule. Finally, one commenter

sought clarification as to whether the time needed to find a substitute mentor would be tacked on to the new mentor-protégé agreement to give the protege its full six years. Under SBA's regulations, a small business may generally have a total of two mentor-protégé agreements with different mentors. Each mentor-protégé agreement may last for no more than six years. The current regulations also authorize the substitution of one mentor for another where the initial mentor-protégé relationship is terminated. SBA does not believe that the time it takes a protégé small business to find a new mentor should be subtracted from the six-year authorized mentor-protégé relationship. That is SBA's current policy, but the final rule makes that clear in a revised paragraph (c)(4)(iii).

The proposed rule also redesignated current § 125.9(e)(6) as § 125.9(c)(4). This provision relates to rules affecting protégé firms and SBA believes it should more appropriately be located in § 125.9(c), which has a heading entitled ''Proteges.'' The proposed rule added clarifying language to redesignated § 125.9(c)(4)(iv) to make clear that a concern cannot be a protégé for a total of more than 12 years. There has been some confusion that if a protégé elects to extend its mentor-protégé relationship with the same mentor for an additional six-year period that the protégé could somehow be able to participate in the mentor-protégé program as a protégé for more than 12 years. SBA believes that the current regulations clearly restrict such participation to a total of 12 years. Nevertheless, in order to dispel any possible contrary interpretation, the proposed rule specified that a firm could be a protégé for up to 12 years, whether the concern has a mentor-protégé relationship with two different mentors or the same mentor for second six-year period. Two commenters supported this clarification without substantive comment. SBA adopts the proposed language as final in this rule.

Finally, the proposed rule added a new § 125.9(c)(5). Within the provisions relating to mentors in § 125.9(b), the current regulations authorize a firm to purchase another firm that is currently an approved mentor in SBA's mentor-protégé program and to continue that mentor-protégé relationship if the purchasing firm commits to honoring the obligations under the seller's mentor-protégé agreement. The regulations do not, however, currently address any rights a protégé may have where such a sale occurs. There are times that the former mentor-protégé agreement would not be a good fit with the purchasing business concern. The purchasing concern may have different capabilities than the selling concern and may not be the best business concern to carry out the previous mentor's commitments. Where the purchasing concern is not able to fulfill the requirements of the existing mentor-protégé agreements as written, SBA believes that the protégé firm should be able to either negotiate a revised mentor-protégé agreement with the buying concern or terminate the mentor-protégé agreement if the protégé believes the buying concern is not a good fit for it. This right of the protégé is limited to where the new mentor would not fulfill the former mentor-protégé agreement. SBA would have to approve any revised mentor-protégé agreement. If the mentor-protégé agreement is terminated, the protégé firm could seek another business concern to enter a mentor-protégé relationship for a duration not to exceed six years minus the length of the mentor-protégé relationship with the former mentor.

SBA received four comments regarding this proposal. All four supported the language generally. Two commenters sought clarification that the protégé could terminate its mentor-protégé relationship only where the purchasing business concern (*i.e.,* the new mentor) and the protégé cannot agree on either continuing with the previous mentor-protégé agreement or negotiating a new mentor-protégé agreement that is acceptable to SBA. That was SBA's intent and the final rule makes slight wording changes in order to clarify that intent.

Sections 125.12, 126.619, 127.504(h), and 128.401(e)

SBA proposed to relocate size recertification and small business program status recertification to new § 125.12. Historically, size and status recertification have been separately addressed in parts 121 (for size), 124 (for 8(a) BD), 126 (for HUBZone), 127 (for WOSB), and 128 (for service-disabled veteran-owned small business or SDVOSB) of SBA's regulations. SBA sought to provide consistency among and clean up differences in the regulatory text in the programs. SBA believes that the rules regarding recertification should be the same for size and status, across all SBA small business government contracting and business development programs. The consolidation of the rules into one section that is cross-referenced in each small business program regulations will simplify the text and ensure easier, more consistent interpretation and application of the regulations.

Size and status recertification is a complex area of SBA's regulations that requires simplification and clarity, especially in the context of exceptions to recertification and the impact of recertification. The proposed rule made several clarifications to how SBA always intended recertification to operate, but which may be unclear from the existing regulatory text. First, a concern that recertifies as other than the size or status required for an award that it is currently performing may continue to perform the requirement for the remainder of that particular period of performance. Whether it can continue to receive future orders under an underlying contract or agreement after it submitted a disqualifying recertification depends upon whether the underlying contract or agreement is a single award or a multiple award vehicle. A concern that has recertified as other than small or other than a qualified program participant still may receive orders or agreements issued under a single award small business contract or agreement or unrestricted orders issued under an unrestricted multiple award contract. In either case, a procuring agency could not count the order as an award to small business or to the specific type of small business (*i.e.,* 8(a), WOSB, SDVOSB, or HUBZone). For any multiple award contract or agreement, the concern would not be eligible for orders set aside for small business or set aside for a specific type of small business.

Similarly, for a single award small business contract or any unrestricted contract, a concern that recertified as other than small or other than the required small business program status remains eligible to receive options. The procuring agency cannot count the option period as an award to a small business or small business program participant for goaling purposes. Such a concern may recertify as small or as the required small business program status for a subsequent option period if it meets the applicable size standard or becomes a certified small business program participant at that time. Conversely, for a multiple award small business set-aside or reserve, a concern that recertified as other than small or other than the required small business program would be ineligible to receive options.

The proposed rule also clarified SBA's intent as to the effect of a disqualifying recertification that occurs after an offer is submitted but prior to award. For an award set aside or reserved for small business, a concern must recertify its size and, where

appropriate, status if a merger, sale or acquisition occurs after an offer is submitted but prior to award. If the concern submits a disqualifying recertification, it may or may not be eligible for the award depending on when the sale, merger or acquisition occurred. If the merger, sale, or acquisition occurs within 180 days of offer submission and before award, the concern is ineligible for the award. If the merger, sale, or acquisition occurs after 180 days of its offer and before award, the concern would continue to be eligible for the award.

Any disqualifying size or status recertification precipitated by § 125.12(a) or § 125.12(b) (except for the 180-day rule discussed above), renders a concern ineligible for future set-aside or reserved awards, including awards of set-aside or reserved orders against pre-existing unrestricted or set-aside multiple award contracts. Additionally, in support of this interpretation, SBA proposed to allow requests for size determinations following any size recertification made in §§ 125.12(a) and (b) as well as those requested by a contracting officer as set forth in § 125.12(c).

SBA notes that the requirement for size recertification has always been interpreted by SBA to apply to Blanket Purchase Agreements in addition to all other small business set-aside or reserved awards, whether those awards are executed in the form of task orders, contracts, or any other type of procurement mechanism. Following a 2022 bid protest decision from GAO, SBA explicitly added the word ''agreement'' at 13 CFR 121.404(g)(2)(iii).

SBA received 31 comments responding to the proposed changes. Two commenters believed that recertifications should not be required in response to agreements in principle since those agreements may never be finalized or the ultimate sale or merger may take a long time, conceivably beyond one or more additional fiscal years (upon which size status is based). SBA agrees and has eliminated that language from § 125.12(a).

There were strong opinions on both sides of the significant proposals. Many of the commenters were concerned that contract holders on multiple award contracts would not be eligible for orders set aside for small business or set aside for a specific type of small business after disqualifying recertifications. These commenters believed that it could diminish the acquisition value of small business concerns. Others supported the proposed change, stating that to allow a firm that was purchased by a very large business to remain an eligible contract holder on a small business multiple award contract would sanction an unfair competitive advantage in favor of such now large entities for individual orders. These commenters believed that would only encourage more purchases by large businesses, which would hurt individual small businesses. Regarding decertifying recertifications on long-term contracts, many comments also believed that this disincentives growth and penalizes mid-tier businesses that have naturally evolved beyond the small business size standards. Others stated that they did not believe that a firm that becomes other than large or other than an eligible, HUBZone, WOSB or SDVO small business should be able to be eligible for any options beyond five years. They believed that even though an agency could not count the options as awards to small business, the opportunities would not be available to legitimate small businesses. They posed that a firm that may have grown to be other than small in year one of a 10-year contract would be able to benefit as a small business for 9 years after it actually qualified as a small business. Several commenters recommended a phased or delayed implementation of these provisions to allow time to adapt. Commenters recommended one year, two years and five years for a grace period.

SBA agrees that it makes sense to allow business concerns some time to adapt and plan how best to comply with the recertification provisions. The final rule adds a new § 125.9(g) that would delay the effective date of ineligibility for orders and options on underlying small business multiple award contracts due to disqualifying recertifications for one year after the effective date of this final rule. As such, a firm that has a disqualifying size or status recertification due to a merger, acquisition or sale that occurs prior to one year after the effective date of this final rule will remain eligible for orders issued under an underlying small business multiple award contract. Similarly, a firm that has a disqualifying size or status recertification prior to the end of the fifth year of a long-term contract will remain eligible for any options to be exercised prior to one year after the effective date of this final rule. However, in both cases, the procuring activity cannot count any new or pending orders issued pursuant to the contract or any such options exercised under the contact towards its small business and socioeconomic goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants, certified HUBZone small business concerns, SDVOSBs, and WOSBs/EDWOSBs.

In further response to comments, the final rule also amends which business concerns will be ineligible for orders and options after a disqualifying certification due to merger, acquisition or sale. Specifically, the final rule will make ineligible only those contract holders that have disqualifying recertifications involving a merger, acquisition or sale with a large business. Where two business concerns individually qualify as small before a merger, acquisition or sale but do not in the aggregate after such occurrence, the final rule allows the contract holder to remain eligible for orders issued under an underlying small business multiple award contract. Although the surviving entity may be eligible for orders after the merger, sale or acquisition, a procuring activity could no longer count orders issued to the entity as awards to small business.

One commenter encouraged SBA to specify in its final rulemaking that the rule will become effective 30 days (or longer) after the date of final rule publication and wanted to make sure that the rule will not be applied retroactively. As noted in the Dates section of this final rule, the provisions set forth in the rule will not be effective for 30 days after the date of publication. In addition, SBA agrees that any final rule should not be retroactively applied. SBA asserts that this rule has no retroactive effect. Once in effect, the rule will apply to existing contracts, but the provisions making firms ineligible for orders or options after disqualifying recertifications will apply only to future disqualifying recertifications (*i.e.,* ones that occur after one year from the effective date of this rule). Firms that have made or will continue to make disqualifying recertifications prior to one year after the effective date of this rule will continue to be eligible to receive orders and options after the effective date of this rule.

Sections 125.13 and 124.4

The proposed rule added a new § 125.13 explaining the restrictions on fees for representatives of applicants to and participants in the 8(a) BD, HUBZone, WOSB, and VetCert programs. These restrictions are currently contained in § 124.4 for the 8(a) BD program. The proposed rule took the language currently contained in § 124.4 for the 8(a) BD program and adds it to a new § 125.13 that will be applicable to the 8(a) BD, HUBZone, WOSB, and VetCert programs. SBA

considered making revisions to part 126, 127 and 128 of this title adopting the same language contained in § 124.4 for the WOSB, HUBZone, and VetCert programs. Instead, SBA believes that it is more expedient to add a new § 125.13 that would apply to all of SBA's certification programs than it would be to repeat the same language in each of the specific program area's regulations. SBA received three comments agreeing that the restrictions on fees for representatives should apply to all programs, not just 8(a). SBA adopts the proposed language as final in this rule.

Section 126.103

SBA proposed to revise, add, and eliminate certain definitions set forth in 13 CFR 126.103, to clarify existing policies and to reduce the burden on small businesses. Except where otherwise noted in the discussion below, SBA implements these changes as proposed.

SBA proposed to delete the definition for the term ''AA/BD'' because this term no longer appears in Part 126. SBA received no comments on this deletion.

SBA proposed to revise the definition of ''certify'' (or ''certification'') to clarify that this means the process by which SBA determines that a concern is qualified for the HUBZone program and eligible to be designated by SBA as a certified HUBZone small business concern in DSBS. SBA received one comment supporting this clarification without substantive comment.

As discussed above in the corresponding change to § 124.3 for the 8(a) BD program, SBA proposed to revise the definition of ''Community Development Corporation (CDC)'' for HUBZone purposes to align this definition with current practices and that applying to the 8(a) BD program. SBA received two comments supporting this change without substantive comment.

SBA proposed to revise the definition of ''contracting officer'' to correct an outdated citation. SBA received one comment in support of this update.

SBA proposed to revise the definition of ''decertify'' to clarify that a firm may voluntarily withdraw from the program without SBA needing to approve such withdrawal. SBA received one comment in support of this change.

SBA proposed to revise the definition of ''Dynamic Small Business Search (DSBS)'' to reference ''SAM, as defined in this section'' rather than ''the System for Award Management (SAM)''. In addition, SBA proposed to remove the words ''the Dynamic Small Business Search (DSBS)'' wherever they appear and add in their place the acronym ''DSBS''. SBA received one comment in support of this change.

SBA proposed to make several amendments to the definition of ''employee'' to prevent abuse and strengthen the integrity of the program. First, SBA proposed to increase the number of hours that an individual must work to be considered an employee for HUBZone purposes to 80 hours per month (up from 40 hours per month). The HUBZone program was intended to provide meaningful work experiences to individuals who reside in some of the nation's most economically distressed communities to help them gain valuable skills, on-the-job experience, and upward mobility. *See* 143 Cong. Rec. S730 (Jan. 28, 1997); S. Rpt. 105–62 (1997). In 2021, SBA HUBZone analysts identified a pattern in which firms put HUBZone residents on their payroll but did not actually employ them or give them work to perform. Rather, these individuals were put on the payroll only to enable the firm to appear to be eligible for the HUBZone program. This has never been permitted under the HUBZone regulations because allowing this practice would undermine the purpose of the HUBZone program. In response to the discovery of this practice and to prevent further fraud and abuse in the program, SBA proposed to increase the threshold to 80 hours.

As noted in the proposed rule, SBA was concerned that the minimum 40 hours per month was not sufficient to promote the purpose of the HUBZone program. SBA also noted that an 80 hour per month requirement would be consistent with how the 8(a) BD program treats employees establishing a bona fide place of business. In that context, § 124.3 defines the term bona fide place of business for 8(a) construction contracts to mean a location where an 8(a) BD Participant regularly maintains an office within the appropriate geographical boundary which employs at least one individual who works at least 20 hours per week at that location. The 80 hours per month requirement in the proposed rule would be in line with that 20 hours per week requirement. SBA requested comments on whether 80 hours per month was an appropriate threshold and whether there should be a minimum number of hours per week. SBA also sought comments on whether there should be an exception to the 80 hours per month threshold for a limited number (or percentage) of individuals where such individuals are working at least 40 hours per month.

SBA received 83 comments on this proposed change to the definition of ''employee.'' The majority of comments opposed the proposed increase in the minimum number of hours from 40 to 80 per month to meet the definition of ''employee'' for HUBZone purposes. These commenters argued that this change would disproportionately harm part-time employees, particularly students, retirees, people with disabilities, or individuals holding multiple jobs. The commenters noted that these groups often rely on the flexibility that the current 40-hour requirement allows. In addition, several commenters highlighted the potential for businesses to face increased operational costs, reduced hiring opportunities, and greater administrative burdens, which could ultimately lead to firms leaving the program or being less competitive. Many respondents also questioned the justification for this change, noting that it may not effectively address fraud or abuse as intended by the SBA. They suggested that the 80-hour threshold may simply create more paperwork without leading to meaningful improvements. Some commenters argued that the focus should be on addressing bad actors rather than imposing blanket requirements that penalize responsible businesses. Others proposed alternative solutions, such as requiring a certain number of hours per week (*e.g.,* 15–20 hours) instead of instead of a specified number per month, or suggesting a phased implementation to allow businesses to adjust. A number of commenters expressed opposition to using driver's licenses for residency verification and excessive documentation requirements for proving employee status. These commenters viewed these processes as burdensome, particularly for non-driving employees or those with disabilities. Several commenters urged SBA to focus on practical solutions that recognize the realities of running small businesses and supporting diverse workforces, including students, retirees, and individuals with disabilities. A few commenters expressed support for the increase to 80 hours, arguing that it would help boost economic impact in HUBZone areas and ensure that businesses are genuinely contributing to community development. However, even supporters recommended a phased-in approach to avoid overwhelming businesses and employees. Some suggested exceptions for certain types of workers, such as students or specialized professionals, or a more flexible workweek requirement to accommodate various needs. Overall, the feedback indicated a strong desire for SBA to reconsider the 80-hour rule

or provide more nuanced alternatives that balance the goals of the HUBZone program with the practicalities of running small businesses and supporting diverse employees.

SBA has considered the comments received and decided to maintain the 40-hour threshold at this time. However, rather than requiring an aggregate of 40 hours of work during the 4-week period preceding the date of review, this final rule generally requires an individual to work at least 10 hours per week during the 4-week period preceding the date of review in order to be considered an ''employee'' for HUBZone purposes. The final rule permits a business concern to allow an employee less than 10 hours per week, provided that the employee works at least 40 hours per month, if the business concern can demonstrate a legitimate business reason for doing so. For example, if a business concern demonstrates that there is seasonal work that requires more work in one or two weeks than in the rest of the month, SBA could find the individual to count as an employee for HUBZone purposes. SBA believes this decision is responsive to the public comments while also addressing some of the concerns outlined in the proposed rule.

Second, SBA proposed to add a provision clarifying the obvious requirement that an individual must be performing work in order to be considered an employee for HUBZone purposes. The provision provides that SBA may request documentation demonstrating that an individual is performing work, including job descriptions, resumes, detailed timesheets, sample work product and other relevant documentation. SBA received 12 comments on this clarification. Some commenters believed it served the purposes of the program to pay HUBZone residents minimum wage without giving them any work to do. SBA strongly disagrees. Allowing such a practice would be akin to allowing companies to buy their way into the HUBZone program, which is far from the purpose of the HUBZone program. As noted above, the HUBZone program was created to provide employment opportunities to residents of economically distressed areas. Simply paying HUBZone residents, without giving them work to do, does not create real employment opportunities.

In addition, some of the comments opposed the collection of employee resumes. A few commenters argued that instead of resumes, which could contain false information that HUBZone companies cannot verify, SBA should require specific work history from employees related to their time at the applicant company. Some commenters also expressed opposition to the proposed requirement for employees to perform work that is ''commensurate'' with the hours charged. These commenters argued that this expectation misrepresents the intent of the HUBZone program, which is primarily focused on increasing employment opportunities and economic development in underutilized areas, rather than mandating specific work contributions. They emphasized that HUBZone firms providing employment and wages are fulfilling the program's goals, regardless of the nature of the work performed. Commenters highlighted the need for simplification in the requirements, advocating for limited proof related to hiring processes rather than extensive documentation like job descriptions and sample work products. They argued that such requirements complicate the certification process, especially for smaller businesses that may lack the resources to comply with such stringent documentation requirements. A few commenters suggested that SBA provide further clarity on what constitutes ''meaningful'' work and offer templates and training to help businesses meet SBA's expectations. In response to these comments, SBA reiterates its position that the HUBZone program was intended to create meaningful employment opportunities in underserved areas. SBA will continue to require individuals to perform some work in order to be considered employees for HUBZone purposes and may require relevant documentation to ensure this requirement is being met.

Third, SBA proposed deleting the provision within the definition of ''employee'' providing that individuals who receive in-kind compensation may be considered employees. The current regulations provide that an individual receiving in-kind compensation may be considered an employee, where the compensation is commensurate with the work performed by the individual and provides a demonstrable financial value to the individual, and where the arrangement is compliant with all relevant Federal and State laws, such as Federal tax laws. SBA proposed to eliminate this provision because SBA has found that little to no firms are able to meet these requirements. The process of requesting and reviewing documentation that is ultimately insufficient has only served to slow down application processing. SBA received five comments in response to this proposed change, the majority of which supported the deletion. Commenters agreed that removing this provision would improve the efficiency of the eligibility review process. One commenter recommended that SBA evaluate cases involving in-kind compensation individually. The commenter noted that permitting in-kind compensation was originally aimed at helping smaller startups, particularly those with spouses or family members who contributed to the business but did not hold ownership. SBA has considered the comments and is adopting the proposal to delete the provision allowing in-kind compensation. Despite the original intent of this provision, SBA believes the significant delays in processing—including delays caused when firms do not understand the provision or the requirements for meeting it—outweigh its potential benefit.

Fourth, SBA proposed adding language to clarify that individuals who are obtained ''from a concern *primarily engaged* in leasing employees'' are generally considered employees for HUBZone purposes. The current regulations provide that individuals obtained from a ''leasing concern'' are generally considered employees. However, it has been SBA's policy for a number of years that leased employees will only be considered employees for HUBZone purposes where they are leased from a concern that is primarily engaged in leasing employees. This policy is consistent with SBA's size regulations at § 121.103(b)(4), which provide: ''Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses . . . are not affiliated with the leasing company . . . solely on the basis of a leasing agreement.'' SBA received three comments in response to this proposal, all of which supported the change. The commenters noted that this proposal will provide greater clarity for the HUBZone program. One commenter noted that there is a need for clearer, more defined standards to differentiate between leasing companies and subcontractors, as the line between them is increasingly blurred, leading to confusion and compliance issues. The commenter believes that establishing specific criteria for what constitutes a leasing company will help ensure consistent application of the rule and prevent potential exploitation of this provision. SBA agrees with these comments and adopts the language related to leased employees as proposed.

Finally, SBA requested comments on when reservists should be considered employees for HUBZone purposes. As SBA noted in the proposed rule, when reservists are called up for active duty, companies may be required to promptly reemploy them in an appropriate reemployment position (which may or may not be the pre-service position) upon their return from service. A company may list such individuals as employees, which may mean those individuals appear on the company's payroll with zero hours listed. SBA received 12 comments in response to this request, 11 of which supported treating reservists as employees when they are called up for active duty. The comments emphasized the importance of recognizing reservists—as well as National Guard members—as employees even during their periods of active duty. They argued that this policy prevents penalties to HUBZone firms for complying with the Uniformed Services Employment and Reemployment Rights Act of 1994 (''USERRA''), 38 U.S.C. 4301–4335. Commenters suggested that reservists should be counted as employees for the entire duration of their call-up, ensuring that firms are not disadvantaged when key personnel are deployed, particularly if they are critical for meeting HUBZone employment requirements. A few commenters suggested extending these protections to employees on long-term disability or maternity leave, ensuring that they retain their employee status as long as their positions are maintained. The comments also proposed including military spouses and dependents residing near HUBZone areas to promote employment opportunities for military families. Based on the comments received, the final rule provides that, in general, reservists and National Guard members will be treated as employees for HUBZone purposes during their periods of active duty, even if they do not receive compensation from the HUBZone company during this time. The final rule does not adopt the suggestion that this treatment be extended to military spouses or dependents, or to employees on long-term disability or those on maternity leave who are not currently on the company's payroll. In other words, if an individual is on medical or maternity leave and is still being paid by the HUBZone concern (*i.e.,* being paid on sick or maternity leave), the individual will count as an employee for HUBZone purposes. However, if the individual has exhausted her/his paid leave and is taking additional time off from employment, the individual would not count as an employee for HUBZone purposes. SBA believes that at that point in time there is no certainly that the individual would come back to be employed by the firm and allowing such individual to be considered an employee for HUBZone purposes would create a much larger exception to the rule and leave the program vulnerable to abuse. The final rule clarifies that individuals who are on sick or maternity leave and continue to be paid by the business concern are considered employees.

SBA proposed to add a new definition for the term ''HUBZone certification date'' providing that this is the date on which SBA approves a concern's application for HUBZone certification and is the date specified in the concern's certification letter. The definition provides that if a concern leaves the HUBZone program and reapplies for certification, their HUBZone certification date is the date SBA approves the concern's most recent application.

SBA proposed to add a new definition for the term ''HUBZone Map'' providing that the HUBZone Map is a publicly accessible online tool that depicts HUBZones.

SBA proposed to add a new definition for the term ''HUBZone resident employee'' providing that this means an individual who meets the definition of an employee and who SBA has determined resides in a HUBZone.''

SBA proposed to amend the definition of the term ''HUBZone small business concern'' by deleting the last sentence, which provides: ''A concern that was a certified HUBZone small business concern as of December 12, 2017, and that had its principal office located in a Redesignated Area set to expire prior to January 1, 2020, shall remain a certified HUBZone small business concern until June 30, 2023, so long as all other HUBZone eligibility requirements are met.'' This was a reference to the previous map freeze, and since the map freeze ended on June 30, 2023, this language is no longer necessary.

SBA proposed to revise the definition of ''Indian Tribal Government'' to make it consistent with the definition of the term ''Indian tribe'' in the 8(a) BD Program regulations at § 124.3 of this chapter. Specifically, SBA proposed to revise the definition to explicitly allow participation by State-recognized Tribes. SBA received one comment opposing this change, arguing that expanding eligibility would significantly increase the number of competing entities. The commenter argued that already, a large percentage of HUBZone dollars go to Tribal 8(a) companies, creating an imbalance in contract awards and urged SBA to explore this differentiation to foster a more level playing field. SBA disagrees. State-recognized Tribes are legitimate Tribes and Federal assistance programs should be equally available to them and, in this case, to business concerns that they own. SBA does not believe that it makes sense for a tribally-owned small business concern to qualify as eligible for the 8(a) BD program and then, with the same ownership and control, fail to qualify for the HUBZone program as an eligible tribally-owned small business concern. One of the purposes of this final rule is to make the eligibility requirements for SBA's various programs as consistent as possible. As such, SBA adopts the proposed language as final in this rule.

SBA proposed to revise the definition of ''interested party'' to prevent non-HUBZone firms from filing a HUBZone protest on a HUBZone set-aside procurement. Currently, an interested party is defined as any concern that submits an offer for a specific HUBZone set-aside contract or order, or any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone small business concern. In the context of a HUBZone set-aside contract, SBA does not believe that a firm that is not itself a qualified HUBZone small business concern should be able to submit a protest. In other words, a large business or a small business which is not a qualified HUBZone small business should not be able to protest the HUBZone status of the apparent successful offeror on a HUBZone set aside contract merely because it submitted an offer for that contract or order. The large business or small business which is not a qualified HUBZone small business is not harmed by an award to the apparent successful offeror since it has no right itself to that award. It is ineligible for that award. Only firms that are capable of winning the HUBZone set-aside contract or order should be able to protest the HUBZone status of an apparent successful offeror. SBA has seen situations where a non-eligible firm has submitted an offer and then protested the HUBZone status of the apparent successful offeror. SBA believes this is not the intent of the protest process and causes unnecessary delays. If such a ''protest'' raises a genuine concern, SBA can always adopt it as an SBA-initiated protest. However, often this is a delay tactic used by an incumbent contractor protesting the apparent successful offeror in order to

continue to perform the underlying work while the protest is resolved. This change would not affect the ability of a large business to protest the HUBZone status of an apparent successful offeror where the apparent successful offeror received the benefit of the HUBZone price evaluation preference in an unrestricted competition and the large business submitted an offer for that contract. In such a case, a large business could otherwise be eligible for the award of the contract.

On May 16, 2024, SBA published a proposed rule in the **Federal Register** to make several changes to the WOSB program. 89 FR 42816. In that rule, SBA proposed to amend the definition of the term ''interested party'' to clarify who may submit a protest against an apparent successful offeror's EDWOSB or WOSB status. 89 FR 42819. In response to that proposed rule, commenters recommended that SBA should also clarify the term ''interested party'' for both HUBZone and SDVO status protests. SBA agreed and is amending the term ''interested party'' for HUBZone status protests in that final rule. As such, it is no longer necessary to make that change in this final rule.

SBA proposed to amend the definition of ''principal office'' to make several changes and clarifications. First, SBA proposed to require firms to provide a lease that commenced at least 30 days prior to the date of SBA's review and ends at least 60 days after the date of SBA's review. Second, SBA proposed to clarify the requirement that a firm must conduct business from the location identified as the firm's principal office and may be required to demonstrate that it is doing so by providing documentation such as photos and/or providing a live or virtual walk-through of the space. SBA also proposed to clarify that for shared working spaces (or ''coworking'' spaces), firms will need to provide evidence that the firm has dedicated space within any shared location, and that such dedicated space contains sufficient work surface area, furniture, and equipment to accommodate the number of employees claimed to work from this location. SBA proposed to specify that a virtual office (or other location where a firm only receives mail and/or occasionally performs business) does not qualify as a principal office. Third, SBA proposed to add a provision stating that if 100% of a firm's employees telework (*i.e.,* work the majority of the time from their homes), then at least 51% of its employees must work from HUBZone locations and the firm's principal office would be the location where its records are kept. One of the purposes of the principal office requirement is to provide an infusion of capital into the HUBZone area with employees utilizing the services of other business concerns located near the HUBZone firm's principal office. Where all of a firm's employees telework, that intent cannot be fulfilled. However, SBA understands that in today's business environment, firms are utilizing telework employees more and more. With that understanding, SBA proposed to allow 100% of a firm's employees to telework, but where that occurs SBA required the firm to have 51% of its employees reside in a HUBZone instead of the normal 35%. SBA believes that such an additional requirement would make up for the lack of additional capital infusion caused by not having a traditional office located in a HUBZone. In addition, SBA sought comments on whether SBA could allow teleworking employees who reside and work within the same census tract as the firm's claimed principal office (or an adjacent census tract) to be counted as working from the principal office.

SBA received twenty-six comments on these proposed changes, some of which supported the proposed revisions and some of which opposed them. Most commenters opposed the proposed increase of the HUBZone residency requirement from 35% to 51% for firms with teleworking employees. Many argued that such a change would be detrimental to small businesses, especially in sectors like IT and consulting, where high-wage positions often operate remotely. These commenters believed that a 51% requirement would be unmanageable and could discourage HUBZone participation, ultimately undermining the program's goal of fostering economic growth in underutilized areas. Instead, they suggested maintaining the 35% threshold, which has historically facilitated access for small businesses, allowing them to thrive while contributing to local economies. Many commenters argued that the principal office should not be limited to traditional office spaces, especially since many small businesses operate from home offices. They advocated for counting employees who reside and work in the same or adjacent census tracts as those working from the principal office, even if it is owner-occupied. Additionally, some commenters raised concerns about the proposed requirement for a lease to be active for a specific period before and after SBA reviews, which could impose burdensome compliance challenges for businesses with shorter-term leases or those sharing space with parent companies. Overall, the comments emphasized the need for flexibility in the definition of the principal office and the residency requirement to reflect contemporary work practices, such as telework. Many suggested that SBA should consider alternatives that recognize the realities of modern business operations without creating barriers to entry for new firms. Additionally, they called for clear guidance and documentation expectations to ensure compliance while maintaining the program's integrity and supporting economic development in HUBZone areas.

Given the volume of negative comments received, SBA has decided not to implement the proposed provision requiring that if 100% of a firm's employees telework, then 51% must reside in HUBZones in order to meet the principal office requirement. SBA believes that allowing 35% of a firm's employees to qualify the firm as HUBZone eligible where the firm does not have a ''principal office'' would be inconsistent with the statutory requirements. The principal office requirement is statutorily required in addition to the 35% residency requirement. The proposed rule attempted to recognize the increase in teleworking, but sought to make up for the lack of a principal office being located in a HUBZone by requiring a greater percentage of HUBZone resident employees. The final rule does not adopt the proposed language. As such, the current policy will continue to apply, meaning that HUBZone firms must always have an office located in a HUBZone where more employees work compared to any other location (unless all employees work in HUBZones and have at least 35% HUBZone resident employees. SBA will continue to evaluate the impact of the prevalence of telework on the HUBZone portfolio.

SBA proposed to revise the definition of ''Qualified Disaster Area'' to provide that a census tract or non-metropolitan county shall be considered to be a Qualified Disaster Area starting on the date on which the President declared the major disaster for the area in which the census tract or non-metropolitan county, as applicable, is located (or in the case of a catastrophic incident, on the date on which the catastrophic incident occurred in the area in which the census tract or non-metropolitan county, as applicable, is located) and ending on the date when SBA next updates the HUBZone Map in accordance with § 126.104(a). This is SBA's current interpretation of the statutory definition of ''Qualified

Disaster Area'' and SBA proposed to make that interpretation clearer. SBA received two comments on this, both of which supported SBA's clarifications.

SBA proposed to revise the definition of ''Redesignated Area'' to delete the last sentence, which currently reads: ''However, an area that was a redesignated area on or after December 12, 2017, shall remain a redesignated area until June 30, 2023.'' This is a reference to the previous map freeze, and since the map freeze ended on June 30, 2023, this language is no longer necessary. SBA received one comment supporting this update.

SBA proposed to revise the definition of ''reside'' to provide that to determine residence, SBA will first look to an individual's address identified on his or her driver's license ''or other government-issued identification.'' The current regulation provides that SBA will rely on an individual's voter registration card. However, voter registration cards generally do not specify the date that they were issued and thus SBA cannot rely on them to determine how long an individual has resided at a location. In addition, SBA proposed to change the requirement for an individual to have lived at a location for 180 calendar days immediately prior to the relevant date of review. SBA proposed to decrease this to 90 calendar days because it would allow firms to enter the program more quickly where they have employees who have resided in HUBZones for less than 180 days.

SBA received 13 comments on these proposed revisions to the definition of ''reside.'' Eight commenters supported these changes and five opposed them. The commenters who supported the reduction to 90 days argued that it would streamline the certification process and encourage companies to hire HUBZone residents more efficiently. They emphasized that the current rules create rigidities that can hinder businesses from fully benefiting from HUBZone participation. Suggestions for improvement included allowing greater flexibility in how residency is verified, such as accepting various forms of documentation and aligning verification processes with existing employment and tax records. Commenters argued that this flexibility would also accommodate special circumstances, like those faced by military personnel and students living in HUBZones, ensuring that these individuals can still contribute to and benefit from the HUBZone program. Commenters who opposed the change to 90 days were concerned about the potential for companies to hire employees only temporarily to meet certification requirements. They argued that employees should be permanent members of the company, which would foster a more stable workforce. Additionally, there was significant opposition to using driver's licenses for address verification. Some commenters argued that it imposes unnecessary financial burdens on employees, especially those who may not regularly update their identification due to economic constraints. Alternative verification methods, such as lease agreements, were suggested as more practical solutions.

SBA agrees that some flexibility in demonstrating residency is required, and that there may be good reasons why a driver's license does not match the address of the claimed HUBZone residence. For example, where a claimed HUBZone employee's spouse is in the military and that individual has accompanied the spouse to a new residence where the spouse is currently deployed, the individual's driver's license may legitimately identify a residence in a totally different State. However, SBA still believes that a driver's license is the easiest way to demonstrate residency and that it should not be eliminated as a means of verifying an individual's address. The final rule clarifies that SBA will ask for a driver's license in all cases, but if a driver's license is not available (*e.g.,* an individual lives in a city and uses only public transportation) or the residence on the driver's license does not match the claimed HUBZone residence, SBA will accept other proof of residency. In such case, the final rule requires that an individual also provide an explanation as to why a driver's license is unavailable or inconsistent. This is a change from the proposed rule, which required an individual to submit a signed statement explaining why a driver's license is unavailable and attesting to the individual's dates of residency. SBA believes that the final rule is a more reasonable requirement. The final rule adopts the 90-day residency requirement set forth in the proposed rule. SBA believes that 90 days strikes a good balance between ensuring that individuals actually reside in a specified location and allowing firms seeking HUBZone certification to avail themselves of a streamlined application process. SBA is not concerned with the commenters who believed that companies could hire employees only temporarily to meet certification requirements because the final rule also adds the requirement that a firm must qualify as an eligible HUBZone small business concern as of the date it submits an offer for a HUBZone contract.

SBA proposed to revise the definition of ''Small business concern (SBC)'' to make it consistent with the definition contained in § 126.200(b)(1). In order to be eligible for the HUBZone program, SBA previously required that a concern qualify as small for the size standard corresponding to its primary industry. That requirement was contained both in § 126.103 and § 126.200(b)(1). In 2023, SBA amended § 126.200(b)(1) to specify that a concern must qualify as small under the size standard corresponding to any NAICS code listed in its profile in the System for Award Management. 88 FR 26164, 26212 (Apr. 27, 2023). SBA inadvertently did not make a corresponding change to the definition of small business concern contained in § 126.103. Thus, SBA proposed to amend § 126.103 to be consistent with § 126.200(b)(1). SBA implements this change in the final rule.

SBA proposed to add a new definition for the term ''System for Award Management (SAM)'' providing that this term has the same meaning as that which is in FAR 2.101. SBA also proposed to remove the words ''System for Award Management'' wherever they appear in this part and add in their place the acronym ''SAM''.

Finally, SBA proposed to remove the word ''SBC'' wherever it appears in this part and add in its place the phrase ''small business concern''.

Section 126.104

SBA proposed to make several amendments to § 126.104, which explains how Governor-designated covered areas become designated. First, SBA proposed to insert language providing that a State Governor may annually submit a petition to the SBA Office of the HUBZone Program requesting that certain covered areas be designated as Governor-designated covered areas. This is not a change from current policy, but rather a restatement of that policy in a more clear and direct way. Second, SBA proposed to clarify that a petition need not seek SBA approval for those covered areas previously designated as Governor-designated covered areas. Third, SBA proposed to specify that a Governor-designated covered area will be treated as a HUBZone until SBA next updates the HUBZone Map in accordance with § 126.104(a), or one year after the petition is approved, whichever is later. Fourth, SBA proposed to authorize the Associate Administrator for Government Contracting and Business Development or designee, instead of the SBA Administrator, to approve specific

covered areas to be considered as Governor-designated covered areas. SBA believes that this will reduce the amount of time to approve a petition, which will allow small businesses located in such areas the opportunity to participate more expeditiously in the HUBZone Program.

Finally, SBA proposed to remove the term ''urbanized area'' in the definition of ''covered area'' in § 126.104(d)(1). The HUBZone statute and the current regulations provide that only certain areas are eligible to become Governor-Designated Covered Areas. Such areas are referred to as ''covered areas.'' A ''covered area'' is defined in the statute and regulations as ''an area in a State . . . (i) [t]hat is located outside of an urbanized area, as determined by the Bureau of the Census; (ii) [w]ith a population of not more than 50,000; and (iii) [f]or which the average unemployment rate is not less than 120 percent of the average unemployment rate of the United States or of the State in which the covered area is located, whichever is less, based on the most recent data available from the American Community Survey conducted by the Bureau of the Census.'' 15 U.S.C. 657a(b)(3)(F)(v)(I); 13 CFR 126.104(d)(1). Thus, the statute and implementing regulations provide that ''covered areas'' must be located outside of ''urbanized areas.'' At the time this provision was implemented, the Census Bureau defined ''urbanized areas'' as ''urban areas'' with populations of 50,000 or more. In addition, the Census Bureau defined ''urban clusters'' as ''urban areas'' with populations of more than 2,500 and less than 50,000. Given these definitions, SBA interpreted the statute to mean that areas located in ''urban clusters'' could be eligible for Governor's designation if they also met the unemployment requirement. In addition, SBA interpreted ''area'' to mean either a census tract or a county. Following the 2020 census, the Census Bureau changed the definition of ''urban area'' in several ways, including by removing the distinction between ''urbanized areas'' and ''urban clusters'' and discontinuing the use of those terms. As a result, areas that previously were known as urbanized areas or urban clusters are both now simply designated as urban areas. In a **Federal Register** notice published on December 29, 2022, the Census Bureau noted: ''Agencies using the [urban area] classification for their programs are responsible for ensuring that the classification is appropriate for their use.'' 87 FR 80114, 8011. To be consistent with Congressional intent, SBA proposed to amend the definition of ''covered area'' to remove the term ''urbanized area'' and instead provide that the term ''covered area'' means a census tract or a county ''that is located outside of an urban area, as determined by the Bureau of the Census, with a population of not more than 50,000.'' SBA received no comments on proposed § 126.104 and adopts it as final in this rule.

Section 126.105

SBA proposed to add a new § 126.105, explaining when the HUBZone Map will be updated in accordance with statutory requirements. Proposed § 126.105 provided that Qualified Census Tracts and Qualified Non-Metropolitan Counties will be updated every five years. This is consistent with the statutory requirement for SBA to update these designations on a five-year cycle. The proposed rule provided that Redesignated Areas will be added to the HUBZone Map when areas cease to be designated as Qualified Census Tracts or Qualified Non-Metropolitan Counties, in accordance with the five-year cycle, and will expire after three years. The proposed rule provided that Qualified Base Closure Areas will be added to the HUBZone Map after SBA receives information that the Department of Defense has created a new base closure area and will expire after eight years. The proposed rule provided that Qualified Disaster Areas generally will be added to the HUBZone Map on a monthly basis, based on data received by SBA from the Federal Emergency Management Agency (FEMA), and generally will expire on the effective date of the five-year HUBZone Map update following the declaration. Finally, the proposed rule provided that Governor-designated covered areas will be added to the HUBZone Map after SBA approves a petition in accordance with § 126.104 and will expire on the effective date of the five-year HUBZone Map update following the approval, or one year after the petition is approved, whichever is later.

SBA received three comments on this new section, all of which were supportive. One commenter noted that the five-year cycle offers businesses greater stability and minimizes disruptions, fostering long-term planning and investment in HUBZone areas. To further improve this area of the program, the commenter suggested including active-duty military bases in eligibility criteria to increase participation from military families and extending the re-designation period from three to five years to reduce administrative burden on SBA and to provide more stability for affected communities. SBA notes that these changes would require statutory amendments. As such, SBA is implementing this section as proposed.

Sections 126.200(b)(1), 127.200(e), and 128.204(a)

Section 126.200 sets forth the requirements a concern must meet to be eligible as a certified HUBZone small business concern. Pursuant to § 126.200(b)(1), a concern, together with its affiliates, must qualify as a small business concern under the size standard corresponding to any NAICS code listed in its profile in SAM. This paragraph does not, however, explain how SBA will determine whether a business concern qualifies as small. Some have questioned whether SBA performs a formal size determination with respect to each application. That is not the case. In determining whether a concern seeking to be a certified HUBZone small business (or one seeking to recertify its HUBZone status) qualifies as small under the size standard corresponding to a specific NAICS code, SBA will accept the concern's size representation in SAM, unless there is evidence to the contrary. SBA will request a formal size determination pursuant to § 121.1001(b)(8) of this chapter where any information it possesses calls into question the concern's SAM size representation. The proposed rule clarified SBA's intent in this regard. The proposed rule also provided the same guidance for WOSB/EDWOSB certifications by adding a new § 127.200(e) and to VOSB/SDVOSB certifications by revising § 128.204(a).

SBA received two comments that supported this change. Both commenters agreed that SBA should not perform a formal size determination for every applicant to the HUBZone, WOSB, and VetCert programs. One commenter noted that size is generally a self-certification function that is properly addressed by protests from competitors with respect to the award of specific contracts, and it would be burdensome for both SBA and individual applicants to require formal size determinations on every application. One commenter also recommended that the applicable provisions be clarified to apply the same rule to certification and recertification. Although SBA believes the proposed rule adequately captured firms applying for HUBZone, WOSB and VetCert certifications and those seeking to recertify such status, the final rule makes minor wording changes to make that clear.

Section 126.200

SBA proposed to revise § 126.200(c)(1) to incorporate policy updates to the ''long-term investment'' provision, which was implemented through SBA's final rule published on November 26, 2019 (84 FR 65222). This provision incentivizes firms to make long-term investments in qualifying HUBZones by allowing them to maintain their principal office for up to 10 years and continue to be considered to meet the principal office requirement even if the area loses its HUBZone designation. First, SBA proposed to specify that the 10-year ''clock'' starts to run on the firm's HUBZone certification date (if the investment was made prior to the firm's certification) or on the firm's recertification date that follows the execution of the lease or deed (if the investment was made after the firm's certification). Second, SBA proposed to clarify SBA's current policy that a firm is not eligible to take advantage of the long-term investment provision if its principal office is in a Redesignated Area or a Qualified Disaster Area at the time of the investment. Redesignated Areas and Qualified Disaster Areas are areas that have already lost their designation as Qualified Census Tracts or Qualified Non-Metropolitan Counties because the income, poverty, and/or unemployment levels of those tracts/counties have improved beyond the statutory levels necessary to qualify as HUBZones. SBA does not believe it would be in line with the purpose of the HUBZone program—to encourage investment in low-income and high-unemployment areas—to encourage firms to invest in areas that have already surpassed the HUBZone thresholds for these socioeconomic indicators. SBA notes that if a firm's principal office is in a location that falls within both a qualifying area (*i.e.,* Qualified Census Tract, Qualified Non-Metropolitan County, Governor-Designated Covered Area, Qualified Base Closure Area) and a non-qualifying area (*e.g.,* Redesignated Area that was previously a Qualified Non-Metropolitan County) at the time of the investment, the firm would be eligible for this provision. In addition, SBA proposed to provide that this provision would not apply to an investment made within 180 days of the expiration of an area's designation as a Qualified Census Tract, Qualified Non-Metropolitan County, Governor-Designated Covered Area, or Qualified Base Closure Area. Third, SBA proposed to provide that a firm is not eligible for this provision if its principal office is owner-occupied (*e.g.,* a location that also serves as a residence). In such a case, SBA does not believe that the investment in the HUBZone was primarily to develop a certified HUBZone small business.

SBA received four comments on proposed § 126.200(c), three of which were supportive of the clarifications related to the long-term investment provision. One commenter opposed the proposed exclusion for an owner's residence, but this commenter mistakenly believed that the rule proposed to disallow an owner's residence to qualify as a principal office, when in fact the rule proposed this exclusion only for the long-term investment provision. Another commenter supported the timing of the 10-year clock but encouraged SBA to allow exceptions to the owner-occupied exclusion. For example, if a company purchases a property and is in the process of building or intends to build, the commenter suggested that the property could be considered eligible if it is commercially zoned. Additionally, the commenter suggested that SBA should consider providing flexibility for properties like duplexes that serve dual purposes (both residential and office), as more companies are adopting such models. SBA does not believe that it makes sense to allow an exception for future construction. At the time of certification, a firm must demonstrate that it currently has a principal office in a HUBZone. Unless it does so, it would not be eligible for participation in the program. Construction of a new principal office could take several years. If it does not currently have a principal office located in a HUBZone and SBA counted the projected new construction site as its principal office, the firm would in essence would be certified into the program without currently meeting all of the necessary requirements and could be in this non-compliance state for a lengthy time while construction takes place. SBA does not believe that was the intent of the program. Conversely, if a firm currently has a principal office located in a HUBZone but has purchased another property in a HUBZone to construct a new principal office at the time of its application, it again does not make sense to invoke the long-term investment provision. If SBA considered the projected construction site to be an applicant's principal office, the firm would lose the construction time from the 10-year protection period. As such, SBA does not adopt this suggestion. Regarding a duplex, SBA believes that a duplex, where residence and business are truly separated, would qualify for the long-term investment protection. A duplex has two separate addresses. The final rule states that an owner's residence cannot qualify for the long-term investment protection. However, where a residence is located in one half of a duplex with a separate address from the business concern which is located in the other half of the duplex with its own distinct address, the business duplex address would qualify for the long-term investment protection. It would not, however, where the address of the residence is the same as the address of the business.

The final rule amends the principal office long-term investment provision to state that the 10-year protection period starts to run on the firm's HUBZone certification date (if the investment was made prior to the firm's certification) or on the date of the investment (if the investment was made after the firm's HUBZone certification date). The language stating that the protection period started on the date of recertification was a holdover from when HUBZone recertification was required annually. Because this rule changes recertification from an annual requirement to a requirement that occurs every three years, SBA does not believe it makes sense to tie the 10-year protection period to the date of recertification where the investment is made after the date of the firm's certification. If an investment occurs soon after certification, and recertification is not required for three years, a firm could receive almost 13 years of protection instead of the intended 10 years. That was not SBA's intent.

SBA proposed to revise § 126.200(d)(1) to clarify that if a firm has one employee, that employee must reside in a HUBZone for the firm to be eligible for HUBZone certification. That has always been SBA's interpretation of the HUBZone requirements, and SBA proposed to make that explicit. SBA did not receive any comments on this clarification and is implementing it as proposed.

SBA proposed to revise § 126.200(d)(3), which addresses ''Legacy HUBZone Employees,'' to clarify certain requirements and place limits on who can qualify as a Legacy HUBZone Employee. First, SBA proposed to clarify that a Legacy HUBZone Employee is an individual who: (a) resided in a HUBZone (other than a Redesignated Area) for at least 90 days preceding, and 180 days following, the concern's HUBZone certification date or most recent recertification date, and (b) remains an employee at the time of the concern's current recertification date. Second, SBA proposed to clarify

that an individual cannot reside in a Redesignated Area and qualify as a Legacy HUBZone Employee. This does not mean to imply that an individual who resided in a HUBZone when a firm was first certified as a HUBZone eligible firm and continued to live at that same location while the area transitioned to a Redesignated Area cannot be considered a Legacy HUBZone Employee if that individual moves to a non-HUBZone area. SBA proposed to clarify that an individual who qualifies as a HUBZone employee for the first time while living in a Redesignated Area cannot later be deemed a Legacy HUBZone Employee. Third, SBA proposed to specify that a certified HUBZone small business may only have one legacy HUBZone employee at a given time. SBA supports the growth of individual HUBZone employees and allowing such employees to improve their personal residential situation. However, SBA is concerned that the Legacy HUBZone Employee concept could be abused. Without a limit on the number of Legacy HUBZone Employees permitted by SBA, a firm could potentially move all individuals into a HUBZone for a one-year period and qualify all of those individuals as Legacy HUBZone Employees without those individuals ever intending to live long-term in the HUBZone area. SBA sought comments on: what the limit on Legacy HUBZone Employees should be and whether there should be any other limitations; whether SBA should limit the duration of Legacy HUBZone employee status to a certain number of years, and if so, how many years would be appropriate; whether individuals who were students when they resided in a HUBZone should be eligible for treatment as Legacy HUBZone Employees; whether Legacy Employees should be limited to full-time employees only; and whether an owner of the concern should be able to qualify as a Legacy HUBZone Employee. SBA is concerned that not imposing some restrictions on Legacy Employees could open the provision to abuse. The purpose of this provision is to allow HUBZone firms to retain employees who have managed to improve their position and move out of a HUBZone. This purpose is not relevant to many owners of HUBZones because they are not at risk of being fired for moving out of a HUBZone.

The majority of comments opposed the proposed limitations on the number of ''Legacy HUBZone Employees.'' Many commenters argued that the proposed limitations would negatively impact businesses that rely on a broader pool of legacy employees for stability and workforce retention, especially in light of HUBZone redesignations. Commenters argued that restricting legacy employees to one per firm would punish HUBZone companies for successfully retaining staff, discourage employee development, and create unnecessary administrative burdens. They emphasized that companies have relied on the legacy employee provision as it was originally written and that reducing the number of eligible legacy employees would harm long-term employee retention and growth. Some commenters pointed out that limiting legacy employees disproportionately affects smaller firms with fewer employees, making it harder for them to meet the HUBZone requirements while maintaining staff. Commenters suggested several alternatives, such as allowing up to 50% of a firm's employees to be legacy employees, or implementing a scalable approach based on company size. There was also support for grandfathering existing legacy employees and suggestions that the legacy designation should be based on the duration of time an employee has worked in a HUBZone, not just their residency status. Many commenters opposed limiting the duration of legacy status or suggested that it should match the amount of time an employee lived in a HUBZone. A few argued for a a specific timeframe, such as five years, to provide stability for businesses. Overall, there was significant concern that restricting legacy employees contradicts the intent of the HUBZone program. These commenters believed that hiring an individual that lives in an area of high unemployment or low income (*i.e.,* a HUBZone) and providing that individual with a good salary that enables the individual to move to a better neighborhood should be celebrated as a success of the HUBZone program, and should not be discouraged. One commenter stated that a HUBZone firm may be forced to fire a good employee in order to remain eligible for the program because that employee moved to a better neighborhood due to the success of the HUBZone program.

The comments were mixed on whether to limit legacy employee status to full-time employees only, excluding students who lived in a HUBZone while attending school, and whether business owners should be considered legacy employees.

Based on the comments received, SBA has decided not to limit firms to only one Legacy HUBZone Employee. Instead, this final rule provides that a HUBZone small business concern may have up to four Legacy HUBZone Employees at a given time, but must have at least one other HUBZone employee in order for any employee to count as a Legacy HUBZone resident employee. This means there could never be a scenario where a HUBZone firm has zero employees residing in HUBZones. In addition, the final rule provides that an individual who initially qualified as a HUBZone Resident Employee by residing in a Redesignated Area or a Qualified Disaster Area will not qualify as a Legacy HUBZone Employee and that individuals who work fewer than 30 hours per week at any time during their employment with the HUBZone concern cannot qualify as Legacy HUBZone Employees. Of course, that would not include normal time off for vacation or sick leave (including extended time off for maternity/paternity leave). SBA believes this compromise strikes the right balance between the concern related to risk that were raised in the proposed rule and the concerns raised in the comments.

SBA proposed to revise § 126.200(e), which addresses the ''attempt to maintain'' requirement, to clarify when HUBZone firms must certify that they will attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract. The proposed rule provided that firms must make this certification when they apply for HUBZone certification, at the time they complete their recertification, and at the time of offer for any HUBZone contract. SBA received one comment on this change, which requested that SBA clarify how it intends to monitor and enforce the ''attempt to maintain'' requirement for contracts that count toward agency HUBZone goals but are not HUBZone set-asides (such as subcontracts). The commenter urged SBA to ensure consistent oversight across all types of HUBZone contracts, including subcontracts. In response to this comment, SBA notes that the ''attempt to maintain'' requirement is statutory, and is specifically tied to HUBZone set-asides, HUBZone sole source contracts, and contracts where the HUBZone price evaluation preference is applied. Thus, this final rule does not expand the ''attempt to maintain'' requirement to HUBZone subcontracts or to non-HUBZone contracts for which a procuring agency takes goaling credit as an award to a HUBZone small business concern. SBA has clarified this in the definition of ''attempt to maintain'' in § 126.103 by specifying that the requirement applies only during the performance of a

HUBZone contract as defined in § 126.600. SBA has also clarified in this final rule that the 20% floor described in the definition of ''attempt to maintain'' is not an automatic substitute for the 35% HUBZone residency requirement. Specifically, this final rule adds a sentence to the definition of ''attempt to maintain'' stating that a firm that cannot demonstrate that it is making the ''substantive and documented efforts'' described in the definition of ''attempt to maintain'' has failed to attempt to maintain the HUBZone residency requirement.

SBA proposed to amend § 126.200(f) to provide that HUBZone firms must certify that they will comply with the applicable limitations on subcontracting requirements when they apply for HUBZone certification, and at the time they complete their recertification. The proposed rule also provided that certified HUBZone small business concerns also agree to comply with the limitations on subcontracting requirements under FAR clause 52.219–14, Limitations on Subcontracting, by submitting an offeror for and executing a HUBZone contract. SBA received one comment on proposed § 126.200(f), which provided that if the requirement to maintain compliance at the subcontracting level applies, then the flexibility granted through the ''attempt to maintain'' provision should also be extended to these subcontracts. As discussed above, this final rule does not extend the ''attempt to maintain'' provision to HUBZone subcontracts. In reviewing this provision, SBA believes that it is not necessary to require a certification relating to the limitation on subcontracting requirements that apply to possible future HUBZone contracts. By statute and applicable contract clauses, the limitations on subcontracting apply to all HUBZone contracts. SBA does not believe that any benefit is added by requiring firms to certify that they will comply with those requirements at the time of application and recertification. As such, this final rule removes proposed paragraph (f) and the associated burden of requiring another certification.

Finally, SBA proposed to revise § 126.200(g) (regarding suspension and debarment) to clarify that neither a concern nor any of its owners may have an active exclusion in SAM at the time of application or at any time while the concern is HUBZone-certified. Because of the elimination of paragraph (f) identified above, the final rule moves the provisions regarding suspension and debarment from § 126.200(g) to § 126.200(f). SBA received one comment on this proposed amendment, which supported the change but also suggested specifying that affiliates of excluded entities cannot be HUBZone-certified. SBA notes that a suspension or debarment action specifically identifies the entities and individuals involved in those entities that are excluded in SAM. The fact that a business concern may be somehow affiliated with a business concern that has been suspended or debarred does not automatically make the affiliated business ineligible for Government programs and assistance. A Suspension and Debarment Official has discretion to suspend or debar affiliated companies where it makes sense to do so. Where the Suspension and Debarment Official does not suspend or debar an affiliated business concern, that business concern remains eligible for Government programs and assistance. SBA does not believe it would be consistent with the debarment and suspension regulations to render all possible affiliates ineligible for SBA's programs where they themselves have not been suspended or debarred.

Section 126.201

SBA proposed to amend § 126.201 by refining the language explaining the ownership requirements for HUBZone small business concerns. The current regulations provide: ''An owner of a SBC seeking HUBZone certification or a qualified HUBZone SBC is a person who owns any legal or equitable interest in such SBC.'' SBA proposed to rephrase this sentence to read: ''For purposes of qualifying for HUBZone certification, SBA considers any person who owns any legal or equitable interest in a concern to be an owner of the concern.'' This change is intended only to make this section clearer and easier to read, without changing the meaning or intent of the provision. SBA received no comments on this proposed amendment and adopts it as final in this rule.

Section 126.204

SBA proposed to revise § 126.204(a) to specify that a HUBZone firm can have affiliates, so long as the firm and its affiliates in the aggregate qualify as small in at least one NAICS code listed in the HUBZone firm's SAM profile. This clarification is necessary because the current regulation says only that the firm and its affiliates in the aggregate must be small—without specifying that the firms, together, must be small in at least one NAICS code listed in the HUBZone-certified firm's SAM profile. SBA also proposed to amend § 126.204(c) to clarify that SBA reviews the ''totality of circumstances'' when determining whether to aggregate the employees of affiliated companies for purposes of calculating a firm's compliance with the 35% HUBZone residency and principal office requirements. In addition, SBA proposed to add a new paragraph (c)(4) clarifying SBA's current policy that if firms are not considered affiliated for size purposes, their employees generally will not be aggregated for HUBZone purposes.

SBA received three comments on proposed § 126.204, all of which were supportive. One commenter suggested that SBA should also explain how SBA will treat employees of a parent, subsidiary or sister entity for HUBZone purposes. The commenter noted that such firms would be affiliated under SBA's size regulations, but the commenter believed SBA should not aggregate the employees of a parent, subsidiary, or sister entity for HUBZone program purposes as long as the companies were operating independently. The commenter noted that there is a certain amount of inter-dependence that will always exist between parent/subsidiary/sister entities, such as shared accounting functions and potentially shared management or directors, and it would defeat the purpose of permitting indirect ownership of HUBZone firms if SBA aggregates the employees of parent/subsidiary or sister entities simply because of the types of inter-dependence or overlap between entities that is inherent in the parent/subsidiary or sister entity relationships. The commenter suggested that SBA should only aggregate the employees of parent/subsidiary or sister entities when the entities go beyond the types of connections that are customary for parent/subsidiary or sister entity relationships and, as a result, the firms are essentially operating as one combined entity without any separation of employees, resources, and facilities. SBA believes that the current regulatory language adequately addresses these concerns. In the entity-owned small business context (*i.e.,* Tribe, ANC, or NHO), a firm is generally not considered to be affiliated with its parent or sister companies. As noted above, the rule provides that if firms are not considered affiliated for size purposes, their employees generally will not be aggregated for HUBZone purposes. For other affiliated companies, although their receipts or employees will be aggregated for size purposes, the employees will not be aggregated for HUBZone residency requirements as long as there is a clear line of fracture between the concern seeking HUBZone status and its affiliates. In addition,

current § 126.204(c)(2) specifically provides that ''[t]he use of common administrative services between parent and/or sister concerns by itself will not result in an affiliate's employees being counted as employees of the HUBZone applicant or HUBZone small business concern.''

Sections 124.203, 126.302, 126.303, 127.301, 127.302, 128.301

Sections 126.302 and 126.303 provide general guidance on applying to SBA to be certified as a HUBZone small business concern. Section 124.203 provides similar guidance for applying to the 8(a) BD program; sections 127.301 and 127.302 do so for the WOSB program and section 128.301 does the same for applying to the VetCert program. The current regulations for the 8(a) BD, HUBZone and WOSB programs require that an application must be electronically signed by a specified individual (by each individual claiming social and economic disadvantage status for the 8(a) BD program and by an officer of the concern who is authorized to represent the concern for the HUBZone and WOSB programs). The proposed rule changed that language to provide instead that the individual(s) upon whom eligibility is based take responsibility for the accuracy of all information submitted on behalf of the applicant. The proposed rule added similar language to § 128.301 for the VetCert program. SBA received two comments supporting this change without substantive comment and SBA adopts the proposed language as final.

Section 126.304(e)

SBA proposed to amend § 126.304(e) to clarify the records that HUBZone participants must maintain to ensure continued eligibility. Specifically, the proposed rule clarified that HUBZone small business concerns must retain documentation related to any ''Legacy HUBZone employees'' in order to demonstrate that individuals being claimed as Legacy HUBZone employees meet the requirements (*i.e.,* 180 days of HUBZone residence after the firm's certification or recertification date, and uninterrupted employment). SBA received one comment on this section, which was supportive of the clarification, and is implementing it as proposed.

Section 126.306(h)

SBA proposed to amend § 126.306 by adding a new paragraph (h) to make clear that SBA's decision to approve or deny an application to the HUBZone program is the final agency decision. This is a clarification of SBA's long-standing policy. There is no reconsideration or appeal process because declined applicants are permitted to reapply to the HUBZone program 90 days after receiving the decline decision. SBA received four comments on this proposed clarification, all of which were supportive. However, one commenter expressed concern about situations where errors are made during the certification process, particularly in light of the rollout of SBA's new certification platform, where less experienced analysts would be evaluating HUBZone certifications and could be more prone to mistakes. The commenter suggested applying this provision to first-time applicants only, and allowing firms that are denied based on ownership or size the opportunity to appeal. After reviewing the comments, SBA is implementing this section as proposed. SBA first notes that any firm that is denied HUBZone certification based on SBA's determination that the firm does not qualify as a small business concern may currently request a formal size determination as authorized by § 121.1001(b)(8). As such, there is no need to specify that first time applicants can ''appeal'' SBA's determination that the applicant does not qualify as small. In addition, SBA believes that treating first-time applicants and returning applicants differently would cause confusion. Further, there are already policies in place to address situations where processing errors take place. Where an error in processing occurs, SBA is able to fix the error without requiring the applicant to wait 90 days to reapply.

Sections 126.309, 126.803, 127.305, and 128.305

SBA proposed to revise § 126.309, which describes when a declined or decertified firm can re-apply for HUBZone certification. The proposed rule maintained the 90-day wait period for firms whose application has been declined, but SBA proposed to eliminate that wait period for firms that have been decertified. When the HUBZone regulations were first implemented, declined or decertified firms were required to wait one year to reapply to the HUBZone program. At that time, SBA chose the one-year period to give small businesses a reasonable period of time within which to make the changes or modifications that are necessary to enable them to qualify for the HUBZone program, and at the same time to allow SBA to administer the HUBZone program effectively with available resources. However, SBA found that in many cases, a small business only had to hire a few additional HUBZone residents to come back into compliance. SBA also found that after the 2010 census, many small businesses had principal offices in HUBZone areas that were expiring and some such businesses may be planning to move to newly-designated HUBZone areas. SBA found that it would not serve the purposes of the program to make such small businesses wait one year to reapply. Thus, in 2011, SBA reduced the wait period to ninety (90) calendar days, to encourage businesses to move into newly designated HUBZones and hire HUBZone residents, which are the two purposes of the statute. SBA also believed that it would create an incentive for small businesses that no longer meet the HUBZone program requirements to voluntarily decertify and then seek eligibility when they come back into compliance. SBA proposed a corresponding change to § 126.803, to provide that a firm that is decertified for any reason (including based on a protest or due to voluntarily withdrawing) can reapply immediately after the decertification is effective. In order to promote consistency across SBA's programs, SBA proposed to make similar changes in § 127.305 for the WOSB program and in § 128.305 for the VetCert program to eliminate the 90-day wait time to reapply for certification in those programs after it has been decertified.

SBA received three comments on these proposed changes. One commenter opposed maintaining the 90-day wait after decline, arguing that certification is often declined due to minor or inaccurate reasons that can be quickly resolved. The commenter also expressed concern that combined with processing times, a 90-day waiting period could cause unnecessary loss of contracting opportunities. The commenter recommended that the 90-day waiting period be eliminated altogether. One commenter supported the proposed changes and thought that it made sense to align the rules for all of SBA's certification programs. SBA notes that changes can be made to an application during SBA's processing of the application. If SBA has identified a ''minor'' or ''inaccurate'' reason for decline, that reason can be overcome before a final eligibility determination is made. As such, the final rule retains the 90-day waiting period after a concern is declined certification.

Section 126.401

SBA proposed to revise § 126.401, which describes program examinations. The proposed rule explained that a

program examination is an investigation by SBA officials, which verifies the accuracy of any certification made or information provided as part of the HUBZone application process, as part of the recertification process, or in connection with a HUBZone contract. The current regulation does not specify that program examinations may be conducted to verify the accuracy of certifications made in connection with HUBZone contracts. This addition is necessary because this final rule requires a HUBZone small business concern to meet the 35% HUBZone residency and principal office requirements on the date it submits an offer for a HUBZone contract, and SBA needs a mechanism to enforce this requirement. SBA did not receive any comments on this proposed revision.

Section 126.403

SBA proposed to amend § 126.403(a) to clarify that a program examination may include a site visit. The current regulations describing program examinations provide that ''SBA may conduct a program examination, or parts of an examination, at one or more of the concern's offices.'' In order to conduct a program exam at ''one or more locations,'' implicit in that language is the authority to conduct site visits. The proposed rule merely explicitly set forth that authority. SBA notes that site visits are just one potential facet of a program examination and not all program examinations include site visits. The proposed rule added a sentence to § 126.403(b) clarifying that the burden of proof to demonstrate eligibility is on the concern subject to the program examination.

SBA did not receive any comments on the proposed revisions and adopts them as final in this rule.

Section 126.404

SBA proposed to amend § 126.404, which identifies the possible outcomes of a program examination. The proposed rule revised paragraphs (b) and (c) to eliminate the discussion of program examinations on applicants and to clarify that where a firm is found ineligible pursuant to a program examination, SBA will suspend the firm's eligibility as a certified HUBZone small business concern for a period of 30 calendar days to allow the firm to submit sufficient documentation showing that it was in fact eligible on the date of review. During the 30-day suspension period, the firm is ineligible to submit offers for or be awarded HUBZone contracts. Where the firm fails to submit documentation sufficient to demonstrate its eligibility by the last day of the 30-day period, the firm will be decertified. SBA will remove a firm's certification in DSBS as a certified HUBZone small business concern during the 30-day suspension period. SBA may also identify such suspension actions on its website to ensure that relevant contracting officers are aware of any a firm's current ineligibility. Prior to this rule, SBA has not formally removed firms' HUBZone status in DSBS during this 30-day period. However, SBA believes that in order for the statutory requirement to be enforceable, SBA must remove a firm's certification in DSBS during the 30-day suspension period. In addition, the proposed rule provided that the firm must provide written notice of the concern's ineligibility to the contracting officer for any pending HUBZone award. If SBA overturns its determination, SBA will reverse the firm's decertification and reinstate its certification.

SBA received one comment on this proposed amendment. The commenter supported the proposed decertification process for firms found ineligible during program exams because it enhances transparency and compliance with statutory requirements and is a fair approach that protects legitimate HUBZone businesses. The final rule further clarifies this statutory provision by specifically stating that SBA will remove a firm as a certified HUBZone small business concern on DSBS during the 30-day suspension period.

Sections 126.500 and 126.602

SBA proposed to revise §§ 126.500, 126.601, and 126.602 to eliminate the one-year certification rule and instead require firms to be eligible on the date of offer for HUBZone contracts and only recertify once every three years. SBA's regulations in effect before this final rule required a certified HUBZone small business to annually recertify its HUBZone status to SBA. Under those rules, once a firm annually recertified its HUBZone status, it generally could submit offers for HUBZone contracts for one year without being required to meet the 35% HUBZone residency and principal office requirements at the time of offer. Thus, those regulations set one point in time—the date of certification or the certification anniversary date—as the time at which a firm must be eligible for a HUBZone contract. In addition, if a firm was eligible as of its certification or certification anniversary date, it remained eligible for HUBZone contracts for a period of one year from that date regardless of whether the firm falls out of compliance with the HUBZone eligibility requirements throughout the year. SBA believes that that process permitted abuses that were not intended for the program. A firm could hire one or more individuals who reside in a HUBZone for four weeks prior to its application for certification and immediately dismiss those individuals from its employ after becoming certified and be eligible throughout the year for HUBZone contracts. Similarly, a firm could again re-hire one or more individuals who reside in a HUBZone for four weeks prior to its certification anniversary date and immediately release those individuals after the certification anniversary date and be eligible for additional HUBZone contracts for another year. SBA believes that that was not the intent of the program.

Thus, SBA proposed to revise § 126.500 to eliminate the ''one-year certification'' rule and instead require firms to recertify to SBA every three years. SBA believes annual recertification is not necessary, and would impose undue burdens on HUBZone small businesses, if firms are also required to be eligible at the time they submit offers on any HUBZone contracts, as discussed further below. Moreover, SBA believes that uniformity among its contracting programs is an important goal, and SBA's WOSB and VetCert programs require firms to recertify their status every three years. Some commenters opposed a triennial recertification requirement and believed it would not be sufficient to help firms maintain compliance after winning a HUBZone contract. However, the majority of commenters supported the proposed move to triennial recertification. This final rule implements a triennial recertification requirement, bringing the HUBZone program in line with SBA's other certification programs.

Proposed § 126.500(a)(1)(i) provided that, in order to recertify, a HUBZone firm that did not receive a HUBZone contract during the year preceding its recertification date must represent that, at the time of its recertification, at least 35% of its employees reside in HUBZones and the concern's principal office is located in a HUBZone. SBA did not receive any comments on this proposed provision and is implementing it as proposed.

Proposed § 126.500(a)(1)(ii) provided that a HUBZone firm that was awarded a HUBZone contract during the year preceding its recertification date would have to represent that, at the time of its recertification, it is attempting to maintain compliance with the 35% HUBZone residency requirement and the concern's principal office is located in a HUBZone. SBA has found that the

HUBZone Program goals are not sufficiently fulfilled by how the ''attempt to maintain'' requirement is currently being implemented. Under the current rules, a HUBZone firm can have less than 35% HUBZone residents at the time of its recertification if the firm is performing a HUBZone contract. This means that a firm being awarded HUBZone contracts potentially never has to demonstrate that it is employing at least 35% HUBZone residents. SBA believes that an indefinite period of allowing a HUBZone small business concern to fall below the 35% residency requirement is contrary to the purpose of the HUBZone Program. SBA believes that the intent of the program would be better fulfilled by giving firms a specific ''grace period'' after they are awarded a HUBZone contract during which time they can take the necessary steps to hire enough HUBZone residents to get back up to 35% HUBZone residency. If a firm's recertification falls within this grace period, then such firm's recertification would require the firm to represent that it is ''attempting to maintain'' compliance with the 35% HUBZone residency requirement. After the grace period, then such firm would have to be back up to 35% HUBZone residency at the time of any recertification. SBA proposed that the grace period be 12 months following the award of a HUBZone contract. The proposed rule also included this requirement in proposed § 126.602.

SBA received thirty comments on proposed §§ 126.500(a)(1)(i) and 126.602, the majority of which were supportive. Many commenters supported a 12-month grace period, noting that it would provide the necessary flexibility for staffing adjustments. They suggested that this flexibility is vital for firms to comply with the rule without causing undue strain on their operations. Several commenters agreed that HUBZone firms should eventually have to meet the 35% requirement but argued that one year from the contract award was too short. A few suggested extending the timeframe to 18 months or two years. Some commenters suggested that the award of subsequent HUBZone contracts should extend the time to come into compliance with the 35% requirement, arguing that this would help businesses manage multiple contracts without the burden of quickly meeting the 35% employee threshold and would provide more time to adjust staffing levels without compromising quality or making rushed hiring decisions. In response to these comments, SBA has decided to implement the 12-month grace period. The final rule provides that where a certified HUBZone small business concern was awarded a HUBZone contract during the ''12-month period preceding its recertification'' it can represent that it is attempting to maintain compliance with the 35% HUBZone residency. That language is not limited to the first HUBZone contract received by a certified HUBZone small business concern. As long as the concern received any HUBZone contract during the 12-month period preceding its recertification, it can represent that it is attempting to maintain compliance with the 35% HUBZone residency. In effect, that language allows each additional HUBZone award to trigger a new 12-month grace period from the date of award of the additional HUBZone contract.

Proposed § 126.500(a)(2) provided that a concern's recertification must be submitted within 90 calendar days before the triennial anniversary of its HUBZone certification date. SBA received two comments on proposed § 126.500(a)(2). One commenter opposed the recertification deadline of 90 days before triennial anniversary and the removal of 30 day post-certification date grace period, believing this change would lead to (1) firms certifying compliance before being able to comply (since companies cannot attest to meeting the HUBZone requirements 90 days before their recertification date as the measurement period for HUBZone employees will not have started), and (2) firms having to rush to compile information for certification in the days leading up to the certification date. Instead, the commenter suggested that SBA allow HUBZone firms the additional time they currently have to compile information so that they can ensure they meet all program requirements. The other commenter requested clarification of the 90-day recertification window—specifically, if the HUBZone firm would be responsible for initiating recertification, and if so, whether SBA would send out reminders about a firm's upcoming recertification. Regarding the first comment, SBA concurs with the concerns raised by the commenter and clarifies this requirement in this final rule. Specifically, the final rule makes clear that when a HUBZone firm recertifies its HUBZone status during the 90 days prior to its certification anniversary date, it will be recertifying its eligibility as of the date it makes that recertification. This is a change from the current rules, which require firms to recertify their status as of their anniversary date. Since this final rule eliminates the one-year certification rule, there is no longer a need for firms to recertify their status as of their exact anniversary date. By giving firms a 90-day window in which to complete this recertification, SBA believes firms will have sufficient time to gather and review their payroll records to ensure that they indeed meet the HUBZone requirements before recertifying. In addition, in response to the concern that firms would recertify prior to being able to comply, SBA does not see the concern the commenter does. Recertifying ''early'' does not benefit the firm. The final rule eliminates the provision giving eligibility for the remainder of the year after recertification. Under the provisions set forth in the final rule, a firm must be eligible on the date it submits an offer for a HUBZone contract. Whether it recertified early or on time does not change this requirement. If the firm is not HUBZone eligible on the date it submits its offer for a HUBZone contract, it will not be eligible for that contract. Regarding the second comment, SBA will continue its current practice of sending out reminders to HUBZone firms notifying them of their upcoming recertification deadline and corresponding 90-day window. Firms will be responsible for completing the recertification process at any time during that 90-day period. For consistency purposes, this rule also amends § 128.306(d) to provide that same 90-day period for the VetCert program.

Proposed § 126.500(a)(3) provided that a firm that fails to recertify will be proposed for decertification. SBA requested comments on whether such firms should be decertified automatically within a certain timeframe (such as 30 days) of failing to recertify. SBA received three comments on this, two of which supported automatic decertification because it encourages accountability. One commenter noted that this policy should be consistent across all SBA programs and stated that 30 days seemed like a fair amount of time. Another commenter supported a 30-day grace period before decertification, noting that this would allow firms to address problems or submit recertification paperwork, without unduly penalizing them. One commenter opposed automatic decertification, stating that it would not be in the best interests of the government or the industrial base. In response to the comments, the final rule

provides that if a concern fails to recertify, SBA will decertify the concern at the end of its eligibility period. However, if a concern is able to recertify its eligibility within 30 days of the end of its eligibility period, SBA will reinstate the firm as a certified HUBZone small business concern. Thus, this final rule removes the proposed decertification step, which SBA has found to create an unnecessary administrative burden in most cases, but continues to provide due process to firms by creating a 30-day grace period which allows firms to recertify and come back into compliance with SBA's regulations. This final rule also amends § 127.400(b) and § 128.306(a) for the WOSB and VetCert programs, respectively, to ensure consistency between the programs.

SBA proposed to revise § 126.500(b) to explain that SBA will conduct a program examination of each certified HUBZone small business concern at least once every three years to ensure continued program eligibility, but SBA may conduct more frequent program examinations using a risk-based analysis to select which concerns are examined. This is SBA's current policy, and the proposed rule was intended to make this policy clearer. Frequency of program exams is not specified in statute, so this final rule aligns the HUBZone program with the other three programs, which conduct program examinations using a risk-based approach to determine which firms are examined. SBA has found that resources are not well-spent conducting exams on low-risk firms. This change will reduce the burden on small businesses that are not obtaining Federal contracts, improve the experience of small businesses with multiple certifications by making the requirements consistent across programs, and reduce the impact on SBA staffing because the HUBZone program will perform roughly 500 exams per year, rather than 1,500 per year. SBA received two comments in response to proposed § 126.500(b), both of which were supportive. One commenter requested clarification of how ''risk-based'' will be defined and suggested that the analysis should also examine subcontracting agreements. Another commenter recommended that in conjunction with triennial recertification with full document review, SBA conduct annual check-ins and site visits as needed. Risk-based program examinations will utilize contract data to determine which firms have been awarded contracts as a measure of risk to the government. Regarding the recommendation for annual ''check-ins,'' SBA believes that the risk-based program examinations provide sufficient assurance against fraud, waste, and abuse, and annual reviews for all firms in the portfolio would create unnecessary paperwork and administrative burdens for both small businesses and the government, without providing enough of a benefit justify the cost. Thus, this final rule implements § 126.500(b) as proposed.

Section 126.501

SBA proposed to revise § 126.501 in its entirety to address a certified HUBZone small business concern's ongoing obligations to SBA (which is what this section addressed prior to the 2019 rule change). First, proposed § 126.501(a) provided that a certified HUBZone small business concern that acquires, is acquired by, or merges with another business entity must provide evidence to SBA, within 30 calendar days of the transaction becoming final, that the concern continues to meet the HUBZone eligibility requirements. A concern that no longer meets the requirements may voluntarily withdraw from the program or it will be removed by SBA pursuant to program decertification procedures. This is SBA's current policy, but the current regulations only require a firm to notify SBA via email where it is involved in a merger or acquisition and do not explain what happens after such notification. SBA received two comments on this proposed provision. One commenter opposed recertification after a merger or acquisition generally because that could result in a firm being ineligible for orders issued under a multiple award contract. The concern raised by this comment was discussed above in response to comments pertaining to § 125.12. The other commenter questioned whether it is still necessary for HUBZone firms to report mergers and acquisition if the program is now proposing eligibility at the time of offer. As noted in SBA's response to the comments pertaining to § 125.12, recertification is necessary for both possible ineligibility for future orders and for procuring agency goaling purposes (*i.e.,* a procuring agency cannot count an order or an option under a multiple award contract as a HUBZone award if the firm is no longer HUBZone eligible).

Proposed § 126.501(b) provided that a certified HUBZone small business concern that is performing a HUBZone contract and fails to ''attempt to maintain'' the minimum employee HUBZone residency requirement must notify SBA via email to *hubzone@sba.gov* within 30 calendar days of such occurrence. A concern that cannot meet the requirement may voluntarily withdraw from the program or it will be removed by SBA pursuant to program decertification procedures. SBA received three comments on proposed § 126.501(b), all of which opposed the provision. One commenter disagreed with the requirement, arguing that it poses a significant compliance burden. Another commenter noted that the provision was overly harsh because a firm could temporarily appear to not comply with the attempt to maintain requirements but could correct that through its marketing efforts before it submits an offer for another HUHZone contract. The firm believed that decertifying a firm before it had the full opportunity to come back into compliance was wrong. SBA agrees. The firm will not be eligible for any HUBZone contract if it does not comply with the ''attempt to maintain'' requirements at time of offer, and will be decertified if it does not comply with those requirements at the time of recertification. SBA believes that is sufficient and deletes the language set forth in proposed § 126.501(b) in this final rule.

Section 126.503

SBA proposed to add a new paragraph (d) to § 126.503, clarifying that SBA will decertify a HUBZone small business concern that is debarred from Federal contracting without first proposing the firm for decertification. This is merely a clarification of an existing policy. Once a firm has been debarred, it is ineligible for all Federal contracts and subcontracts and thus there is no benefit to being HUBZone-certified. SBA received 18 comments on this proposed change, all of which were supportive. SBA is implementing this change as proposed.

Section 126.504

SBA proposed to amend § 126.504(a) to add that SBA will remove a firm's HUBZone designation if the firm has been debarred from government contracting pursuant to the procedures in FAR 9.4. This change is consistent with the addition of a new paragraph (d) to § 126.503, discussed above. In addition, SBA proposed to revise § 126.504(c) to clarify that once SBA decertifies a firm from the HUBZone program, that firm is ineligible to submit offers for HUBZone contracts. The current regulations provide that a firm is ineligible when it is ''removed as a certified HUBZone small business concern in DSBS.'' However, there are occasional lags between SBA's decertification action and updates to

DSBS, as well as potential errors in updates to DSBS. SBA believes that the effect of decertification should more properly be contained in § 126.503. As such, the final rule moves proposed § 126.504(c)(1) to redesignated § 126.503(e) in this final rule. In addition, the final rule moves proposed § 126.504(c)(2), which provides that as long as a concern was a certified HUBZone small business and met the HUBZone requirements as of the date of its initial offer for a HUBZone contract, it may be awarded a HUBZone contract, to a new § 126.601(a)(5).

Section 126.600

Section 126.600 defines what qualifies as a ''HUBZone contract.'' SBA proposed to amend this section to clarify that a contract awarded to a joint venture may be considered a HUBZone contract if the joint venture meets the requirements in § 126.616. In addition, SBA proposed to clarify that the rules in Part 126 apply only to HUBZone prime contracts, and not to subcontracts awarded to HUBZone small businesses. SBA also proposed to add a new paragraph clarifying that orders awarded under a multiple award contract that was itself a HUBZone set-aside are considered HUBZone contracts. SBA did not receive comments on these proposed clarifications. However, in response to other comments received, this final rule also adds a paragraph clarifying that orders set-aside for certified HUBZone small business concerns under a multiple award contract that was awarded as a small business set-aside are considered HUBZone contracts.

Section 126.601

SBA proposed to revise § 126.601(a) to specify that an offeror on HUBZone contract must be HUBZone-certified and meet the HUBZone eligibility requirements as of the date of its initial offer. As discussed above, this proposed change was made in conjunction with the proposed elimination of the ''one-year certification'' rule and proposed return to triennial recertification. SBA proposed to clarify that a HUBZone firm must be HUBZone-certified on the date of its offer to highlight that for the HUBZone program—unlike the WOSB Program—a firm cannot submit an offer on HUBZone contract while its application is still pending.

SBA received 28 comments on SBA's proposal to require that HUBZone firms be eligible on the date of their initial offer. The comments reflected a mix of support and opposition. Those who opposed this change argued that it imposes significant burdens on HUBZone firms, citing unpredictable contract timelines and the challenge of maintaining compliance with the 35% HUBZone residency requirement. Many noted that the timing of contract opportunities is out of their control, with firms unable to plan ahead due to the variability in solicitation release dates, offer deadlines, and award timelines. They argued that this uncertainty could lead to frequent disruptions in eligibility. Opponents also expressed concerns about the increased administrative burden that would come with recertifications at the time of offer. They noted that this proposed requirement would require HUBZone firms to continuously evaluate their HUBZone eligibility as they prepare for each contract opportunity, creating a compliance burden that ultimately could discourage participation in the program. Additionally, they argued that this change would introduce unnecessary risks to the procurement process, as businesses may not know when an offer date will occur and could waste resources preparing proposals without knowing if they meet eligibility criteria. They argued that this uncertainty could also affect competition, with the potential for more protests and fewer HUBZone set-asides. Several commenters suggested alternatives, such as allowing recertification upon contract award instead of at the time of offer. Some believed this would reduce the administrative burden on both businesses and the government and still promote program integrity. Others proposed allowing a grace period or certification window for HUBZone businesses to adjust to workforce changes or other temporary fluctuations in eligibility. Some commenters urged SBA to maintain flexibility for competitive contracts, while keeping stricter compliance checks for sole source contracts. On the other hand, a number of commenters supported the provision to require eligibility at the time of offer, arguing that it ensures transparency and consistency with other small business programs. SBA is not swayed by the comments stating that firms do not know when a HUBZone opportunity will arise and, correspondingly, when an offer for a HUBZone opportunity must be submitted. These comments presume that maintaining at least 35% HUBZone resident employees is not important, and that as long as the firm did so at one point in time (*i.e.,* the date of certification or recertification), it is free to ignore that requirement for the rest of the year. SBA does not believe that is in line with the intent of the program. One of the purposes of the program is to promote serious, meaningful employment of individuals residing in areas of high unemployment or low income (*i.e.,* in HUBZones). That purpose should be paramount throughout the year, not merely at the time of recertification. If a firm knows that it must comply with the 35% residency requirement at the time it submits an offer for a HUBZone contract, maintaining that 35% will be something the firm tries to do throughout the year. SBA believes that is what the program intended. SBA also continues to believe that requiring HUBZone firms to be eligible at the time of offer is essential for increasing uniformity among the agency's contracting programs. As such, the final rule requires a firm to be eligible at the time it submits its initial offer, including price, for a HUBZone contract.

Proposed § 126.601(a)(2) provided that for a multiple award contract, where concerns are not required to submit price as part of the offer for the contract, an offeror must be identified as a certified HUBZone small business concern in DSBS (or successor system) and meet the HUBZone requirements in § 126.200 on the date of initial offer, which may not include price. This is consistent with SBA's size regulations at § 121.404(a)(1)(iv). SBA did not receive any comments on this particular provision and is implementing it as proposed.

Proposed § 126.601(f) clarified that an offeror on a competitively awarded HUBZone contract need not be eligible on the date of award of such contract. Prior to 2020, SBA's regulations required eligibility for a competitively awarded HUBZone contract both at time of offer and time of award. That caused problems with the procurement process where a HUBZone employee that was counted on for HUBZone eligibility left the firm in the time between the firm's offer and the date of award. The firm could be in the process of hiring a new employee from a HUBZone but if it had not done so by the date of award the firm would be ineligible for award. SBA continues to believe that determining such a firm ineligible for award is inappropriate. There must be certainty to eligibility when a firm submits an offer. As long as a firm is eligible as of the date of its offer for a competitively awarded HUBZone contract, it will be eligible for award. This is similar to the size requirement where a firm must also be small on the date of its offer but may grow to be other than small between the date of its offer and the date of award.

Proposed § 126.601(f) also provided, however, that there is an exception to this rule for HUBZone sole source awards. For a HUBZone sole source award, a firm must be HUBZone-certified at the time of award. SBA believes that sole source procurements warrant stricter eligibility rules. To be eligible for a sole source HUBZone award, a procuring activity must conclude that the firm receiving the award is the only certified HUBZone small business concern that is capable of performing the contract. That requirement by itself is very restrictive, and SBA believes that eligibility should also be restrictive. SBA does not believe that Congress intended to allow a firm that no longer qualifies as a HUBZone small business concern prior to award to be elevated to a status as the only certified HUBZone small business concern that is capable of performing the contract. In addition, this change would align HUBZone sole source awards with how SBA treats sole source awards in the 8(a) BD program. SBA received two comments on proposed § 126.601(f). One commenter supported clarifying that an offeror on a competitively awarded HUBZone contract need not be eligible on the date of award but agreed with the exception for HUBZone sole source awards. The other commenter opposed requiring eligibility at the time of offer and award since, as noted in a prior rulemaking, companies cannot always control for turnover since the timing of award is unknown. SBA has reviewed the comments received and implements the rule as proposed.

Section 126.605

SBA proposed to amend § 126.605 to clarify that this section describes circumstances under which a contracting officer is prohibited from soliciting a requirement as a HUBZone contract. The proposed rule changed the words ''may not'' to ''shall not'' to clarify that a contracting officer does not have discretion to award a HUBZone contract in those specified instances. SBA did not receive any comments on this proposed amendment and implements it as proposed.

Section 126.612

SBA proposed to amend § 126.612 by adding a new paragraph (f) providing that the awardee of a HUBZone sole source contract must be an eligible HUBZone small business concern on the date of award. This has always been the policy for the 8(a) Business Development program (*see* § 124.501(h)), and SBA is trying to make its socioeconomic programs as consistent as possible. SBA received two comments on this section, both of which opposed the change. One commenter believed that annual recertification should be sufficient, because compliance with the 35% requirement can change from one day to another. The second commenter argued that firms lack control over the timing of awards, so they may maintain artificially high staffing overhead while an award is pending, which could ultimately discourage program use. As noted in the discussion pertaining to § 126.601(f) above, because of the restrictive nature of HUBZone sole source contracts, SBA believes that the eligibility for such contracts should also be restrictive. Because of that and SBA's priority to make its contracting programs as uniform as possible, the final rule requires eligibility for sole source HUBZone contracts on the date of award. A firm must not merely be a certified HUBZone small business concern on the date of award for a HUBZone sole source contract, it must actually still meet all HUBZone eligibility requirements. The final rule adds clarifying language to provide that a contracting officer may rely on the firm's status as a certified HUBZone small business concern in awarding a sole source HUBZone contract, but if there is a status protest relating to the apparent successful offeror, SBA will determine whether that firm continues to meet the HUBZone eligibility requirements. Because of the addition of that language, the final rule renumbers the paragraphs contained in § 126.612, with proposed § 126.612(f) becoming § 126.612(a)(6) in the final rule.

Section 126.613

SBA proposed to amend § 126.613, which addresses the HUBZone price evaluation preference (PEP), to clarify how the HUBZone PEP should be applied. The proposed rule explained that to apply the HUBZone PEP, a contracting officer must add 10% to the offer of the otherwise successful large business offeror. Then, if the certified HUBZone small business concern's offer is lower than that of the large business after the HUBZone PEP is applied, the certified HUBZone small business concern must be deemed the lowest-priced offeror. The proposed rule added a sentence specifying that the HUBZone price evaluation preference does not apply where the initial lowest responsive and responsible offeror is a small business concern. It also added language specifying that the HUBZone price evaluation preference does not apply if the certified HUBZone small business concern will receive the contract as part of a reserve for certified HUBZone small business concerns. However, the HUBZone price evaluation preference does apply to the non-reserved portion of a full and open multiple award contract.

The proposed rule also added clarifying language to Example 1 explaining that a non-HUBZone small business concern is not affected by the application of the HUBZone PEP where such non-HUBZone small business is not the lowest offeror prior to the application of the preference. This is because the HUBZone PEP is intended neither to harm nor to benefit a non-HUBZone small business.

The proposed rule amended Example 2 by specifying that, in the example, after the application of the HUBZone PEP, the HUBZone small business concern's offer is not lower than the offer of the large business (*i.e.,* $103 is not lower than $102.3 ($93 × 110%)).

The proposed rule amended Example 3 to clarify that a contracting officer should not apply the HUBZone PEP where the lowest, responsive, responsible offeror is a small business concern, even if a large business concern submitted an offer.

In addition, the proposed rule clarified how the PEP should be applied to a procurement using trade off procedures. The proposed rule stated that for a procurement using trade off procedures, the contracting officer must first apply the 10% price preference to the offers of any large businesses and then determine which offeror represents the best value to the Government, in accordance with the terms of the solicitation. Where, after considering the price adjustment, the offer of the certified HUBZone small business is determined to be the best value to the Government, award shall be made to the certified HUBZone small business concern. Where evaluation points are given to both the price and technical aspects of an offer and the total evaluation points received by a certified HUBZone small business concern is equal to or greater than the total evaluation points received by a large business after considering the price adjustment, award shall be made to the certified HUBZone small business concern.

SBA received four comments on this section. Several commenters suggested that SBA should explicitly state that the HUBZone PEP applies to all full and open procurements, including those involving orders issued under Indefinite Delivery/Indefinite Quantity (IDIQ) contracts and other procurement vehicles. SBA notes that the HUBZone PEP is a statutory requirement, and thus

SBA does not have the discretion to expand the HUBZone PEP to orders under IDIQ contracts without Congressional action. In general, the commenters agreed with the proposed clarifications on how the HUBZone PEP should be applied, including the examples provided by SBA. One commenter asked for clarification as to whether the applicable limitation on subcontracting and the nonmanufacturer rule applied to contracts for which a certified HUBZone small business concern received the benefit of the HUBZone PEP. Section 126.600(c) specifies that awards through full and open competition after the HUBZone price evaluation preference is applied to an other than small business in favor of a certified HUBZone small business is a HUBZone contract. Since the limitations on subcontracting and the nonmanufacturer rule apply to all HUBZone contracts as they do generally for all small business contracts, they apply to unrestricted contracts where a HUBZone PEP is used. SBA does not believe a specific regulatory provision stating that is needed. Several commenters requested further clarification regarding the application of the HUBZone PEP to mentor-protégé joint ventures, particularly when a large business mentor is performing a significant portion (*e.g.,* 60%) of the contract. They questioned whether it is appropriate to give the large business mentor a price evaluation preference over another large business competing for the same contract, as this could create an unfair advantage and dilute the intent of the HUBZone PEP. SBA agrees that one large business should not be receiving a PEP against another large business. The final rule clarifies that a HUBZone PEP does not apply to a HUBZone joint venture consisting of a certified HUBZone small business concern and its other than small mentor.

Section 126.615

SBA proposed to amend § 126.615 by adding a reference to § 125.9 to clarify that large businesses may participate in HUBZone procurements by serving as SBA-approved mentors under SBA's mentor-protégé program, and by correcting the cross-reference to the limitations on subcontracting. SBA did not receive any comments on this proposed amendment but changes the words ''large business'' to ''other than small business'' in the final rule to reflect SBA's general terminology.

Section 126.616

SBA proposed to amend § 126.616, which describes the circumstances under which a joint venture can be awarded a HUBZone contract. The proposed rule deleted language from current § 126.616(a)(1) stating that a ''joint venture itself need not be a certified HUBZone small business concern.'' SBA proposed to delete this language because it implies that a joint venture could be HUBZone-certified, when in fact the HUBZone program does not certify joint ventures under any circumstances. Instead, proposed § 126.616(a)(1) clarified that SBA does not certify HUBZone joint ventures, but provided that a joint venture should be designated as a HUBZone joint venture in SAM (or successor system), with the HUBZone-certified joint venture partner identified. The proposed rule added a new paragraph (k) providing that a procuring agency may only receive HUBZone credit for an award to a HUBZone joint venture where the joint venture complies with the requirements in § 126.616.

SBA received two comments on this proposed amendment. One commenter supported this change without substantive comment. The second commenter stated that joint ventures should not lose an award if they are not designated in SAM. SBA notes that all offerors, including joint venturers must be registered in SAM at the time of offer. SBA implements this section as proposed.

Section 126.619

As discussed above, this final rule moves all recertification requirements for size and socioeconomic status to a new § 125.12. Section 126.619 refers to the requirements set forth in § 125.12 as applying to recertifications of HUBZone status.

Section 126.701

SBA proposed to amend § 126.701 by removing the words ''these subcontracting percentages'' in the section heading and adding in their place the words ''the limitations on subcontracting'' to clarify the content of the section. SBA received no comments on this proposed revision and adopts it as final in this rule.

Section 126.800

SBA proposed to revise § 126.800 to make the section more readable, to clarify that interested parties may protest a HUBZone joint venture offeror's eligibility for award of a HUBZone contract, and to add a paragraph providing that SBA may protest an apparent successful offeror's status as a certified HUBZone small business concern on a non-HUBZone contract. SBA believes that where there is evidence that a prospective awardee claiming status as a certified HUBZone small business does not meet the HUBZone requirements, there should be the ability to protest the firm's HUBZone status, even for a non-HUBZone award. This will prevent an agency from receiving HUBZone credit where the awardee is not eligible for the program. SBA received no comments on this proposed revision and makes minor wording changes to clarify that for other than HUBZone contracts, any offeror for that contract, the contracting officer or SBA may protest an apparent successful offeror's status as a certified HUBZone small business concern.

Section 126.801

In response to the change made to § 126.601(a) requiring a HUBZone small business to be eligible for a HUBZone contract as of the date of its initial offer, the proposed rule made corresponding changes to § 126.801, to recognize that the date of offer would be the relevant date for protesting a HUBZone small business concern's eligibility for award of a HUBZone contract. SBA received no comments on this proposed revision. The final rule adopts the proposed language and adds clarifying language regarding timeliness and where a HUBZone status protest should be filed. The final rule clarifies that an interested party other than a contracting officer or SBA must submit its written protest to the contracting officer. The contracting officer must then forward that protest to SBA at *hzprotests@sba.gov*. A contracting officer can initiate his/her own HUBZone status protest by filing a protest with SBA at that same email address. The final rule also specifies in the general section the current policy that a protest by a contracting officer or SBA challenging the HUBZone status of an apparent successful offeror on a HUBZone contract or of an awardee on a HUBZone contract is always timely. It cannot be premature (*i.e.,* before an apparent awardee has been selected), but it can be at any point after that.

Section 126.803

SBA proposed to amend § 126.803 by revising paragraph (a), which explains the date that will be used to determine a firm's HUBZone eligibility if it is the subject of a HUBZone status protest. Consistent with the proposed requirement that a firm be eligible on the date of offer for a competitive HUBZone contract, proposed § 126.803(a) provided that for all HUBZone contracts other than HUBZone sole source awards, SBA shall determine a protested firm's HUBZone eligibility as of the date of its initial offer that includes price. The proposed

rule provided that for HUBZone sole source awards, SBA would determine a protested firm's HUBZone eligibility as of the date of award.

SBA also proposed to add a new paragraph to § 126.803 providing that the burden of proof to demonstrate eligibility is on the protested concern. This paragraph explained that if a concern does not provide information requested by SBA within the allotted time provided, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the applicant failed to provide would demonstrate ineligibility and sustain the protest on that basis. These policies are explained in SBA's protest notification letters, and SBA believes they should also appear in the protest regulations. SBA received no comments on these proposed revisions and adopts them in this final rule. In addition, this final rule adds a paragraph specifying that for two-step or two-phase procurements, SBA will determine the HUBZone small business concern's eligibility as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one. This is to align with § 126.601(e), which addresses two-step procurements.

Section 126.900

SBA proposed to amend § 126.900 by adding a new paragraph (e)(4) providing that if SBA discovers that false or misleading information has been knowingly submitted by a small business concern in order to obtain or maintain HUBZone certification, SBA will propose the firm for decertification. SBA received fifteen comments on this section, all of which were supportive. SBA adopts this proposed revision as final in this rule.

Sections 127.200 and 128.200

In order to be eligible for the 8(a) BD program, SBA requires socially and economically disadvantaged individuals to reside in the United States. *See* 13 CFR 124.101. There currently is not a similar requirement for the WOSB or VetCert programs. SBA believes that qualifying individuals should reside in the United States to more adequately advance the purposes of the programs. The proposed rule added a United States residency requirement for qualifying individuals in the WOSB and VetCert programs. SBA received two comments supporting these proposals without substantive comment and adopts the proposed rule as final.

Section 127.400

Section 127.400 provides guidance as to how a concern can maintain its WOSB or EDWOSB certification. Current § 127.400(b) specifies that a concern must either request a program examination from SBA or notify SBA that it has requested a program examination from a third-party certifier no later than 30 days prior to its certification anniversary. In order to provide consistency between the programs, this rule states that a concern must either recertify with SBA or notify SBA that it has completed a program examination from a third party certifier in the 90 calendar days prior to its certification anniversary. This rule also revises the example set forth in the regulations to take into account the change from 30 days to 90 days.

Section 134.1104

Section 134.1104 sets forth the time limits a VOSB or SDVOSB must appeal an adverse determination finding it ineligible for the VetCert program to SBA's Office of Hearings and Appeals (OHA). Currently, § 134.1104 requires an appeal to be filed within 10 business days of receipt of the denial. When an application for the 8(a) BD program is denied, a firm has 45 days from the date it receives the Agency decision to file an appeal with OHA. *See* 13 CFR 124.206(b). SBA is in the process of establishing a uniform application processing system. That system will allow a firm to simultaneously apply for multiple certifications for which it believes it is eligible. If a firm applied for 8(a) and VetCert certification at the same time and was denied for both programs, the current regulations would require the firm to appeal its VetCert denial withing 10 days while not being required to file its 8(a) eligibility appeal for 45 days. SBA believes that may be confusing to affected applicants and that there should be consistency in the appeal process. As such, this rule changes the time to file an appeal for the VetCert program to 45 days.

Compliance With Executive Orders 12866, 12988, 13132, 13563, the Congressional Review Act (5 U.S.C. 801–808), the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612):

Executive Orders 12866, 13563 and 14904

Executive Order 12866, ''Regulatory Planning and Review,'' directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563, ''Improving Regulation and Regulatory Review,'' emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14094, ''Modernizing Regulatory Review,'' amends section 3(f) of Executive Order 12866 and supplements and reaffirms the principles, structures and definitions governing contemporary regulatory review established in Executive Order 12866 and Executive Order 13563. The OMB Office of Information and Regulatory Affairs (OIRA) has determined that this rule is a significant regulatory action and, therefore, it was reviewed under subsection 6(b) of E.O. 12866.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

This regulatory action clarifies and streamlines SBA's regulations governing the HUBZone Program and other contracting assistance programs. In 2019, SBA published a comprehensive revision to the HUBZone Program regulations, which implemented changes intended to make these regulations easier to understand and implement. This rule is intended to further clarify and improve policies surrounding some of those changes to ensure that the HUBZone program fulfills its statutory purpose. In addition, SBA has heard from small businesses of a desire for consistency among its contracting assistance programs in order to relieve burdens associated with compliance with multiple programs. As a result, the rule makes several improvements to create uniformity among the programs, including deleting the program-specific recertification requirements contained separately in SBA's size, 8(a) BD, HUBZone, WOSB, and VetCert and moving them to a new section that would cover all size and status recertification requirements.

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

This rule benefits program participants by reducing burdens and increasing consistency with other contracting programs while changing or adding some compliance requirements that strengthen the program's impact and reduce the potential for business policies and practices that are contrary to the goals of the HUBZone program. The reduction of burdens includes the

decrease in the time of proof of residence for employees, removal of the 90-day wait period for reapplication after decertification, revisions to the part of the rule that addresses Governor-designated covered areas, a change in the negative-control rule in SBA's affiliation rule, deletion of program-specific requirements for certification, and triennial instead of annual recertification. Compliance requirements include limits on the number of Legacy Employees, revised requirements for the use of the ''attempt to maintain'' statutory language, and proof of eligibility at the time of offer of a HUBZone contract. These compliance measures are consistent with the program's goal of promotion of growth and impact of small businesses in historically underutilized areas and SBA believes, as outlined below, that they are not substantial burdens.

Benefits

The decrease from 180 days to 90 days for proof of employees' residency allows for firms to enter the HUBZone program more quickly and increases opportunities for newly-hired employees. Both of these results increase accessibility of the program's opportunities. Removal of the 90-day wait period for decertified firms also promotes the program's accessibility because SBA has found that a shorter wait period is consistent with firms' ability to qualify or return to compliance by hiring HUBZone residents or by moving to a newly-designated HUBZone.

The restatement of § 126.104 clarifies existing policy on Governor-designated covered areas, including the condition for annual petitions and a statement of no need for SBA's approval of previously designated covered areas. This restatement decreases uncertainty for firms that participate or plan to participate in the program. The restatement also authorizes the Associate Administrator for Government Contracting and Business Development, or designee, instead of the Administrator to approve covered areas, which will reduce time to approve a petition and facilitate entry into the program.

Amendments to regulations on affiliation will remove inconsistencies with other programs' regulations. The benefit of the amendments is more certainty on measures that minority-share investors can include to protect their investments without a finding of control. This rule further reduces uncertainty in this matter by applying the same language to the 8(a) BD, WOSB and VetCert programs. SBA expects the changes in regulations on affiliation and control and increased consistency among programs to improve the environment for access to capital for small businesses in contracting assistance programs.

The rule returns the HUBZone program to triennial recertification and deletes program-specific recertification requirements. Both of these changes alleviate the burden associated with recertification. With recertification taking about an hour to complete, SBA estimates that the change to triennial recertification will result in an annual reduction in the time burden from recertification of approximately 2,468 hours and about $326,911 in annual savings. SBA has seen a downward trend in the number of HUBZone firms over the years, with lateness in annual recertification as one reason for the trend, so a reduction in this recertification burden may increase the number of HUBZone program participants and, consequently, result in wider economic benefits generated by more HUBZone firms in communities. Deletion of program-specific recertification requirements will also reduce time in recertification. In 2023, SBA sampled several years of data to estimate that about 10% of the firms in the HUBZone program were also in the WOSB program and 15% in the 8(a) program. The eliminated recertification procedures from uniform certification will reduce the time burden by an estimated 617 hours and generate an additional $81,728 in annual savings.

Revisions in Compliance Measures

This final rule revises § 126.200(d)(3) to allow HUBZone firms to retain employees who have move out of a HUBZone but proposes a limitation on the number of these Legacy HUBZone Employees. This is an attempt to balance the needs of employees who move for personal reasons or for professional development with the aims of the program to promote business activity in specific areas. The limitation is a potential source of burden on small business entities but is offset by the economic development from employment of HUBZone residents.

SBA is also adjusting the threshold of 20 percent of employees for ''attempt to maintain'' currently in § 126.500(a)(2) with 35 percent. This increased threshold is a stronger standard but the procedures for demonstrating compliance are not different. Any resulting costs should be balanced against SBA's assessment that HUBZone goals are not sufficiently fulfilled by implementation of the current requirement of 20 percent.

This rule requires any certified HUBZone small business to be eligible as of the date of offer for any HUBZone contract. In Federal Procurement Data System (FPDS) data from previous years, approximately 2,100 new HUBZone contracts were awarded in a fiscal year. SBA estimates it takes approximately 1 hour for a firm to gather proof that it is eligible at the time of offer. Thus, this rule will increase the burden on HUBZone small business concerns by approximately 2,100 hours for an estimated annual cost of $278,166. SBA notes that the number of firms in the program has decreased over the past few years and this number of 2,100 may therefore be too high. SBA also notes that a specific small business entity incurs this burden only when a contract is offered and that, in the aggregate, the burden is balanced by the benefits of consistency of this provision with other contracting programs and maintenance of standards for the integrity of the HUBZone program.

Summary

The changes in this rule clarify and streamline regulations and increase consistency with other contracting programs. Many of the benefits are not quantifiable, but SBA estimates annual savings of about $408,639 from reduced frequency of recertification. Benefits from the changes regarding affiliation and control reduce uncertainty for investors and will therefore have a significant impact on access to capital. The rule contains measures that introduce or strengthen some compliance requirements but these are balanced by the need to maintain the goals and integrity of the program. The one quantifiable burden noted in these compliance measures is proof of eligibility at the time of offer and this is a cost only when the benefit of the offer is present.

3. What are the alternatives to this rule?

SBA considered alternatives to each of the significant changes made by this rule. Instead of requiring HUBZone firms to recertify every three years and be eligible at the time of offer, SBA considered maintaining the current requirement where annual recertification allows a concern to seek and be eligible for HUBZone contracts for a year. However, SBA has found that the annual recertification requirement does not fulfill the purposes of the HUBZone program as effectively as requiring firms to be eligible at the time of offer for HUBZone contracts. Moreover, SBA believes that uniformity among its contracting programs is an important goal, and returning to

triennial recertification and eligibility determinations based on the date of offer would bring the HUBZone program much more in line with SBA's other small business and socioeconomic contracting programs.

This regulatory action is needed to clarify and improve SBA's regulations governing the HUBZone Program and SBA's other socioeconomic contracting programs. In 2019, SBA published a comprehensive revision to the HUBZone Program regulations, which implemented changes intended to make the HUBZone Program more efficient and effective. This rule is intended to clarify and improve policies surrounding some of those changes. The clarifications and improvements are needed to ensure that the rules governing the HUBZone program fulfill its statutory purpose. In addition, SBA has heard from the small business community that improvements are needed to make its socioeconomic contracting programs more uniform, in order to relieve burdens associated with compliance with multiple programs. As a result, this final rule makes several improvements to create uniformity among the programs, including deleting the program specific recertification requirements contained separately in SBA's size, 8(a) BD, HUBZone, WOSB, and VetCert and moving them to a new section that would cover all size and status recertification requirements.

Executive Order 13132

For the purposes of Executive Order 13132, Federalism, SBA has determined that this rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

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

This rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

In 2019, SBA revised its regulations to give contracting officers discretion to request information demonstrating compliance with the limitations on subcontracting requirements. *See* 84 FR 65647 (Nov. 29, 2019). In conjunction with this revision, SBA requested an Information Collection Review by OMB (Limitations on Subcontracting Reporting, OMB Control Number 3245–0400). OMB approved the Information Collection. This rule does not alter the contracting officer's discretion to require a contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract. The estimated number of respondents, burden hours, and costs remain the same as that identified by SBA in the previous Information Collection. As such, SBA believes this provision is covered by its existing Information Collection, Limitations on Subcontracting Reporting.

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

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' This final rule concerns various aspects of SBA's HUBZone program, as well as its size, 8(a) BD, WOSB, and VetCert programs. As such, the rule relates to small businesses but would not affect ''small organizations'' or ''small governmental jurisdictions.''

The rule changes clarify and streamline regulations and increase consistency with other contracting programs. Many of the benefits are not quantifiable, but SBA estimates annual savings of about $408,639 from reduced frequency of HUBZone recertification. There are approximately 5,000 small businesses that are listed as certified HUBZone small businesses in DSBS, and under the proposed rule, these firms would only need to recertify every three years, rather than every year. Benefits from the proposed changes regarding affiliation and control reduce uncertainty for investors and may therefore improve access to capital. The rule contains measures that introduce or strengthen some compliance requirements, but these are balanced by the need to maintain the goals and integrity of the program. The one quantifiable burden noted in these proposed compliance measures is proof of HUBZone eligibility at the time of offer and this is a cost only when the benefit of the offer is present. Moreover, this burden is counterweighed by the benefit of making the HUBZone program more consistent with SBA's other socioeconomic contracting programs, which decreases the amount of regulations that small businesses must learn and understand in order to participate in SBA's programs. The other changes that make the programs more consistent, such as consolidating the regulations related to recertification of size and status, only serve to benefit the small businesses that participate in these programs. Based on the foregoing, SBA does not believe that the proposed amendments would have a disparate impact on small businesses or would impose any additional significant costs. For the reasons discussed, SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

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

13 CFR Part 125

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

13 CFR Part 126

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

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 128

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

13 CFR Part 134

Administrative practice and procedure, Claims, Confidential business information, Equal access to justice, Equal employment opportunity, Lawyers, Organization and function (Government agencies).

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts

121, 124, 125, 126, 127, 128, and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9).

■ 2. Amend § 121.103 by revising paragraphs (a)(3), (h)(3) introductory text, and (h)(3)(i), and adding a new adding paragraph (h)(3)(v), to read as follows:

§ 121.103 How does SBA determine affiliation?

(a) * * *

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. However, SBA will not find that a minority shareholder has negative control where such minority shareholder has the authority to block action by the board of directors or shareholders regarding the following extraordinary circumstances:

(i) Adding a new equity stakeholder or increasing the investment amount of an equity stakeholder;

(ii) Dissolution of the company;

(iii) Sale of the company or all assets of the company;

(iv) The merger of the company;

(v) The company declaring bankruptcy;

(vi) Amendment of the company's corporate governance documents to remove the shareholder's authority to block any of (a)(3)(i) through (v); and

(vii) Any other extraordinary action that is crafted solely to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's business as it chooses.

* * * * *

(h) * * *

(3) *Ostensible subcontractors and unduly reliant managing joint venture partners.* (i) An offeror is ineligible as a small business concern, an 8(a) small business concern, a certified HUBZone small business concern, a WOSB/EDWOSB concern, or a VOSB/SDVOSB concern where SBA determines there to be an ostensible subcontractor. An ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in § 125.1 of this chapter, and performs primary and vital requirements of a contract, or of an order, or is a subcontractor upon which the prime contractor is unusually reliant.

* * * * *

(v) A joint venture offeror is ineligible as a small business concern, an 8(a) small business concern, a certified HUBZone small business concern, a WOSB/EDWOSB concern, or a VO/SDVO small business concern where SBA determines that the managing joint venture partner will not perform 40% of the work to be performed by the joint venture.

* * * * *

■ 3. Amend § 121.104 by revising paragraph (a)(1) to read as follows:

§ 121.104 How does SBA calculate annual receipts?

(a) * * *

(1) SBA will consider and generally rely on a concern's Federal income tax return and any amendments filed with the IRS on or before the date of self-certification to determine the size status of the concern. Where a concern may legally exclude certain revenue for tax purposes, SBA will not include that revenue in its analysis. However, SBA may consider other relevant information where there is reasonable basis to believe the tax filings are false.

* * * * *

■ 4. Revise § 121.404 to read as follows:

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

(a) *General.* A concern, including its affiliates, must qualify as small under the NAICS code assigned to a contract 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. Once awarded a contract as a small business, a firm is generally considered to be a small business throughout the life of that contract.

(b) *Multiple Award Contracts.* (1) If a single NAICS code is assigned to a multiple award contract as set forth in § 121.402(c)(1)(i), SBA determines size status for the underlying multiple award contract as of the date a business concern submits its initial offer (or other formal response to a solicitation), which includes price, for the contract based upon the size standard set forth in the solicitation for the multiple award contract.

(2) When multiple NAICS codes are assigned to a multiple award contract as set forth in § 121.402(c)(1)(ii), SBA determines size status for the underlying multiple award contract for each discrete category for which an offer is submitted, by applying the size standard corresponding to each discrete category, as of the date a business concern submits its initial offer which includes price for the contract.

(3) Where concerns are not required to submit price as part of the initial offer for a multiple award contract, SBA determines size status for the underlying multiple award contract as of the date a business concern submits its initial offer for the contract, which may not include price.

(c) *Orders and Agreements Established Against Multiple Award Contracts*—(1) *Unrestricted Contracts.* Where an order is set-aside for small business under an unrestricted multiple award contract, SBA determines size status for each order placed against the multiple award contract as of the date a business concern submits its initial offer (or other formal response to a solicitation), which includes price, for each order.

(2) *Set-Aside or Reserved Contracts.* Where an order is issued under a multiple award contract that itself was set aside or reserved for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned/economically-disadvantaged women-owned small business), SBA determines size status as of the date a business concern submits its initial offer, which includes price, for the set-aside or reserved multiple award contract, unless a contracting officer requests size recertification with respect to a specific order.

(i) Where a contracting officer requests size recertification with respect to a specific order, size is determined as of the date the business concern submits its initial offer (or other formal response to a solicitation), which includes price, for the order.

(ii) Where a contracting officer requests size recertification with respect to a specific order, size is determined only with respect to that order. Where a contract holder has grown to be other than small and cannot recertify as small for a specific order for which a contracting officer requested recertification, it may continue to qualify as small for other orders issued under the contract where a contracting officer does not request recertification.

(3) *Agreements.* With respect to agreements established under FAR part 13, size is determined as of the date the business concern submits its initial offer, which includes price, for the agreement. Because an agreement is not a contract, the concern must also qualify as small as of the date the concern

submits its initial offer, which includes price, for each order issued pursuant to the agreement to be considered small for the order.

(4) *Exceptions.* (i) For orders or BPAs to be placed against the GSA Federal Supply Schedule (FSS) Multiple Award Schedule (MAS) contract, size is determined as of the date the business concern submits its initial offer, which includes price, for the GSA FSS MAS contract.

(ii) For 8(a) sole source orders issued under a multiple award contract, size is determined in accordance with § 124.503(i)(1)(iv) of this chapter, as of the date the order is offered to the 8(a) BD program, regardless of whether the multiple award contract is unrestricted, set-aside, or the GSA FSS MAS contract.

(iii) Size is determined on the date of recertification when a recertification is required pursuant to §§ 125.12(a) and (b) of this chapter, or on the date of initial offer which includes price if requested by a contracting officer pursuant to § 125.12(c). This exception applies to all provisions of §§ 121.404(a), (b), (c), and (d).

(d) *Eligibility for SBA programs.* A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a HUBZone small business concern (under part 126 of this chapter), as a women-owned small business concern (under part 127 of this chapter), or as a service-disabled veteran-owned small business concern (under part 128 of this chapter) must qualify as a small business as of the date of its application and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification. For the 8(a) Business Development program, a concern must qualify as small under the size standard corresponding to its primary industry classification. For all other certification programs, a concern must qualify as small under the size standard corresponding to any NAICS code listed in its SAM profile. SBA will accept a concern's size representation in SAM, or successor system, unless there is evidence indicating that the concern is other than small. SBA will request a formal size determination pursuant to § 121.1001(b)(8) where any information it possesses calls into question the SAM size representation.

(e) *Certificates of competency.* The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC.

(f) *Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Compliance with the nonmanufacturer rule set forth in § 121.406(b)(1), the ostensible subcontractor rule set forth in § 121.103(h)(3), and the joint venture agreement requirements in §§ 124.513(c) and (d), §§ 126.616(c) and (d), §§ 127.506(c) and (d), and §§ 125.8(b) and (c) of this chapter, as appropriate, is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

(g) *Subcontracting.* For subcontracting purposes, a concern must qualify as small as of the date that it certifies that it is small for the subcontract. The applicable size standard is that which is set forth in § 121.410 and which is in effect at the time the concern self-certifies that it is small for the subcontract. A prime contractor may rely on the self-certification of a subcontractor provided it does not have a reason to doubt the concern's self-certification.

(h) *Two-step procurements.* For purposes of architect-engineering, design/build or two-step sealed bidding procurements, a concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may or may not include price).

(i) *Recertification. See* § 125.12 for information on recertification of size and status, and the effect of recertification. None of the exceptions set forth in paragraph (c)(4) of this section have an effect or serve as an exception to whether recertification is required under § 125.12.

(j) *Follow-on contracts.* A follow-on or renewal contract is a new contracting action. As such, size is determined as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price for the follow-on or renewal contract.

■ 5. Amend § 121.702 by revising paragraph (c)(7) to read as follows:

§ 121.702 What size and eligibility standards are applicable to the SBIR and STTR programs?

* * * * *

(c) * * *

(7) *Affiliation based on the ostensible subcontractor rule.* A concern with an other than small ostensible subcontractor cannot be considered a small business concern for SBIR and STTR awards. An ostensible subcontractor is a subcontractor or subgrantee that performs primary and vital requirements of a funding agreement (*i.e.,* those requirements associated with the principal purpose of the funding agreement), or a subcontractor or subgrantee upon which the concern is unusually reliant.

(i) All aspects of the relationship between the concern and the subcontractor are considered, including, but not limited to, the terms of the proposal (such as management, technical responsibilities, and the percentage of subcontracted work) and agreements between the concern and subcontractor or subgrantee (such as bonding assistance or the teaming agreement).

(ii) To determine whether a subcontractor performs primary and vital requirements of a funding agreement, SBA will also consider whether the concern's proposal complies with the performance requirements of the SBIR or STTR program.

(iii) The prime and any small business ostensible subcontractor both must comply individually with the ownership and control requirements in paragraphs (a) and (b) of this section, as applicable.

* * * * *

■ 6. Amend § 121.1001 by adding paragraphs (a)(10) through (12), and (b)(2)(iii) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) * * *

(10) For orders set-aside for small business, women-owned small business, service-disabled veteran-owned small business, or HUBZone small business under an unrestricted multiple award contract or such orders issued under any type of small business multiple award contract where a contracting officer has requested a size recertification, the following entities may file a size protest:

(i) Any offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, the SBA program manager relating to the order at issue (*i.e.,* the Director of Government Contracting, the Associate Administrator for Business Development, or the Director of

HUBZone, as appropriate), or the Associate General Counsel for Procurement Law.

(11) In connection with a size recertification relating to a contract required by § 125.12 of this chapter, the following entities may file a size protest challenging the recertification:

(a) Any contract holder on that multiple award contract;

(b) The contracting officer; or

(c) The SBA program manager relating to the contract at issue (*i.e.,* the Director of Government Contracting, the Associate Administrator for Business Development, or the Director of HUBZone, as appropriate), or the Associate General Counsel for Procurement Law.

(12) In connection with a size recertification relating to a multiple award contract required by § 125.12 of this chapter, any contract holder on that multiple award contract may also request a formal size determination concerning a recertifying concern's status as a small business.

(i) A request for a formal size determination made by another contract holder on a multiple award contract must be sufficiently specific to provide reasonable notice as to the grounds upon which the recertifying concern's size is questioned. Some basis for the belief or allegation that the recertifying concern does not continue to qualify as small must be given.

(ii) SBA will dismiss as not sufficiently specific any request for a formal size determination alleging merely that the recertifying concern is not small or is affiliated with unnamed other concerns.

(b) * * *

(2) * * *

(iii) Where SBA initially verified the eligibility of an 8(a) Participant for the award of an 8(a) contract but subsequently receives specific information that the Participant may be other than small and consequently ineligible for the award, the Associate Administrator for Business Development or the Associate General Counsel for Procurement Law may request a formal size determination at any point prior to award.

* * * * *

■ 7. Amend § 121.1010 by revising paragraph (b) to read as follows:

§ 121.1010 How does a concern become recertified as a small business?

* * * * *

(b) Recertification will not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation limited to a particular Government procurement or property sale, such as an ostensible subcontracting relationship or non-compliance with the nonmanufacturer rule.

* * * * *

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

■ 8. 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, 42 U.S.C. 9815; and Pub. L. 99–661, 100 Stat. 3816; Sec. 1207, Pub. L. 100–656, 102 Stat. 3853; Pub. L. 101–37, 103 Stat. 70; Pub. L. 101–574, 104 Stat. 2814; Sec. 8021, Pub. L. 108–87, 117 Stat. 1054; and Sec. 330, Pub. L. 116–260.

■ 9. Amend § 124.3 by revising the definition of ''Community Development Corporation or CDC'' to read as follows:

§ 124.3 What definitions are important in the 8(a) BD program?

* * * * *

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, *et seq.* or has received a letter from the Department of Health and Human Services affirming that it has received assistance under a successor program to that authorized by 42 U.S.C. 9805.

* * * * *

§ 124.4 [Removed]

■ 10. Remove § 124.4.

■ 11. Amend § 124.102 by adding the following sentences to the end of paragraph (a)(1) to read as follows:

§ 124.102 What size business is eligible to participate in the 8(a) BD program?

(a) * * *

(1) * * * In determining whether a concern applying to be certified for the 8(a) BD program qualifies as a small business concern under the size standard corresponding to its primary industry classification, SBA will accept the concern's size representation in the System for Award Management (SAM), or successor system, unless there is evidence indicating that the concern is other than small. SBA will request a formal size determination pursuant to § 121.1001(b)(8) of this chapter where any information it possesses calls into question the concern's SAM size representation.

* * * * *

■ 12. Amend § 124.105 by:

■ a. Revising paragraph (b);

■ b. Revising paragraph (f)(1);

■ c. Removing the words ''10 percent'' wherever they appear in paragraph (h)(1) and adding in their place the words ''20 percent'';

■ d. Removing the words ''20 percent'' in paragraph (h)(1) and adding in their place the words ''30 percent''; and

■ e. Revising paragraphs (h)(2), (i)(2), and (k).

The revisions read as follows:

§ 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?

* * * * *

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, one or more individuals determined by SBA to be socially and economically disadvantaged must serve as general partners, with control over all partnership decisions. At least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. The ownership must be reflected in the concern's partnership agreement.

* * * * *

(f) * * *

(1) At least 51 percent of any distribution of profits paid to the owners of a corporation, partnership, or limited liability company concern, and a disadvantaged individual's ability to share in the profits of the concern must be commensurate with the extent of his or her ownership interest in that concern;

* * * * *

(h) * * *

(2) A non-Participant business concern in the same or similar line of business or a principal of such concern may generally not own more than a 20 percent interest in an 8(a) Participant that is in the developmental stage or more than a 30 percent interest in an 8(a) Participant in the transitional stage of the program, except that a business concern approved by SBA to be a mentor pursuant to § 125.9 of this chapter may own up to 40 percent of its 8(a) Participant protégé as set forth in § 125.9(d)(2), whether or not that concern is in the same or similar line of business as the Participant.

(i) * * *

(2) (i) Prior approval by the AA/BD is not needed where:

(A) All non-disadvantaged individual (or entity) owners involved in the change of ownership own no more than a 30 percent interest in the concern both before and after the transaction;

(B) The transfer results from the death or incapacity due to a serious, long-term

illness or injury of a disadvantaged principal;

(C) The disadvantaged individual or entity in control of the Participant will increase the percentage of its ownership interest by any percentage; or

(D) The Participant has never received an 8(a) contract and the individual(s) or entity upon whom initial eligibility was based continues to own more than 50% of the Participant.

(ii) In determining whether a non-disadvantaged individual involved in a change of ownership has more than a 30 percent interest in the concern, SBA will aggregate the interests of all immediate family members as set forth in § 124.3, as well as any individuals who are affiliated based on an identity of interest under § 121.103(f).

(iii) Where prior approval is not required, the concern must notify SBA within 60 days of such a change in ownership, or before it submits an offer for an 8(a) contract, whichever occurs first.

Example 1 to paragraph (i)(2). Disadvantaged individual A owns 90% of 8(a) Participant X; non-disadvantaged individual B owns 10% of X. In order to raise additional capital, X seeks to change its ownership structure such that A would own 75%, B would own 10% and C would own 15%. X can accomplish this change in ownership without prior SBA approval. Non-disadvantaged owner B is not involved in the transaction and non-disadvantaged individual C owns less than 30% of X both before and after the transaction.

Example 2 to paragraph (i)(2). Disadvantaged individual C owns 60% of 8(a) Participant Y; non-disadvantaged individual D owns 35% of Y; and non-disadvantaged individual E owns 5% of Y. C seeks to transfer 5% of Y to E. Prior SBA approval is not needed. Although non-disadvantaged individual D owns more than 30% of Y, D is not involved in the transfer. Because the only non-disadvantaged individual involved in the transfer, E, owns less than 30% of Y both before and after the transaction, prior approval is not needed.

Example 3 to paragraph (i)(2). Disadvantaged individual A owns 80% of 8(a) Participant X; non-disadvantaged individual B owns 20% of X. A seeks to transfer 15% of X to B. SBA approval is needed. Although B, the non-disadvantaged owner of X, owns less than 30% of X prior to the transaction, prior approval is needed because B would own more than 30% after the transaction.

Example 4 to paragraph (i)(2). ANC A owns 55% of 8(a) Participant X; non-disadvantaged individual B owns 45% of X. B seeks to transfer 10% to A. Prior SBA approval is not needed. Although a non-disadvantaged individual who is involved in the transaction, B, owns more than 30% of X both before and after the transaction, SBA approval is not needed because the change only increases the percentage of A's ownership interest in X.

Example 5 to paragraph (i)(2). Disadvantaged individual C owns 65% of 8(a) Participant Z and non-disadvantaged individual D owns 35% of Z. Z has been in the 8(a) BD program for 2 years but has not yet been awarded an 8(a) contract. C seeks to transfer 10% to D. Although a non-disadvantaged individual who is involved in the transaction, D, owns more than 30% of Z both before and after the transaction, prior SBA approval is not needed because Z has never received an 8(a) contract.

* * * * *

(k) *Right of first refusal.* A right of first refusal granting a non-disadvantaged individual or other entity the contractual right to purchase the ownership interests of a qualifying disadvantaged individual does not affect the unconditional nature of ownership, if the terms follow normal commercial practices. If those rights are exercised by a non-disadvantaged individual or other entity after certification, the Participant must notify SBA. If the exercise of those rights results in disadvantaged individuals owning less than 51% of the concern, SBA will initiate termination pursuant to §§ 124.303 and 124.304.

■ 13. Amend § 124.106 by:

■ a. Removing paragraph (d)(3);

■ b. Redesignating paragraphs (d)(4) and (d)(5) as paragraphs (d)(3) and (d)(4), respectively;

■ c. Revising paragraph (e)(3);

■ d. Removing the text ''director, or key employee'' in paragraph (f) and adding in its place the text ''or director'';

■ e. Redesignating paragraph (h) as paragraph (i); and

■ f. Adding new paragraph (h).

The revision and addition to read as follows:

§ 124.106 When do disadvantaged individuals control an applicant or Participant?

* * * * *

(e) * * *

(3) Receive compensation from the applicant or Participant in any form as a director, officer or employee, that exceeds the compensation to be received by the highest ranking officer (usually CEO or President), unless the concern demonstrates that the compensation to be received by the non-disadvantaged individual is commercially reasonable or that the highest-ranking officer has elected to take lower compensation to benefit the applicant or Participant. A Participant must notify SBA within 30 calendar days if the compensation paid to the highest-ranking officer of the Participant falls below that paid to a non-disadvantaged individual. In such a case, SBA must determine that that the compensation to be received by the non-disadvantaged individual is commercially reasonable or that the highest-ranking officer has elected to take lower compensation to benefit the Participant before SBA may determine that the Participant is eligible for an 8(a) award.

* * * * *

(h) *Exception for extraordinary circumstances.* SBA will not find that a lack of control exists where a socially and economically disadvantaged individual does not have the unilateral power and authority to make decisions regarding the following extraordinary circumstances:

(1) Adding a new equity stakeholder or increasing the investment amount of an equity stakeholder;

(2) Dissolution of the company;

(3) Sale of the company or all assets of the company;

(4) The merger of the company;

(5) The company declaring bankruptcy;

(6) Amendment of the company's corporate governance documents to remove the shareholder's authority to block any of paragraphs (h)(1) through (5) of this section;

(7) Any other extraordinary action that is crafted solely to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's business as it chooses.

* * * * *

■ 14. Amend § 124.107 by:

■ a. Revising the first sentence of the introductory text;

■ b. Revising paragraph (a);

■ c. Removing paragraph (e); and

■ d. Redesignating paragraph (f) as paragraph (e).

The revisions read as follows:

§ 124.107 What is potential for success?

SBA must determine that with contract, financial, technical, and management support from the 8(a) BD program, from contractors or from others assisting with business operations, the applicant concern is able to perform 8(a) contracts and possess reasonable prospects for success in competing in the private sector. * * *

(a) Income tax returns for each of the two previous tax years must show operating revenues.

* * * * *

■ 15. Amend § 124.108 by:
■ a. Removing paragraph (a)(1);
■ b. Redesignating paragraphs (a)(2), (3), (4) and (5) as paragraphs (a)(1), (2), (3), and (4), respectively; and
■ c. Revising newly redesignated paragraph (a)(3) and paragraph (e).

The revision to read as follows:

§ 124.108 What other eligibility requirements apply for individuals or businesses?

* * * * *

(a) * * *

(3) An applicant is ineligible for admission to the 8(a) BD program if the applicant concern or a proprietor, partner, limited liability member, director, officer, or holder of at least 20 percent of its stock, or another person (including key employees) with significant authority over the concern lacks business integrity as demonstrated by conduct that could be grounds for suspension or debarment;

* * * * *

(e) *Federal financial obligations.* A business concern is ineligible for admission to or participation in the 8(a) BD program if either the concern or any of its principals has failed to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing. However, a small business concern may be eligible if the concern or the affected principals can demonstrate that they are current on an approved repayment plan or the financial obligations owed have been settled and discharged/forgiven by the Federal Government.

■ 16. Amend § 124.203 by removing the last three sentences and adding a sentence in their place to read as follows:

§ 124.203 What must a concern submit to apply to the 8(a) BD program?

* * * The majority socially and economically disadvantaged owner must take responsibility for the accuracy of all information submitted on behalf of the applicant.

■ 17. Amend § 124.204 by revising paragraph (d) to read as follows:

§ 124.204 How does SBA process applications for 8(a) BD program admission?

* * * * *

(d) An applicant must be eligible as of the date SBA issues a decision. An applicant's eligibility will be based on the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, and any changed circumstances.

* * * * *

■ 18. Revise § 124.207 to read as follows:

§ 124.207 Can an applicant reapply for admission to the 8(a) BD program?

A concern which has been declined for 8(a) BD program participation may submit a new application for admission to the program at any time after 90 calendar days from the date of the Agency's final decision to decline.

■ 19. Amend § 124.303 by adding paragraph (c) to read as follows:

§ 124.303 What is termination?

* * * * *

(c)(1) A firm that is terminated from the 8(a) BD Program due to the submission of false or misleading information may be removed from SBA's other small business contracting programs, including the HUBZone Program, the Women-Owned Small Business (WOSB) Program, the Veteran Small Business Certification (VetCert) Program, and SBA's Mentor-Protégé Program. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may recommend that Government-wide debarment or suspension proceedings be initiated.

(2) A firm that is decertified from the HUBZone Program, the WOSB Program, or the VetCert Program due to the submission of false or misleading information may be terminated from the 8(a) BD Program.

(3) SBA may require a firm that is decertified from the HUBZone Program, the WOSB Program, or the VetCert Program due to the submission of false or misleading information to enter into an administrative agreement with SBA as a condition of admission to the 8(a) BD program.

■ 20. Amend § 124.503 by revising paragraph (g)(1)(iii) to read as follows:

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

* * * * *

(g) * * *

(1) * * *

(iii) For open requirements, the effect that contract would have on the equitable distribution of 8(a) contracts; and

* * * * *

■ 21. Amend § 124.504 by revising paragraph (a) to read as follows:

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract, and when can a requirement be released from the 8(a) BD program?

* * * * *

(a) *Prior intent to award as a small business set-aside, or use the HUBZone, VetCert, or Women-Owned Small Business programs.* A procuring activity, for itself or for another end user, issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, VetCert, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract.

(1) However, SBA may accept the requirement into the 8(a) BD program where the AA/BD determines that there is a reasonable basis to cancel the initial solicitation or, if a solicitation had not yet been issued, a reasonable basis for the procuring agency to change its initial clear expression of intent to procure outside the 8(a) BD program (*e.g.,* the procuring agency's needs have changed since the initial solicitation was issued such that the solicitation no longer represents its current needs; or appropriations that were no longer available for the requirement as anticipated in one fiscal year are available in the succeeding fiscal year).

(i) A change in strategy only (*i.e.,* an agency seeking to solicit through the 8(a) BD program instead of through another previously identified program) will not constitute a reasonable basis for SBA to accept the requirement into the 8(a) BD program.

(ii) The AA/BD may coordinate with the D/GC, where appropriate, before accepting a requirement into the 8(a) BD program to ensure that another SBA program is not adversely affected.

(2) The AA/BD may also permit the acceptance of the requirement under extraordinary circumstances.

* * * * *

■ 22. Amend § 124.509 by redesignating paragraph (d)(1)(ii) as paragraph (d)(1)(iii), and adding new paragraph (d)(1)(ii) to read as follows:

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

* * * * *

(d) * * *

(1) * * *

(ii) In determining the projected revenue SBA should consider in determining whether one or more unsuccessful offers submitted by the Participant would have given the Participant sufficient revenues to achieve the applicable non-8(a) business

activity target under paragraph (d)(1)(i)(A) of this section, SBA will consider only the base year of the procurement at issue and not the projected full value of the procurement. SBA will not consider projected revenue under a particular non-8(a) contract where SBA determines the Participant submitted its offer without possessing reasonable prospects of success. In making this determination, SBA will consider all relevant factors, including, but not limited to:

(A) The magnitude of the contract relative to that of the Participant's previous contracts: and

(B) The past performance and experience of a joint venture partner and/or a subcontractor.

Example 1 to paragraph (d)(1)(ii): Participant X is in year 2 of the transitional stage (or year 6 of the 8(a) BD program). It has never received a contract in excess of $5M. X received $20M in total revenue and $3M in non-8(a) revenue during program year 6. X failed to meet its applicable non-8(a) business activity target (BAT) of 25% ($20M × 0.25 = $5M). To demonstrate its good efforts to achieve non-8(a) revenue, X submits evidence that it submitted two offers without any identified subcontractors: one for a five-year contract valued at $100M and one for a five-year contract valued at $5M. SBA would not consider the first offer to qualify as a ''good faith effort'' and would determine that the offer had no reasonable prospect for success since the magnitude of that contract far exceeded anything it had performed previously (submitting an offer for a $100M contract where the firm had never performed a contract in excess of $5M) and X did not identify any subcontractor or joint venture partner with relevant past performance and experience. The second offer would count as a good faith effort since its overall value was in line with previous contracts X had performed. However, because SBA considers only the projected revenue for the base year of the contract (or $1M), considering this offer does not bring X into compliance with its BAT ($3M + $1M = $4M, which is less than the $5M required to be in compliance).

* * * * *

■ 23. Amend § 124.514 by revising paragraph (a)(1) to read as follows:

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

(a) * * *

(1) If a firm's term of participation in the 8(a) BD program has ended (or the firm has otherwise exited the program) or is no longer small under the size standard corresponding to the NAICS code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.

* * * * *

■ 24. Amend § 124.518 by revising the section heading and paragraph (c), and adding paragraph (d) to read as follows:

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

* * * * *

(c) *Substitution of one 8(a) contractor for another.* SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of an 8(a) contract where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded the 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants. In determining whether a substitution would serve the business development needs of both 8(a) Participants, SBA will consider whether the substitution would allow a Participant to circumvent program policies or impede the interests of the program.

Example 1 to paragraph (c): Participant A anticipates it will not meet its applicable business activity target (BAT). Participant A seeks to transfer an 8(a) contract to another eligible 8(a) Participant through the substitution process and then perform a significant portion of that contract as a subcontractor to the new 8(a) Participant because the revenue from the subcontract will accrue to Participant A as non-8(a) revenue. SBA would not approve such a substitution because doing so would allow Participant X to circumvent the BAT requirement.

Example 2 to paragraph (c): Participant B is performing the last option period of performance under an 8(a) contract it won through competition. Participant B has graduated from the 8(a) Business Development (BD) program and will therefore not be eligible to receive the contract for the follow-on requirement. Participant B seeks to transfer its contract to Participant C, a sister company owned by the same Tribe/Alaska Native Corporation/Native Hawaiian Organization/Community Development Corporation, to allow Participant C to be the incumbent contractor when the procuring agency seeks to procure the follow-on procurement as an 8(a) sole source contract. SBA regulations governing entity participation in the 8(a) BD program prohibit a Participant from receiving an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by a sister company. Participant C would therefore not be eligible to receive the sole source follow-on contract to Participant B's 8(a) contract if contract performance ended under Participant B. SBA would not approve such a substitution because doing so would impede these policies.

Example 3 to paragraph (c): Participant D competed for and won a spot on a multiple award, Indefinite Quantity, Indefinite Delivery 8(a) contract. Participant D has exceeded the size standard under the NAICS code assigned to the contract and is therefore no longer eligible to receive sole source task orders issued under the contract; Participant D may, however, continue to receive competitive orders. Participant D seeks to transfer the contract to another eligible 8(a) Participant through the substitution process. SBA would not approve such a substitution because doing so would not serve its business development needs.

(d) *Novation to the lead partner to an 8(a) joint venture.* A joint venture that was awarded an 8(a) contract may seek to novate the 8(a) contract to the lead 8(a) Participant to the joint venture, provided each member of the joint venture agrees to such novation and the non-lead 8(a) joint venture partner will transfer all assets needed to perform the contract to the lead 8(a) Participant. In order for SBA to authorize novation, SBA must determine that the 8(a) Participant seeking to be novated the contract continues to meet all 8(a) eligibility requirements as if for a new 8(a) contract at the time of novation and the procuring agency must determine that the 8(a) firm is capable and responsible to perform the contract.

§ 124.602 [Amended]

■ 25. Amend § 124.602 by:

■ a. Removing the word ''$10,000,000'' in paragraphs (a)(1) and (a)(2) and adding in its place the word ''$20,000,000'';

■ b. Removing the words ''$2,000,000 and $10,000,000'' in paragraph (b)(1) and adding in their place the words ''7,500,000 and $20,000,000''; and

■ c. Removing the word ''$2,000,000'' in paragraph (c) and adding in its place the word ''$7,500,000''.

§ 124.603 [Amended]

■ 26. Amend § 124.603 by removing the word ''Former'' and adding in its place

the words ''If requested by the SBA, former''.

■ 27. Revise § 124.604 to read as follows:

§ 124.604 Report of benefits for firms owned by Tribes, ANCs, NHOs and CDCs.

(a) As part of its annual financial statement submission (*see* § 124.602), each Participant owned by a Tribe, ANC, NHO or CDC must submit to SBA information showing how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.

(b) A participating Tribe, ANC, NHO, or CDC may submit a consolidated report prepared by the parent entity showing how the Tribe, ANC, NHO, or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program through one or more firms. Where a Tribe/ANC/NHO/CDC elects to report consolidated community benefits, its individual 8(a) Participants need not submit separate reports as prescribed under paragraph (a) of this section.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 28. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

■ 29. Amend § 125.1 by adding, in alphabetical order, the definitions of ''Agreement'', ''Disqualifying recertification'', ''Qualifying recertification'', and ''Set Aside or Reserved Award'' to read as follows:

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

Agreement means a Blanket Purchase Agreement, Basic Agreement, or a Basic Ordering Agreement.

* * * * *

Disqualifying recertification means a recertification as either other than small or other than a qualified small business program participant that is required for eligibility to participate in a Set Aside or Reserved Award.

* * * * *

Qualifying recertification means a recertification as small or as a qualified small business program participant that is required for eligibility to participate in a Set Aside or Reserved Award.

* * * * *

Set Aside or Reserved Award means a contract, including multiple award contracts, agreements, or orders against contracts or agreements, that are set aside, partially set aside, or reserved for small business or any socio-economic small business program participants.

* * * * *

■ 30. Amend § 125.2 by:

■ a. Redesignating paragraph (c)(6) as paragraph (c)(7);

■ b. Adding new paragraph (c)(6);

■ c. Redesignating paragraph (e)(7) as paragraph (e)(8); and

■ d. Adding new paragraph (e)(7).

The additions read as follows:

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

* * * * *

(c) * * *

(6) *Prohibition on competitions requiring or favoring additional socioeconomic certifications.* A procuring activity cannot create a small business set-aside or reserve (for either a contract, order or agreement) that requires multiple socioeconomic certifications in addition to a size certification (*e.g.,* a competition cannot be limited only to small business concerns that are also 8(a) and HUBZone certified) or give evaluation preferences to concerns having multiple socioeconomic certifications.

* * * * *

(e) * * *

(7) *Partial set-aside and reserve.* A procuring activity may have both a partial small business set-aside and a small business reserve on the same contract. A partial set-aside can be done for one or more CLINs that must be set-aside for small business and a reserve could also be done on the same procurement for other items or services where a contracting officer would have discretion to utilize the small business reserve where appropriate.

* * * * *

■ 31. Amend § 125.3 by:

■ a. Adding paragraphs (a)(4) and (b)(4);

■ b. Removing from paragraph (d)(1) the text ''30 days'' and ''October 30th'' and adding in their place ''45 days'' and ''November 14th'', respectively; and

■ c. Removing from paragraph (d)(2) the text ''60 days'' and ''November 30th'' and adding in their place ''75 days'' and ''December 14th'', respectively.

The additions read as follows:

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

(a) * * *

(4) For subcontracting purposes, a concern must qualify as a small business concern and a socioeconomic small business concern as of the date that it certifies that it is small or that it qualifies as a socioeconomic small business concern for the subcontract.

(b) * * *

(4) Except for HUBZone and SDVO small business subcontractors, a prime contractor may rely on the socioeconomic self-certification of a subcontractor provided the prime contractor does not have a reason to doubt the subcontractor's self-certification.

* * * * *

■ 32. Amend § 125.6 by revising the second sentence and adding a new third sentence in paragraph (d) introductory text and adding two sentences to the end of paragraph (d)(3) to read as follows:

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

* * * * *

(d) * * * However, for a multi-agency set aside contract where more than one agency can issue orders under the contract, the ordering agency must use the period of performance for each order to determine compliance and monitor compliance with the limitations on subcontracting for that specific order. At the end of performance of the order, the ordering contracting officer should then inform the contracting officer for the underlying multi-agency contract if the ordering contracting officer knows that the contractor has failed to meet the applicable limitations on subcontracting requirement. * * *

* * * * *

(3) * * * Except with respect to staffing contracts, work performed by an employee obtained from a temporary employee agency, professional employer organization, or leasing concern shall be treated as the recipient concern's self-performance. The work performed by employees leased to the small business prime contractor will therefore not count against the applicable limitation on subcontracting.

* * * * *

■ 33. Amend § 125.8 by revising paragraphs (e) and (f) to read as follows:

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

* * * * *

(e) *Capabilities, past performance and experience.* When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

(1) A procuring activity has discretion whether to require a protégé or lead small business member of a joint venture to demonstrate some level of past performance and/or experience. It may rely solely on the past performance and experience of the mentor or non-similarly situated joint venture partner, or it may require some level of past performance and/or experience of the protégé or lead small business member. Where it requires some level of past performance and/or experience of the protégé or lead small business firm, the procuring activity shall not require that firm to individually meet all the same evaluation or responsibility criteria as that required of other offerors generally.

(2) If a procuring activity requires a protégé or lead small business joint venture partner to demonstrate some successful performance and/or experience on fewer previous contracts of lower values than that required of other offerors generally, successful performance by the protégé or lead small business firm on the contracts it identifies shall be rated equivalently to successful performance by the mentor or non-similarly situated partner to the joint venture or any other individual offeror on the higher valued contracts they identify.

(3) The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

Example 1 to paragraph (e). A solicitation requires offerors to demonstrate successful performance on five similar contracts valued at $20 million or more. Because a protégé joint venture partner must perform at least 40% of the work to be done by a successful joint venture offeror, the procuring activity seeks to require a protégé joint venture partner to demonstrate some past performance. The procuring activity may require a protégé joint venture partner to demonstrate one or two contracts valued at $10 million or $8 million, but may not require the protégé to demonstrate successful performance on five similar contracts and may not require the protégé to demonstrate successful performance on contracts valued at $20 million. In addition, if a procuring activity requires a protégé joint venture partner to demonstrate successful performance on two contracts valued at $10 million or more, successful performance by the protégé firm on those $10 million contracts shall be rated equivalently to successful performance by the mentor partner to the joint venture or any other individual offeror on $20 million contracts.

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

* * * * *

■ 34. Amend § 125.9 by:
■ a. Revising paragraph (b) introductory text;
■ b. Revising paragraph (b)(2);
■ c. Adding the word ''a'' after the words ''more than one protégé at'' and before the word ''time'' in paragraph (b)(3) introductory text;
■ d. Adding paragraph (b)(4);
■ e. Revising paragraph (c)(2);
■ f. Redesignating paragraph (e)(6) as paragraph (c)(4);
■ g. Revising newly redesignated paragraphs (c)(4)(iii) and (iv);
■ h. Adding paragraph (c)(5);
■ i. Adding paragraph (d)(1)(iv); and
■ j. Redesignating paragraphs (e)(7), (8) and (9) as paragraphs (e)(6), (7) and (8), respectively.

The revisions and additions read as follows:

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

* * * * *

(b) *Mentors.* Any for-profit business concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

* * * * *

(2) (i) SBA will decline an application if SBA determines that the mentor does not possess good character or a favorable financial position, employs or otherwise controls the managers or key employees of the protégé, or is otherwise affiliated with the protégé.

(ii) SBA may terminate the mentor-protégé agreement if:

(A) SBA determines that the mentor does not possess good character or a favorable financial position;

(B) SBA determines that the mentor was affiliated with the protégé at the time of application or becomes affiliated with the protégé for reasons other than the mentor-protégé agreement or assistance provided under the agreement; or

(C) Key managers or personnel become employees of both the mentor and protégé firms at the same time.

* * * * *

(4) A mentor cannot be a contract holder through joint ventures with two protégé small business concerns on the same small business multiple award contract or small business reserve on a multiple award contract at the same time.

(i) Where a mentor purchases another business entity that is also an SBA-approved mentor that is a contract holder as a joint venture with a protégé small business and the mentor is also a contract holder with a protégé small business on that same multiple award contract, the mentor must exit one of those joint venture relationships.

(ii) The protégé firm connected to the joint venture from which the mentor exits may seek to:

(A) Acquire the new mentor's interest in the small business multiple award contract or reserve and, where necessary and appropriate, novate such contract or reserve to itself only pursuant to FAR 42.1204; or

(B) Replace the new mentor with another business in the joint venture such that the revised joint venture will continue to qualify as small and be eligible for orders issued under the multiple award contract.

(C) SBA will not find affiliation where a protégé obtains financing under normal commercial terms in order to purchase the mentor's interest in a multiple award contract.

* * * * *

(c) * * *

(2) A protégé firm may generally have only one mentor at a time.

(i) SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship, and:

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

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

(ii) Where SBA has approved two mentor-protégé relationships for the same protégé small business, the protégé may enter joint venture relationships with each of its two mentors. However, those joint ventures cannot compete against each other and cannot be contract holders on the same multiple award contract.

* * * * *

(4) * * *

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

Example to paragraph (c)(4)(iii). 8(a) Participant X enters an SBA approved mentor-protégé relationship with A. After 3 years, X and A decide to terminate the mentor-protégé relationship. After 8 months of searching for a new mentor, X and B submit a mentor-protégé agreement to SBA for review. Once SBA determines that the mentor-protégé agreement meets all of SBA's requirements, SBA will approve the X–B relationship for a period of 3 years from the date of SBA's approval. The time searching for a new mentor and SBA's review time are not subtracted from the time authorized for the substituted mentor-protégé relationship.

(iv) Instead of having a six-year mentor-protégé relationship with two separate mentors, a protégé may seek to extend or renew a mentor-protégé relationship with the same mentor for a second six-year term. In order for SBA to approve an extension or renewal of a mentor-protégé relationship with the same mentor, the mentor must commit to providing additional business development assistance to the protégé. Whether a protégé has a mentor-protégé relationship with two different mentors or the same mentor for a second six-year period, a concern cannot be a protégé for a total of more than 12 years.

(5) Where a business concern purchases another business concern that is currently the mentor of a protégé firm, that business concern shall become the new mentor of the protégé if it commits to honoring the obligations under the seller's mentor-protégé agreement or the purchasing business concern and the protégé negotiate a new mentor-protégé agreement that SBA approves. Where that occurs, that new mentor-protégé relationship will be effective for no longer than six years minus the length of the mentor-protégé relationship with the seller mentor.

(i) The protégé firm can terminate its mentor-protégé relationship only if the purchasing business concern and the protégé firm cannot agree on either continuing with the previous mentor-protégé agreement or negotiating a new mentor-protégé agreement that is acceptable to SBA.

(ii) Where a mentor-protégé relationship is terminated, the protégé firm may seek another business concern to enter a mentor-protégé relationship for a duration not to exceed six years minus the length of the mentor-protégé relationship with the former mentor.

Example 1 to paragraph (c)(5). 8(a) Participant A enters a mentor-protégé relationship with business concern X. After 3 years, business concern Y purchases X. A and Y agree to continue to abide by the mentor-protégé agreement between A and X. The mentor-protégé relationship between A and Y can last no longer than 3 years (6 years minus the length of the A and X mentor-protégé relationship). At the end of that agreement A and Y could seek to renew the mentor-protégé relationship for another 6 years if this is A's first mentor-protégé relationship.

Example 2 to paragraph (c)(5). 8(a) Participant Z enters a mentor-protégé relationship with business concern B. After 3 years, business concern C purchases B. If either C is unwilling to abide by the terms of the Z–B mentor-protégé agreement or Z does not want to extend a mentor protégé relationship with C and the mentor-protégé agreement is terminated, Z may seek a new business concern to enter a mentor-protégé relationship. If business concern D agrees to enter into a mentor-protégé relationship with Z and SBA approves that relationship, the Z–D mentor-protégé relationship can last for no longer than 3 years (6 years minus the length of the Z/B mentor-protégé relationship). If that was Z's first mentor-protégé relationship, Z may seek to extend the Z–D mentor-protégé relationship for an additional 6 years or may seek a new mentor-protégé relationship with another firm for up to 6 years. In no case can a protégé firm have mentor-protégé relationships lasting more than 12 years.

(d) * * *

(1) * * *

(iv) Where a mentor seeks to sell its interest in a mentor-protégé joint venture, the protégé firm shall have a right of first refusal to purchase that interest. SBA will not find affiliation where a protégé obtains financing under normal commercial terms in order to purchase the mentor's interest in a mentor-protégé joint venture.

* * * * *

■ 35. Add § 125.12 to read as follows:

§ 125.12 Recertification of Size and Small Business Program Status.

(a) *General.* Recertification of size and small business program status (*i.e.,* 8(a), HUBZone, WOSB/EDWOSB, or SDVOSB) is required within 30 calendar days of a merger, acquisition, or sale of or by a concern or an affiliate of the concern, which results in a change in controlling interest.

(1) A concern and the acquiring concern must recertify if each has received an award as a small business or small business program participant.

(2) In the context of a joint venture, recertification is required from any partner to the joint venture that has merged or is party to the sale or acquisition.

(3) Recertification does not change the terms and conditions of the award. The limitations on subcontracting, non-manufacturer and subcontracting plan requirements in effect at the time of award remain in effect throughout the life of the award regardless of whether a recertification is qualifying or disqualifying. However, a contracting officer may require a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.

(4) A size re-certification shall relate to the size standard in effect at the time of re-certification that corresponds to the NAICS code that was initially assigned to the award.

(b) *Long term contracts.* For contracts (including multiple award contracts) and orders with durations of more than five years (including options), a concern must recertify its size and status no more than 120 days prior to the end of the fifth year of the award, and no more than 120 days prior to exercising any option thereafter. A contracting officer may also request size and/or status recertification, as he or she deems appropriate, prior to the 120-day point in the fifth year of a long-term contract or order. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(c) *Request by contracting officer.* Recertification of size and small

business program status is required where the contracting officer explicitly requires concerns to recertify their size or status in response to a solicitation for a set aside or reserved order or agreement.

(d) *Change in structure of entity-owned concern.* Size or status recertification is not required when the ownership of a concern that is at least 51% owned by an Indian Tribe, Alaska Native Corporation, or Community Development Corporation changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

Example 1 to paragraph (d). Indian Tribe X owns 100% of small business ABC. ABC wins an award for a small business set-aside contract. In year two of contract performance, X changes the ownership of ABC so that X owns 100% of a holding company XYZ, Inc., which in turn owns 100% of ABC. This restructuring does not require ABC to recertify its status as a small business because it continues to be 100% owned (indirectly rather than directly) by Indian Tribe X.

(e) *Effect of Recertification*—(1) *Qualifying Recertification.* A concern that has a qualifying recertification is generally considered to be a small business or small business program participant for up to five years from the date of the recertification and remains eligible for set-aside or reserved awards unless there is a subsequent disqualifying recertification.

(2) *Disqualifying Recertification*—(i) *Pending Set Aside or Reserved Award.* If events triggering a disqualifying recertification under paragraph (a) of this section occur within 180 days after the date of an offer but prior to award, the concern is ineligible to receive the pending small business set aside or reserved award. The concern must notify the contracting officer of the change in its size or status. If events triggering a disqualifying recertification under paragraph (a) of this section occur more than 180 days after the date of an offer but prior to award, the concern is eligible to receive a pending single award or reserve and the award will count as an award to a small business or small business program participant for goaling purposes for up to five years from the date of the award unless there is a disqualifying recertification. However, where the underlying award is a multiple award small business set aside or reserve the concern is ineligible for the pending award because the concern would not be eligible for orders set aside for small business or set aside for a specific type of small business. *See* paragraph (e)(2)(ii)(B) of this section.

(ii) *Future Set Aside or Reserved Award*—(A) *Request for recertification on a specific order or agreement under an underlying multiple award contract that is set aside or reserved for small business.* If a concern has a disqualifying size or status recertification in response to a contracting officer request for recertification on a specific order or agreement under an underlying multiple award contract that is set aside or reserved for small business (*i.e.,* small business set-aside or reserve, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned/economically disadvantaged women-owned small business), the concern is ineligible for the specific order or agreement but remains eligible for other set aside or reserved awards and unrestricted awards.

(*1*) Where an initially-small contract holder has naturally grown to be other than small and could not recertify as small for a specific order or agreement for which a contracting officer requested recertification, it may continue to qualify as small for other orders or agreements where a contracting officer does not request recertification.

(*2*) Where an initially-eligible 8(a), HUBZone, WOSB or SDVOSB contract holder on an 8(a), HUBZone, WOSB or SDVOSB set-aside or reserve cannot recertify its status for a specific order or agreement for which a contracting officer requested recertification, it may continue to qualify as eligible for other competitively awarded orders or agreements where a contracting officer does not request recertification.

(B) *Other Events Triggering Recertification.* (*1*) If a concern has a disqualifying recertification in response to a recertification requirement on a long-term multiple award contract or a recertification requirement following a merger, acquisition, or sale involving a business entity that does not itself qualify as small under the NAICS code assigned to the multiple award contract, the concern is ineligible to submit an offer for a set aside or reserved award after the triggering event occurs. The concern remains eligible for unrestricted awards under a multiple award contract and orders issued under a single award small business contract. In either case, a procuring agency cannot count the order as an award to small business or to the specific type of small business (*i.e.,* 8(a), WOSB, SDVOSB, or HUBZone).

(*2*) If a concern has a disqualifying recertification in response to a requirement to recertify size and/or status following a merger, acquisition, or sale involving another small business concern, the concern remains eligible for set-aside or reserved orders issued under a multiple award contract, but a procuring agency cannot count the order as an award to small business or to the specific type of small business (*i.e.,* 8(a), WOSB, SDVOSB, or HUBZone).

(iii) *Options.* (A) For a single award small business set-aside or reserve award or any unrestricted award, a concern that submits a disqualifying recertification remains eligible to receive options. The procuring agency cannot count the option period as an award to a small business or small business program participant for goaling purposes. Such a concern may make a qualifying recertification for a subsequent option period if it meets the applicable size standard or becomes a certified small business program participant.

(B) For a multiple award contract that is set-aside or reserved for small business, a concern that submits a disqualifying recertification in response to a recertification requirement on a long-term contract or a recertification requirement following a merger, acquisition, or sale involving a business entity that does not itself qualify as small under the NAICS code assigned to the multiple award contract is ineligible to receive options.

(C) For a multiple award contract that is set-aside or reserved for small business, a concern that submits a disqualifying recertification in response to a requirement to recertify size and/or status following a merger, acquisition, or sale involving another small business concern, the concern remains eligible to receive options. The procuring agency cannot count the option period as an award to a small business or to the specific type of small business (*i.e.,* 8(a), WOSB, SDVOSB, or HUBZone). Such a concern may make a qualifying recertification for a subsequent option period if it meets the applicable size standard or becomes a certified small business program participant.

(f) *Joint venture recertifications.* Where a joint venture must recertify its small business size status under paragraph (a) of this section, the joint venture can recertify as small where all parties to the joint venture qualify as small at the time of recertification, or the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification. A joint venture can recertify as small even though the date of recertification occurs more than two years after the joint venture received its first contract award (*i.e.,* recertification

is not considered a new contract award under § 121.103(h).

(g) *Delayed effective date.* Notwithstanding paragraphs (e)(2)(ii)(B) and (e)(2)(iii)(B) of this section:

(i) A firm that has a disqualifying size or status recertification due to a merger, acquisition or sale that occurs prior to January 17, 2026 remains eligible for orders issued under an underlying small business multiple award contract. However, the agency cannot count any new or pending orders issued pursuant to the contract, from that point forward, towards its small business and socioeconomic goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants, certified HUBZone small business concerns, SDVO SBCs, and ED/WOSBs.

(ii) A firm that has a disqualifying size or status recertification prior to the end of the fifth year of a long-term contract remains eligible for any options to be exercised prior to January 17, 2026. However, the agency cannot count those options towards its small business and socioeconomic goals.

■ 36. Add § 125.13 to read as follows:

§ 125.13 What restrictions apply to fees for representatives of applicants and participants in SBA's 8(a) BD, HUBZone, WOSB and VetCert programs?

(a) The compensation received by any packager, agent, or representative of a concern applying for 8(a) BD, HUBZone, WOSB/EDWOSB, or VOSB/SDVOSB certification in exchange for assisting the applicant in obtaining such certification must be reasonable in light of the service(s) performed by the packager, agent, or representative.

(b) The compensation received by any packager, agent, or representative of a certified 8(a) BD, HUBZone small business concern, WOSB/EDWOSB, or VOSB/SDVOSB in exchange for assisting the concern in obtaining any small business contracts, orders, BPAs, BAs, or BOAs must be reasonable in light of the service(s) performed by the packager, agent, or representative, and cannot be a fee that is a percentage of the gross value of the contract, order, BPA, BA or BOA.

(c) For good cause, SBA may initiate proceedings to suspend or revoke a packager's, agent's, or representative's privilege to assist applicants obtain SBA certification and assist certified small business concerns obtain contracts, orders, or any other assistance to support participation in the 8(a) BD, HUBZone, WOSB or VetCert programs. Good cause is defined in § 103.4 of this chapter.

(1) SBA may send a ''show cause'' letter requesting the agent or representative to demonstrate why the agent or representative should not be suspended or proposed for revocation, or may immediately send a written notice suspending or proposing revocation, depending upon the evidence in the administrative record. The notice will include a discussion of the relevant facts and the reason(s) why SBA believes that good cause exists.

(2) Unless SBA specifies a different time in the notice, the agent or representative must respond to the notice within 30 calendar days of the date of the notice with any facts or arguments showing why good cause does not exist. The agent or representative may request additional time to respond, which SBA may grant in its discretion.

(3) After considering the agent's or representative's response, SBA will issue a final determination, setting forth the reasons for this decision and, if a suspension continues to be effective or a revocation is implemented, the term of the suspension or revocation.

(d) The relevant SBA program office may refer a packager, agent, or other representative to SBA's Suspension and Debarment Official for possible Government-wide suspension or debarment where appropriate, including where it appears that the packager, agent, or representative assisted an applicant or certified small business concern to submit information to SBA that the packager, agent, or representative knew to be false or materially misleading.

PART 126—HUBZONE PROGRAM

■ 37. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

§ 126.100 [Amended]

■ 38. Amend § 126.100 by removing the words ''qualified SBCs'' and adding in their place the words ''small business concerns''.

§ 126.102 [Amended]

■ 39. Amend § 126.102 by removing the words ''qualified HUBZone SBCs'' and adding in their place the words ''certified HUBZone small business concerns''.

■ 40. Amend § 126.103 by:

■ a. Removing the definition for ''AA/BD'';

■ b. Revising the definitions for ''Attempt to maintain'', ''Certification or Certify'', ''Community Development Corporation or CDC'', ''Contracting Officer'', ''Decertify'', ''Dynamic Small Business Search (DSBS)'', ''Employee'', and ''Governor-Designated Covered Area'';

■ c. Adding in alphabetical order definitions for ''HUBZone certification date'', ''HUBZone Map'', and ''HUBZone resident employee'';

■ d. Revising the definitions for ''HUBZone small business concern or certified HUBZone small business concern'', ''Indian Tribal Government'', and ''Principal office'';

■ e. Removing paragraph (3) in the definition of ''Qualified Census Tract'';

■ f. Revising the definition of ''Qualified Disaster Area'';

■ g. Removing paragraph (4) in the definition of ''Qualified Non-Metropolitan County'';

■ h. Adding in alphabetical order the definition for ''Recertification (or certification renewal)'';

■ i. Revising the definitions for ''Redesignated Area'', ''Reside'', and ''Small business concern''; and

■ j. Adding in alphabetical order the definition for ''System for Award Management (SAM)''.

The revisions and additions read as follows:

§ 126.103 What definitions are important in the HUBZone program?

* * * * *

Attempt to maintain means making substantive and documented efforts to meet the HUBZone residency requirement, such as making written offers of employment, publishing advertisements seeking employees, and attending job fairs, and applies only during the performance of a HUBZone contract as defined in § 126.600. A firm that cannot demonstrate that it is making such efforts has failed to attempt to maintain the HUBZone residency requirement. In addition, a firm that has less than 20% of its total employees residing in a HUBZone during the performance of a HUBZone contract has failed to attempt to maintain the HUBZone residency requirement.

* * * * *

Certification or Certify means the process by which SBA determines that a concern is qualified for the HUBZone program and eligible to be designated by SBA as a certified HUBZone small business concern in DSBS (or successor system).

* * * * *

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, *et seq.* or has received a letter from the Department of Health and Human Services affirming that it has received

assistance under a successor program to that authorized by 42 U.S.C. 9805.

* * * * *

Contracting Officer has the meaning given that term in 41 U.S.C. 2101(1), which defines a contracting officer as a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

* * * * *

Decertify means the process by which SBA removes a concern as a certified HUBZone small business concern from DSBS (or successor system) upon a finding that the firm does not meet the HUBZone eligibility requirements or after a firm voluntarily withdraws from the HUBZone program.

Dynamic Small Business Search (DSBS) means the database that government agencies use to find small business contractors for upcoming contracts. The information a business provides when registering in SAM, as defined in this section, is used to populate DSBS. For HUBZone Program purposes, a concern's DSBS profile will indicate whether it is a certified HUBZone small business concern, and if so, the date it was certified.

Employee means an individual employed on a full-time, part-time, or other basis, so long as that individual generally works a minimum of 10 hours per week during the four-week period immediately prior to the relevant date of review. SBA may permit an individual to count as an employee if that individual works less than 10 hours in any week during the four-week period immediately prior to the relevant date of review provided the individual works at least 40 hours during that four-week period and the concern demonstrates a legitimate business reason for that work schedule.

(1) To determine the number of hours worked by each individual employed by the business concern, SBA will review a concern's payroll records for the most recently completed pay periods that account for the four-week period immediately prior to the relevant date of review. To determine if an individual is an employee, SBA reviews the totality of circumstances, including criteria used by the Internal Revenue Service (IRS) for Federal income tax purposes and the factors set forth in SBA's Size Policy Statement No. 1 (51 FR 6099, February 20, 1986).

(2) In general, the following are considered employees:

(i) Individuals obtained from a temporary employee agency, from a concern primarily engaged in leasing employees, or through a union agreement, or co-employed pursuant to a Professional Employer Organization agreement;

(ii) An individual who has an ownership interest in the concern and who works for the concern 80 hours or more during the four-week period immediately prior to the relevant date of review, whether or not the individual receives compensation;

(iii) An owner who works less than 80 hours during the four-week period immediately prior to the relevant date of review, where another individual has not been hired to manage and direct the actions of the concern's employee(s);

(iv) Reservists or National Guard members when called to active duty; and

(v) Individuals who are on annual, sick, or maternity leave and continue to be paid by the business concern.

(3) In general, the following are not considered employees:

(i) Individuals who are not owners and receive no compensation for work performed;

(ii) Individuals who receive deferred compensation for work performed;

(iii) Independent contractors to whom payments are reported via IRS Form 1099 and who are not otherwise considered employees under SBA's Size Policy Statement No. 1; and

(iv) Subcontractors.

(4) Employees of an affiliate may be considered employees, if the totality of the circumstances shows that there is no clear line of fracture between the HUBZone applicant (or certified HUBZone small business concern) and its affiliate(s) (*see* § 126.204).

(5) An individual must perform work for the concern to be considered an employee for HUBZone purposes. SBA may require evidence that an individual is performing work, including but not limited to the following: a job description; the individual's resume; timesheets; proof of onboarding and/or training; evidence of regular communication assigning work to the individual and responses to such communication; examples of work product commensurate with hours worked; documentation demonstrating the individual's participation in online or telephonic meetings with supervisors or colleagues, such as meeting invitations, notes from meetings, post-meeting questions or assignments; written attestations; and other relevant documentation.

Governor-Designated Covered Area means an area that SBA has designated as a HUBZone by approving a Governor-generated petition pursuant to the procedures described in § 126.104.

* * * * *

HUBZone certification date means the date on which SBA approves a concern's application for HUBZone certification and is the date specified in the concern's certification letter. If a concern leaves the HUBZone program and reapplies for certification, its HUBZone certification date is the date SBA approves the concern's most recent application.

HUBZone Map means a publicly accessible online tool that depicts HUBZones.

HUBZone resident employee means an individual who meets the definition of an employee and who SBA has determined resides in a HUBZone.

HUBZone small business concern or certified HUBZone small business concern means a small business concern that meets the requirements described in § 126.200 and that SBA has certified as eligible for Federal contracting assistance under the HUBZone program.

* * * * *

Indian Tribal Government means the governing body of any Indian Tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the Tribe, band, nation, group, or community resides.

* * * * *

Principal Office means the location where the greatest number of the concern's employees at any one location perform their work.

(1) In order for a location to be considered the principal office, the concern must provide a deed or an active lease that includes a start date that was at least 30 calendar days prior to the relevant date of review, and an end date that is at least 60 calendar days after the relevant date of review, as well as any other documentation requested by SBA;

(2) In order for a location to be considered the principal office, the concern must conduct business at this location. The concern may be required to demonstrate that it is doing so by submitting evidence including but not limited to the following:

(i) Photos and/or a live or virtual walk-through of the space; and

(ii) For shared working spaces, evidence that the firm has dedicated space within any shared location, and that such dedicated space contains

sufficient work surface area, furniture, and equipment to accommodate the number of employees claimed to work from this location;

(3) If an employee works at multiple locations, then the employee will be deemed to work at the location where the employee spends more than 50% of his or her time. If an employee does not spend more than 50% of his or her time at any one location and at least one of those locations is a non-HUBZone location, then the employee will be deemed to work at a non-HUBZone location.

(4) For those concerns whose ''primary industry classification'' is services or construction (*see* § 121.201 of this chapter), the determination of principal office excludes the concern's employees who perform more than 50% of their work at job-site locations to fulfill specific contract obligations. If all of a concern's employees perform more than 50% of their work at job sites, the concern does not comply with the principal office requirement.

(i) *Example 1:* A business concern whose primary industry is construction has a total of 78 employees, including the owners. The business concern has one office (Office A), which is located in a HUBZone, with 3 employees working at that location. The business concern also has a job-site for a current contract, where 75 employees perform more than 50% of their work. The 75 job-site employees are excluded for purposes of determining principal office. Since the remaining 3 employees all work at Office A, Office A is the concern's principal office. Since Office A is in a HUBZone, the business concern complies with the principal office requirement.

(ii) *Example 2:* A business concern whose primary industry is services has a total of 4 employees, including the owner. The business concern has one office located in a HUBZone (Office A), where 2 employees perform more than 50% of their work, and a second office not located in a HUBZone (Office B), where 2 employees perform more than 50% of their work. Since there is not one location where the greatest number of the concern's employees at any one location perform their work, the business concern would not have a principal office in a HUBZone.

(iii) *Example 3:* A business concern whose primary industry is services has a total of 6 employees, including the owner. Five of the employees perform all of their work at job-sites fulfilling specific contract obligations. The business concern's owner performs 45% of her work at job-sites, and 55% of her work at an office located in a HUBZone (Office A) conducting tasks such as writing proposals, generating payroll, and responding to emails. Office A would be considered the principal office of the concern since it is the only location where any employees of the concern work that is not a job site and the 1 individual working there spends more than 50% of her time at Office A. Since Office A is located in a HUBZone, the small business concern would meet the principal office requirement.

* * * * *

Qualified Disaster Area. (1) Qualified Disaster Area means any census tract or non-metropolitan county located in an area where a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) has occurred or an area in which a catastrophic incident has occurred if such census tract or non-metropolitan county ceased to be a Qualified Census Tract or Qualified Non-Metropolitan County during the period beginning 5 years before the date on which the President declared the major disaster or the catastrophic incident occurred.

(2) A census tract or non-metropolitan county shall be considered to be a Qualified Disaster Area for the period of time starting on the date on which the President declared the major disaster for the area in which the census tract or non-metropolitan county, as applicable, is located (or in the case of a catastrophic incident, on the date on which the catastrophic incident occurred in the area in which the census tract or non-metropolitan county, as applicable, is located) and ending on the date when SBA next updates the HUBZone Map in accordance with § 126.104(a).

* * * * *

Recertification (or certification renewal), for purposes of this subpart, means the process by which a concern represents that it continues to meet the requirements of the HUBZone program.

Redesignated Area means any census tract that ceases to be a Qualified Census Tract or any non-metropolitan county that ceases to be a Qualified Non-Metropolitan County. A Redesignated Area generally shall be treated as a HUBZone for a period of three years, starting from the date on which the area ceased to be a Qualified Census Tract or a Qualified Non-Metropolitan County. The date on which the census tract or non-metropolitan county ceases to be qualified is the date on which the official government data affecting the eligibility of the HUBZone is released to the public.

Reside means to live at a location full-time and for at least 90 calendar days immediately prior to the relevant date of review.

(1) To determine residence, SBA will first look to an individual's address identified on his or her driver's license or other government-issued identification card. Where such documentation is not available (or where the address on the individual's driver's license does not match the residence claimed), SBA will require other specific proof of residency, such as deeds, leases, and/or utility bills, as well as an explanation as to why a driver's license is unavailable or inconsistent.

(2) For HUBZone purposes, SBA will consider individuals temporarily residing overseas in connection with the performance of a contract to reside at their U.S. residence.

(i) *Example 1:* A person possesses the deed to a residential property and pays utilities and property taxes for that property. However, the person does not live at this property, but instead rents out this property to another individual. For HUBZone purposes, the person does not reside at the address listed on the deed and is not considered a HUBZone employee.

(ii) *Example 2:* A person moves into an apartment under a month-to-month lease and lives in that apartment full-time. SBA would consider the person to reside at the address listed on the lease if the person can show that he or she has lived at that address for at least 90 calendar days immediately prior to the relevant date of review.

(iii) *Example 3:* A person is working overseas on a contract for the small business and is therefore temporarily living abroad. The employee can provide documents showing he has paid rent for an apartment located in a HUBZone for at least 90 calendar days immediately prior to the relevant date of review. That person is deemed to reside in a HUBZone.

* * * * *

Small business concern means a concern that, with its affiliates, meets the size standard corresponding to any NAICS code listed in its profile in the System for Award Management (or successor system), pursuant to part 121 of this chapter.

System for Award Management (SAM) has the same meaning as in FAR 2.101.

■ 41. Revise § 126.104 as follows:

§ 126.104 How can a Governor petition for the designation of a Governor-designated cover area?

(a) *Petition.* Each calendar year, the Governor of a State may submit a

petition to the SBA Office of the HUBZone Program requesting that certain covered areas be designated as Governor-designated covered areas. For a specific covered area to receive a designation as a Governor-designated covered area, the Governor of the State in which the identified covered area is wholly contained shall include such area in a petition to SBA requesting such a designation.

(1) A Governor may submit not more than one petition described in this section per calendar year.

(2) The petition described in this section shall include all covered areas in a State for which the Governor seeks designation as a Governor-designated covered area. The total number of covered areas included in such petition may not exceed ten percent of the total number of covered areas in the State.

(3)(i) The total number of covered areas in a State shall be calculated by aggregating the number of census tracts and counties that qualify as covered areas as described in paragraph (d) of this section.

(ii) A petition need not seek SBA approval for those covered areas previously designated as Governor-designated covered areas.

(b) *SBA Review.* In reviewing a request for designation included in such a petition, SBA may consider:

(1) The potential for job creation and investment in the covered area;

(2) The demonstrated interest of small business concerns in the covered area to be designated as a Governor-designated covered area;

(3) How State and local government officials have incorporated the covered area into an economic development strategy; and

(4) If the covered area was a HUBZone before becoming the subject of the petition, the impact on the covered area if the Administrator did not approve the petition.

(c) *SBA Decision.* The AA/GCBD (or designee) is authorized to grant the petitions described in this section. If the AA/GCBD (or designee) grants a petition described in this section, SBA will issue a written notice to the petitioning Governor and add the newly designated Governor-designated covered areas to the HUBZone Map.

(d) *Length of designation.* A Governor-designated covered area will be treated as a HUBZone until SBA next updates the HUBZone Map in accordance with § 126.105(a), or one year after the petition is approved, whichever is later.

(e) *Definitions.* In this section:

(1) The term ''covered area'' means a census tract or county in a State—

(i) That is located outside of an urban area, as determined by the Bureau of the Census, with a population of not more than 50,000; and

(ii) For which the average unemployment rate is at least 120 percent of the average unemployment rate of the United States or of the State in which the covered area is located, whichever is less, based on the most recent data available from the American Community Survey conducted by the Bureau of the Census.

(2) The term ''Governor'' means the chief executive of a State.

(3) The term ''State'' means each of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or American Samoa.

■ 42. Add § 126.105 to read as follows:

§ 126.105 How often will the HUBZone Map be updated?

The HUBZone Map will be updated as follows:

(a) Qualified Census Tracts and Qualified Non-Metropolitan Counties will be updated every 5 years.

(b) Redesignated Areas will be added to the HUBZone Map when areas cease to be designated as Qualified Census Tracts or Qualified Non-Metropolitan Counties, in accordance with the 5-year cycle described in paragraph (a) of this section, and will be removed after 3 years.

(c) Qualified Base Closure Areas will be added to the HUBZone Map after SBA receives information from the Department of Defense that a new base closure area has been created and will be removed after 8 years.

(d) Qualified Disaster Areas generally will be added to the HUBZone Map on a monthly basis, based on data received by SBA from the Federal Emergency Management Agency (FEMA), and generally will be removed on the effective date of the 5-year HUBZone Map update following the declaration.

(e) Governor-Designated Covered Areas will be added to the HUBZone Map after SBA approves a petition in accordance with § 126.104 and will be removed on the effective date of the 5-year HUBZone Map update following the approval, or one year after the petition is approved, whichever is later.

■ 43. Amend § 126.200 by:

■ a. Revising paragraphs (b)(1) and (c)(1);

■ b. Adding a paragraph heading in paragraph (c)(2);

■ c. Revising paragraph (d)(1);

■ d. Adding a paragraph heading in paragraph (d)(2);

■ e. Revising paragraph (d)(3);

■ f. Revising paragraphs (e), (f), and (g); and

The revisions and additions read as follows:

§ 126.200 What requirements must a concern meet to be eligible as a certified HUBZone small business concern?

* * * * *

(b) * * *

(1) In order to be eligible for HUBZone certification and recertification, a concern, together with its affiliates, must qualify as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its profile in SAM (or successor system). In determining whether a concern qualifies as small under the size standard corresponding to a specific NAICS code, SBA will accept the concern's size representation in SAM (or successor system), unless there is evidence indicating that the concern is other than small. SBA will request a formal size determination pursuant to § 121.1001(b)(8) of this chapter where any information it possesses calls into question the concern's SAM size representation.

* * * * *

(c) * * *

(1*) Long-term investment*—(i) *General.* A concern that has purchased a building or entered a long-term lease of at least 10 years for a property in a HUBZone (other than in a Redesignated Area or Qualified Disaster Area) will be deemed to have its principal office located in a HUBZone for up to 10 years from the date of the investment, as long as that building or property qualifies as the concern's principal office and continues to qualify as the concern's principal office, and as long as the firm maintains the long-term lease or continues to be the sole owner of the property.

(ii) *Commencement of 10-year period.* The 10-year principal office long-term investment protection period starts to run on the firm's HUBZone certification date (if the investment was made prior to the firm's certification) or on the date of the investment (if the investment was made after the firm's HUBZone certification date).

Example 1 to paragraph (c)(2)(i): If a firm was certified on March 31, 2020, and purchased a building on July 20, 2020, the 10-year clock would begin when the firm recertifies as of July 29, 2020.

(iii) *Exceptions.* The following do not qualify for this provision:

(A) An office located in a Redesignated Area or Qualified Disaster

Area at the time of initial HUBZone certification;

(B) An office that is shared with one or more other concerns or individuals;

(C) Any location being used as a personal residence; or

(D) An investment made within 180 calendar days of the expiration of an area's designation as a Qualified Census Tract, Qualified Non-Metropolitan County, Governor-Designated Covered Area, or Qualified Base Closure Area.

(2) *Tribally-owned concerns.* * * * * * * * * * *

(d) * * *

(1) *General.* In order to be eligible for HUBZone certification, at least 35% of a concern's employees must qualify as HUBZone resident employees. When determining the percentage of employees that must reside in a HUBZone to meet the 35% HUBZone residency requirement, if the percentage results in a fraction, SBA rounds to the nearest whole number, except for a firm with only one employee. For firms with only one employee, that one employee must reside in a HUBZone.

Example 1 to paragraph (d)(1): A concern has 25 employees; 35% of 25, or 8.75, employees must reside in a HUBZone. The number 8.75 rounded to the nearest whole number is 9. Thus, 9 employees must reside in a HUBZone.

Example 2 to paragraph (d)(1): A concern has 95 employees; 35% of 95, or 33.25, employees must reside in a HUBZone. The number 33.25 rounded to the nearest whole number is 33. Thus, 33 employees must reside in a HUBZone.

(2) *Tribally-owned concerns.* * * *

(3) *Legacy HUBZone employees.* (i) An individual will be considered a Legacy HUBZone Employee and count as a HUBZone resident employee, even if the employee subsequently moves to a location that is not in a HUBZone or the area in which the employee's residence is located no longer qualifies as a HUBZone, if the individual:

(A) Continues to live in a HUBZone for at least 180 calendar days immediately after the firm's HUBZone certification date (or recertification date); and

(B) Continues to meet the definition of ''employee'' in § 126.103 continuously and without interruption.

(ii) A certified HUBZone small business concern may have up to four Legacy HUBZone Employees at a given time, but must have at least one other HUBZone employee in order for any legacy employee to count as a HUBZone employee.

(iii) The certified HUBZone small business concern must maintain records of the Legacy HUBZone Employee's original HUBZone address, as well as records of any HUBZone other address in which the individual resided, as well as records of the individual's continuous and uninterrupted employment by the HUBZone small business concern, for the duration of the concern's participation in the HUBZone program. In order to demonstrate that an individual resided in a HUBZone for 180 days after certification (or recertification), the concern must submit to SBA copies of leases, utility bills, or property tax records.

(iv) The certification date or recertification date being used to establish the HUBZone residency of the employee must be after December 26, 2019.

(v) The following individuals do not qualify as Legacy HUBZone Employees:

(A) An individual who initially qualified as a HUBZone Resident Employee by residing in a Redesignated Area or a Qualified Disaster Area; and

(B) An individual who works less than 30 hours per week.

Example 1 to paragraph (d)(3): As part of its application for HUBZone certification, a concern provides documentation showing that it has ten employees, four of which reside in HUBZones. SBA certifies the concern as a certified HUBZone small business concern. More than 180 days after being certified, two individuals who qualified as HUBZone Resident Employees, and were critical to the concern's meeting the 35% residency requirement, move out of the HUBZone area but continuously remain employees of the concern. Because the business concern has two other employees who still live in a HUBZone, both of the individuals who may be treated as Legacy Employees and count as HUBZone Resident Employees for purposes of recertification.

(e) *Attempt to maintain.* (1) At the time of application, each recertification required by § 126.500(a), and offer for a HUBZone contract, a concern must certify that it will ''attempt to maintain'' (*see* § 126.103) having at least 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

(2) At the time of recertification, a firm that is currently performing a HUBZone contract and falls below the 35% HUBZone residency requirement may recertify as a HUBZone small business concern as long as at least 20% of its total employees reside in a HUBZone and it is making substantive and documented efforts to meet the HUBZone residency requirement.

(3) During performance of a HUBZone contract, a HUBZone small business concern must attempt to maintain having at least 35% of its employees residing in HUBZones.

(f) *Suspension and Debarment.* At the time of application and at all times while a concern is HUBZone-certified, such concern and any of its owners must not have an active exclusion in SAM.

(g) *Federal financial obligations.* A business concern is ineligible to be certified as a HUBZone small business concern or to participate in the HUBZone program if either the concern or any of its principals has failed to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing. However, a small business concern may be eligible if the concern or the affected principals can demonstrate that they are current on an approved repayment plan, or the financial obligations owed have been settled and discharged/forgiven by the Federal Government.

■ 44. Amend § 126.201 by revising the section heading, and the first sentence of the introductory text to read as follows:

§ 126.201 Who does SBA consider to be an owner of a HUBZone small business concern?

For purposes of qualifying for HUBZone certification, SBA considers any person who owns any legal or equitable interest in a concern to be an owner of the concern. * * * * * * * * * * *

§ 126.202 [Amended]

■ 45. Amend § 126.202 by removing the word ''SBC'' in the section heading and in the first sentence and adding in its place the words ''small business concern'', and removing the third and fourth sentences.

■ 46. Amend § 126.204 by:
■ a. Revising paragraph (a);
■ b. Removing the words ''all information'' in the introductory text of paragraph (c) and adding in their place the words ''the totality of circumstances'';
■ c. Revising paragraph (c)(3); and
■ d. Adding paragraph (c)(4).

The revisions and addition read as follows:

§ 126.204 May a HUBZone small business concern have affiliates?

(a) A HUBZone small business concern may have affiliates, provided that the HUBZone small business

concern, together with its affiliates, qualifies as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its profile in SAM (or successor system), except as otherwise provided for small agricultural *cooperatives.gov* in § 126.103.

* * * * *

(c) * * *

(3) Minimal business activity between the concern and its affiliate alone will not result in an affiliate's employees being counted as employees of the HUBZone applicant or HUBZone small business concern.

(4) SBA will not treat the employees of one company as employees of another for HUBZone program purposes if the two firms would not be considered affiliated for size purposes under Part 121 of this chapter.

Example 1 to paragraph (c): X owns 100% of Company A and 51% of Company B. Based on X's common ownership of A and B, the two companies are affiliated under SBA's size regulations. SBA will look at the totality of circumstances to determine whether it would be reasonable to treat the employees of B as employees of A for HUBZone program purposes. If both companies do construction work and share office space and equipment, then SBA would find that there is not a clear line of fracture between the two concerns and would treat the employees of B as employees of A for HUBZone program purposes. In order to be eligible for the HUBZone program, at least 35% of the combined employees of A and B must reside in a HUBZone.

§ 126.302 [Amended]

■ 47. Amend § 126.302 by removing the last sentence.

■ 48. Revise § 126.303 to read as follows:

§ 126.303 Where must a concern submit its application for certification?

A concern seeking certification as a HUBZone small business concern must submit an electronic application to SBA's HUBZone Program Office via SBA's website at *https://SBA.gov*. The majority owner must take responsibility for the accuracy of all information submitted on behalf of the applicant.

■ 49. Amend § 126.304 by revising paragraph (e) to read as follows:

§ 126.304 What must a concern submit to SBA in order to be certified as a HUBZone small business concern?

* * * * *

(e) *Records maintenance.* (1) HUBZone small business concerns must retain documentation demonstrating satisfaction of all qualifying requirements for 6 years from the date of submission of all initial and continuing eligibility actions.

(2) HUBZone small business concerns must retain documentation related to ''Legacy HUBZone employees,'' as described in § 126.200(d)(3).

■ 50. Amend § 126.306 by:

■ a. Revising paragraph (d);

■ b. Removing the words ''System for Award Management'' in paragraph (g) and adding in their place the word ''SAM''; and

■ c. Adding paragraph (h).

The revision and addition read as follows:

§ 126.306 How will SBA process an application for HUBZone certification?

* * * * *

(d) An applicant must be eligible as of the date SBA issues a decision.

* * * * *

(h) SBA's decision to approve or deny an application is the final agency decision.

§ 126.308 [Amended]

■ 51. Amend § 126.308 in paragraph (b) by removing the words ''System for Award Management'' and adding in their place the word ''SAM''.

■ 52. Revise § 126.309 to read as follows:

§ 126.309 May a declined or decertified concern apply for certification at a later date?

(a) A concern that SBA has declined may apply for certification after ninety (90) calendar days from the date of decline if it believes that it has overcome all reasons for decline through changed circumstances and is currently eligible.

(b) A concern that SBA has decertified may apply for certification immediately after the date of decertification, if it believes that it has overcome all reasons for decertification through changed circumstances and is currently eligible.

(c) A concern that voluntarily withdraws from the HUBZone program may immediately re-apply for certification, if it believes that it is currently eligible.

■ 53. Revise § 126.401 to read as follows:

§ 126.401 What is a program examination?

A program examination is an investigation by SBA officials, which verifies the accuracy of any certification made or information provided as part of the HUBZone application process, as part of the recertification process, or in connection with a HUBZone contract.

■ 54. Amend § 126.403 by revising paragraphs (a) and (b) to read as follows:

§ 126.403 What will SBA review during a program examination?

(a) SBA will determine the scope of a program examination and may review any information related to the concern's HUBZone eligibility including, but not limited to, documentation related to the concern's size, principal office, ownership, compliance with the 35% HUBZone residency requirement, and compliance with the ''attempt to maintain'' (*see* § 126.103) requirement. A representative from SBA may visit one or more of a concern's offices as part of a program examination.

(b) SBA may require that a HUBZone small business concern submit additional information as part of the program examination. If SBA requests additional information, SBA will presume that written notice of the request was provided when SBA sends such request to the concern at an email address provided in the concern's profile in DSBS or SAM (or successor systems). The burden of proof to demonstrate eligibility is on the concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the concern failed to provide would demonstrate ineligibility and decertify the concern (or deny certification) on this basis.

* * * * *

■ 55. Amend § 126.404 by revising paragraphs (b) and (c) to read as follows:

§ 126.404 What are the possible outcomes of a program examination and when will SBA make its determination?

* * * * *

(b) If SBA determines that the concern is eligible, SBA will send a written notice to the HUBZone small business concern and continue to designate the concern as a certified HUBZone small business concern in DSBS (or successor system).

(c) If SBA determines that the concern is not eligible, the firm will be suspended from the HUBZone program. The concern will have 30 calendar days to submit sufficient documentation showing that it was in fact eligible on the date of review. During the suspension period, SBA will remove the firm as a certified HUBZone small business concern from DSBS. In addition, the concern may not compete for or be awarded a HUBZone contract during that suspension period and must provide written notice of the concern's

ineligibility to the contracting officer for any pending HUBZone award. If such concern fails to submit documentation sufficient to demonstrate its eligibility, the concern will be decertified. If SBA overturns its determination, SBA will lift the suspension and reinstate the firm as an eligible certified HUBZone small business concern in DSBS.

■ 56. Revise § 126.500 to read as follows:

§ 126.500 How does a concern maintain HUBZone certification?

(a) *Recertification.* (1) Any concern seeking to remain a certified HUBZone small business concern in DSBS (or successor system) must recertify to SBA that it continues to meet all HUBZone eligibility criteria (*see* § 126.200) every three years. In order to recertify—

(i) A certified HUBZone small business concern that was not awarded a HUBZone contract during the 12-month period preceding its recertification must represent that, at the time of its recertification, at least 35% of its employees reside in HUBZones and the concern's principal office is located in a HUBZone.

(ii) A certified HUBZone small business concern that was awarded a HUBZone contract during the 12-month period preceding its recertification must represent that, at the time of its recertification, it is attempting to maintain compliance with the 35% HUBZone residency requirement and the concern's principal office is located in a HUBZone.

(2) The concern's recertification must be submitted in the 90 calendar days before the triennial anniversary of its HUBZone certification date.

(3) If a concern fails to recertify, SBA will decertify the concern at the end of its eligibility period. However, if a concern is able to recertify its eligibility within 30 days of the end of its eligibility period, SBA will reinstate the firm as a certified HUBZone small business concern.

(4) For a certified HUBZone small business concern that is also a certified WOSB or SDVOSB, the firm may have to recertify less than three years after its previous recertification in order to align certification date.

(b) *Program examinations.* SBA will conduct a program examination of each certified HUBZone small business concern at least once every three years to ensure continued program eligibility, but may conduct more frequent program examinations using a risk-based analysis to select which concerns are examined.

■ 57. Revise § 126.501 to read as follows:

§ 126.501 What are a certified HUBZone small business concern's ongoing obligations to SBA?

A certified HUBZone small business concern that acquires, is acquired by, or merges with another business entity must provide evidence to SBA, within 30 calendar days of the transaction becoming final, that the concern continues to meet the HUBZone eligibility requirements. A concern that no longer meets the requirements may voluntarily withdraw from the program or it will be removed by SBA pursuant to program decertification procedures.

§ 126.502 [Amended]

■ 58. Amend § 126.502 by removing the words ''§§ 126.200, 126.500, and 126.501'' and adding in their place the words ''§§ 126.200, 126.500, and 126.501, and all other requirements described in this part''.

■ 59. Amend § 126.503 by:
■ a. Revising paragraphs (a) and (c);
■ b. Redesignating paragraph (d) as paragraph (e);
■ c. Adding new paragraph (d); and
■ d. Revising the first sentence of redesignated paragraph (e).

The revisions and addition read as follows:

§ 126.503 What happens if SBA is unable to verify a HUBZone small business concern's eligibility or determines that a concern is no longer eligible for the program?

(a) *Proposed decertification*—(1) *Bases for proposed decertification.* SBA may propose a certified HUBZone small business concern for decertification from the HUBZone program if:

(i) SBA has found the concern to be ineligible based on a program examination;

(ii) The concern failed to respond to a program examination;

(iii) SBA has information indicating that the concern is performing a HUBZone but is not attempting to maintain (*see* § 126.103) compliance with the 35% HUBZone residency requirement; or

(iv) SBA is unable to verify the concern's eligibility or otherwise has information indicating that the concern may not meet the eligibility requirements of this part,

(2) *Notice of proposed decertification.* SBA will notify the HUBZone small business concern by email that SBA is proposing to decertify it and state the reason(s) for the proposed decertification. The notice of proposed decertification will notify the concern that it has 30 calendar days from the date SBA emails the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify decertification. SBA will consider that written notice was provided if SBA sends the notice of proposed decertification to the concern at the email address provided in the concern's profile in DSBS (or successor system).

(3) *Response to notice of proposed decertification.* The HUBZone small business concern must submit a written response to the notice of proposed decertification within the timeframe specified in the notice. In this response, the concern must rebut each of the reasons set forth by SBA in the notice of proposed decertification, and where appropriate, the rebuttal must include documents showing that the concern is eligible for the HUBZone program as of the date specified in the notice.

(4) *Adverse inference.* If a HUBZone small business concern fails to cooperate with SBA or fails to provide the information requested, SBA may draw an adverse inference and assume that the information that the concern failed to provide would demonstrate ineligibility.

(5) *SBA's decision.* SBA will determine whether the HUBZone small business concern remains eligible for the program within 90 calendar days after receiving all requested information, when practicable. SBA will provide written notice to the concern stating the basis for the determination.

(i) If SBA finds that the concern is not eligible, SBA will decertify the concern and remove its designation as a certified HUBZone small business concern in DSBS (or successor system).

(ii) If SBA finds that the concern is eligible, the concern will continue to be designated as a certified HUBZone small business concern in DSBS (or successor system).

* * * * *

(c) *Decertification based on false or misleading information.* (1) If SBA discovers that a certified HUBZone small business concern or its representative submitted false or misleading information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may recommend that Government-wide debarment or suspension proceedings be initiated.

(2) A firm that is decertified from the HUBZone program due to the submission of false or misleading information may be removed from SBA's other small business contracting programs, including the 8(a) Business Development Program, the Women-Owned Small Business (WOSB)

Program, the Veteran Small Business Certification (VetCert) Program, and SBA's Mentor-Protégé Program.

(3) A firm that is decertified or terminated from the 8(a) BD Program, the WOSB Program, or the VetCert Program due to the submission of false or misleading information may be decertified from the HUBZone Program.

(4) SBA may require a firm that is decertified or terminated from the HUBZone Program, 8(a) BD Program, the WOSB Program, or the VetCert Program due to the submission of false or misleading information to enter into an administrative agreement with SBA as a condition of admission or re-admission to the HUBZone program.

(d) *Decertification due to debarment.* If a certified HUBZone small business concern is debarred from Federal contracting, SBA will decertify the HUBZone small business concern immediately and change the concern's status in DSBS (or successor system) to reflect that it no longer qualifies as a certified HUBZone small business concern, without first proposing it for decertification.

(e) * * * Once SBA has decertified a concern, the concern is ineligible for the HUBZone program and may not submit an offer or quote for a HUBZone contract. * * *

■ 60. Amend § 126.504 by:
■ a. Removing the word ''or'' at the end of paragraph (a)(2);
■ b. Redesignating paragraph (a)(3) as (a)(4);
■ c. Adding new paragraph (a)(3);
■ d. Removing the words ''pursuant to § 126.501(b)'' in newly redesignated paragraph (a)(4); and
■ e. Removing paragraph (c).

The addition reads as follows:

§ 126.504 When will SBA remove the designation of a concern in DSBS (or successor system) as a certified HUBZone small business concern?

(a) * * *

(3) Been debarred pursuant to the procedures in FAR 9.4; or

* * * * *

■ 61. Revise § 126.600 to read as follows:

§ 126.600 What are HUBZone contracts?

HUBZone contracts are prime contracts awarded to a certified HUBZone small business concern (or a HUBZone joint venture that complies with the requirements of § 126.616), regardless of the place of performance, through any of the following procurement methods:

(a) Sole source awards awarded pursuant to § 126.612 to certified HUBZone small business concerns (or HUBZone joint ventures that comply with the requirements of § 126.616);

(b) Set-aside awards (including partial set-asides and set-aside multiple award contracts) based on competition restricted to certified HUBZone small business concerns;

(c) Awards through full and open competition after the HUBZone price evaluation preference is applied to an other than small business in favor of a certified HUBZone small business;

(d) Awards based on a reserve for certified HUBZone small business in an unrestricted solicitation;

(e) Orders awarded to certified HUBZone small business concerns under a multiple award contract that was set-aside for certified HUBZone small business concerns;

(f) Orders set-aside for certified HUBZone small business concerns under a multiple award contract that was awarded using full and open competitive procedures;

(g) Orders set-aside for certified HUBZone small business concerns under a multiple award contract that was awarded as a small business set-aside.

■ 62. Amend § 126.601 by revising paragraphs (a), (b)(1), and (e), and adding paragraph (f) to read as follows:

§ 126.601 What additional requirements must a certified HUBZone small business concern meet to submit an offer on a HUBZone contract?

(a) Only certified HUBZone small business concerns are eligible to submit offers for a HUBZone contract or to receive a price evaluation preference under § 126.613.

(1) An offeror for a HUBZone contract must be identified as a certified HUBZone small business concern in DSBS (or successor system) and meet the HUBZone requirements in § 126.200 as of the date it submits its initial offer that includes price.

(2) A certified HUBZone small business concern that was awarded a HUBZone contract during the 12-month period prior to submitting an offer relating to the award of another HUBZone contract may submit an offer and be eligible as a certified HUBZone small business concern as long as at least 20% of its total employees reside in a HUBZone and it is making substantive and documented efforts to meet the HUBZone residency requirement.

(3) For a multiple award contract, where concerns are not required to submit price as part of the offer for the contract, an offeror must be identified as a certified HUBZone small business concern in DSBS (or successor system) and meet the HUBZone requirements in § 126.200 as of the date it submits its initial offer, which may not include price.

(4) A HUBZone joint venture must have its joint venture agreement in place that complies with the requirements in § 126.616 as of its final offer.

(5) As long as a concern was a certified HUBZone small business and met the HUBZone requirements as of the date of its initial offer for a HUBZone contract, it may be awarded a HUBZone contract even if it no longer appears as a certified HUBZone small business concern on DSBS, or successor system, or no longer qualifies as an eligible HUBZone small business on the date of award.

(b) * * *

(1) Is a certified HUBZone small business concern in DSBS (or successor system) and meets the HUBZone requirements in § 126.200, including having 35% of its employees residing in HUBZones and having its principal office located in a HUBZone;

* * * * *

(e) For two-step procurements to be awarded as HUBZone contracts (*e.g.,* architect-engineering and design-build procurements), a certified HUBZone small business concern must be eligible as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

(f) In general, an offeror on a HUBZone contract is not required to be HUBZone-certified on the date the contract is awarded. However, for HUBZone sole source contracts, the concern must be a certified HUBZone small business concern and meet the requirements in § 126.200 at the time of award and must qualify as small as of that date under the size standard corresponding to the NAICS code assigned to the procurement.

■ 63. Revise § 126.602 to read as follows:

§ 126.602 Must a certified HUBZone small business concern maintain the HUBZone employee residency percentage during contract performance?

(a) A certified HUBZone small business concern that has been awarded a HUBZone contract must ''attempt to maintain'' (*see* § 126.103) having 35% of its employees residing in a HUBZone during the performance of any HUBZone contract. If a certified HUBZone small business concern is awarded a HUBZone contract within 12 months prior to the due date for its triennial recertification, then such concern must attempt to maintain compliance with the 35% HUBZone

residency requirement at the time of such recertification. However, such a concern must have at least 35% of its employees residing in HUBZones at the time of each recertification thereafter, even if the concern is still performing that HUBZone contract.

(b) For orders under indefinite delivery, indefinite quantity contracts (including orders under multiple award contracts), a certified HUBZone small business concern must ''attempt to maintain'' the HUBZone residency requirement during the performance of each order that is set aside for HUBZone small business concerns.

(c) A certified HUBZone small business concern that is tribally-owned, and made the certification in § 126.200(c)(2)(ii) at the time of its HUBZone certification (or at the time of its most recent recertification), must have at least 35% of its employees engaged in performing a HUBZone contract residing within any Indian reservation governed by one or more of the concern's Indian Tribal Government owners, or residing within any HUBZone adjoining any such Indian reservation.

(d) A certified HUBZone small business concern that has less than 20% of its total employees residing in a HUBZone during the performance of a HUBZone contract has failed to attempt to maintain the HUBZone residency requirement. Such failure will result in proposed decertification pursuant to § 126.503.

§ 126.603 [Amended]

■ 64. Amend § 126.603 by removing the word ''concernwill'' and adding in its place the words ''concern will''.

§ 126.604 [Amended]

■ 65. Amend § 126.604 by removing the words ''makes this decision'' and adding in their place the words ''determines if a contract opportunity for HUBZone set-aside competition exists''.

§ 126.605 [Amended]

■ 66. Amend § 126.605 by removing the word ''may'' in the introductory text and adding in its place the word ''shall''.

§ 126.607 [Amended]

■ 67. Amend § 126.607 by:

■ a. Removing the word ''must'' in the section heading and adding in its place the word ''may'';

■ b. Removing the words ''SDVO SBC'' wherever they appear in paragraphs (b)(1) and (b)(2) and adding in their place the words ''Veteran Small Business Certification''; and

■ c. Removing the words ''qualified HUBZone SBCs'' in paragraph (c)(1) and adding in their place the words ''certified HUBZone small business concerns''.

■ 68. Revise § 126.612 to read as follows:

§ 126.612 When may a contracting officer award sole source contracts to HUBZone small business concerns?

(a) A contracting officer may award a sole source contract to a HUBZone small business concern only when the contracting officer determines that:

(1) None of the provisions of §§ 126.605 or 126.607 apply;

(2) The anticipated award price of the contract, including options, will not exceed: (i) $7,000,000 for a contract assigned a manufacturing NAICS code, or

(ii) $4,500,000 for all other contracts.

(3) Two or more HUBZone small business concerns are not likely to submit offers;

(4) A HUBZone small business concern is a responsible contractor able to perform the contract; and

(5) In the estimation of the contracting officer, contract award can be made at a fair and reasonable price.

(6) The intended awardee is a certified HUBZone small business concern at the time of its initial offer and continues to be eligible on the date of award.

(b) A contracting officer may rely on the firm's status as a certified HUBZone small business concern in awarding a sole source HUBZone contract. However, if there is a status protest relating to the apparent successful offeror, SBA will determine eligibility as of the intended date of award.

■ 69. Amend § 126.613 by revising paragraph (a), adding paragraph headings in paragraphs (b) through (d), and adding a new paragraph (e).

The revisions and additions read as follows:

§ 126.613 How does a price evaluation preference affect the bid of a certified HUBZone small business concern in full and open competition?

(a) *General.* (1) Where a contracting officer will award a contract on the basis of full and open competition, the contracting officer must deem the price offered by a certified HUBZone small business concern to be lower than the price offered by an offeror that is not a small business concern if: the other than small business initially is the lowest responsive and responsible offeror, and the price offered by the certified HUBZone small business concern is not more than 10% higher than the price offered by the other than small business.

(2) The HUBZone price evaluation preference does not apply where the initial lowest responsive and responsible offeror is a small business concern.

(3) The HUBZone price evaluation preference does not apply to the portion of a multiple award contract that is reserved for certified HUBZone small business concerns. However, the HUBZone price evaluation preference does apply to the non-reserved portion of a multiple award contract.

(4) To apply the HUBZone price evaluation preference, the contracting officer must add 10% to the offer of the otherwise successful other than small business offeror. If the certified HUBZone small business concern's offer is lower than that of the other than small business after the preference is applied, the certified HUBZone small business concern must be deemed the lowest-priced offeror. For a best value procurement, the contracting officer must first apply the 10% price preference to the offers of any other than small businesses and then determine which offeror represents the best value to the Government, in accordance with the terms of the solicitation. Where, after considering the price evaluation adjustment, the offer of a certified HUBZone small business concern is determined to be the best value to the Government, award shall be made to the certified HUBZone small business concern.

Example 1 to paragraph (a): In a full and open competition procurement, a certified HUBZone small business concern submits an offer of $98, a non-HUBZone small business concern submits an offer of $95, and a large business submits an offer of $93. The initial lowest, responsive, responsible offeror is the large business. The contracting officer must then apply the HUBZone price evaluation preference because an offer was received from a certified HUBZone small business concern. After the application of the price preference, the HUBZone small business concern's offer is considered to be lower than the offer of the large business (*i.e.,* $98 is lower than $102.3 ($93 × 110%)). Since the certified HUBZone small business concern's offer is not more than 10% higher than the large business' offer, the certified HUBZone small business concern displaces the large business as the lowest, responsive, and responsible offeror. The non-HUBZone small business concern is unaffected by the preference because it was not the lowest offeror prior to the application of the preference.

Example 2 to paragraph (a): In a full and open competition procurement, a certified HUBZone small business concern submits an offer of $103, a non-HUBZone small business concern submits an offer of $100, and a large business submits an offer of $93. The initial lowest responsive and responsible offeror is the large business. The contracting officer must then apply the HUBZone price evaluation preference. After the application of the price preference, the HUBZone small business concern's offer is not lower than the offer of the large business (*i.e.,* $103 is not lower than $102.3 ($93 × 110%)). Since the certified HUBZone small business concern's offer is more than 10% higher than the large business' offer, the certified HUBZone small business concern does not displace the large business as the lowest offeror. In addition, the non-HUBZone small business concern's offer at $100 does not displace the large business' offer because a price evaluation preference is not applied to change an offer and benefit a non-HUBZone small business concern.

Example 3 to paragraph (a): In a full and open competition procurement, a certified HUBZone small business concern submits an offer of $98, a large business submits an offer of $95, and a non-HUBZone small business concern submits an offer of $93. The contracting officer would not apply the price evaluation preference in this procurement because the lowest, responsive, responsible offeror is a small business concern.

Example 4 to paragraph (a): In a full and open competition procurement, a certified HUBZone small business concern submits an offer of $98 and a large business submits an offer of $93. The contracting officer has stated in the solicitation that one contract will be reserved for a certified HUBZone small business concern. The contracting officer would not apply the price evaluation preference when determining which HUBZone small business concern would receive the contract reserved for HUBZone small business concerns but would apply the price evaluation preference when determining the awardees for the non-reserved portion.

(b) *Agricultural commodities.* * * *

(c) *International food aid operations.* * * *

(d) *Not treated as partial set-aside.* * * *

(e) *Applicability to HUBZone joint ventures.* The HUBZone price evaluation preference applies only to a joint venture consisting of a certified HUBZone small business concern and a small business concern that complies with the requirements of § 125.9. The HUBZone price evaluation preference does not apply to a joint venture consisting of a certified HUBZone small business concern and its other than small mentor.

■ 70. Revise § 126.615 to read as follows:

§ 126.615 May an other than small business participate on a HUBZone contract?

Except as provided in §§ 125.9 and 126.618, an other than small business may not participate as a prime contractor on a HUBZone award but may participate as a subcontractor to a certified HUBZone small business concern, subject to the limitations on subcontracting set forth in § 125.6.

■ 71. Amend § 126.616 by revising paragraphs (a)(1) and (e)(1)(i), and adding paragraph (l) to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible for award of a HUBZone contract?

(a) * * *

(1) SBA does not certify HUBZone joint ventures, but the joint venture should be designated as a HUBZone joint venture in SAM (or successor system) with the HUBZone-certified joint venture partner identified.

* * * * *

(e) * * *

(1) * * *

(i) It is a certified HUBZone small business concern that appears in DSBS (or successor system) as a certified HUBZone small business concern and it meets the eligibility requirements in § 126.200;

* * * * *

(l) *Non-HUBZone contracts.* On a non-HUBZone contract, for an award to a joint venture to be considered awarded to a certified HUBZone small business concern (*i.e.,* for a procuring agency to receive HUBZone credit for goaling purposes), the joint venture awardee must comply with the requirements of this section and § 125.8.

■ 72. Revise § 126.619 to read as follows:

§ 126.619 When must a certified HUBZone small business concern recertify its status for a HUBZone contract?

A prime contractor that receives an award as a certified HUBZone small business concern must comply with the recertification requirements set forth in § 125.12 of this chapter regarding its status as a certified HUBZone small business.

■ 73. Revise the subpart heading for subpart G to read as follows:

Subpart G—Limitations on Subcontracting Requirements

§ 126.701 [Amended]

■ 74. Amend § 126.701 by:

■ a. Removing the words ''these subcontracting percentages'' in the section heading and adding in their place the words ''the limitations on subcontracting''.

■ b. Removing the words ''the subcontracting percentage'' in the paragraph and adding in their place the words ''the limitations on subcontracting''.

■ 75. Revise § 126.800 to read as follows:

§ 126.800 Who may protest the status of a certified HUBZone small business concern?

(a) For a HUBZone sole source procurement, SBA or the contracting officer may protest the intended awardee's status as a certified HUBZone small business concern.

(b) For HUBZone contracts other than sole source procurements, including multiple award contracts (*see* § 125.1 of this chapter), SBA, the contracting officer, or any other interested party may protest the apparent successful offeror's status as a certified HUBZone small business concern (or the HUBZone joint venture offeror's compliance with § 126.616).

(c) For other than HUBZone contracts, any offeror for that contract, the contracting officer or SBA may protest an apparent successful offeror's status as a certified HUBZone small business concern.

§ 126.801 [Amended]

■ 76. Amend § 126.801 by revising paragraphs (b), (c) and paragraph (d) introductory text to read as follows:

§ 126.801 How does an interested party file a HUBZone status protest?

* * * * *

(b) *Format and specificity.* (1) Protests must be in writing and must state all specific grounds as to why the protestor believes the protested concern did not qualify as a certified HUBZone small business concern. Specifically, a protestor must explain why:

(i) The protested concern did not meet the HUBZone eligibility requirements set forth in § 126.200;

(ii) The protested joint venture does not meet the requirements set forth in § 126.616;

(iii) The protested concern, as a HUBZone prime contractor, is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or subcontractors that are not HUBZone-certified will perform the

primary and vital requirements of the contract; and/or

(iv) The protested concern that was awarded a HUBZone contract during the 12-month period prior to submitting the offer at issue has less than 20% of its total employees that reside in a HUBZone and/or is not making substantive and documented efforts to meet the HUBZone residency requirement.

(2) Specificity requires more than conclusions of ineligibility. A protest merely asserting that the protested concern did not qualify as a HUBZone small business concern, or that it did not meet the principal office and/or 35% residency requirements, without setting forth specific facts or allegations, is insufficient and will be dismissed.

(3) For a protest filed against a HUBZone joint venture, the protest must state all specific grounds as to why:

(i) The HUBZone small business partner to the joint venture did not meet the HUBZone eligibility requirements set forth in § 126.200 at the time of offer; and/or

(ii) The protested HUBZone joint venture does not meet the requirements set forth in § 126.616 as of the date of its final proposal revision.

(4) For a protest alleging that the prime contractor has an ostensible subcontractor, the protest must state all specific grounds as to why:

(i) The protested concern is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or

(ii) One or more subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract.

(5) For a protest alleging that the protested concern failed to attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract, the protest must state all specific grounds explaining why the protester believes that at least 20% of the protested firm's employees do not reside in a HUBZone and/or that the protested firm has not made any substantive and documented efforts to meet the HUBZone residency requirement.

(c) *Filing.* (1) An interested party other than a contracting officer or SBA must submit its written protest to the contracting officer.

(2) A contracting officer must submit his/her protest and forward an interested party's protest to SBA at *hzprotests@sba.gov*.

(d) *Timeliness.* A protest by an interested party challenging the HUBZone status of an apparent successful offeror on a HUBZone contract must be timely, or it will be dismissed. A protest by a contracting officer or SBA challenging the HUBZone status of an apparent successful offeror on a HUBZone contract or of an awardee on a HUBZone contract is always timely.

* * * * *

■ 77. Amend § 126.803 by:
■ a. Revising paragraph (a);
■ b. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), respectively;
■ c. Adding new paragraph (c); and
■ d. Revising newly redesignated paragraph (f)(3).

The revisions and additions read as follows:

§ 126.803 How will SBA process a HUBZone status protest and what are the possible outcomes?

(a) *Date at which eligibility determined.* (1) For competitively awarded HUBZone contracts, SBA will determine the eligibility of a concern subject to a HUBZone status protest as of the date of its initial offer that includes price.

(2) For sole source HUBZone contracts, SBA will determine the eligibility of a concern subject to a HUBZone status protest as of the date of the award or intended award.

(3) For protests filed against a HUBZone joint venture alleging that the joint venture does not comply with the requirements in § 126.616, SBA will determine the eligibility of the joint venture as of its final proposal revision for the procurement.

(4) For protests alleging undue reliance on one or more non-HUBZone subcontractors or alleging that such subcontractor(s) will perform the primary and vital requirements of the contract, SBA will determine the HUBZone small business concern's eligibility as of the date of its final proposal revision for the procurement.

(5) For two-step or two-phase procurements, SBA will determine the HUBZone small business concern's eligibility as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

* * * * *

(c) *Burden of proof.* In the event of a protest, the burden of proof to demonstrate eligibility is on the protested concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the concern failed to provide would demonstrate ineligibility and sustain the protest on that basis.

* * * * *

(f) * * *

(3) A concern found to be ineligible may apply for HUBZone certification immediately after its decline if it believes that it has overcome all reasons for ineligibility through changed circumstances and is currently eligible.

■ 78. Amend § 126.900 by:
■ a. Removing the word ''SBCs'' in paragraphs (a) and (b)(1) and adding in its place the phrase ''small business concerns'';
■ b. Removing the word ''SBC'' in paragraphs (a), (b)(2), (b)(3), (d), and (e)(1) and adding in its place the phrase ''small business concern'';
■ c. Removing the word ''SBC'' in the introductory text of paragraph (b) and in paragraph (c);
■ d. Removing the phrase ''agency suspension'' in paragraph (e)(1) and adding in its place the phrase ''procuring agency's suspension'';
■ e. Adding paragraph (e)(4).

The addition reads as follows:

§ 126.900 What are the requirements for representing HUBZone status, and what are the penalties for misrepresentation?

* * * * *

(e) * * *

(4) If SBA discovers that false or misleading information has been knowingly submitted by a small business concern in order to obtain or maintain HUBZone certification, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may recommend that Government-wide debarment or suspension proceedings be initiated.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 79. 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.

■ 80. Amend § 127.200 by:
■ a. Revising paragraphs (a)(2) and (b)(2);
■ b. Redesignating paragraph (d) as paragraph (f); and
■ c. Adding new paragraphs (d) and (e).

The revisions and additions read as follows:

§ 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

(a) * * *

(2) Not less than 51 percent unconditionally and directly owned and

controlled by one or more economically disadvantaged women who are citizens of and reside in the United States.

(b) * * *

(2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are citizens of and reside in the United States.

* * * * *

(d) *Size.* In determining whether a concern qualifies as small for WOSB/EDWOSB certification and recertification under the size standard corresponding to a specific NAICS code, SBA will accept the concern's size representation in the System for Award Management (SAM), or successor system, unless there is evidence indicating that the concern is other than small. SBA will request a formal size determination pursuant to § 121.1001(b)(7) of this chapter where any information it possesses calls into question the concern's SAM size representation.

(e) *Federal financial obligations.* A business concern is ineligible to be certified as a WOSB or EDWOSB or to participate in the WOSB program if either the concern or any of its principals has failed to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing. However, a small business concern may be eligible if the concern or the affected principals can demonstrate that they are current on an approved repayment plan, or the financial obligations owed have been settled and discharged/forgiven by the Federal Government.

* * * * *

■ 81. Amend § 127.201 by revising paragraph (b) and adding paragraph (g) to read as follows:

§ 127.201 What are the requirements for ownership of an EDWOSB and WOSB?

* * * * *

(b) *Unconditional ownership.* To be considered unconditional, ownership must not be subject to any conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity).

(1) The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(2) In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by qualifying women. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by men or other entities will be treated as exercised, except for any ownership interests which are held by investment companies licensed under 15 U.S.C. 681 *et. seq.*

(3) A right of first refusal granting a man or other entity the contractual right to purchase the ownership interests of the qualifying woman, does not affect the unconditional nature of ownership, if the terms follow normal commercial practices. If those rights are exercised by a man or other entity after certification, the WOSB/EDWOSB must notify SBA. If the exercise of those rights results in qualifying women owning less than 51% of the concern, SBA will initiate decertification pursuant to § 127.405.

* * * * *

(g) *Dividends and distributions.* One or more qualifying women must be entitled to receive:

(1) At least 51 percent of any distribution of profits paid to the owners of a corporation, partnership, or limited liability company concern, and a qualifying woman's ability to share in the profits of the concern must be commensurate with the extent of her ownership interest in that concern;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock or member interest owned in the event of dissolution of the corporation, partnership, or limited liability company.

■ 82. Amend § 127.202 by revising paragraphs (d) and (g) and adding paragraph (h) to read as follows:

§ 127.202 What are the requirements for control of an EDWOSB or WOSB?

* * * * *

(d) *Ownership of a partnership.* In the case of a concern which is a partnership, one or more qualifying women, or in the case of an EDWOSB, economically disadvantaged women, must serve as general partners, with control over all partnership decisions. At least 51 percent of every class of partnership interest must be unconditionally owned by one or more qualifying women or economically disadvantaged women. The ownership must be reflected in the concern's partnership agreement.

* * * * *

(g) *Involvement in the concern by other individuals or entities.* Men or other entities may be involved in the management of the concern and may be stockholders, partners or limited liability members of the concern. However, no males or other entities may:

(1) Exercise actual control or have the power to control the concern;

(2) Have business relationships that cause such dependence that the qualifying woman cannot exercise independent business judgment without great economic risk;

(3) Control the concern through loan arrangements (which does not include providing a loan guaranty on commercially reasonable terms);

(4) Provide critical financial or bonding support or a critical license to the concern, which directly or indirectly allows the male or other entity to significantly influence business decisions of the qualifying woman.

(5) Be a former employer, or a principal of a former employer, of any qualifying woman, unless the concern demonstrates that the relationship between the former employer or principal and the qualifying woman does not give the former employer actual control or the potential to control the concern and such relationship is in the best interests of the concern; or

(6) Receive compensation from the concern in any form as a director, officer, or employee, that exceeds the compensation to be received by the qualifying woman who holds the highest officer position (usually Chief Executive Officer or President), unless the concern demonstrates that the compensation to be received by non-qualifying woman is commercially reasonable or that the qualifying woman has elected to take lower compensation to benefit the concern. A certified WOSB or EDWOSB must notify SBA within 30 calendar days if the compensation paid to the highest-ranking officer falls below that paid to a man. In such a case, SBA must determine that that the compensation to be received by the man is commercially reasonable or that the highest-ranking officer has elected to take lower compensation to benefit the WOSB or EDWOSB before SBA may determine that the concern is eligible for a WOSB/EDWOSB award.

(h) *Exception for extraordinary circumstances.* SBA will not find that a lack of control exists where a woman or an economically disadvantaged woman

does not have the unilateral power and authority to make decisions regarding the following extraordinary circumstances:

(1) Adding a new equity stakeholder or increasing the investment amount of an equity stakeholder;

(2) Dissolution of the company;

(3) Sale of the company or all assets of the company;

(4) The merger of the company;

(5) The company declaring bankruptcy;

(6) Amendment of the company's corporate governance documents to remove the shareholder's authority to block any of the actions in paragraphs (h)(1) through (5) of this section; and

(7) Any other extraordinary action that is crafted solely to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's business as it chooses.

§ 127.301 [Amended]

■ 83. Amend § 127.301 by removing the last sentence.

■ 84. Revise § 127.302 to read as follows:

§ 127.302 Where can a concern apply for certification?

A concern seeking certification as a WOSB or EDWOSB must submit an electronic application to SBA via *https://certifications.sba.gov* or any successor system. The majority woman or economically disadvantaged woman owner must take responsibility for the accuracy of all information submitted on behalf of the applicant.

■ 85. Amend § 127.304 by revising paragraph (d) to read as follows:

§ 127.304 How is an application for certification processed?

* * * * *

(d) An applicant must be eligible as of the date SBA issues a decision. An applicant's eligibility will be based on the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, and any changed circumstances.

* * * * *

■ 86. Revise § 127.305 to read as follows:

§ 127.305 May declined or decertified concerns apply for certification at a later date?

(a) A concern that SBA or a third-party certifier has declined may apply for certification after ninety (90) calendar days from the date of decline if it believes that it has overcome all of the reasons for decline and is currently eligible. A concern that has been declined may seek certification by any of the certification options listed in § 127.300.

(b) A concern that SBA has decertified may apply for certification immediately after the date of decertification, if it believes that it has overcome all reasons for decertification through changed circumstances and is currently eligible.

(c) A concern that voluntarily withdraws from the WOSB program may immediately apply for certification, if it believes that it is currently eligible.

■ 87. Amend § 127.400 by revising paragraph (b) to read as follows:

§ 127.400 How does a concern maintain its WOSB or EDWOSB certification?

* * * * *

(b) The concern must either recertify with SBA or notify SBA that it has completed a program examination from a third party certifier within 90 calendar days of the end of its eligibility period. If a concern fails to so, SBA will decertify the concern at the end of its eligibility period. However, if a concern is able to recertify its eligibility within 30 days of the end of its eligibility period, SBA will reinstate the firm as a certified WOSB or EDWOSB.

Example 1 to paragraph (b). On July 20, 2024, concern B is certified as a WOSB under the WOSB Program by a third-party certifier. Concern B is considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2027. Concern B must request a program examination from SBA or notify SBA that it has completed a program examination from a third-party certifier, by April 21, 2027, to continue participating in the WOSB Program after July 19, 2027.

* * * * *

■ 88. Amend § 127.405 by revising paragraph (d) to read as follows:

§ 127.405 What happens if SBA determines that the concern is no longer eligible for the program?

* * * * *

(d) *Decertification due to submission of false or misleading information.* If SBA discovers that a WOSB or EDWOSB or its representative knowingly submitted false or misleading information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may recommend that Government-wide debarment or suspension proceedings be initiated.

(1) A firm that is decertified from the WOSB program due to the submission of false or misleading information may be removed from SBA's other small business contracting programs, including the 8(a) Business Development Program, the HUBZone Program, the Veteran Small Business Certification (VetCert) Program, and SBA's Mentor-Protégé Program.

(2) A firm that is decertified or terminated from the 8(a) BD Program, the HUBZone Program, or the VetCert Program due to the submission of false or misleading information may be decertified from the WOSB Program.

(3) SBA may require a firm that is decertified or terminated from the WOSB Program, 8(a) BD Program, the HUBZone Program, or the VetCert Program due to the submission of false or misleading information to enter into an administrative agreement with SBA as a condition of admission or re-admission to the WOSB program.

* * * * *

■ 89. Amend § 127.504 by:

■ a. Revising paragraph (a);

■ b. Removing the words ''under paragraph (f) of this section'' in paragraph (d)(1) and adding in their place the words ''under § 125.12 of this chapter''; and

■ c. Revising paragraph (h).

The revisions read as follows:

§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?

(a) *General.* In order for a concern to submit an offer on a specific EDWOSB or WOSB set-aside requirement, the concern must, at the time of its initial offer that includes price:

(1) Qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract;

(2) Meet the eligibility requirements of an EDWOSB or WOSB in § 127.200; and

(3) Either be a certified EDWOSB or WOSB pursuant to § 127.300, or represent that the concern has submitted a complete application for WOSB or EDWOSB certification to SBA or a third-party certifier and has not received a negative determination regarding that application from SBA or the third party certifier.

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

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

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

* * * * *

(h) *Recertification.* A prime contractor that receives an award as a certified WOSB or EDWOSB must comply with the recertification requirements set forth in § 125.12 of this chapter regarding its status as a certified WOSB or EDWOSB.

PART 128—VETERAN SMALL BUSINESS CERTIFICATION PROGRAM

■ 90. The authority citation for part 128 continues to read as follows:

Authority: 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f–1.

§ 128.100 [Amended]

■ 91. Amend § 128.100 by removing the words ''Veteran Small Business Certification Program'' and adding in their place the words ''Veteran Small Business Certification Program (VetCert)''.

■ 92. Amend § 128.200 by revising paragraphs (a)(2) and (b)(2) to read as follows:

§ 128.200 What are the requirements a concern must meet to qualify as a VOSB or SDVOSB?

(a) * * *

(2) Not less than 51 percent owned and controlled by one or more veterans who reside in the United States.

(b) * * *

(2) Not less than 51 percent owned and controlled by one or more service-disabled veterans who reside in the United States or, in the case of a veteran with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern, the spouse or permanent caregiver of such veteran who resides in the United States.

* * * * *

■ 93. Amend § 128.201 by revising paragraph (b) to read as follows:

§ 128.201 What other eligibility requirements apply for certification as a VOSB or SDVOSB?

* * * * *

(b) *Federal financial obligations.* A business concern is ineligible to be certified as a VOSB or SDVOSB or to participate in the VetCert program if either the concern or any of its principals has failed to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing. However, a small business concern may be eligible if the concern or the affected principals can demonstrate that they are current on an approved repayment plan, or the financial obligations owed have been settled and discharged/forgiven by the Federal Government.

■ 94. Amend § 128.202 by
■ a. Revising paragraph (c); and
■ b. In paragraph (g)(1), removing the words ''the annual distribution'' and adding in their place the words ''any distribution''.

The revision reads as follows:

§ 128.202 Who does SBA consider to own a VOSB or SDVOSB?

* * * * *

(c) *Ownership of a partnership.* In the case of a concern which is a partnership, one or more qualifying veterans must serve as general partners, with control over all partnership decisions. At least 51 percent of every class of partnership interest must be unconditionally owned by one or more qualifying veterans. The ownership must be reflected in the concern's partnership agreement.

* * * * *

■ 95. Amend § 128.203 by:
■ a. Removing the second and third sentences in paragraph (f);
■ b. Revising paragraphs (g) and (h);
■ c. Revising paragraph (j)(1);
■ d. Removing the word ''and'' at the end of paragraph (j)(4);
■ e. Removing the punctuation mark ''.'' at the end of paragraph (j)(5) and adding in its place punctuation mark ''; ''; and
■ e. Adding paragraphs (j)(6) and (7).

The revision and addition read as follows:

§ 128.203 Who does SBA consider to control a VOSB or SDVOSB?

* * * * *

(g) *Unexercised rights.* Except as set forth in paragraph (e)(1) of this section, a qualifying veteran's unexercised right to cause a change in the control or management of the concern does not in itself constitute control, regardless of how quickly or easily the right could be exercised.

(h) *Limitations on control by non-qualifying-veterans.* Non-qualifying-veterans may be involved in the management of the concern and may be stockholders, partners or limited liability members of the concern. However, no non-qualifying veteran may:

(1) Exercise actual control or have the power to control the concern;

(2) Have business relationships that cause such dependence that the qualifying veteran cannot exercise independent business judgment without great economic risk;

(3) Control the concern through loan arrangements (which does not include providing a loan guaranty on commercially reasonable terms);

(4) Provide critical financial or bonding support or a critical license to the concern, which directly or indirectly allows the non-qualifying veteran to significantly influence business decisions of the qualifying veteran.

(5) Be a former employer, or a principal of a former employer, of any qualifying veteran, unless the concern demonstrates that the relationship between the former employer or principal and the qualifying veteran does not give the former employer actual control or the potential to control the concern and such relationship is in the best interests of the concern; or

(6) Receive compensation from the concern in any form as a director, officer, or employee, that exceeds the compensation to be received by the qualifying veteran who holds the highest officer position (usually Chief Executive Officer or President), unless the concern demonstrates that the compensation to be received by non-qualifying veteran is commercially reasonable or that the qualifying veteran has elected to take lower compensation to benefit the concern. A certified SDVOSB must notify SBA within 30 calendar days if the compensation paid to the highest-ranking officer falls below that paid to a non-qualifying veteran. In such a case, SBA must determine that that the compensation to be received by the non-qualifying veteran is commercially reasonable or that the highest-ranking officer has elected to take lower compensation to benefit the SDVOSB before SBA may determine that the concern is eligible for a SDVOSB award.

* * * * *

(j) * * *

(1) Adding a new equity stakeholder or increasing the investment amount of an equity stakeholder;

* * * * *

(6) Amendment of the company's corporate governance documents to remove the shareholder's authority to block any of the actions in paragraphs (j)(1) through (5) of this section; and

(7) Any other extraordinary action that is crafted solely to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's business as it chooses.

* * * * *

■ 96. Amend § 128.204 by revising paragraph (a) to read as follows:

§ 128.204 What size standards apply to VOSBs and SDVOSBs?

(a) *Time of certification.* At the time of certification or recertification, a VOSB or SDVOSB must be a small business under the size standard corresponding to any NAICS code listed in its System for Award Management (SAM), or successor system, profile. In determining whether a concern qualifies as small for VOSB/SDVOSB certification or recertification under the size standard corresponding to a specific NAICS code, SBA will accept the concern's size representation in SAM, unless there is evidence indicating that the concern is other than small. SBA will request a formal size determination pursuant to § 121.1001(b)(12) of this chapter where any information it possesses calls into question the concern's SAM size representation.

* * * * *

■ 97. Revise § 128.301 to read as follows:

§ 128.301 Where must an application be filed?

An application for certification as a VOSB or SDVOSB must be electronically filed according to the instructions on SBA's website at *www.sba.gov*. The qualifying veteran must take responsibility for the accuracy of all information submitted on behalf of the applicant.

■ 98. Amend § 128.302 by:

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

■ b. Removing from the introductory text to paragraph (d) the phrase ''any independent research conducted by SBA,''.

The addition reads as follows:

§ 128.302 How does SBA process applications for certification?

(a) * * * An applicant must be eligible as of the date SBA issues a decision.

* * * * *

■ 99. Revise § 128.305 to read as follows:

§ 128.305 May declined or decertified concerns apply for recertification at a later date?

(a) A concern that SBA has declined may apply for certification after ninety (90) calendar days from the date of decline, if it believes that it has overcome all of the reasons for decline and is currently eligible.

(b) A concern that SBA has decertified may apply for certification immediately after the date of decertification, if it believes that it has overcome all reasons for decertification through changed circumstances and is currently eligible.

(c) A concern that voluntarily withdraws from the VetCert program may immediately apply for certification, if it believes that it is currently eligible.

■ 100. Amend § 128.306 by revising paragraph (a) to read as follows:

§ 128.306 How does a concern maintain its VOSB or SDVOSB certification?

(a) Any Participant seeking to remain certified must recertify its eligibility every 3 years. There is no limitation on the number of times a business may recertify. Participants may recertify within 90 calendar days prior to the termination of their eligibility period. If a concern fails to recertify, SBA will decertify the concern at the end of its eligibility period. However, if a concern is able to recertify its eligibility within 30 days of the end of its eligibility period, SBA will reinstate the concern as a certified VOSB or SDVOSB.

* * * * *

§ 128.309 [Amended]

■ 101. Amend § 128.309 by removing the third and fourth sentences of paragraph (a), the second and third sentences of paragraph (b), and the second and third sentences of paragraph (c).

■ 102. Amend § 128.310 by revising paragraph (d) to read as follows:

§ 128.310 What are the procedures for decertification?

* * * * *

(d) *Decertification based on false or misleading information.* (1) If SBA discovers that a VOSB/SDVOSB or its representative knowingly submitted false or misleading information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may recommend that Government-wide debarment or suspension proceedings be initiated.

(2) A firm that is decertified from the VetCert Program due to the submission of false or misleading information may be removed from SBA's other small business contracting programs, including the 8(a) Business Development Program, the HUBZone Program, the Women-Owned Small Business (WOSB) Program, and SBA's Mentor-Protégé Program.

(3) A firm that is decertified or terminated from the 8(a) BD Program, the HUBZone Program, or the WOSB Program due to the submission of false or misleading information may be decertified from the VetCert Program.

(4) SBA may require a firm that is decertified or terminated from the VetCert Program, the 8(a) BD Program, the HUBZone Program, or the WOSB Program due to the submission of false or misleading information to enter into an administrative agreement with SBA as a condition of admission or re-admission to the VetCert program.

* * * * *

■ 103. Amend § 128.401 by:

■ a. Revising paragraph (a);

■ b. In paragraph (d)(1)(i) removing the words ''under paragraph (e) of this section'' and adding in their place the words ''under § 125.12 of this chapter''; and

■ c. Revising paragraph (e).

The revisions read as follows:

§ 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?

(a) *Certification requirement.* Only certified VOSBs and SDVOSBs are eligible to submit an offer on a specific VOSB or SDVOSB requirement. For a competitively awarded VOSB/SDVOSB contract, order, or agreement, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract, order or agreement, and be a certified VOSB or SDVOSB and meet the eligibility requirements of a VOSB or SDVOSB in § 128.200 at the time of initial offer or response which includes price. For any sole source VOSB or SDVOSB award, the concern must qualify as a small business concern under the size standard corresponding to the applicable NAICS code and be a certified VOSB or SDVOSB and meet the eligibility requirements of a VOSB or SDVOSB in § 128.200 on the date of award.

* * * * *

(e) *Recertification.* A prime contractor that receives an award as a certified SDVOSB must comply with the recertification requirements set forth in § 125.12 of this chapter regarding its status as a certified SDVOSB.

* * * * *

■ 104. Amend § 128.402 by revising the second sentence of the introductory text of paragraph (a) and adding paragraph (k) to read as follows:

§ 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?

(a) * * * SBA does not certify VOSB or SDVOSB joint ventures, but the joint venture should be designated as a VOSB or SDVOSB joint venture in SAM with the VOSB or SDVOSB-certified joint venture partner identified. * * *

* * * * *

(k) *Non-VOSB/SDVOSB contracts.* On a non-VOSB/SDVOSB contract, for an award to a joint venture to be considered awarded to a VOSB or SDVOSB (*i.e.,* for a procuring agency to receive VOSB or SDVOSB credit for goaling purposes), the joint venture awardee must comply with the requirements of this section and § 125.8.

§ 128.500 [Amended]

■ 105. Amend § 128.500 by removing the text ''128.402(c)'' in paragraph (c) and adding in its place ''128.402''.

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

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

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 15 U.S.C. 657f.

Subpart K issued under 15 U.S.C. 657f.

Subpart L issued under 15 U.S.C. 636(a)(36); Pub. L. 116–136, 134 Stat. 281; Pub. L. 116–139, 134 Stat. 620; Pub. L. 116–142, 134 Stat. 641; and Pub. L. 116–147, 134 Stat. 660.

Subpart M issued under 15 U.S.C. 657a; Pub. L. 117–81, 135 Stat. 1541.

■ 107. Amend § 134.1003 by revising the first sentence of paragraph (e)(1) to read as follows:

§ 134.1003 Grounds for filing a VOSB or SDVOSB status protest.

* * * * *

(e) * * *

(1) If the VOSB or SDVOSB status protest pertains to a procurement, the Judge will determine a protested concern's eligibility as a VOSB or SDVOSB as of the date of its initial offer or response which includes price for a competitively awarded VOSB/SDVOSB contract, order, or agreement, and as of the date of award for any sole source VOSB or SDVOSB award. * * *

* * * * *

§ 134.1104 [Amended]

■ 108. Amend § 134.1104 by removing the words ''10 business days'' in paragraph (a) and adding in their place the words ''45 business days''.

Isabella Casillas Guzman,

Administrator.

[FR Doc. 2024–29393 Filed 12–16–24; 8:45 am]

BILLING CODE 8026–09–P