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: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) proposes to amend 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 proposed rule is intended to clarify and improve policies surrounding some of those changes. In particular, the rule proposes to require any certified HUBZone small business to be eligible as of the date of offer for any HUBZone contract. SBA also proposes to make 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 proposed rule would delete the program specific recertification requirements contained separately in SBA's size, 8(a) BD, HUBZone, WOSB, and VetCert and move them to a new section that would cover all size and status recertification requirements. This should ensure that the size and status requirements will be uniformly applied.

DATES: Comments must be received on or before October 7, 2024.

ADDRESSES: You may submit comments, identified by Docket No. SBA–2024–0007 or RIN 3245–AH68, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov* and follow the instructions for submitting comments.
- *Mail (for paper submissions):* Laura Maas, HUBZone Program, 409 Third Street SW, Washington, DC 20416.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov,* please submit the comments to Laura Maas and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published or not.

FOR FURTHER INFORMATION CONTACT: Laura Maas, Deputy Director, Office of HUBZone, (202) 205–7341, *hubzone@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On November 26, 2019, SBA published the first comprehensive revision of the HUBZone Program regulations since the program's implementation more than 20 years ago. 84 FR 65222. The revisions were intended to clarify current HUBZone Program policies and procedures and implement changes to make the HUBZone Program more efficient and effective. This proposed rule would make additional clarifications to the program regulations to reflect SBA policies established in response to feedback received in the time since the publication of the comprehensive revision.

SBA also made a number of revisions to the HUBZone regulations as part of its implementation of section 1701 of the National Defense Authorization Act for Fiscal Year 2018 (NDAA 2018), Public Law 115–91, Dec. 12, 2017. Included within that rulemaking were revisions freezing the HUBZone map until the results of the 2020 census were released; authorizing ''legacy HUBZone employees''; requiring annual recertification; implementing one-year certification and requiring HUBZone firms to be eligible on each anniversary of their HUBZone certification date; and requiring HUBZone firms to be HUBZone-certified at the time of offer for any HUBZone contract, with eligibility relating back to their certification anniversary date and removing the requirement for HUBZone small businesses to be eligible at the time of award of a HUBZone contract.

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. This proposed rule would incorporate some of those clarifications and make other refinements in 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 proposed rule would clarify 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.

Further, in response to concerns related to potential fraud and abuse in the program, SBA is proposing to amend the definition of the term ''employee'' by raising the minimum number of work hours necessary for an individual to count as an employee for HUBZone program purposes.

The proposed rule would also make 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 proposed rule would delete the program specific recertification requirements contained separately in SBA's size, 8(a) BD, HUBZone, WOSB, and VetCert and move them to a new section that would cover 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.

II. Section-by-Section Analysis

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

SBA proposes 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, this proposed rule would make 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).

This proposed rule would first amend § 121.103(a)(3) 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 (g) 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 (*see* § 128.203(j)).

This rule proposes to add the same language to a new § 124.106(h) for the 8(a) BD program and to § 127.202(h) for the WOSB program. Finally, since the current VetCert regulations have only the first five exceptions for control and this rule would add six to the size, 8(a) BD and WOSB regulations, the proposed rule would add that same sixth exception to the VetCert regulations also. That addition would be a new § 128.203(j)(6). Through this proposed rule, SBA would add explicit exceptions to the negative-control provision for all programs for which control is an eligibility element. This would permit all small businesses to seek equity funding without becoming affiliated with the investors solely because of a broad interpretation of the negative-control rule. SBA specifically requests comments as to whether the six identified exceptions are sufficient or whether one or more additional exceptions should also be included in the regulations.

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. The current regulatory text provides 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. That language has caused some confusion. In the context of a subcontractor that is an SBA-approved mentor of the prime contractor, in treating the relationship ''as a joint venture'', 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 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. Unfortunately, without clearly specifying SBA's intent, the current regulation could be read to allow mentors to be found to be ostensible subcontractors while not meeting the normal joint venture requirements. That was not SBA's intent. This proposed rule would simplify § 121.103(h) by eliminating the reference to a joint venture and instead specify 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.

This proposed rule would also make a corresponding change to § 121.702(c)(7) for the SBIR program. That change would provide that a concern with an other than small ostensible subcontractor cannot be considered a small business concern for SBIR and STTR awards.

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 clarifies 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.

Section 121.404

SBA proposes to simplify and reorganize § 121.404, which addresses the date used to determine size for size certifications and determinations. The proposed changes would not alter the substance of SBA's rules regarding the date to determine size, but rather seek to clarify the current rules and make them easier to understand and apply. In addition to these clarifications, SBA is proposing substantive changes to the rules regarding size recertification and proposes 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 repeats here its view that 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.

This rule proposes to also clarify that where a contracting officer requests size recertification with respect to a specific order or agreement, size is 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.

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 occurred, 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.

To summarize and clarify, there are three, narrow exceptions to the general rule that the date on which size is determined for an order or agreement against a multiple award contract is dependent on whether the underlying multiple award contract was set aside for small business or unrestricted. The first exception is for set-aside orders or agreements to be placed against GSA's Federal Supply Schedule (FSS) Multiple Award Schedule (MAS) contracts, which is an unrestricted vehicle. Unlike set-side and reserved orders issued under unrestricted multiple award contracts where size status is determined at the date of the offer for the order, for FSS orders size status is determined as of the date of offer for the underlying FSS contract. This exception does not apply when any trigger for size recertification occurs under § 125.12, including when a contracting officer requests a size recertification with the offer for a specific order or agreement that is set-aside for small businesses against the FSS MAS.

SBA provides this clarification in response to a recent decision of the Government Accountability Office (GAO) in *Washington Business Dynamics, LLC,* B–421953, B–421953.2 (Dec. 18, 2023), which cites to several OHA decisions. SBA believes both GAO and OHA misinterpret SBA's regulations. In its decision, GAO extended the FSS exception to apply to size recertifications for orders placed under other multiple award contracts. When a contracting officer requests recertification of size with respect to an order or agreement, the FSS exception does not apply. If there is a disqualifying size recertification in response to any event in 125.12, including a merger, sale, or acquisition, the concern must notify the contracting officer for the underlying multiple award contract and the contracting officer for all existing orders, and update its *SAM.gov* profile to reflect its current size status. The concern is no longer eligible for set-aside orders or agreements against the FSS MAS. In those instances, size is determined as of the date that the triggering event occurred or offer for the particular order or agreement, depending on the cause for recertification.

The second exception is for 8(a) sole source awards issued against multiple award contracts, regardless of whether the underlying multiple award contract is unrestricted, set-aside (even if the underlying multiple award contract itself was set-aside or reserved as an 8(a) award), or under the GSA's FSS MAS contracts. SBA has always required an 8(a) Participant to qualify as eligible (to still be an active Participant in the 8(a) program, qualify as small, and meet all other eligibility criteria) at the time of any 8(a) sole source award. In terms of size for a specific 8(a) sole source order or agreement under a multiple award contract, including GSA's FSS MAS contracts, the concern must qualify as small for the size standard corresponding to the NAICS code assigned to the order or agreement on the date of initial offer for and award of the order or agreement.

The third exception applies when size recertification is triggered pursuant to any scenario outlined in new § 125.12, including when a contracting officer requests recertification of size for a particular order or agreement against a multiple award contract. To be clear, when a recertification of size is triggered, the date to determine size is outlined in new section 125.12, and is typically the date of the triggering event, but may be the date of initial offer for a particular order or agreement if a contracting officer requested recertification with the offer. Size recertification is an essential tool that ensures small business awards continue to be entered into with entities that are small at the time of offer for a particular award. As such, when the requirement for recertification is triggered, the date to determine size shifts to a date that coincides with either the triggering event or the date of initial offer for a particular award (except for sole source 8(a) awards as noted above).

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. This proposed rule would add 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.

This rule also proposes 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 the proposed rule would 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 would specifically authorize 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 HUBZones; and for a small business set-aside, WOSB/EDWOSB or SDVOSB contract, that would be the Director of Government Contracting. The proposed rule would also specify 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 is also 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 requests comments regarding whether SBA should implement a regulatory provision authorizing such a protest.

Section 121.1010

Section 121.1010 explains how a concern can become recertified as a small business after receiving an adverse size determination. This proposed rule would make 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.

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

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. SBA seeks 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.

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 regulation currently provides that a non-disadvantaged individual or another business concern in the same or similar line of business generally cannot own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in the transitional stage of the program. The proposed rule would increase the allowable ownership percentages for non-disadvantaged individuals and business concerns in the same or similar line of business from 10 and 20 percent to 20 and 30 percent. By changing 10 percent to 20 percent, the proposed rule would make this ownership restriction consistent with that contained in § 124.108(a)(4). It then follows that the current 20 percent ownership restriction for the transitional stage would also be correspondingly increased, which is why the proposed rule would raise that restriction to 30 percent.

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. Paragraph 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 proposed change to § 124.105(h) above, the proposed rule would require 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 would also add a fourth exception as to when prior SBA approval is not required. Specifically, the proposed rule would specify that prior SBA approval is not required where the 8(a) Participant has never received an 8(a) contract. The rule would then clarify 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 rule would make changes to the examples set forth in § 124.105(i)(2) to reflect the change from 20 percent to 30 percent and would add a fifth example highlighting that prior SBA approval is not required where a Participant has never received an 8(a) contract.

Paragraph 124.105(k) currently provides generally that SBA considers applicable state community property laws in determining ownership interests when an owner resides in a community property state. Under that provision, a transfer or relinquishment of interest by the non-disadvantaged spouse may be necessary in some cases to establish eligibility for the 8(a) BD program. SBA initially promulgated this provision in order to comply with the statutory requirement that an 8(a) concern must be at least 51 percent ''unconditionally'' owned one or more socially and economically disadvantaged individuals. Upon reexamination, SBA believes that it may not be necessary to consider community property laws when determining that a specific individual does in fact ''unconditionally'' own an applicant or Participant. In order to align the 8(a) BD ownership requirements with those applicable in the WOSB and VetCert programs, SBA proposes to eliminate § 124.105(k). SBA requests comments as to whether not considering community property laws complies with the unconditional ownership requirement and whether previously required transmutation agreements (*i.e.,* agreements between spouses relinquishing some percentage of his or her community property ownership rights in an applicant or Participant) are permissible under state law.

The proposed rule would add 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 would align 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. This same provision would be added to § 127.201(b) to conform the WOSB unconditional ownership requirements as well.

The proposed rule would also align the language in § 124.105(f)(1) (for the 8(a) BD program), § 127. (for the WOSB program), and § 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 would make the wording consistent. The same provision would also be added to the WOSB regulations.

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, this rule proposes to change 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 would add a similar provision for the WOSB program. In connection with the 8(a) BD program, the proposed rule would 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.

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 would revise 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.

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. The current section 124.107(e) affects relatively few businesses because it applies only to those in an industry requiring a professional license. This rule proposes to remove this 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 also considered changing the current license provision to requiring an applicant to acknowledge that a license is needed for its primary business and to certify that it has such a license or will obtain a license when performing a contract. SBA requests comments on both alternatives.

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.

The proposed rule would 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). It would remove the automatic bar for ''possible criminal conduct'' and amend the lack of business integrity bar to lack of business integrity as demonstrated by conduct that could be grounds for suspension or debarment. Expanding access to the 8(a) BD program aids the federal government's goal of helping small businesses win at least 23% of federal contracting dollars each year. The 8(a) BD program gives socially and economically disadvantaged small businesses access to important tools and training to help them become stronger competitors in the marketplace. The proposed rule also will facilitate employment opportunities for individuals with criminal history records. Research demonstrates that employment increases success during reentry, decreases the risk of recidivism, and strengthens both public safety and economic opportunity. Research also demonstrates that entrepreneurship provides an important and distinct avenue for economic stability given persistent stigma from employers who may decline to hire people with criminal history records. Notably, SBA found several studies showing the difficulty of obtaining employment for formerly incarcerated people (*see, e.g., Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*; [1] from the Department of Justice's National Institute of Justice Grant) and a positive link between employment and successful reentry, including preventing recidivism (*see, e.g., Local Labor Markets and Criminal*

[1] *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men. Investigating Prisoner Reentry* National Institute of Justice *Grant, Final Report., October 2009.*

Recidivism [2] in the Journal of Public Economics). Moreover, because individuals with criminal history records may face barriers in obtaining employment, entrepreneurship can be a productive option, and SBA found several studies showing the potential for entrepreneurship among individuals with criminal records (*see, e.g., From Prison to Entrepreneurship* [3] in the American Academy of Political and Social Science).

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. The proposed 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.

Where fraudulent activity occurs after a firm is admitted to the 8(a) BD program, whether that activity results in an indictment, conviction, civil judgment or not, SBA may immediately move to protect the Government's interests. This could be through suspension/termination from the 8(a) BD program or through a Government-wide suspension/debarment action. The existence of a cause for suspension, termination or debarment, however, does not necessarily require that the Participant be suspended, terminated or debarred. SBA will consider the seriousness of the Participant's acts or omissions and any remedial measures or mitigating factors made by the Participant.

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. This rule proposes to apply that restriction to the WOSB and HUBZone programs as well. To ensure consistency among the programs, the rule would also revise the language in §§ 124.108(e) and 128.201(b) so that the regulatory language applying to all four programs is the same.

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, this proposed rule amends 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 would specify 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.

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

The proposed rule would 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, the proposed rule would provide that SBA may require the 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.

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. The proposed rule would remove that second provision. No other program has such a restriction and SBA does not seek to thwart firms who have made legitimate attempts to overcome deficiencies from again applying to the 8(a) BD program.

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-

[2] *Local Labor Markets and Criminal Recidivism,* ScienceDirect, Journal of Public Economics, Volume 147, March 2017, Pages 16–29

[3] *From Prison to Entrepreneurship: Can Entrepreneurship be a Reentry Strategy for Justice-Impacted Individuals? https://doi.org/10.1177/00027162221115378,* Sage Journals, Volume 701, Issue 1, September 14, 2022.

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, § 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 rule would clarify this position by providing that § 124.503(g)(1)(iii) applies only to open sole source 8(a) offerings.

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. This rule proposes 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 would 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.

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). This rule proposes to provide further 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 would first provide that SBA will consider only procurements for which the Participant had reasonable prospects of success. The proposed regulatory text would include an example showing how revenue for an unsuccessful offer would be considered. 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 $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 would also clarify 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. There has 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. SBA believes that it does not make sense to consider more than the revenues from the base year of the contract. If the Participant had been successful and was awarded 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. Thus, SBA would look at the non-8(a) revenues

received, not the total value of the non-8(a) contract that a Participant is performing. SBA believes the same should happen when considering whether a Participant has made good faith efforts to meet its BAT.

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 would merely make 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.

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). However, in order to more specifically authorize such a substitution, the proposed rule would add a new § 124.518(d). SBA also seeks 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 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.

Section 124.602

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. Currently, Participants with gross annual receipts of more than $10 million must 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 must 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 must 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, this rule proposes 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.

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 would add 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.

Section 125.3

Section 125.3 governs subcontracting plans and reporting of subcontracting achievements. SBA proposes to extend the due dates for subcontracting reports by 15 days, from 30 days to 45 days. SBA also would 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.

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 than similarly qualified small business. 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 would clarify this position in § 125.6(d)(3).

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. This rule proposes to provide such guidance. Specifically, the rule proposes 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 rule would provide 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.

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 would clarify SBA's intent.

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 no-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, this rule proposes to clarify that only for-profit business concerns may be mentors.

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 would provide 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 any harm to a protégé, the proposed rule would also permit 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 where it is consistent with 41 U.S.C. 6305 and FAR 42.1204. The protégé may also seek to replace 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 would also add a new § 125.9(d)(1)(iv) which would 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.

The proposed rule would also redesignate 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 would add 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 would specify 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.

Finally, the proposed rule would add 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 would be 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.

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

SBA proposes 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. Differences in the regulatory text are an unintended result of placing the size and status recertification rules across multiple sections of title 13. 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 regulation would simplify the text and ensure easier, more consistent interpretation and application of the regulations. The requirements for recertification currently contained in § 121.404(g) (for size), § 126.619 (for HUBZone status), § 127.504(h) (for WOSB/EDWOSB status), and § 128.401(e) (for SDVOSB status) would be amended to reference the provisions contained in § 125.12. This change would ensure that all recertification requirements pertaining to size and status would be identical.

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. SBA's proposed

consolidation and relocation of size and status recertification would make 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 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 would also clarify 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.

These proposed changes are needed to overcome several recent decisions from the GAO and SBA's Office of Hearings and Appeals (OHA). SBA believes that GAO and OHA adopted incorrect interpretations in these cases, resulting in the misapplication of SBA's size recertification regulations. SBA provides clarification through this preamble and proposed changes to the regulatory text to avoid confusion from courts or administrative venues regarding the proper and reasonable interpretation of SBA's size recertification rules.

In 2021, OHA issued a decision in Size Appeal of *Odyssey Systems Consulting Group, Ltd.,* SBA No. SIZ–6135 (2021). *Odyssey* involved a small business set-aside task order that was awarded against the General Services Administration's (GSA) OASIS multiple award contract. Specifically, the task order was solicited against the small business pool that was established for the OASIS multiple award contract. The protested firm had allegedly exceeded the size standard assigned to a task order solicitation, following an acquisition by another entity. The issue on appeal was whether SBA had properly dismissed the size protest as untimely.

SBA filed comments in response to the appeal that distinguished between size recertifications requested by a contracting officer and recertifications following a merger, sale, or acquisition, only as that distinction relates to timeliness for size protests. Over the years, the distinction was misinterpreted to be broader than SBA intended and to impact eligibility for future set-aside orders against unrestricted multiple award contracts. SBA's OHA has issued several subsequent decisions to the *Odyssey* case that relate to this issue with the most recent in January 2024, confirming that if a concern recertifies as other than small following a merger, sale, or acquisition, the concern may remain eligible for future set-aside orders under an unrestricted multiple award contract, but not provide goaling credit. *See Size Appeal of Saalex Corp. d/b/a Saalex Solutions, Inc.,* SBA No. SIZ–6274 at 11 (2024). This was not SBA's intended interpretation of a size recertification following a merger, sale, or acquisition, or following the requirement to recertify size in the fifth year of a long-term contract.

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 proposes to allow requests for size determinations following any size recertification made in §§ 125.12(a) and (b) as well as those is 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).

Sections 125.13 and 124.4

The proposed rule would add 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 takes the language currently contained in § 124.4 for the 8(a) BD program and adds it to a new § 125.13 that would 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 would be 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.

Section 126.103

The proposed rule would revise the definitions for the following terms: ''Certify'', ''Contracting Officer (CO)'', ''Decertify'', ''Dynamic Small Business Search (DSBS)'', ''Employee'', ''HUBZone Small Business Concern'', ''Indian Tribal Government'', ''Interested party'', ''Principal office'', ''Qualified Disaster Area'', ''Redesignated Area'', ''Reside'', and

''Small business concern (SBC)''. The proposed rule would add definitions for the terms ''HUBZone Certification Date'', ''HUBZone Map'', ''HUBZone Resident Employee'', and ''System for Award Management (SAM)''. The proposed rule would delete the definition for the term ''AA/BD'' because this term no longer appears in Part 126.

The proposed rule would clarify that ''Certification'' and ''Certify'' both mean 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).

The proposed rule would add a new definition for the term ''Certification''.

The proposed rule would amend the definition of ''Contracting Officer'' to correct an outdated citation.

The proposed rule would amend the definition of ''decertify'' to clarify that a firm may voluntarily withdraw from the program without SBA needing to approve such withdrawal.

The proposed rule would amend the definition of ''Dynamic Small Business Search (DSBS)'' to reference ''SAM, as defined in this section'' rather than ''the System for Award Management (SAM)''. SBA proposes to remove the words ''the Dynamic Small Business Search (DSBS)'' wherever they appear and add in their place the acronym ''DSBS''.

The proposed rule would amend the definition of ''employee'' to prevent abuse and strengthen the integrity of the program. 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. In 2021, SBA HUBZone analysts identified a pattern in which firms put on their payroll HUBZone residents who did not perform work for those companies in order to claim them as employees and appear to qualify for the 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 fraud and abuse in the program, this proposed rule would increase the number of hours that an individual must work to be considered an employee for HUBZone purposes to 80 hours per month. Under SBA's current regulations, an employee is defined as an individual ''employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours during the four-week period immediately prior to the relevant date of review . . .'' 13 CFR 126.103. SBA believes that the minimum 40 hours per month is not sufficient to promote the purpose of the program. Furthermore, under the current 40 hour per month requirement, an individual could work 40 hours in one week and be off the remaining three weeks of the month. If all HUBZone employees did the same, the ''principal office'' could be empty and closed for the remaining three weeks of the month. SBA believes that there needs to be a legitimate presence in the HUBZone, and this includes occupying the principal office and requiring that office to be open during normal business hours, and requiring employees to work significantly at that office. SBA does not believe that a firm that can close its ''principal office'' three weeks every month meets that legitimate presence, but rather that there should be a consistent presence at the principal office. SBA also notes 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 this proposed rule would be in line with that 20 hours per week requirement. SBA requests comments on whether 80 hours per month is an appropriate threshold and whether there should be a minimum number of hours per week. SBA also seeks 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.

In addition, the proposed rule would clarify the existing requirement that an individual must be performing work for the concern in order to be considered an employee for HUBZone purposes. This proposed rule would provide that in order to ensure that an individual is performing work for the business concern, SBA may request a combination of job descriptions, resumes, detailed timesheets, sample work product and other relevant documentation.

The proposed rule also would delete the provision providing that individuals who receive in-kind compensation may be considered employees. The current regulations provide that someone 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 is proposing 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.

Finally, SBA is requesting comments on when reservists should be considered employees for HUBZone purposes. When reservists are called up for active duty, companies may be required to hold their positions for them, which may mean those individuals appear on the company's payroll with zero hours listed. SBA requests feedback on whether there are scenarios when such individuals should be treated as employees for HUBZone purposes.

The proposed rule would provide that individuals who are obtained ''from a concern *primarily engaged* in leasing employees'' (emphasis added) are generally considered employees. 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.''

The proposed rule would 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 proposed definition would provide 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.

The proposed rule would add a new definition for the term ''HUBZone Map'' providing that the HUBZone Map is a

publicly accessible online tool that depicts HUBZones.

The proposed rule would 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.''

The proposed rule would 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 is a reference to the previous map freeze, and since the map freeze ended on June 30, 2023, this language is no longer a necessary.

The proposed rule would amend 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, the proposed rule revises the definition to explicitly allow participation by State-recognized tribes.

The proposed rule would amend 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. SBA is proposing a similar change to the WOSB regulations through a separate rulemaking.

The proposed rule would amend the definition of ''principal office'' to make several changes and clarifications. First, the proposed rule would 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, the proposed rule would 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. The proposed rule would also provide 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. The proposed rule would 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, the proposed rule would 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 principal office is situated. 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 proposes to allow 100% of a firm's employees to telework, but where that occurs would require 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 seeks 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. If permitted, SBA believes this should be limited to firms with commercial leases and/or firms with only a single office location but seeks comments on this and other changes SBA should consider in response to the shift to telework.

The proposed rule would 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 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). This is SBA's current interpretation of the statutory definition of ''Qualified Disaster Area'' and the proposed rule would only make that interpretation clearer.

The proposed rule would amend 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.

The proposed rule would 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 is proposing 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. The proposed rule would 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.

The proposed rule would amend 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). SBA amended § 126.200(b)(1) to require 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. The proposed rule would adjust § 126.103 to be consistent with § 126.200(b)(1).

The proposed rule would define ''System for Award Management (SAM)'' as having the same meaning as that which is in FAR 2.101. SBA also proposes to remove the words ''System for Award Management (*SAM.gov*)'' wherever they appear in this part and add in their place the acronym ''SAM''.

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

Section 126.104

The proposed rule would make several amendments to § 126.104, which explains how Governor-designated covered areas become designated. First, the proposed rule would 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, the proposed rule also would clarify that a petition need not seek SBA approval for those covered areas previously designated as Governor-designated covered areas. Third, the proposed rule would provide 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, the proposed rule would 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, the proposed rule would 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.'' To be consistent with Congressional intent, this proposed rule would 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.''

Section 126.105

The proposed rule would add a new § 126.105, explaining when the HUBZone Map will be updated in accordance with statutory requirements. Proposed § 126.105 would provide that Qualified Census Tracts and Qualified Non-Metropolitan Counties will be updated every 5 years. This is consistent with the statutory requirement for SBA to update these designations on a 5-year cycle. The proposed rule would provide 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 5-year cycle, and will expire after 3 years. The proposed rule would provide 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 8 years. The proposed rule would provide 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 5-year HUBZone Map update following the declaration. Finally, the proposed rule would provide 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 5-year HUBZone Map update

following the approval, or one year after the petition is approved, whichever is later.

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 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 would clarify SBA's intent in this regard. The proposed rule would also provide the same guidance for WOSB/EDWOSB certifications by adding a new § 127.200(e) and to VOSB/SDVOSB certifications by revising § 128.204(a).

Section 126.200

The proposed rule would 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, the proposed rule would provide 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). For example, if a firm was certified on May 1, 2020, and purchased a building on December 1, 2020, the 10-year clock would start when the firm recertifies prior to May 1, 2023.

Second, the proposed rule would 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, the proposed rule would 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, the proposed rule would 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.

The proposed rule would 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 the proposed rule merely makes that explicit.

The proposed rule would revise § 126.200(d)(3), which addresses ''Legacy HUBZone Employees'' to: clarify the amount of time an individual must reside in a HUBZone in order to qualify as a Legacy HUBZone Employee; specify that residence in a Redesignated Area does not qualify someone for this provision; and to implement limits on the number of Legacy HUBZone Employees a firm may have.

First, the proposed rule would provide 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, the proposed rule would 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. The proposed rule intends 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, the proposed rule would provide 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 seeks comments on what the limit on Legacy HUBZone Employees should be and whether there should be any other limitations. Specifically, SBA requests comments on the following: 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 proposed rule would revise § 126.200(e), which addresses the ''attempt to maintain'' requirement. The proposed rule would 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 rule would provide 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.

Similarly, the proposed rule would 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 annual recertification. 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.

Finally, the proposed rule would revise § 126.200(g) 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.

Section 126.201

The proposed rule would amend § 126.201 by rephrasing 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.'' The proposed rule would 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.

Section 126.204

The proposed rule would 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.

The proposed rule would 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, the proposed rule would 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.

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). This proposed rule would change 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 would also add similar language to § 128.301 for the VetCert program.

Section 126.304(e)

The proposed rule would amend § 126.304(e) to clarify the records that HUBZone participants must maintain to ensure continued eligibility. Specifically, the proposed rule would provide 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).

Section 126.306(h)

The proposed rule would amend § 126.306 by adding a new paragraph (h) to make clear that the D/HUB's decision to approve or deny an application to the HUBZone program is the final agency decision. This has been 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.

Sections 126.309, 126.803, 127.305, and 128.305

The proposed rule would revise § 126.309, which describes when a declined or decertified firm can re-apply for HUBZone certification. The proposed rule would keep the 90-day wait period for firms whose application has been declined, but would 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.

At the present time, the HUBZone portfolio is once again being significantly impacted by changes to the HUBZone Map caused by the decennial census. When the HUBZone Map was updated on July 1, 2023, many Redesignated Areas lost their HUBZone status, and thus many small businesses with principal offices in those Redesignated Areas have faced (or are facing) the decision to either relocate their principal office or withdraw from the program. Given how many small businesses are being affected by the expiration of the Redesignated Areas—whether as a result of its principal office no longer being located in a HUBZone or employees no longer residing in a HUBZone—SBA believes it is best to eliminate the waiting period that currently applies after decertification.

This rule proposes 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, the proposed rule would 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.

Section 126.401

The proposed rule would revise § 126.401, which explains what program examinations are. The proposed rule would provide 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 proposed change would be necessary if SBA implemented the proposed changes requiring 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. In light of this proposed requirement, proposed § 126.401 would provide that during a program examination, SBA ''may verify that the concern met the program's eligibility requirements at the time of its application for certification, at the time of any recertification, or at the time of its offer for a HUBZone contract.''

Section 126.403

The proposed rule would 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.'' It is true that SBA may conduct a site visit to one or more of a HUBZone concern's offices as part of a program examination. However, site visits are just one potential facet of a program examination and not all program examinations include site visits.

Section 126.404

The proposed rule would amend § 126.404 to clarify that where a firm is found ineligible pursuant to a program examination, SBA will decertify the firm by removing the firm's certification in DSBS for a period of 30 calendar days, during which time the firm is ineligible to submit offers for or be awarded HUBZone contracts. SBA may also identify such decertification actions on its website to ensure that relevant contracting officers are aware of any such decertification. Decertification in this instance is a statutory requirement under section 31(d)(6) of the Small Business Act. Prior to this rule, SBA has not formally removed firms' HUBZone status in DSBS during this 30-day period. However, SBA has determined 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 would provide that the firm must provide written notice of the concern's ineligibility to the contracting officer for any pending HUBZone award. During this 30-day period, the firm may submit documentation showing that it was in fact eligible on its recertification date. If the concern failed to submit documentation sufficient to demonstrate its eligibility by the last day of the 30-day period, the concern would remain decertified. If SBA overturned its determination, SBA would reverse the firm's decertification and reinstate its certification.

Sections 126.500 and 126.601

The proposed rule would revise §§ 126.500 and 126.601 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. Currently, the HUBZone rules require firms to annually recertify their HUBZone status to SBA. Under the current rules, once a firm annually recertifies its HUBZone status, it generally can 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, SBA's current 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. Under the current regulations, if a firm is eligible as of its certification or certification anniversary date, it remains 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 the current process can permit 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, proposed § 126.601(a) would require a firm to be both a certified HUBZone small business and one that continues to be eligible as of the date of its offer for a HUBZone contract.

In light of this change, the rule also proposes to amend § 126.500 to require firms to recertify to SBA every three years, rather than annually. 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. Moreover, SBA believes that uniformity among its contracting programs is an important goal, and SBA's WOSB and VetCert programs require firms to be eligible at the time of offer for contracts and to recertify to SBA every three years. Thus, returning to triennial recertification, combined with the change to require HUBZone firms to be eligible on the date of offer for HUBZone contracts, would bring the HUBZone program

more in line with SBA's other socioeconomic contracting programs.

The proposed rule would clarify 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. The proposed rule, however, would provide that certainty. 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. However, the proposed rule would specify that there is an exception to this rule for HUBZone sole source awards, for which a firm must be HUBZone-certified at the time of award. SBA believes that sole source procurements require stricter eligibility rules. In order 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 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.

The proposed rule would clarify that an offeror under a competitive HUBZone contract must be identified as HUBZone-certified in DSBS when it submits its initial offer. SBA proposes to add this to clarify that for the HUBZone program, unlike the WOSB Program, a firm cannot submit an offer on HUBZone contract while its application is still pending. That is, a concern is only eligible to submit offers for HUBZone contracts after SBA has formally approved its application and updated DSBS (or successor system) showing that the concern is a certified HUBZone small business concern. In addition, the proposed rule would clarify 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 has also 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 annual recertification if the firm is performing a HUBZone contract. This means that a firm being awarded HUBZone contracts in essence never has to demonstrate that it is employing at least 35% HUBZone residents. SBA believes this is contrary to the purpose of the HUBZone Program. SBA believes it would make more sense to give 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. This rule proposes that the grace period be 12 months following the award of a HUBZone contract. To implement this proposed change, proposed § 126.500(a)(1)(i) would provide 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. Proposed § 126.500(a)(1)(ii), on the other hand, would provide 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.

Proposed § 126.500(a)(2) would provide that a concern's recertification must be submitted within 90 calendar days before the triennial anniversary of its HUBZone certification date. This 90-day window mirrors the VetCert regulations and thus creates additional uniformity among SBA's programs.

Proposed § 126.500(a)(3) would provide that a firm that fails to recertify will be proposed for decertification. However, SBA is seeking comments on whether such firms should be decertified automatically within a certain timeframe (such as 30 days) of failing to recertify.

Proposed § 126.500(b) would 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, using a risk-based analysis. The proposed rule would further provide that 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 this rule would make these policies clearer.

Section 126.501

The proposed rule would revise § 126.501 in its entirety. The proposed section would 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, the proposed rule would provide 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. The proposed section would provide that 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.

Second, proposed § 126.501(b) would provide 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 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.

Section 126.503

The proposed rule would 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.

Section 126.504

The proposed rule would 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 would be consistent with the addition of a new paragraph (d) to § 126.503, discussed above.

The proposed rule would revise § 126.504(c) by renumbering the introductory language as paragraph (c)(1), changing paragraph (c)(1) to paragraph (c)(2), and eliminating current paragraph (c)(2) as unnecessary. The proposed rule would then amend renumbered § 126.504(c)(1) by clarifying that a firm is ineligible to submit offers for HUBZone contracts at the time SBA decertifies the firm. 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 may identify such decertification actions on its website to address the occasional lags.

The proposed rule would amend renumbered § 126.504(c)(2) by clarifying that a firm must be HUBZone-certified at the time of its initial offer for a HUBZone contract, and it must be able to demonstrate its compliance with the HUBZone requirements (*e.g.,* the 35% HUBZone residency requirement and the principal office requirement) as of the date of its offer. This provision would continue to provide that HUBZone eligibility is determined at the time of offer, and not at the time of award, but eligibility would no longer relate back to the firm's certification anniversary date.

Section 126.600

The proposed rule would amend § 126.600 to clarify that qualifying joint ventures may be considered HUBZone small business concerns for HUBZone contracts and to clarify that the rules in Part 126 apply to HUBZone prime contracts, not subcontracts awarded to HUBZone small businesses. The proposed rule would add a new paragraph (e) clarifying that orders awarded to certified HUBZone small business concerns under set-aside Multiple Award Contracts are HUBZone contracts.

Section 126.602

The proposed rule would amend the requirements relating to how a certified HUBZone small business concern ''attempts to maintain'' having at least 35% of its employees reside in a HUBZone during the performance of a HUBZone contract. Specifically, the proposed rule would revise § 126.602 to provide that a certified HUBZone small business concern that has received a HUBZone contract must be ''attempting to maintain'' the 35% HUBZone residency requirement (including by having at least 20% of its employees reside in a HUBZone) on the first certification anniversary date after being awarded a HUBZone contract and at least 35% of its employees reside in a HUBZone on each certification anniversary date thereafter. SBA does not believe that the 35% HUBZone residency requirement should be watered down to as low as 20% over the course of a firm's participation in the HUBZone program merely because a HUBZone small business concern received one or more HUBZone contracts. However, SBA also believes that it must give some meaning to the ''attempt to maintain'' statutory language, which is why allowing a firm to drop below the 35% residency requirement (but no lower than 20%) for a year makes sense to SBA. SBA believes that giving a firm an additional year to come back into compliance with the 35% residency requirement after being awarded a HUBZone contract is a good balance between the two statutory requirements. However, SBA requests comments on how to implement this requirement where a HUBZone firm receives multiple HUBZone awards in successive years.

Section 126.605

The proposed rule would 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 changes 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.

Section 126.612

The proposed rule would amend § 126.612 by adding a new paragraph (f) providing that the awardee of a HUBZone sole source contract must be a certified 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.

Section 126.613

The proposed rule would amend § 126.613, which addresses the HUBZone price evaluation preference (PEP), to clarify how the HUBZone PEP should be applied. The proposed rule would revise paragraph (a) and the examples. The proposed rule would provide 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 would add 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.

The proposed rule would add 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 would amend 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 would amend 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 would clarify how the PEP should be applied to a procurement using trade off procedures. The proposed rule would provide that for a procurement using trade off procedures, the CO 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 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, award shall be made to the certified HUBZone small business concern.

Section 126.615

The proposed rule would 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.

Section 126.616

The proposed rule would amend § 126.616, which describes the circumstances under which a joint venture can be awarded a HUBZone contract. The proposed rule would delete language from current § 126.616(a)(1) stating that a ''joint venture itself need not be a certified HUBZone small business concern.'' SBA proposes 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) would clarify that SBA does not certify HUBZone joint ventures, but provide 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 would add a new paragraph (k) to provide 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.

Section 126.619

As noted above, this rule proposes to move recertification requirements for size and socioeconomic status to a new § 125.12. A revised § 126.12 would refer to the requirements set forth in§ 125.12 as applying to recertifications of HUBZone status.

Section 126.701

The proposed rule would 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.

Section 126.800

The proposed rule would amend § 126.800 by removing the paragraph subheadings and incorporating them into the text of the regulation, to make the section more readable. In addition, the proposed rule would clarify that interested parties may protest a HUBZone joint venture offeror's eligibility for award of a HUBZone contract. Finally, the proposed rule would add a new paragraph (c) providing that for contracts other than HUBZone contracts, SBA may protest an apparent successful offeror's status as a certified HUBZone small business concern. SBA believes that where there is evidence that the prospective awardee does not meet the HUBZone requirements, the agency needs to be able to protest a firm's HUBZone status, even for a non-HUBZone award. This would prevent an agency from receiving HUBZone credit where the awardee is not eligible for the program.

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 including price, the proposed rule would first align the protest procedures 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.

Section 126.803

SBA proposes 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. As explained above, this proposed rule would require HUBZone firms to be eligible at the time of offer for competitively awarded HUBZone contracts. Consistent with this proposed change, proposed § 126.803(a) would provide 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. For HUBZone sole source awards, SBA would determine a protested firm's HUBZone eligibility as of the date of award.

SBA also proposes to redesignate paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), and to add a new paragraph (c) to § 126.803. Proposed § 126.803(c) would provide that the burden of proof to demonstrate eligibility is on the protested concern. The section would explain 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 it makes sense to add them to the protest regulations.

Section 126.900

The proposed rule would 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 certified small business concern in order to obtain or maintain HUBZone certification, the D/HUB will propose the firm for decertification.

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 would add a United States residency requirement for qualifying individuals in the WOSB and VetCert programs.

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, the proposed rule would state 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. The

proposed rule would also revise 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 proposed rule would change 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 proposed 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 proposed rule would make 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?

The proposed 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. Additionally, the proposed rule adds a telework provision. Proposed compliance requirements include limits on the number of Legacy Employees, revised requirements for the use of the ''attempt to maintain'' statutory language, possible minimum thresholds for number of hours worked, and proof of eligibility at the time of offer of a HUBZone contract. These proposed 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 SBA believes would 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 proposed 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 proposed 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.[4] 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, the savings from this change in the future, in addition to the wider economic benefits generated by more HUBZone firms in communities. Deletion of program-specific recertification requirements would 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 could reduce the time burden by an estimated 617 hours and generate an additional $81,728 in annual savings.[5]

The proposed rule recognizes the increased importance of telework and allows small businesses with 100 percent of its employees to participate in the HUBZone program but with the condition that at least 51 percent of the employees work from HUBZone locations. This provision enables program participants to use the benefits of telework for recruitment and flexibility while addressing the program's goals of stimulating economic activity in HUBZone areas.

Revisions in Compliance Measures

The proposed 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 and SBA is seeking comments on aspects of limiting the number of Legacy Employees.

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.

Currently, § 126.103 specifies that an individual who works 40 hours in a four-week period is an employee. SBA proposes to increase the number of hours worked to 80 but seeks comments on whether this level is appropriate. This proposal is a revised and stricter compliance requirement but is one that SBA believes better promotes the purpose of the program and the need for a firm's legitimate presence in the HUBZone area. SBA expects that the increase in hours of gainful employment would be matched with increased output and therefore the additional hours would not impose a burden on employers. Recognizing some employers' and employees' needs for fewer hours per period, SBA seeks comments on a minimum number of hours for some individuals.

This rule proposes to require 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 proposed rule will increase the burden on HUBZone small business concerns by approximately 2,100 hours for an estimated annual cost of $278,166.[6] 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 proposed 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 recertification. Benefits from the proposed changes regarding affiliation and control reduce uncertainty for investors and may 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 proposed 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

[4] The calculation assumes that with triennial recertification, two-thirds of the number of program participants, which is now 3,700 firms, will not recertify each year. Using 3,700 for this calculation, with the value of an hour at $132.46 per hour, which is the mean hourly wage of $66.23 plus 100 percent for overhead and benefits for Management Occupation (from Management Occupations (*bls.gov*), retrieved April 16, 2024), savings for about 2,468 small business is $326,912.

[5] The calculation assumes that with triennial recertification, two-thirds of the 10 percent of HUBZone firms that are in WOSB and 15% of the HUBZone firms that are in 8(a) will not engage in program-specific recertification procedures in a given year. A small number of firms participated in all three of these contracting programs. Using the current number of about 3,700 small businesses in the HUBZone program, with the value of an hour at $132.46 per hour, which is the mean hourly wage of $66.23 plus 100 percent for overhead and benefits for Management Occupation (from Management Occupations (*bls.gov*), retrieved April 16, 2024), savings for about 247 small business in HUBZone program and WOSB and 370 small business in HUBZone and 8(a) amounts to $81,728. SBA notes that this would be a low estimate of relief of recertification burden because it does not include HUBZone firms that also participate in other contracting programs like VetCert.

[6] This calculation is 2,100 multiplied by the value of an hour of $132.46 per hour, which is the mean hourly wage of $66.23 for Management Occupation (from Management Occupations (bls.gov), retrieved April 16, 2024) plus 100 percent for overhead and benefits.

comprehensive revision to the HUBZone Program regulations, which implemented changes intended to make the HUBZone Program more efficient and effective. This proposed 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, the proposed rule would make 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 would 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. The proposed rule would 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 proposed 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 proposed 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 proposes to amend 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;

(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; and

(vi) Amendment of the company's corporate governance documents to remove the shareholder's authority to block any of (1) through (5).

* * * * *

(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, 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.

* * * * *

■ 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 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. SBA may also consider other relevant information where it appears that the tax return does not properly capture a concern's total revenue.

* * * * *

■ 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 of 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 paragraphs 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.gov 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:

■ a. Adding paragraph (b)(2)(iii);

■ b. Redesignating paragraphs (b)(12) and (b)(13) as paragraphs (b)(14) and (b)(15), respectively; and

■ c. Adding new paragraphs (b)(12) and (b)(13).

The revision and additions read as follows:

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

* * * * *

(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, the Associate Administrator for Business Development or the Associate General Counsel for Procurement Law may request a formal size determination.

* * * * *

(12) In connection with a size recertification relating to a contract required by § 125.12 of this chapter, the contracting officer, 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 may request a formal size determination.

(13) 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.

* * * * *

■ 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 sentence 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.gov*), 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.gov* 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; or

(D) The Participant has never received an 8(a) contract.

(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;

(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 corporate governance documents to remove the shareholder's authority to block any of (1) through (5).

* * * * *

■ 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), (a)(3), (a)(4) and (a)(5) as paragraphs (a)(1), (a)(2), (a)(3), and (a)(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) *Termination based on false or misleading information.* (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.

(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.

§ 124.403 [Amended]

■ 20. Amend § 124.403 by removing the text ''within thirty (30) days after'' from paragraph (a) and adding, in its place, the text ''in the 90 days prior to''.

■ 21. 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

* * * * *

■ 22. 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. 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 are no longer available for the requirement as anticipated). 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.

* * * * *

■ 23. Amend § 124.509 by:

■ a. Removing the text ''within 30 days from'' in paragraph (c)(1) and adding in its place the text ''in the 90 days prior to'';

■ b. Redesignating paragraph (d)(1)(ii) as paragraph (d)(1)(iii); and

■ c. Adding new paragraph (d)(1)(ii).

The addition 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:

(A) Only procurements for which the Participant had reasonable prospects of success; and

(B) Only the base year of the procurement at issue and not the projected full value of the procurement.

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: 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'' since there was no reasonable prospect for success in submitting an offer for a $100M contract where the firm had never performed a contract in excess of $5M. 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).

* * * * *

■ 24. 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.

* * * * *

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

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

* * * * *

(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. 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]

■ 26. 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 ''5,000,000 and $20,000,000''; and
■ c. Removing the word ''$2,000,000'' in paragraph (c) and adding in its place the word ''$5,000,000''.

§ 124.603 [Amended]

■ 27. Amend § 124.603 by removing the word ''Former'' and adding in its place the words ''If requested by the SBA, former''.

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 redesignating paragraph (c)(6) as paragraph (c)(7) and adding new paragraph (c)(6) to 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 one or more socioeconomic certifications in addition to a size certification (*i.e.,* a competition cannot be limited only to small business concerns that are also 8(a), HUBZone, WOSB, or SDVOSB certified) or give evaluation preferences to concerns having one or more socioeconomic certifications.

* * * * *

■ 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) * * * Work performed by an employee obtained from a temporary employee agency, professional employee 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:
■ a. Removing the second sentence in paragraph (e) and adding in its place two sentences;
■ b. Adding an Example 1 to paragraph (e); and
■ c. Revising paragraph (f).

The additions and revision 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) * * * A procuring activity has discretion whether to require a protégé member of a joint venture to demonstrate some level of past performance and/or experience. Where it does so, the procuring activity may not require a protégé firm to individually meet all the same evaluation or responsibility criteria as that required of other offerors generally.

* * *

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 where there is a separate legal entity joint venture or the name of a small business partner to the joint venture where 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. Redesignating paragraph (e)(6) as paragraph (c)(4);
■ f. Revising newly redesignated paragraph (c)(4)(iv);
■ g. Adding paragraph (c)(5);
■ h. Adding paragraph (d)(1)(iv); and
■ i. 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 continues to qualify as small, and, where necessary and appropriate, novate such contract or reserve pursuant to FAR 42.1204.

* * * * *

(c) * * *

(4) * * *

(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 can 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) 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, the protégé firm can terminate its mentor-protégé relationship.

(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.

* * * * *

■ 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 an approved novation, merger, acquisition, or sale, including agreements in principle, 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.* If a concern has a disqualifying recertification in response to a contracting officer request for recertification on a specific order or agreement, the concern is ineligible for the specific order or agreement but remains eligible for other set aside or reserved awards and unrestricted awards.

(B) *Other Events Triggering Recertification.* If a concern has a disqualifying recertification in response to any triggering event for recertification, aside from a contracting officer request for recertification on a specific order or agreement, the concern is ineligible to submit an offer for a set aside or reserved award under a multiple award contract 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 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).

(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 small business set-aside or reserve award, a concern that submits a disqualifying

recertification is ineligible to receive options.

(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).

■ 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 ''Certify'', ''Community Development Corporation (CDC)'', ''Contracting Officer (CO)'', ''Decertify'', ''Dynamic Small Business Search (DSBS)'', ''Employee'', ''Governor-Designated Covered Area'', ''HUBZone small business concern or certified HUBZone small business concern'', ''Indian Tribal Government'', ''Interested party'', ''Principal office'', ''Qualified Disaster Area'', ''Redesignated Area'', ''Reside'', and ''Small business concern'';

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

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

■ e. Adding definitions for ''HUBZone certification date'', ''HUBZone Map'', ''HUBZone resident employee'', and ''System for Award Management (SAM)'', in alphabetical order.

The revisions and additions read as follows:

§ 126.103 What definitions are important in the HUBZone program?

* * * * *

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 (CO) has the meaning given that term in 41 U.S.C. 2101(1), which defines a CO 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 works a minimum of 80 hours during

the four-week period immediately prior to the relevant date of review.

(1) To determine the number of hours worked by each individual employed by the firm, 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).

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

(i) Individuals who are not owners and receive no compensation (including no in-kind 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.

(3) 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).

(4) 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, their 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.

Interested party means any certified HUBZone small business concern that submits an offer for a specific HUBZone set-aside contract (including a multiple award contract) or order, 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 to a certified HUBZone small business concern or by a reserve of an award given to a certified HUBZone small business concern, the contracting activity's contracting officer, or SBA.

* * * * *

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) If 100% of a firm's employees telework, at least 51% of its employees must work from HUBZone locations to meet the principal office requirement.

(5) 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).

* * * * *

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.

(i) Where such documentation is not available (or where the address on the individual's driver's license it outdated), SBA will require other specific proof of residency, such as deeds, leases, and/or utility bills, as well as a signed statement explaining why a driver's license is unavailable and attesting to an individual's dates of residency.

(ii) Where such documentation does not demonstrate 90 days of residency, SBA will require a signed statement attesting to an individual's dates of residency.

(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.

(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 (*i.e.,* date of application, date of recertification, or date of offer for a HUBZone contract).

(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 (SAM or *SAM.gov*), 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 1 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 10 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 (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, the Administrator 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 § 126.104(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), 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. Adding two sentences to the end of paragraph (b)(1);

■ b. Revising paragraph (c)(1);

■ c. Adding paragraph headings in paragraphs (c)(2) and (d)(2);

■ d. Removing the words ''Example to paragraph (d)(3)'' in paragraph (d)(3)(i) and adding in their place the words ''Example 1 to paragraph (d)(3)'';

■ e. Revising paragraphs (d)(1) and (d)(3);

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

■ g. Adding paragraph (h).

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 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.gov* 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) 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 (d)(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 May 1, 2021.

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

(A) An office located in a Redesignated 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) *Employees.* (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) An individual who initially qualified as a HUBZone Resident Employee by living in a Redesignated Area or a Qualified Disaster Area will not qualify as a Legacy HUBZone Employee.

(iii) A certified HUBZone small business concern may have up to one Legacy HUBZone Employee at a given time.

(iv) 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.

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

Example 1 to paragraph (d)(3): As part of its application for HUBZone certification, a concern provides documentation showing that it has 10 employees, 4 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. Only one of these individuals may be treated as a Legacy Employee and count as a HUBZone Resident Employee for purposes of recertification.

(e) *Attempt to maintain.* (1) At the time of application and each recertification, 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) If the concern is owned in whole or in part by one or more Indian Tribal Governments (or by a corporation that is wholly owned by one or more Indian Tribal Governments), the concern must certify at the time of application and at each recertification that it will ''attempt to maintain'' (see § 126.103) the applicable employment percentage described in paragraph (c)(2) of this section during the performance of any HUBZone contract it receives.

(3) At the time of offer for a HUBZone contract, a concern must certify that it will ''attempt to maintain'' compliance with the 35% HUBZone residency requirement.

(f) *Subcontracting.* (i) At the time of application and each recertification, a concern must certify that it will comply with the applicable limitations on subcontracting requirements in connection with any HUBZone contract it receives (*see* §§ 125.6 and 126.700).

(ii) In connection with a HUBZone contract, certified HUBZone small business concerns also agree to comply with the limitations on subcontracting requirements under FAR clause 52.219–14 by submitting an offeror for and executing a HUBZone contract.

(g) *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.

(h) *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.

* * * * *

(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 web page at *www.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) The D/HUB's decision is the final agency decision.

§ 126.308 [Amended]

■ 51. Amend § 126.308 by removing the words ''System for Award Management'' in paragraph (b) 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.gov* (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 the D/HUB (or designee) 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 the D/HUB (or designee) 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, such concern may not compete for or be awarded a HUBZone contract 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 reverse the firm's decertification and reinstate its certification.

■ 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 propose the concern for decertification pursuant to § 126.503.

(b) *Program examinations.* SBA will conduct program examinations of certified HUBZone small business concerns to ensure continued program eligibility 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) 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.

(b) A certified HUBZone small business concern that is performing a HUBZone contract and fails to ''attempt to maintain'' the minimum employee HUBZone residency requirement (*see* § 126.103) must notify SBA 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.

§ 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); and

■ c. Adding new paragraph (d).

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.* If SBA is unable to verify a certified HUBZone small business concern's eligibility or has information indicating that a concern may not meet the eligibility requirements of this part, SBA may propose decertification of the concern. In addition, if SBA has information indicating that a HUBZone small business concern that is performing a HUBZone contract is not attempting to maintain (*see* § 126.103) compliance with the 35% HUBZone residency requirement, SBA will propose the concern for decertification.

(1) *Notice of proposed decertification.* SBA will notify the HUBZone small business concern in writing that SBA is proposing to decertify it and state the reasons for the proposed decertification. The notice of proposed decertification will notify the concern that it has 30 calendar days from the date it receives 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 a mailing address, email address, or fax number provided in the concern's profile in DSBS (or successor system).

(2) *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.

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

(4) *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. The D/HUB will provide written notice to the concern stating the basis for the determination.

(i) If SBA finds that the concern is not eligible, the D/HUB 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, inconsistent, 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 request that Government-wide debarment or suspension proceedings be initiated by the agency.

(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.

* * * * *

■ 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. Revising paragraph (c).

The additions and revisions read 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

* * * * *

(c)(1) After a concern has been decertified by SBA, it is ineligible for the HUBZone program and may not submit an offer for a HUBZone contract.

(2) 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 no longer qualifies as an eligible HUBZone small business on the date of award.

■ 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 to certified HUBZone small business concerns (or HUBZone joint ventures that comply with the requirements of § 126.616) 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 concern (or a HUBZone joint venture that complies with the requirements of § 126.616);

(d) Awards based on a reserve for certified HUBZone small business concerns (or HUBZone joint ventures that comply with the requirements of § 126.616) in an unrestricted solicitation;

(e) Orders awarded to certified HUBZone small business concerns (or HUBZone joint ventures that comply with the requirements of § 126.616) under a multiple award contract that was set-aside for certified HUBZone small business concerns; or

(f) Orders set-aside for certified HUBZone small business concerns (or HUBZone joint ventures that comply with the requirements of § 126.616) under a multiple award contract that was awarded in full and open competition.

■ 62. Amend § 126.601 by revising paragraphs (a) and (b)(1) 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.

(i) An offeror on 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.

(ii) 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.

(iii) 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.

(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;

* * * * *

(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 be attempting 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. Amend § 126.612 by:
■ a. Revising the section heading;
■ b. Removing the word ''and'' at the end of paragraph (d);
■ c. Removing the punctuation mark ''.'' at the end of paragraph (e) and adding in its place the text ''; and''; and
■ d. Adding paragraph (f).

The addition to read as follows:

§ 126.612 When may a contracting officer award a sole source contract to a HUBZone small business concern?

* * * * *

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

■ 69. Amend § 126.613 by revising paragraph (a) and adding a paragraph heading in paragraph (b).

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) *In general.* (1) Where a CO will award a contract on the basis of full and open competition, the CO 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 large 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 large 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 if the certified HUBZone small business concern will receive the contract as part of a reserve for certified HUBZone small business concerns.

(4) To apply the HUBZone price evaluation preference, the CO must add 10% to the offer of the otherwise successful large business offeror. If the certified HUBZone small business concern's offer is lower than that of the large 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 CO 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 evaluation adjustment, the price offered by a certified HUBZone small business concern is equal to the price offered by a large business (or, in a best value procurement, 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), award shall be made to the certified HUBZone small business concern.

Example 1 to paragraph (a): In a full and open competition, 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 CO 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, 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 CO 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, 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 CO 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, 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.* * * *

* * * * *

■ 70. Revise § 126.615 to read as follows:

§ 126.615 May a large business participate on a HUBZone contract?

Except as provided in §§ 126.618 and 125.9, a large 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.gov* (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) 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 contracts other than HUBZone contracts, SBA may protest an apparent successful offeror's status as a certified HUBZone small business concern.

§ 126.801 [Amended]

■ 76. Amend § 126.801 by:

■ a. Removing the words ''should not qualify'' in the introductory text to paragraph (b)(1) and adding in their place the words ''did not qualify'';

■ b. Removing the words '', on the anniversary date of its initial HUBZone certification,'' in paragraph (b)(1)(iv); and

■ c. Removing the words ''at the time the concern applied for certification or on the anniversary of such certification'' in paragraph (b)(3)(i) and adding in their place the words ''at the time of offer''.

■ 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. 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.

(2) 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 offer for the procurement.

(3) 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 offer for the procurement.

* * * * *

(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 certified small business concern in order to obtain or maintain HUBZone certification, the D/HUB will propose the firm for decertification.

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 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.gov*), 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.gov* 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.

(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;

(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 corporate governance documents to remove the shareholder's authority to block any of (1) through (5).

§ 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 *www.certify.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 in the 90 calendar days prior to its certification anniversary. Failure to do so will result in the concern being decertified.

Example 1 to paragraph (b). Concern B is certified by a third-party certifier to be eligible for the WOSB Program on July 20, 2024. 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 redesignating paragraph (f) as paragraph (g) and adding new paragraph (f) to read as follows:

§ 127.405 What happens if SBA determines that the concern is no longer eligible for the program?

* * * * *

(f) *Decertification based on false or misleading information.* (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 revising paragraph (c) and removing the words ''the annual distribution'' in paragraph (g) and adding in their place the words ''any distribution'' to read 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. Removing the word ''and'' at the end of paragraph (j)(4);

■ d. Removing the punctuation mark ''.'' at the end of paragraph (j)(5) and adding in its place the text ''; and''; and

■ e. Adding paragraph (j)(6).

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.

* * * * *

(j) * * *

(6) Amendment of the company's corporate governance documents to remove the shareholder's authority to block any of (1) through (5).

* * * * *

■ 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.gov*), or successor system, profile. In determining whether a concern applying to be certified as a VOSB or SDVOSB 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 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.gov* 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 text ''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.

§ 128.306 [Amended]

■ 100. Amend § 128.306 by removing the text ''120 calendar days'' from paragraph (a) and adding, in its place, the text ''the 90 calendar days''.

§ 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 adding paragraph (g) to read as follows:

§ 128.310 What are the procedures for decertification?

* * * * *

(g) *Decertification based on false or misleading information.* (1) 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.

(2) 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.

(3) 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. Removing the words ''under paragraph (e) of this section'' in paragraph (d)(1)(i) 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.gov* with the VOSB or SDVOSB-certified joint venture partner identified. * * *

* * * * *

(k) 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. 2024–18325 Filed 8–22–24; 8:45 am]

BILLING CODE 8026–09–P