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SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245–AH71

Past Performance Ratings for Small Business Joint Venture Members and Small Business First-Tier Subcontractors

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to implement new provisions of the National Defense Authorization Act (NDAA) Fiscal Year (FY) 2021. The final rule provides new methods for small business government contractors to obtain past performance ratings to be used with offers on prime contracts with the Federal Government. A small business contractor may use a past performance rating for work performed as a member of a joint venture or for work performed as a first-tier subcontractor. This final rule updates the requirements for small business subcontracting plans to add a requirement for prime contractors to provide past performance to a first-tier, small business subcontractor when requested by the small business.

DATES: This rule is effective on August 22, 2022.

FOR FURTHER INFORMATION CONTACT: Donna Fudge, Procurement Analyst, Office of Policy Planning and Liaison, Small Business Administration, at *Donna.Fudge@sba.gov,* (202) 205–6363.

SUPPLEMENTARY INFORMATION:

I. Background Information

Section 868 of National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021, Public Law 116–283, addressed a common obstacle that small businesses may face when competing for prime Federal Government contracts: possessing qualifying past performance. The final rule implements section 868 by providing small businesses with two new methods for obtaining qualifying past performance. First, a small business may use the past performance of a joint venture of which it is a member, provided that the small business worked on the joint venture's contract or contracts. Second, a small business may use past performance it obtained as a first-tier subcontractor on a prime contract with a subcontracting plan. For this latter method, section 868 authorizes the small business to seek a past performance rating from the prime contractor and submit the rating with the small business' offer on a new prime contract. SBA published a proposed rule on November 18, 2021, 86 FR 64410, to implement section 868. After receiving comments from the public, SBA finalizes the rule with the changes described below.

Section 868 added a new section 15(e)(5) to the Small Business Act, 15 U.S.C. 644(e)(5), to address past performance ratings of joint ventures for small business concerns. A small business concern that previously participated in a joint venture with another business concern (whether or not the other concern was small) may use the past performance of the joint venture with the small business' offer on a prime contract. Section 15(e)(5) required SBA to establish regulations to allow the small business to elect to use the joint venture's past performance if the small business has no relevant past performance of its own. The small business must: (i) identify to the contracting officer the joint venture of which the small business was a member; (ii) specify the contract(s) of the joint venture the small business elects to use; and (iii) inform the contracting officer what duties and responsibilities the small business carried out as part of the joint venture. In turn, the contracting officer shall consider the past performance of the joint venture when evaluating the past performance of the small business concern, giving due consideration to the information submitted about the duties and responsibilities that the small business carried out.

To address first-tier small business subcontractors, section 868 amended section 8(d)(17) of the Small Business Act, 15 U.S.C. 637(d)(17), which previously discussed a pilot program, to provide past performance ratings for small business subcontractors. Under section 868, small business concerns may obtain past performance ratings for performance as a first-tier subcontractor on a prime contract that included a subcontracting plan. The final rule requires the prime contractor on the prime contract to provide a rating of the small business' past performance with respect to that prime contract to the small business within 15 calendar days of the request. If the small business elects to use the past performance rating, the contracting officer shall consider the past performance rating when evaluating the small business' offer on a prime contract.

This final rule creates a separate mechanism for first-tier subcontractors to obtain past performance ratings. A Federal Acquisition Regulation (FAR) rule implementing this requirement will account for the additional burden in its existing information collection and clearance for the information collection will be obtained by the General Services Administration (GSA) for the FAR Council.

SBA received 15 comments in response to the proposed rule. The following discusses and responds to the comments.

II. Summary of and Response to Comments

Support for the Rule

Comment: SBA received numerous comments expressing support for this final rule.

Response: SBA appreciates the feedback and engagement from stakeholders. SBA will implement the rule with the changes as noted below.

Outside the Scope of the Rule

Comments: Comments were received pertaining to SBA's revised regulations to facilitate agency use of affiliate past performance. Both commenters suggested the Federal Acquisition Regulation (FAR) section 15.305(a)(2)(iii) be amended to mandate past performance acquired by entity-owned affiliated/sister companies be evaluated.

Response: SBA does not have authority to amend the FAR. Requiring procuring activities to use affiliate/sister companies past performance would require the FAR Council to open a FAR

Case. Therefore, the proposed change is outside the scope of this rulemaking.

Comment: A commenter suggested continued use of Past Performance Questionnaires and increasing use of small business invitation for bid set-aside opportunities. This commenter also suggested promotion of SBA's Mentor-Protégé program and consideration by the government of past performance from commercial (non-Federal) projects.

Response: The FAR currently provides for consideration of Federal, State, and local government, and private past performance. *See* FAR 15.305(a)(2)(ii). Additionally, SBA recently amended its Mentor-Protégé regulation (85 FR 66146), effective November 16, 2020, and the amended regulation allows for consideration of past performance of both members of a Mentor-Protégé relationship. Therefore, no changes to this rule are necessary.

Negative Impact on Small Business From No Past Performance

SBA requested comments on whether small business subcontractors have been negatively impacted in competing for prime contracts due to not having a past performance rating(s).

Comments: There were several responsive comments, and all the respondents described some level of negative impact to small business because of lack of past performance ratings. More specifically, most of the commenters observed that solicitations require small businesses to have prior past performance—and in some cases, as a prime contractor—to win a prime contract. This treatment limits the ability of Black-owned small businesses and Native-owned small businesses to compete for contracts, in particular, two commenters stated. Additionally, four commenters suggested that lack of past performance creates an obstacle to small business participation, restrains competition, and restricts the government's access to innovative products.

Response: SBA acknowledges the impediments that small businesses have faced due to not having past performance ratings. As it now stands, FAR 15.302(a)(2)(iv) provides small businesses the opportunity to compete without a record of past performance. Section 868 of the NDAA FY 2021, however, sought to address small businesses not being able to compete for contracts because of lack of past performance. SBA believes that, by implementing this rule, the government will be able to attract new small business prime contractors. This will enhance competition in government contracting and provide agencies with increased access to innovative products and services.

Timeframe for Responding to a Small Business' Request for a Rating

Comments: The time period within which the prime contractor must respond to the subcontractor's request was set at 15 calendar days in the proposed rule. Three commenters supported the 15-calendar-day time period. One commenter requested a 10-business-day period, and another commenter requested a 15-business-day period. One commenter believed that a longer period of 30 days would still allow subcontractors enough time to prepare their proposal packages. Another commenter also observed that subcontractors could negotiate a period shorter than 15 days, and prime contractors could require in the subcontract that subcontractors reuse prior ratings from the same prime if one already has been provided.

Response: SBA adopts the 15 calendar-day response period as specified in the proposed rule. That period provides enough time for the prime contractor to prepare a response while still permitting the small business to respond to proposal deadlines. With respect to reusing prior ratings, the rule permits the subcontractor to use the same rating for multiple proposals. SBA does not anticipate that subcontractors will request multiple ratings from a prime contractor for the same work.

Timeframe for Using the Rating

Comments: Two commenters sought clarification on the period within which a subcontractor could continue to use its past performance rating for offers on prime contracts. The commenters suggested that a rating completed by the prime at the end of the contract be valid for three years to five years.

Response: The proposed rule had included a provision, similar to FAR 42.1503(g), that past performance would need to be from within three years (six for construction and architect-engineering) to be considered relevant. However, FAR 42.1503(g) applies only to past-performance information in CPARS, and, because the past-performance ratings in this rule are not in CPARS, that limitation does not apply. Instead, agencies have discretion to determine what is relevant with regard to past performance and could accept past performance that is older than the period in FAR 42.1503(g), as the comments suggest. The timeliness restriction also is not provided for in statute. This final rule therefore removes the timeliness restriction on using past performance.

Timeframe for Small Business Subcontractor To Request Past Performance Rating

SBA requested comments on whether to prescribe a time frame within which the subcontractor must make a request to the prime contractor for a rating under this final rule.

Comments: There were numerous comments suggesting a timeframe for the small business subcontractor to request a past performance rating. A few commenters suggested a 30-day time period after the period of performance within which the subcontractor would be required to request a rating. One suggested that the prime should review the small business on an annual basis, in addition to a review upon request during or within 90 days after the contractor's performance period. One commenter preferred a process in which the prime contractor would submit a rating within 14 days of the end of the contract and the subcontractor would receive 14 days to respond.

A separate commenter indicated that the subcontractors should be required to request a rating during the period of performance of the contract. Outside of the performance, the commenter stated, it would be difficult to accurately rate the subcontractor because of shifts in personnel. Similarly, another commenter wrote that subcontractors should not submit requests after the date of their final invoices. One commenter stated that SBA should require that the time period be specified in the subcontract agreement, but the commenter did not suggest a default period. Conversely, two commenters did not support negotiating the timelines and stated that the timelines should be uniform. One commenter expressed that subcontractors should only request ratings after the subcontractor's work is complete.

Response: SBA agrees with the commenters that the final rule should include a specific default period within which the subcontractor must submit its request to the prime contractor for a past performance rating. Based on the comments, SBA sets the deadline as 30 calendar days after completion of the period of performance for the prime contractor's contract with the government. This time period balances the prime's desire to avoid having an open-ended obligation, and the subcontractor's need for flexibility in submitting its request. The prime contractor and the subcontractor may choose to negotiate a later deadline than 30 calendar days after the prime's

contract completion. But the prime contractor cannot set a deadline earlier than the 30 calendar days after the prime's completion.

SBA disagrees that subcontractors should be limited to requesting ratings after their work on a contract is complete. For prime contracting, the government can provide ratings prior to contract completion (*i.e.,* at the end of base periods or option years). This rule treats subcontractors similarly by allowing them to request ratings midway through performance. Further, the intent of this change is to provide subcontractors more access to past performance ratings.

Allowing Ratings for Contracts Without a Subcontracting Plan

Comments: A few commenters suggested the rule should allow for ratings on subcontracts even where the prime is not required to have a subcontracting plan. These commenters expressed that this limits the ability to obtain a rating, particularly where the subcontractor is performing on another small business' prime contract.

Response: This final rule adopts the language in the proposed rule, which limited the requirement for subcontractors to request ratings to those prime contractors with subcontracting plans. Section 868 of NDAA FY 2021 included a precise definition of ''covered contract'' that limits application to those contracts with subcontracting plans. SBA observes, however, that a prime contractor could choose to provide a past performance rating, even though the contract did not include a subcontracting plan. An agency could then consider that rating at its discretion.

Concern Regarding Enforcement if Primes Do Not Provide Performance to Small Business Subcontractors

Comments: A few commenters expressed concern that there may be no enforcement mechanisms to ensure that prime contractors provide performance ratings for small business subcontractors. Three commenters specifically mentioned the lack of penalty for prime contractors that do not provide performance ratings.

Response: There are several provisions in the current regulatory framework that will help to enforce the duty of prime contractors to provide performance ratings for small business first-tier subcontractors when requested. The rule establishes that responding to subcontractor requests will be included in the prime contractor's subcontracting plans. See 13 CFR 125.3(c)(1)(xii)(A). There are consequences for failing to comply with a subcontracting plan, including: contract remedies such as termination for default or the withholding of award fees; a lower past performance rating under the subcontracting element (FAR 42.1502(g)(1) and 42.1503(b)(2)(v)); liquidated damages for failing to make a good faith effort to comply with the subcontracting plan (FAR 19.705–7); and even debarment if the failure is willful or repeated (FAR 9.406–2(b)(1)(i)).

Furthermore, subcontractors may notify the contracting officer of the prime's failure to provide a required rating, similar to the process provided for in FAR 52.242–5. SBA is therefore adding to this final rule that subcontractors should notify the contracting officer in the event that the prime contractor fails to submit the requested rating within the rule's prescribed timeframe.

Use of Standard/Contractor Performance Assessment Reporting System Format

Comments: SBA received several comments suggesting a standardized format for prime contractors to use in evaluating the past performance for subcontractors. Two commenters suggested using the Contractor Performance Assessment Reporting System (CPARS) format as the subcontractor past performance ratings format. Four commenters suggested using a standardized format, based on objective measures such as work scope and funded amount. One commenter suggested SBA should provide a sample past performance template to be added as an appendix to the subcontract. One commenter suggested clarification that a small business subcontractor rating does not need to be established for each subcontract.

Response: In response to these comments, SBA finds that the past performance evaluation factors should be the same as the CPARS evaluation factors. These evaluation factors are the minimum required to use in rating a subcontractor's past performance. The rule does not preclude the use of additional evaluation factors. In response to the comments seeking a standardized rating format, SBA is adding to the final rule that the prime contractor shall use the five-scale rating system at FAR 42.1503(b)(4): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. SBA does not find it necessary to provide a past performance template, as the evaluation factors and ratings level mirror CPARS.

Concern About Subjective Performance Ratings and Inquiries on Disputing the Performance Rating

Comments: Several commenters expressed concern about subjective past performance ratings and whether subcontractors could dispute the past performance rating. One commenter suggested that the prime contractor's rating of its subcontractor(s) has the potential to be subjective because of changes in the program managers. One commenter stated there is the potential for conflicts with prime contractors providing subcontractor past performance ratings. Two commenters suggested the government should provide regulatory guidance and procedures to ensure unbiased or consistent and fair assessments. Three commenters suggested the subcontractors should be allowed to rebut the past performance rating issued by the prime, similar to how a prime rebuts its CPARS rating by the government.

Response: In response to these comments, SBA notes that the statute provides the small business subcontractor with discretion in electing to use or not use the past performance rating. As discussed in the comments regarding a standard format, and in response to the comment seeking additional guidance, the final rule includes a rating system by reference to the definitions in FAR 42.1503. This final rule does not adopt a rebuttal procedure as none is provided or required by the statute. However, subcontractors may be able to negotiate a rebuttal procedure as part of their subcontract.

Stakeholders Who Will Benefit From the Proposed Rule

Comments: Commenters expressed that the proposed rule would likely benefit certain stakeholders and groups more than others. One commenter believed that the proposed rule would tend to benefit small businesses that had been more established and had been doing business for a number of years. Another commenter believed that the proposed rule could specifically benefit small, Black-owned businesses.

Response: SBA agrees that this rule will mostly benefit small businesses that are prepared to bid on prime contracts but are currently held back by a lack of prime contract performance. The rule addresses this problem by allowing for past performance ratings for first-tier subcontracting experience. That is the design of the statute and the problem being addressed.

Retroactive Application of the Rule

Comment: A commenter suggested that the rule be made retroactive, so that subcontractors could receive past performance ratings on recently completed contracts.

Response: The final rule does not make the rule retroactive. Generally, unless their language requires it, new legislative enactments are not retroactive. *Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988). Nevertheless, a prime contractor could respond to a first-tier subcontractor's request for a past performance rating, even if not required by the prime contractor's subcontracting plan. Such ratings still could be considered by the contracting agency if submitted with the proposal for a prime contract.

Prime Contractor Should Automatically Provide Past Performance Rating

Comments: Commenters expressed support for making a past performance rating of small business subcontractor(s) a requirement for prime contractors even if no past performance rating is requested by the small business subcontractor. In other words, the past performance rating would be automatic after performance. Both commenters believed that this should happen within 14 or 15 days of performance.

Response: Section 868 explicitly states that its requirements only apply when a first-tier small business subcontractor requests a past performance rating; therefore, it does not apply to all contracts, as not all first-tier subcontractors will request a past performance rating. The statute presumes this, perhaps because a small business might not be interested in bidding on future prime contracts or because it already has sufficient past performance to bid on a prime contract. Given the statutory language, this rule does not expand the coverage of past performance ratings, as doing so could potentially add unnecessary burden on prime contractors to issue performance ratings to every small business first-tier subcontractor.

Primes Should Rate Small Business Subcontractors as Part of the CPARS Process

Comments: Several commenters suggested prime contractors fill out small business subcontractor past performance ratings as part of CPARS. Two commenters suggested a first-tier subcontractor past performance rating be required to be filed annually by the prime as part of the prime's CPARS rating. One commenter suggested primes be required to file subcontractor past performance ratings as part of satisfactory completion of the prime's contract. One commenter suggested requiring a prime to complete a subcontractor past performance rating at the end of a contract or order.

Response: CPARS is a website designed for federal contracting officers to objectively evaluate the performance of prime contractors and allows other source selection officials to review contractor past performance ratings. The CPARS system is not designed to allow prime contractors the ability to complete a subcontractor past performance rating. Access to completed evaluations is restricted to individuals working on source selections for federal solicitations. In response to the comments, SBA notes that the statute, section 868, applies only when the small business has requested a past performance rating, not to every small business subcontract. Given the statutory language, this rule does not expand the coverage of past performance ratings, as doing so could potentially add unnecessary burden on prime contractors to issue performance ratings to every small business first-tier subcontractor.

Minimum Subcontract Value Threshold for Past Performance Rating

Comment: A commenter suggested the rule include a minimum threshold of $750,000.00 or $2 million, below which it would not apply to a subcontractor. The commenter suggested that the government conduct a study of the administrative cost of responding within the 15-day timeframe when the subcontract was of small value. Another commenter suggested that, when the subcontract exceeded the recommended threshold of 10% of the total contract value, the government be required to rate the subcontractor in CPARS.

Response: This rule implements section 868 of the NDAA for FY 2021, which applies to all eligible first-tier small business subcontractors performing on prime contracts with subcontracting plans. The statute did not include a threshold for applicability; therefore, no threshold is included in this final rule.

Reporting Mechanism for Subcontractor or Joint Venture Past Performance

Comments: Commenters suggested use of an explicit mechanism for reporting first-tier subcontractor performance. One commenter merely asked what systems would be utilized while the other commenter suggested a reporting mechanism from the prime contractor to the requesting agency.

Response: The statute that SBA is implementing does not create a formal reporting mechanism for past performance as a first-tier subcontractor. This is because it is up to the small business submitting past performance as a first-tier subcontractor to provide those ratings to the government. As the small business will be in possession of the past performance ratings, there is no need to formalize a reporting mechanism. Past performance ratings and/or information will be submitted to the agency in accordance with the solicitation.

Administrative Burden on Prime Contractors

Comment: A commenter expressed concern about the administrative burden on prime contractors in preparing subcontract past performance ratings. The commenter stated that its subcontractors have access to the performance rating system through a subcontractor portal; however, it is not unique to a specific contract.

Response: SBA notes the prime contractor is only required to provide a rating at the request of the first-tier small business subcontractor. Not every first-tier small business subcontractor will request a rating.

Subcontracting Past Performance Rating Should Be Weighted Differently Than Prime Contractor Performance

Comment: A commenter suggested that past performance as a subcontractor should be weighted less than past performance as a prime contractor. This commenter expressed concern that a small business subcontractor could selectively choose to request past performance only on projects where they expect a good rating. This is in contrast to prime contractor performance, which is always rated good or bad.

Response: SBA does not agree that first-tier subcontractor past performance should be weighted differently than prime contractor past performance. Implementing the statute in this manner would be inconsistent with its intent, which is to help small businesses to have qualifying past performance. In addition, while it is true that subcontractors may choose which contracts on which they request a performance rating, a prime contractor can also choose what past performance examples to submit with its proposal(s). In this way, a subcontractor's past performance rating is equivalent to that of a prime contractor. In addition, and in accordance with FAR 15.305(a)(2), when past performance is an evaluation factor, the currency and relevance of the

information, source of the information, context of the data, and general trends in contractor's performance shall be considered; therefore, there is no need to make explicit or require a contracting officer to evaluate past performance as a first-tier subcontractor differently than past performance as a prime contractor.

Evaluating Joint Venture Members Based on Ownership and Liability

Comment: A commenter opposed the restriction on evaluating joint venture members only on the duties and responsibilities that the member carried out as part of the joint venture. The commenter remarked that any joint venture with significant ownership is held jointly and severally liable for the work; as such, the member should enjoy the benefit of past performance credit.

Response: SBA believes the joint venture member should establish its participation in the joint venture's contract in order to receive past performance evaluation. This is necessary regardless of the member's level of participation because the agency needs to be able to gauge the relevancy of the past performance. Even where a member's involvement is limited to taking on risk and liability, that still could be part of the duties and responsibilities that the small business carried out for the joint venture.

Adding Language About the Subcontractor Past Performance Being Equal to CPARS Rating

Comment: A commenter suggested language should be added to 13 CFR 125.11(c)(3) making a subcontractor past performance rating equal to a CPARS rating for a prime contractor.

Response: SBA is not adopting this suggested language for the following reasons. SBA believes that, in most cases, the subcontractor past performance rating should be treated as equivalent to a prime's past performance rating. While agencies are required to use CPARS as one of the sources of past performance information in source selections when past performance is an evaluation factor, the FAR does not indicate that the information in CPARS is to be weighted more highly than information obtained from other sources. Under FAR 15.305(a)(2), when past performance is an evaluation factor, the currency and relevance of the information, source of the information, context of the data, and general trends in the contractor's performance shall be considered. Additionally, past performance is evaluated in accordance with the solicitation. The recency and relevancy of past-performance information will differ from one source selection to the next; therefore, it is not necessary to indicate that the past-performance rating provided to a first-tier small subcontractor by its prime contractor is equally weighted in importance to information obtained from CPARS. In response to this comment and for the reasons state above, SBA clarifies that the importance of past performance information is dependent on the individual acquisition, not on the source of the information.

III. Section-by-Section Analysis

13 CFR 125.3

This final rule adds a requirement to prime contractors' subcontracting plans. The subcontracting plan requires the prime contractor to provide a rating of a first-tier subcontractor's past performance within 15 calendar days of the first-tier subcontractor's request. The requested rating is prepared including, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; and (e) Other (as applicable). The requested rating will use the five-scale rating system from FAR 14.1503: Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory.

13 CFR 125.11

This final rule renumbers 13 CFR 125.11 and subsequent sections to create a new section 125.11. New subsection 125.11(a) provides general guidance to require agencies to consider the past performance of certain small business offerors that have been members of joint ventures or first-tier subcontractors. The remainder of this final rule addresses the two scenarios from NDAA 2021.

First, a small business concern may receive past performance consideration for the past performance of a joint venture of which the small business was a member. To receive past performance consideration, where the small business does not independently demonstrate past performance necessary for award, the small business may elect to use the joint venture's past performance and the contracting officer shall consider the joint venture past performance that the small business has elected to use. In its offer for a prime contract, the small business must identify: (i) the joint venture; (ii) the contract(s) of the joint venture that the small business elects to use; and (iii) describe to the agency what duties or responsibilities the small business carried out as a joint venture member. The small business cannot, however, claim past performance credit for work performed exclusively by other partners to the joint venture.

As required by NDAA 2021, the contracting officer shall consider the information that the small business provided about its duties and responsibilities carried out as part of the joint venture. Where the small business does not independently demonstrate past performance necessary for award, agencies shall consider a small business' successful rating of past performance through a joint venture. For example, a solicitation might require three past performance examples. This final rule authorizes the small business offeror to submit two examples from performance in its own name and one example from performance of a joint venture of which it was a member if the small business cannot independently provide the third example of past performance on its own. This final rule provides that the joint venture's past performance may supplement the relevant past performance of the small business when the small business cannot independently demonstrate the past performance on its own.

Second, a small business concern may receive past performance consideration for performance as a first-tier subcontractor. NDAA FY21 directs that this mechanism is limited to small businesses that performed as first-tier subcontractors on contracts that include subcontracting plans. The small business may request a rating of its subcontractor past performance from the prime contractor. Under the final rule, the prime contractor must provide a rating to the requesting small business within 15 calendar days of the request.

Under this final rule, the requested rating is prepared including, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; and (e) Other (as applicable). The requested rating will use the five-scale rating system from FAR 42.1503: Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. The final rule does not contain a limit on how recent the evaluated contract must be. The final rule clarifies that one scenario where this applies is where the small business lacks a rating in the Contractor Performance Assessment Reporting System (CPARS).

This final rule clarifies that a joint venture composed of small businesses may receive past performance consideration for work that the joint venture performed as a first-tier subcontractor. A small business member of the joint venture subcontractor may request a past performance rating from the prime contractor for a contract that included a subcontracting plan. The prime contractor must provide the requested rating to the joint venture member within 15 calendar days of the request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested record: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; (e) Other (as applicable). The small business could then use that rating to establish its past performance in accordance with the prior provision on submitting joint venture past performance.

13 CFR 125.28

SBA is changing the reference from 125.15(a) to 125.18(a) everywhere it appears in this section due to renumbering of sections. Section 125.18(a) provides the requirements for representation of service-disabled veteran-owned (SDVO) small business status.

13 CFR 125.29

SBA is changing the reference from 125.8 to 125.12 everywhere it appears in this section due to renumbering of sections. Section 125.12 provides the definitions that are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) program.

13 CFR 125.30

SBA is changing the reference from 125.8 to 125.12 everywhere it appears in this section due to renumbering of sections. Section 125.12 provides the definitions that are important in the SDVO SBC program.

IV. Compliance With Executive Orders 12866, 12988, 13132, 13175, 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 Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

Regulatory Impact Analysis:

1. *Is there a need for the regulatory action?*

This rule is necessary to satisfy statutory requirements to implement section 868 of National Defense Authorization Act of Fiscal Year 2021 (NDAA FY 2021). Section 868 (e) requires the Administrator to issue rules to carry out the section.

Absence of past performance has been a limitation for small businesses when pursuing procurement opportunities that evaluate past performance. Small businesses often have past performance through work performed as a joint venture partner or as a subcontractor, but this experience and past performance is often not acknowledged or credited to the relevant small business in the evaluation process. This final rule is necessary to address that shortcoming in the evaluation of past performance and experience.

The Federal Acquisition Regulation (FAR) states that ''past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.'' See FAR 15.304(c)(3)(i). Past performance is ''one indicator of an offeror's ability to perform the contract successfully.'' See FAR 15.305(a)(2). FAR 15.305(a)(2)(iv) provides that, ''[i]n the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.'' Because past performance may be considered a responsibility factor or because past performance affects an offeror's evaluation as compared to other offerors, the ability of small businesses that have been first-tier subcontractors or participated in joint ventures to demonstrate past performance increases their competitiveness in Federal contracting.

2. *What is the baseline, and the incremental benefits and costs of this regulatory action?*

OMB directs agencies to establish an appropriate baseline to evaluate any benefits, costs, or transfer impacts of regulatory actions and alternative approaches considered. The baseline should represent the agency's best assessment of what the world would look like absent the regulatory action. For a regulatory action that modifies or replaces an existing regulation, a baseline assuming no change to the regulation generally provides an appropriate benchmark for evaluating benefits, costs, or transfer impacts of proposed regulatory changes and their alternatives. This final rule implements the changes, by modifying and expanding the rating procedures of the unimplemented pilot program in 8(d)(17) of the Small Business Act (15 U.S.C. 637(d)(17)), which was added by section 1822 of the National Defense Authorization Act of 2017.

NDAA FY 2021 amends Section 8(d)(17) of the Act to allow small businesses that performed as first tier subcontractors to request a past performance rating from the prime contractor. The prime contractor must provide a rating of the small business past performance with respect to that prime contract to the small business within 15 calendar days of the request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; (e) Other (as applicable). The requested rating will use the five-scale rating system from FAR 42.1503: Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. This final rule modifies the pilot program, in which a small business that had not performed as a prime contractor could request a past performance rating in the Contractor Performance Assessment Reporting System (CPARS), if the small business is a first-tier subcontractor under a covered Federal Government contract requiring a subcontracting plan. Section 868(a) amends Section 15(e) of the Small Business Act to direct the establishment of regulations that allow the use of past performance in joint ventures in Federal contracting offers. This amendment expands the opportunities for past performance consideration by including consideration of the past performance of a joint venture of which the small business was a member.

The baseline is that which exists without implementation of the pilot program in section 8(d)(17) of the Small Business Act. In this environment, when a Federal agency creates a procurement opportunity requiring an offeror to provide examples of past performance, a newer small business concern may forego the opportunity because it individually lacks the required number of examples and then opt to join an established prime contractor's team as a subcontractor.

The most significant benefit of this final rule to small businesses is that it enhances the small businesses' ability to compete for Federal contracting opportunities. The Federal Acquisition Regulation (FAR) states that ''past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.'' See FAR 15.304(c)(3)(i). FAR 15.305(a)(2)(iv) provides that, ''[i]n the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.'' Nevertheless, small businesses without past experience as prime contractors may forego seeking some Federal contracting opportunities. This enhancement of Federal contracting opportunities is consistent with the amendment of the Small Business Act, which states that ''procurement strategies used by a Federal department or agency having contract authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers.'' 15 U.S.C. 644(e)(1).

With more small businesses able to demonstrate past performance, agencies will have a larger pool of small businesses competing for contracting opportunities. This added competition may result in lower prices to the Government. SBA cannot quantify this impact prior to proposal of applicable FAR rules.

Costs of this final rule to the private sector include the prime contractor's provision, upon request to provide a past performance rating. The time burden of this requirement to the prime contractor is similar to that of the pilot program's past performance rating requirement. SBA estimates the fulfillment of a past performance request to require about 30 minutes of time. Assuming that a compilation of a rating of past performance involves 30 minutes of work by an employee of the prime contractor and valuing the time at $93.44 per hour,[1] SBA estimates that each rating request costs a prime contractor $46.72 in labor plus de minimis costs of transmission of the rating. There were approximately 34,000 individual subcontracting plans with 24,000 at the prime contract level in fiscal year 2015 (81 FR 94249), but it is not known how many small businesses were involved in these subcontracting plans or how many small businesses were involved in multiple subcontracting plans. SBA notes that 1,800 small businesses have active SBA-approved Mentor-Protégé agreements.[2] SBA also notes that in FY 2019, the Electronic Subcontracting Reporting System (eSRS) listed 2,082 commercial plans with small businesses.

Assuming half, or 900, of the small businesses with active agreements in the Mentor-Protégé program request a rating of past performance each year, the annual cost to the private sector of fulfilling these requests for past performance ratings would be $42,048 plus de minimis costs. Assuming small businesses with 10 percent of 24,000 subcontracting plans at the prime contract level, in addition to those in the Mentor-Protégé program, request a rating of past performance each year, the annual cost to the private sector of fulfilling these requests is $112,128. Assuming each of the 2,082 commercial plans has two to four subcontracts, and half of the total subcontracts represents small business that would request a past performance rating each year, then the annual cost to the private sector of fulfilling these requests would be $145,907 plus de minimis costs. With these assumptions, total annual costs to the private sector of fulfilling requests is $300,083 plus de minimis costs.

The requirement of small business offerors that have been members of joint ventures to identify the joint venture, identify the contract(s) of the joint venture, and describe duties or responsibilities as a joint venture member in order to receive consideration of past performance involves a resource cost to the small business offerors that compile the specified information. SBA notes that this cost would be voluntarily incurred by small businesses that assess the enhancement of Federal contracting opportunities from consideration of past performance to be of greater value than the incremental costs incurred.

If more small businesses meet past performance standards and then submit proposals to contracting agencies, administrative costs to the Government may increase when a contracting agency reviews an increased number of proposals and past performance ratings. SBA cannot quantify these costs and notes that increased competition may offset these costs to the Government.

The ability of more small businesses to demonstrate past performance may redistribute some Federal contracts from businesses that can demonstrate past performance in the baseline scenario that exists with no implementation of the pilot program. This redistribution would not affect overall economic activity. This final rule and its effects do not change the amount of dollars in all available Federal contracts. SBA cannot quantify the actual outcome of the gains and losses from the redistribution of contracts among different groups of small businesses that would result from an increased number of small businesses with the ability to demonstrate their experience and past performance, but it expects that competition from small businesses with newly established past performance ratings may displace some small businesses that had established ratings in Federal contracting opportunities. A partial offset of this transfer impact among small businesses may occur with increased numbers of contracts set aside for small businesses through the Rule of Two, which states there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

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

This final rule implements specific statutory provisions in Section 868 of the NDAA FY 2021. There are no alternatives that would meet the statutory requirements.

Executive Order 12988

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

Executive Order 13132

This final rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

[1] The median hourly wage for construction managers is $46.72, according to 2020 Bureau of Labor Statistics (BLS) data, and the hourly rate of $93.44 includes 100 percent more for benefits and overhead. Source for hourly rate: *https://www.bls.gov/ooh/management/construction-managers.htm.* Retrieved June 8, 2021.

[2] One of the goals of the SBA's Mentor-Protégé program is to promote the ability of small protégé businesses to successfully compete for government contracting opportunities. Protégé small businesses often form joint ventures with their mentors to pursue specific procurement requirements in order to gain experience and be able independently perform similar requirements in the future.

Executive Order 13175

This final rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13563

This Executive Order directs agencies to, among other things: (a) afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considers these requirements in developing this rule, as discussed below.

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

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

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

The proposed rule had a 60-day comment period and was posted on *www.regulations.gov* to allow the public to comment meaningfully on its provisions. SBA received comments from 15 commenters in response to the Proposed Rule. SBA has reviewed all the comments while drafting this final rule. SBA submitted the final rule to OMB for interagency review.

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

Yes, the final rule implements statutory provisions that provide new methods for small business government contractors to obtain past performance ratings to be used with offers on prime contracts with the Federal Government. The final rule updates the requirements for small business subcontracting plans to add a requirement for prime contractors to provide past performance to a small business, first-tier subcontractor when requested by the small business first-tier subcontractor. The final rule enhances the small business' ability to compete for Federal Government prime contracting opportunities.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (codified at 5 U.S.C. 801–808), also known as the Congressional Review Act or CRA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the CRA cannot take effect until 60 days after it is published in the **Federal Register**. OMB's Office of Information and Regulatory Affairs has determined that this rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Paperwork Reduction Act

This rule updates the requirements for small business subcontracting plans to add a requirement for prime contractors to provide past performance ratings to a first-tier small business subcontractor when requested. A FAR rule implementing this requirement will account for the additional burden in its existing information collection and clearance for the information collection will be obtained by the GSA for the FAR Council.

In this final rule, SBA provides for a small business concern to receive past performance consideration for the past performance of a joint venture of which the small business was a member. This does not require a new information collection because the burden is already accounted for when the Government contracting officer rates the joint venture entity serving as a prime contractor.

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

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organization,'' and ''small governmental jurisdictions.''

This final rule provides new methods for small business contractors to obtain past performance ratings to be used with offers on prime contracts. As such, the rule relates to small business concerns but would not affect ''small organizations'' or ''small governmental jurisdictions'' because those programs generally apply only to ''business concerns'' as defined by SBA regulations; in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns'' within the meaning of SBA's regulations.

There are approximately 1,800 active SBA-approved Mentor-Protégé agreements and SBA estimates that half, or 900, small businesses with active agreements would request a past performance rating from its prime contractor in a year. Of the 24,000 subcontracting plans at the prime contract level in fiscal year 2015, SBA assumes for this analysis that up to 2,400 that are not in the Mentor-Protégé program may request a past performance rating each year. Additionally, in FY 2019 there were 2,082 commercial plans with small businesses. Assuming two to four subcontracts for each commercial plan, and half of them request a past performance rating, SBA estimates that up to 3,123 small businesses involved in commercial plans may request a past performance rating each year. The changes allow small business contractors to request a past performance rating from a prime contractor for whom they performed

work as a first-tier subcontractor or as a member of a joint venture. In addition, the final rule updates the requirements for small business subcontracting plans to add a responsibility for prime contractors to provide past performance of the first-tier when requested by that first-tier subcontractor.

As a result, SBA does not believe the final rule would have a disparate impact on small businesses or would impose any additional significant costs. For the reasons discussed, SBA certifies that this final rule does not have a significant economic impact on a substantial number of small business concerns.

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small business subcontracting, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

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

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

■ 2. Amend § 125.3 by:
■ a. Removing the word ''and'' at the end of paragraphs (c)(1)(ix) and (x);
■ b. Removing the period at the end of paragraph (c)(1)(xi) and adding ''; and'' in its place; and
■ c. Adding paragraph (c)(1)(xii).

The addition reads as follows:

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

* * * * *

(c) * * *

(1) * * *

(xii)(A) The prime contractor, upon request from a first-tier small business subcontractor, shall provide the subcontractor with a rating of the subcontractor's past performance. The prime contractor must provide the small business subcontractor the requested rating within 15 calendar days of the request. The rating provided by the prime contractor to the first-tier small business subcontractor shall utilize the five-scale ratings system found in FAR 42.1503 (48 CFR 42.1503): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. If the subcontractor will use the rating for an offer on a prime contract, it must include, at a minimum, the following evaluation factors in the requested rating:

(*1*) Technical (quality of product or service);

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

(*3*) Schedule/timeliness;

(*4*) Management or business relations; and

(*5*) Other (as applicable).

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

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

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

* * * * *

§§ 125.11 through 125.14 [Redesignated as §§ 125.12 through 125.15]

■ 3. Redesignate §§ 125.11 through 125.14 as §§ 125.12 through 125.15.

■ 4. Add new § 125.11 before subpart A to read as follows:

§ 125.11 Past performance ratings for certain small business concerns.

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

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

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

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

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

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

(2) *Evaluation.* When evaluating the past performance of a small business concern that has submitted an offer on a prime contract, the contracting officer shall consider the joint venture past performance that the concern elected to use under paragraph (b)(1) of this section, giving due consideration to the information provided under paragraph (b)(1)(i)(C) of this section for the performance of the evaluated contract or order. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System, or successor system used by the Federal Government to monitor or rate contractor past performance.

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

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

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

(iii) Schedule/timeliness;

(iv) Management or business relations; and

(v) Other (as applicable).

(2) *Responsibility of first-tier small business subcontractors.* A first-tier small business subcontractor must make the request for a performance rating from the prime contractor within 30 days after the completion of the period of performance for the prime contractor's contract with the Government. However, the prime contractor and the first-tier small business subcontractor may negotiate a later deadline for the request for a performance rating, but in no case can the prime contractor impose a deadline earlier than 30 days after the completion of the period of performance for the prime contractor's contract with the Government. The subcontractor may notify the contracting officer in the event that the prime contractor does not comply with its responsibility to submit a timely rating.

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

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

§ 125.28 [Amended]

■ 5. Amend § 125.28 in paragraph (a) by removing ''§ 125.15(a)'' and adding ''§ 125.18(a)'' in its place.

§ 125.29 [Amended]

■ 6. Amend § 125.29 in paragraph (a) by removing ''§ 125.8'' and adding ''§ 125.12'' in its place.

§ 125.30 [Amended]

■ 7. Amend § 125.30 in paragraph (g)(4) by removing ''§ 125.8'' and adding ''§ 125.12'' in its place.

Isabella Casillas Guzman,

Administrator.

[FR Doc. 2022–15622 Filed 7–21–22; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 122

[CBP Dec. 22–16]

Technical Amendment to List of User Fee Airports: Addition of Four Airports, Removal of Two Airports

AGENCY: U.S. Customs and Border Protection; DHS.

ACTION: Final rule; technical amendment.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations by revising the list of user fee airports. User fee airports are airports that have been approved by CBP to receive, for a fee, the customs services of CBP officers for processing aircraft, passengers, and cargo entering the United States, but do not qualify for designation as international or landing rights airports. Specifically, this technical amendment reflects the designation of user fee status for four additional airports: Coeur d'Alene Airport in Hayden, Idaho; Ithaca Tompkins Regional Airport in Ithaca, New York; University of Illinois-Willard Airport in Savoy, Illinois; and Sheboygan County Memorial Airport in Sheboygan Falls, Wisconsin. This document also amends CBP regulations by removing the designation of user fee status for two airports: Ardmore Industrial Airpark, in Ardmore, Oklahoma, and Decatur Airport in Decatur, Illinois.

DATES: Effective July 22, 2022.

FOR FURTHER INFORMATION CONTACT: Ryan Flanagan, Director, Alternative Funding Program, Office of Field Operations, U.S. Customs and Border Protection at *Ryan.H.Flanagan@cbp.dhs.gov* or 202–550–9566.

SUPPLEMENTARY INFORMATION:

Background

Title 19, part 122, of the Code of Federal Regulations (19 CFR part 122) sets forth regulations relating to the entry and clearance of aircraft engaged in international commerce and the transportation of persons and cargo by aircraft in international commerce.[1] Generally, a civil aircraft arriving from outside the United States must land at an airport designated as an international airport. Alternatively, civil aircraft may request permission to land at a specific airport and, if landing rights are granted, the civil aircraft may land at that landing rights airport.[2]

Section 236 of the Trade and Tariff Act of 1984 (Pub. L. 98–573, 98 stat. 2948, 2994 (1984)), codified at 19 U.S.C. 58b, created an alternative option for civil aircraft seeking to land at an airport that is neither an international airport nor a landing rights airport. This alternative option allows the Commissioner of U.S. Customs and Border Protection (CBP) to designate an airport, upon request by the airport authority or other sponsoring entity, as a user fee airport.[3] Pursuant to 19 U.S.C. 58b, a requesting airport may be designated as a user fee airport only if CBP determines that the volume or value of business at the airport is insufficient to justify the unreimbursed availability of customs services at the airport and the governor of the state in which the airport is located approves the designation. As the volume or value of business cleared through this type of airport is insufficient to justify the availability of customs services at no cost, customs services provided by CBP at the airport are not funded by appropriations from the general treasury of the United States. Instead, the user fee airport pays for the customs services provided by CBP. The user fee airport must pay the fees charged, which must be in an amount equal to the expenses

[1] For purposes of this technical rule, an ''aircraft'' is defined as any device used or designed for navigation or flight in air and does not include hovercraft. 19 CFR 122.1(a).

[2] A landing rights airport is ''any airport, other than an international airport or user fee airport, at which flights from a foreign area are given permission by Customs to land.'' 19 CFR 122.1(f).

[3] Sections 403(1) and 411 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 stat. 2135, 2178–79 (2002)), codified at 6 U.S.C. 203(1) and 211, transferred certain functions, including the authority to designate user fee facilities, from the U.S. Customs Service of the Department of the Treasury to the U.S. Department of Homeland Security. The Secretary of Homeland Security delegated the authority to designate user fee facilities to the Commissioner of CBP through Department of Homeland Security Delegation, Sec. II.A., No. 7010.3 (May 11, 2006). The Commissioner subsequently delegated this authority to the Executive Assistant Commissioner (EAC) of the Office of Field Operations, on March 23, 2020, to designate new UFFs. On December 23, 2020, the broader authority to withdraw a facility's designation as a UFF, as well as execute, amend, or terminate Memorandum of Agreements, was also delegated to the EAC of the Office of Field Operations.