Federal reserve bank	Rate	Effective
Philadelphia	3.25	December 14, 2004.
Cleveland	3.25	December 14, 2004.
Richmond	3.25	December 14, 2004.
Atlanta	3.25	December 14, 2004.
Chicago	3.25	December 14, 2004.
St. Louis	3.25	December 15, 2004.
Minneapolis	3.25	December 14, 2004.
Kansas City	3.25	December 14, 2004.
Dallas	3.25	December 14, 2004.
San Francisco	3.25	December 14, 2004.

(b) *Secondary credit.* The interest rates for secondary credit provided to depository institutions under § 201.4(b) are:

Federal reserve bank	Rate	Effective
Boston	3.75	December 14, 2004
New York	3.75	December 14, 2004
Philadelphia	3.75	December 14, 2004
Cleveland	3.75	December 14, 2004
Richmond	3.75	December 14, 2004
Atlanta	3.75	December 14, 2004
Chicago	3.75	December 14, 2004
St. Louis	3.75	December 15, 2004
Minneapolis	3.75	December 14, 2004
Kansas City	3.75	December 14, 2004
Dallas	3.75	December 14, 2004
San Francisco	3.75	December 14, 2004

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 15, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–27788 Filed 12–17–04; 8:45 am]

BILLING CODE 6210–02–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245–AF12

Small Business Government Contracting Programs; Subcontracting

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Small Business Administration (SBA) regulations government small business subcontracting to address comments received in response to SBA's proposed rule on subcontracting, which was published in the **Federal Register** on October 20, 2003. The final rule also addresses comments in response to SBA's earlier proposed rule on contract bundling, which was published in the **Federal Register** on January 31, 2003. Specifically, this final rule provides a list of factors to consider in evaluating a prime contractor's performance and good-faith efforts to achieve the requirements in its subcontracting plan. The final rule also authorizes the use of goals in subcontracting plans, and/or past performance in meeting such goals, as a factor in source selection when placing orders against Federal Supply Schedules, government-wide acquisition contracts, and multi-agency contracts. In addition, this final rule implements statutory provisions and other administrative procedures relating to subcontracting goals and assistance. In particular, the final rule lists the various categories of small businesses that must be afforded maximum practicable subcontracting opportunities, and clarifies the responsibilities of prime contractors and SBA's Commercial Market Representatives (CMRs) under the subcontracting assistance program. The final rule also supplies guidance on Subcontracting Orientation and Assistance Reviews (SOARs), which CMRs perform to assist prime contractors in their efforts to understand and comply with the requirements governing the small business subcontracting assistance program.

DATES: This rule is effective on December 20, 2004.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, Office of Policy and Research, (202) 401–8150 or *dean.koppel@sba.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

On January 31, 2003, SBA published a proposed rule in the **Federal Register,** 67 FR 47244, to solicit comments on its proposal to implement several recommendations included in the Office of Management and Budget's October 2002 report, entitled ''Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business.'' Several of the responding commenters identified the need for more guidance on evaluating large prime contractor performance in awarding subcontracts to small businesses and their efforts to achieve subcontracting plans, including examples of what types of conduct constitute ''good-faith'' efforts to comply with subcontracting plans. SBA thought that this suggestion was valid; accordingly, on October 20, 2003, the agency published a proposed rule addressing these as well as other major issues in subcontracting.

In response to the proposed rule published on October 20, 2003, which had a 60-day public-comment period, SBA received 19 written comments. The commenters included three members of Congress (two letters, one signed by two members), three Federal agencies (including SBA's own Office of Advocacy), two prime contractors, seven trade associations or small-business advocacy groups, four small businesses, and one private citizen

formerly employed by the Congress who is now working in academia. The specific comments are addressed in the section-by-section analysis of comments below. However, two of the commenters' responses may require additional review through a different venue. One of these responses was from a participant in the Department of Defense (DoD) Test Program for Comprehensive Subcontracting Plans (DoD Test Program), and the other was from a major U.S. corporation that currently operates under a commercial subcontracting plan. In both cases, their concerns are unique to their own situations and do not justify substantial changes to this rule.

The comments received from the corporation with a commercial subcontracting plan were far-reaching, and some of the suggestions would result in radical changes to the subcontracting program. For example, the commenter suggests a new formula for computing subcontracting goals for companies with commercial subcontracting plans. SBA did not adopt this suggestion because it is outside the scope of this rule.

The two references to SBAS's PRO-Net in the proposed rule have been changed to the Central Contractor Registration (CCR) in this final rule, to reflect the fact that SBA's PRO-Net was folded into the CCR effective January 1, 2004. In addition, the fourth exception to the requirement for a subcontracting plan cited in the proposed rule at § 1225.3(c)(3)(iv) has been deleted in this final rule because this exception applies primarily to contracts awarded prior to October 24, 1978, the date that Public law 95–507 was enacted by the Congress. That exception involved modifications to contracts that did not originally contain the clause at 48 CFR 52.219–8. It is SBA's conclusion that this exception is no longer needed.

B. Section-by-Section Analysis of Comments

1. Comments on the General Requirement

SBA received two comments on § 125.3(a), General. One commenter suggested adding the phrase ''unless otherwise exempt'' before the phrase ''other-than-small'' in the second sentence to clarify the fact that there are some exceptions to the requirement that prime contractors submit subcontracting plans for certain Federal contracts. (The exceptions are listed in the regulation at the beginning of the following paragraph, § 125.3(b).) The same commenter also suggested changing the word ''firms'' to ''business concerns'' and adding the word ''appropriate'' before ''contracting agency'' in the same sentence. SBA considers all of these suggestions to be constructive and has revised the language accordingly. The other commenter expressed concern that SBA was changing the phrase ''maximum utilization'' in the current version of the regulation to ''maximum practicable subcontracting opportunities'' and said that this change would convey a dangerous message to those who are required to participate in the Subcontracting Assistance Program. SBA reviewed the statute and found that the Congress itself had used the phrase ''maximum practicable opportunity'' in the legislation; therefore, SBA decided against making this change.

2. Comments on the Responsibilities of Prime Contractors

SBA received ten comments on § 125.3(b), Responsibilities of prime contractors. All of these commenters misunderstood the proposed rule to mean that SBA was either intending to require small businesses to submit subcontracting plans and/or planning to impose new reporting requirements on them. In fact, the Small Business Act specifically excludes small business concerns from the requirement to submit a subcontracting plan. Several commenters criticized SBA for its failure to perform an Initial Regulatory Flexibility Analysis (IRFA). One commenter suggested that SBA require subcontracting plans from small businesses only when the small business intends to subcontract some of the contract. In other words, if a small-business prime contractor performs 100 percent of the contract with its own labor, a subcontracting plan would not be required. This suggestion cannot be implemented without an amendment to the legislation (15 U.S.C. 637(d)(4)), which currently prohibits the Government from requiring small businesses to submit subcontracting plans under any circumstances. Therefore, SBA cannot adopt this suggestion. Since SBA does not intend to require subcontracting plans or reports from small business, no IRFA is required.

It was never SBA's intent to require small businesses to submit subcontracting plans or to impose new reporting requirements on them. However, since the language in the proposed rule has apparently caused some confusion, SBA has added language to § 125.3(b) clarifying that a small business cannot be required to submit a formal subcontracting plan or a subcontracting report (*see* § 125.3(b)(2)). Since the clarifying language has been added as § 125.3(b)(2), § 125.3(b)(2) in the proposed rule has been redesignated § 125.3(b)(3) in the final rule.

It should be noted that, under § 19.1202 of the Federal Acquisition Regulation (FAR), 48 CFR 19.1202, all offerors, including small business offerors, submit targets for small disadvantaged business (SDB) participation, and the successful offeror must submit a final report on SDB participation at contract completion. The requirement to submit targets for SDB participation does not constitute a subcontracting plan; in any case, that provision and related reporting requirement are separate and apart from the subcontracting plan requirements discussed in this regulation.

One commenter suggested revising § 125.3(b)(1) in its entirety to state: ''While a small businesses prime contractor is exempt from the requirement to establish a subcontracting plan, it is encouraged to provide maximum practicable opportunity for small businesses to participate in the performance of the contract, consistent with the efficient performance of the contract.'' SBA thinks that this suggestion is excellent; however, we believe that the suggested wording serves its purpose better under § 125.3(b)(2), rather than under § 125.3(b)(1), and we have therefore added it as a second sentence under § 125.3(b)(2).

The same commenter suggested revising the proposed § 125.3(b)(2) (§ 125.3(b)(3) in the final rule) to add the phrase ''as appropriate for the procurement.'' SBA agrees with this suggestion and has made the change. SBA has also added the word ''may'' and ''one or more of the following actions'' to the same sentence to clarify the face that each of the items in the list (§ 125.3(b)(2)(i) through (viii) of the proposed rule, § 125.3(b)(3)(1) through (ix) of the final rule) will not necessarily be applicable to every procurement. To ensure consistency throughout the final rule, SBA also added similar language to § 125.3(d)(1).

One commenter questioned the omission of the mentor-protégé program from the list at the proposed § 125.3(b)(2). Under 15 U.S.C. § 637(d)(11), prime contractors acting as mentors are allowed to receive credit towards their subcontracting goals for developmental assistance to their protégés. It is noted that many Federal agencies, such as the DoD, have Federal Acquisition Regulation Supplements addressing their mentor-protégé programs, and in fact SBA has a separate regulation dealing with its own

mentor-protégé; program (13 CFR 124.520). However, SBA agrees that adding a separate item to the list at the proposed § 125.3(b)(2) strengthens this regulation, and we have made this change by adding a new item as § 125.3(b)(3)(ix).

Two commenters said that the provisions at the proposed § 125.3(b)(2)(vii) (§ 124.3(b)(2)(vii) of the final rule), which addresses assistance to small business in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services, could lead to improper arrangements between large and small businesses in terms of control, conflicts of interest, and fair dealing. SBA has carefully considered this argument and concluded that, where any impropriety in this regard is alleged, it should be referred to the contracting officer for review under the procedures set forth in Part 121 of this regulation or other applicable procedures. However, when the assistance is properly structured so as to comply with applicable legal authority, a large business may provide this type of assistance without violating any laws or regulations. Therefore, SBA has retained this provision as written.

3. Comments on the Additional Responsibilities of Large Prime Contractors

One commenter took issue with the word ''utilization'' in the phrase ''maximum practicable utilization'' at § 125.3(c)(1)(i). SBA agrees with this comment and has changed the phrase to read ''maximum practicable opportunity,'' which, as noted above, is consistent with the language in the statute.

Two commenters complimented SBA on changing the dollar threshold for the mandatory pre-award written notification to unsuccessful offerors from $10,000 to $100,000, which is the simplified acquisition threshold. (§ 125.3(c)(1)(v)). Another commenter disagreed with this proposed change, saying it would be harmful to small businesses. Two other commenters disagreed with the requirement altogether, saying that there is no rationale for such a rule. One of the commenters in favor of the change suggested that the final rule could encourage prime contractors, as a good business practice, to provide the same written notification to unsuccessful offerors below this threshold. SBA agrees with this suggestion and believes that it will address the concerns of the commenter who said that this change would be harmful to small businesses. SBA did not adopt the comments of the two commenters who said that there is no rationale for such a rule. If unsuccessful offerors are notified in advance of the proposed awardee, they may protest or bring eligibility issues to the attention of the prime contractor. In addition, this requirement is also applicable to contracting officers in the Federal government (*see* 48 CFR 15.503(a)(2) and SBA strives to make its prime and subcontracting programs consistent where practical. SBA has added a provision at § 125.3(c)(1)(vi) to encourage prime contractors, as a good business practice, to provide written notification to unsuccessful offerors below $100,000. Two commenters questioned SBA's reference to an electronic database in § 125.3(c)(1)(iii). In fact, as part of the Integrated Acquisition Environment (IAE), the Government is working aggressively to develop and implement such a database. Therefore, SBA has made no change to § 125.3(c)(1)(iii).

In response to § 125.3(b)(2), which addresses commercial subcontracting plans, one commenter pointed out that the plan template required by the Federal government for contractors with commercial subcontracting plans is based on the contractor's fiscal year (usually the calendar year), but the reports are required for the Federal government's fiscal year. SBA is aware of this problem and has addressed it separately by means of a formal case submitted to the Federal Acquisition Regulation (FAR Council). The electronic database mentioned above is also being designed to correct this problem.

Another commenter questioned the policy set forth in § 125.3(c)(2) that permits the contracting officer of the agency that originally approved a commercial plan to exercise the functions of the contracting officer on behalf of all agencies that award contracts covered by the plan. This is a practical approach since a choice must be made as to which agency administers the plan and the appropriate choice is the agency that originally approved it. This policy has been in effect for some time and no significant problems or issues have arisen as a result. Moreover, an almost identical provision currently exists in the Federal Acquisition Regulation (48 CFR) (*see* 48 CFR 19.705–7(f). For these reasons, SBA has not changed the wording of this provision.

4. Comments on Determination of Good-Faith Efforts

At least eight commenters, including two members of Congress, objected to the provision at § 125.3(d)(2) that would include, in the determination of good-faith efforts evidence that other contractors awarded contracts of similar scope, size or dollar value had not achieved or exceeded the goals stated in their subcontracting plans. One commenter pointed out that the Federal government, using this guidance, could penalize a company that is in complete compliance based on a comparison to other companies that are performing better; or, alternatively, the federal government could compare a company that is barely complying to companies that are complete failures and conclude that it is making a good-faith effort when it is not. SBA agrees with these comments and has stricken this provision from the final rule.

One commenter pointed out that prime contractors are often penalized for failing to achieve their goal in one socio-economic category, even though they may have exceeded their goal in another area. SBA believes that this is a valid concern, and we have replaced the provision stricken from § 125.3(d)(2), as noted above, with a statement addressing this point. This subparagraph now reads, in part:

> Evidence that a large business prime contractor has made a good-faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:
>
> (1) The contractor performed one or more of the actions described in paragraph (b) of this section, as appropriate for the procurement; and
>
> (2) Although the contractor may have failed to achieve its goal in one socio-economic category, it exceeded its goal by an equal or greater amount in one or more of the other categories.

One commenter from another Federal agency pointed out that the Federal Acquisition Regulation (48 CFR) defines the failure to make a good-faith effort to comply with a subcontracting plan as the ''willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.'' This commenter recommends using this language in the final rule. SBA has decided not to adopt this suggestion because it believes that the language is too narrow and could be subject to misinterpretation. For example, a prime contractor could argue that its failure to make any effort to comply with its subcontracting plan was not willful but merely negligent or unintentional. SBA believes that the nine-item list of actions a prime contractor could take in order to demonstrate good faith efforts provides sufficient guidance concerning the meaning of this term.

5. Comments on CMR Responsibilities

SBA received only two comments on § 125.3(e), CMR Responsibilities, and the commenters were generally in favor of the additional responsibilities. The commenters inquired about the accountability and chain of command, and one commenter suggested that the CMRs should report to either the SBA District Directors or to other SBA managers at the same level. SBA did not make this change, as it is outside the scope of this rule and an established reporting structure is already in place.

A commenter that is a participant in the DoD Test Program asked how SOARs would work for contractors participating in that program. The memorandum of understanding (MOU) between the Defense Contract Management Agency (DCMA) and SBA (see next section) does not prohibit SBA's CMRs from conducting SOARs of contractors participating in the DoD Test Program. Therefore a participant may request a SOAR visit at any time. SBA sees no need to change the subject regulation in response to this comment.

6. Comments on Compliance Reviews

SBA received few comments on § 125.3(f), Compliance Reviews. Most of these were favorable. One commenter said, ''We support the inclusion of this new coverage in the regulations to aid in the understanding of the elements of the compliance review, the ratings to be evaluated, and the standards to be used. This coverage will also help standardize the reviews across the covered contractor base.'' Another commenter pointed out that the regulation does not address what corrective or punitive steps should be taken when a prime contractor receives an unsatisfactory rating. SBA believes that this is addressed adequately in other regulations (*e.g.,* 48 CFR 19.705–7); however, we have added two new subparagraphs, § 125.3(f)(4) and (5), to address this concern and clarify existing policy. We have renumbered the remaining subparagraphs in this section.

One commenter suggested the need for subcontractor input into the evaluation process. SBA believes that this idea may have some merit, but it could not be accomplished without imposing a new reporting requirement on industry, which SBA prefers not to do at this time.

The commenter that is a participant in the DoD Test Program suggested that the regulation be clarified to state that the compliance review would be for the entire company (or for the level of the company participating in the DoD Test Program), not for a particular site or location. This may be true in an individual case, but is not always true. SBA believes that it is impractical to answer this question in a broad regulation. Most, if not all, of the participants in the DoD Test Program also have contracts with civilian agencies that do not fall under that program. For those companies, SBA performance compliance reviews on the divisions and sites/locations that have contracts containing subcontracting plans, regardless of the corporate level approved for the DoD Test Program. Since the division or level of the company subject to the compliance review would vary depending on the particular plan or plans the concern is operating under, it is not possible to adopt this comment.

In response to the provision at § 125.3(f)(5), which authorizes SBA to enter into agreements with other agencies to conduct compliance reviews, two commenters questioned why SBA has entered into a memorandum of understanding (MOU) with the DCMA to assist SBA in performing compliance reviews. These commenters said that SBA ''should see how to reconfigure its work force to add more commercial marketing representatives'' rather than delegate this function to other agencies. SBA has chosen to enter into the MOU with DCMA because that agency has more than two decades of experience conducting compliance reviews and employs a strong cadre of experienced compliance specialists. Nothing is lost by giving DCMA a role in the reviews since SBA is actively involved and retains ultimate responsibility. Therefore, SBA has not adopted this suggestion.

7. Comments on Subcontracting Consideration in Source Selection

SBA received several comments on this section reflecting widely differing points of view. One commenter who supported the approach said that § 125.3(g)(1), (2) and (3) should be modified to make clear that the contracting officer must disclose to all competitors which one (or more) of the three elements will be evaluated as an important source selection evaluation factor in any subsequent procurement action. SBA agrees with this suggestion and has added it to § 125.3(g).

Another commenter suggested that the word ''may'' in this paragraph be changed to ''should,'' so that contracting officers would be required to establish an evaluation factor for subcontracting as part of the source selection criteria. SBA believes that this suggestion has merit, except that such approach cannot be made mandatory without providing specific guidance for measuring success in subcontracting, particularly when offerors on the same order or agreement operate under different types of subcontracting plans (commercial, individual or DoD Test Program). Until SBA establishes specific guidance for evaluating a business concern's goals and performance in this area, it is neither practical nor fair to impose this requirement on Federal agencies. However, SBA is working on establishing such guidance and will consider imposing mandatory evaluation factors in future revisions to its subcontracting regulations. We also note that in individual cases the evaluation factor may be simple to utilize without additional guidance, particularly in cases where all of the offerors operate under the same type of subcontracting plan. Therefore, based on the above, SBA believes that making the use of the evaluation optional until specific guidance is provided is the best course at this time.

SBA has changed the word ''important'' to ''significant'' and made other minor changes in this paragraph. The new language appears in § 125.3(g).

Another commenters said that it would be inappropriate for the Federal government to use subcontracting plans in the source selection for schedule purchases, Government-wide acquisition contracts, and multi-agency contracts because the members that the commenter represents ''are not sure how this appropriately could be accomplished.'' SBA notes that contracting officers are already required to establish an evaluation factor for subcontracting in negotiated acquisitions involving bundling (48 CFR 15.304). This is simply taking the concept one step further. SBA believes that the potential advantage of this approach to the small business community outweigh the concern expressed in this comment.

Another commenter pointed out that small businesses will be at a disadvantage because they do not have a subcontracting plan or evidence of subcontracting past performance; therefore, a small-business offeror should receive ''full/exemplary'' credit in each of the relevant categories. SBA agrees with this point and has added a similar statement to § 125.3(g).

Another commenter that is a participant in the DoD Test Program argued that this would be a problem for participant in the DoD Test Program, since they do not submit subcontracting goals for individual contracts and do not have contract-specific past performance. The DoD Test Program applies only to

contracts with the DoD. The vast majority of schedule contracts are with the General Services Administration (GSA) and the Department of Veterans Affairs. A participant in the DoD Test Program must provide civilian agencies with individual or commercial subcontracting plans and must then submit semi-annual or annual reports against these plans. SBA sees no need to revise the regulation to address this concern.

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

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

The Office of Management and Budget (OMB) has determined that this rule constitutes a significant regulatory action under Executive Order 12866. the rule revises the SBA regulation governing small business contracting assistance to define good faith effort.

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

SBA has determined that this final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit 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. Therefore, within the meaning of RFA, SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

The rule does not impose any new substantive responsibilities, nor does it require any new reporting or recordkeeping requirements on small business. Instead, this rule clarifies the existing statutory responsibilities under the subcontracting assistance program, including the responsibilities of prime contractors to maximize small business subcontracting opportunities. It also provides guidance to government officials in monitoring and determining the achievements of subcontracting goals.

In fiscal year 2002, the most recent year for which the Government has reliable subcontracting data, small business received nearly $34.4 billion in subcontract awards, representing more than 35 percent of all subcontracts. As a result of this regulation, subcontracting opportunities for small business should expand, and this figure may be expected to increase in the year(s) following publication of the Final Rule.

The Government does not maintain a database of small business subcontractors, but the Central Contractor Registration (CCR) maintained by the Department of Defense contains 175,209 small businesses. All of these firms are, or wish to become, prime contractors or subcontractors on Federal contracts. In most cases, a firm in the CCR is willing to perform on Federal contracts in either capacity—*i.e.,* as a prime contractor or subcontractor. Accordingly, this figure may be considered representative of the universe of small business concerns impacted by this regulation. For the record, the 175,209 includes 9,752 small disadvantaged business concerns; 8,714 HUBZone small business concerns; 40,755 women-owned small business concerns; 24,292 veteran-owned small business concerns (VOPSBs); and 4,416 service-disabled VOSBs.

From the foregoing discussion, it should be evident that the rule is primarily procedural in nature and would not have a significant economic impact on small entities. As a result, no further regulatory flexibility analysis (other than that stated above) is required under 5 U.S.C. 605(b).

List of Subjects in 13 CFR Part 125

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

■ For the reasons set forth in the preamble, SBA amends 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 1. The authority citation for 13 CFR part 125 continues to read as follows:

Authority 15 U.S.C. 634(b)(6), 637 and 644; 31 U.S.C. 9701 and 9702.

■ 2. Revise § 125.3 to read as follows:

§ 125.3 Subcontracting assistance.

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

(b) *Responsibilities of prime contractors.* (1) Prime contractors (including small business prime contractors) selected to receive a Federal contract that exceeds the traditional simplified acquisition threshold of $100,000, that will not be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, and that is not for services which are personal in nature, are responsible for ensuring that small business concerns have the maximum practicable opportunity to participate in the performance of the contract, including subcontracts for subsystems, assemblies, components, and related services for major systems, consistent with the efficient performance of the contract.

(2) A small business cannot be required to submit a formal subcontracting plan or be asked to submit a formal subcontracting plan, a small-business prime contractor is encouraged to provide maximum

practicable opportunity to other small businesses to participate in the performance of the contract, consistent with the efficient performance of the contract.

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

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

(ii) Conducting market research to identify small business subcontractors and suppliers through all reasonable means, such as performing on-line searches on the Central Contractor Registration (NCR), posting Notices of Sources Sought and/or Requests for Proposal on SBA's SUB-Net, participating in Business Matchmaking events, and attending pre-bid conferences;

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

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

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

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

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

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

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

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

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

(ii) Making a good-faith effort to achieve the dollar and percentage goals and other elements in its subcontracting plan;

(iii) Submitting a timely, accurate, and complete SF–294, Subcontracting Report for Individual Contract, and SF–295, Summary Subcontract Report; or entering the same information into an electronic database approved by SBA;

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

(v) Providing pre-award written notification to unsuccessful small business offerors on all subcontracts over $100,000 for which a small business concern received a preference. The written notification must include the name and location of the apparent successful offeror and if the successful offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business; and

(vi) As a best practice, providing the pre-award written notification cited in paragraph (c)(1)(v) of this section to unsuccessful and small business offerors on subcontracts at or below $100,000 whenever it is practical to do so.

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

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

(i) The prime contractor is a small business concern;

(ii) The prime contract or contract modification is a personal services contract; or

(iii) The prime contract or contract modification will be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(d) *Determination of good-faith efforts.* Evidence that a large business prime contractor has made a good-faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

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

(2) Although the contractor may have failed to achieve its goal in one socio-economic category, it over-achieved its goal by an equal or greater amount in one or more of the other categories; or

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

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

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

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

(3) Instructing large prime contractors on identifying small business concerns by means of the CCR, SUB-Net, Business Matchmaking events, and other resources and tools;

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

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

(6) Conducting periodic reviews, including compliance reviews in

accordance with paragraph (f) of this section.

(f) *Compliance reviews.* A prime contractor's performance under its subcontracting plan is evaluated by means of on-site compliance reviews and follow-up reviews. A compliance review is a surveillance review that determines a contractor's achievements in meeting the goals and other elements in its subcontracting plan for both open contracts and contracts completed during the previous twelve months. A follow-up review is done after a compliance review, generally within six to eight months, to determine if the contractor has implemented SBA's recommendations.

(2) All compliance reviews begin with a validation of the contractor's most recent SF–295, Summary Subcontract Report, and SF–294, Subcontracting Report for Individual Contracts, if applicable. The validation includes a review of the contractor's methodology for completing these reports and a sampling of specific documentation to substantiate small business status.

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

(4) Any contractor that receives a marginal or unsatisfactory rating must provide a written corrective action plan to SBA, or to both SBA and the agency that conducted the compliance review if the agency conducting the review has an agreement with SBA, within 30 days of its receipt of the official compliance report.

(5) Any contractor that fails to comply with paragraph (f)(4) of this section, or any contractor that fails to demonstrate a good-faith effort, as set forth in paragraph (d) of this section, may be considered for liquidated damages under the procedures in 48 CFR 19.705–7 and the clause at 52.219–16. This action shall be considered by the contracting officer upon receipt of a written recommendation to that effect from the CMR. The CMR's recommendation must include a copy of the compliance report and any other relevant correspondence or supporting documentation.

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

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

(g) *Subcontracting consideration in source selection.* When an ordering agency anticipates placing an order against a Federal Supply Schedule, government-wide acquisition contract (GWAC), or multi-agency contract (MAC), the ordering agency may evaluate subcontracting as a significant factor in its source selection process. In addition, the ordering agency may also evaluate subcontracting as a significant factor in source selection when entering into a blanket purchase agreement. At the time of contract award, the contracting officer must disclose to all competitors which one (or more) of these three elements will be evaluated as an important source selection evaluation factor in any subsequent procurement action. A small-business offeror automatically receives the maximum possible score or credit on this evaluation factor without having to submit a subcontracting plan and without having to demonstrate subcontracting past performance. The factors that may be evaluated, individually or in combination, are:

(1) The subcontracting to be performed on the specific requirement;

(2) The goals negotiated in previous subcontracting plans; and

(3) The contractor's past performance in meeting the subcontracting goals contained in previous subcontracting plans.

Dated: October 6, 2004.

Hector V. Barreto,

Administrator.

[FR Doc. 04–27765 Filed 12–17–04; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–347–AD; Amendment 39–13908; AD 2004–25–20]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Saab Model SAAB 2000 series airplanes. This action requires various repetitive inspections for cracking of the drag and shear angles that attach the nacelle to the wing, and related corrective action. This action also requires eventual modification of the drag and shear angles, which would end the repetitive inspections. This action is necessary to prevent fatigue cracking of the drag and shear angles, which could result in reduced structural integrity of the nacelle attachment to the wing. This action is intended to address the identified unsafe condition.

DATES: Effective January 24, 2005.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 24, 2005.

ADDRESSES: The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4057; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD)