

# Rules and Regulations

Federal Register

Vol. 70, No. 55

Wednesday, March 23, 2005

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 125

RIN 3245-AF16

#### Government Contracting Programs

**AGENCY:** Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the interim final regulations governing the Service-Disabled Veteran Owned Small Business Concern (SDVO SBC) Program. In particular, this rule clarifies several regulations, specifically those concerning protest procedures.

**DATES:** This rule is effective March 23, 2005.

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Administrator, Office of Policy and Research, (202) 205-7322 or at [SDVOSBCProgram@sba.gov](mailto:SDVOSBCProgram@sba.gov).

**SUPPLEMENTARY INFORMATION:** On May 5, 2004, the U.S. Small Business Administration (SBA or Agency) published in the **Federal Register**, 69 FR 25261, an interim final rule, with request for comments, to implement that section of the Veterans Benefits Act of 2003 (VBA), which addressed procurement programs for SBCs owned and controlled by service-disabled veterans. Specifically, the interim final rule defined the term service-disabled veterans, explained when competition may be restricted to SDVO SBCs, and established procedures for protesting the status of an SDVO SBC.

#### Discussion of Comments on the Interim Final Rule

The comment period for the interim final rule closed on July 6, 2004. SBA received 45 comments. The majority of the commenters fully supported the regulatory amendments. Twenty-seven of the 45 commenters provided substantive comments. The following is

a synopsis of those substantive comments.

#### Section-by-Section Analysis of Comments

In the interim final rule, SBA amended § 121.401 by adding the phrase “the Service-Disabled Veteran-Owned Small Business Concern Program (SDVO SBC Program)” to state that the SDVO SBC Program is subject to size determinations. SBA received three comments on this section. The commenters stated that by SBA imposing size restrictions, SDVO SBCs will be excluded from certain industries, especially those industries where few employees or affiliation are needed. Consequently, these commenters believed that agencies will not be able to reach their 3% SDVO SBC goal.

In response to these comments, SBA notes that the VBA specifically applies to SBCs. Thus, to be eligible for a SDVO SBC contract, the business concern must meet the small business size standard for the applicable North American Industry Classification System code contained in the contract, in accordance with SBA’s size regulations contained in 13 CFR part 121. Therefore, SBA did not adopt this comment and has not amended the rule.

SBA received one comment on § 125.6, which added subcontracting limitations for SDVO SBCs so that all subcontracting limitations would be centrally located and easy for SBCs and contracting officials to locate. The commenter stated that SBA should amend the subcontracting rules so that if a SDVO SBC subcontracts work to another company, the amount of the subcontract would be excluded from the total revenues of the SDVO SBC when calculating size. We note that § 121.104 of SBA’s size regulations defines the term receipts and does not exclude subcontracting costs from its definition. In fact, SBA includes subcontracting costs as a factor when developing the size standards. Consequently, SBA believes that this comment is outside the scope of this rulemaking and therefore, SBA has not adopted the commenter’s recommendation.

SBA notes that it has clarified § 125.6 to state that the SDVO SBC joint venture must perform the applicable percentage of work. This same requirement is also set forth in § 125.15(b)(3); however, SBA

believes it would be helpful to set forth this requirement in § 125.6 as well.

SBA has also clarified the definition of service-disabled veteran with permanent and severe disability in § 125.8 to explain that it is relying on *written* documentation from the U.S. Department of Veterans Affairs (VA) that the veteran has a service-connected, permanent and total disability, as set forth in the VA’s regulations.

In addition, SBA has corrected a typographical error in the definition of the term spouse. The definition refers readers to the correct cite—38 U.S.C. 101(31)—for that definition.

SBA defined who owns and controls an SDVO SBC in Subpart B, § 125.9 and § 125.10. SBA received two comments on these sections. One commenter stated that SDVO SBCs should be allowed to own and control holding companies for the purpose of program participation. One commenter stated that SBA should allow a surviving spouse to own and control a SDVO SBC following the death of the service-disabled veteran. Further, one commenter stated that all veterans should be considered, not just service-disabled veterans.

In response to these comments, SBA notes that the VBA and Small Business Act (Act) set forth specific criteria for program eligibility. For example, the Act states that in the case of a publicly-owned business, not less than 51% of the stock must be owned by one or more service-disabled veterans. Thus, we believe that the statute expresses a clear intent for direct ownership of the SBC by service-disabled veterans. SBA has created an exception for certain trusts because SBA believes that living trusts may be treated as the functional equivalent of ownership by service-disabled veterans where the trust is revocable, and the service-disabled veterans are, at all times, the grantors, trustees, and the current beneficiaries of the trust.

Further, the statute does not provide for ownership by surviving spouses of service-disabled veterans or for ownership by a veteran that is not service-disabled. Therefore, SBA has not amended the interim final rule to allow for ownership by holding companies, surviving spouses or veterans that are not service-disabled.

SBA is correcting a typographical error at the heading for Subpart C to change “guarantee” to “guarantee.”

SBA received six comments regarding the eligibility requirements set forth in § 125.15, including the joint venture and nonmanufacturer requirements. Four commenters stated that this program should not allow self-representation on a contract and to avoid a firm's misrepresentation as a SDVO SBC, SBA should require proof of status. SBA notes that it did consider proposing a certification program, similar to others administered by the Agency, which would have required proof of eligibility prior to certification on a particular contract. However, SBA did not believe such a certification program was necessary to implement the VBA or was required by the VBA. In addition, SBA believes that allowing other SDVO SBCs to protest the self-representation made on an offer is a self-policing process and will prevent business concerns from misrepresenting their status. This procedure—allowing self-representation on an offer and then a protest on the self-representation—is the same procedure used for small business set-asides, which SBA believes has worked well in the past and continues to work well.

With respect to the joint venture requirements set forth in § 125.15, one commenter stated that SBA's established joint venture process is unduly restrictive and recommended that SBA allow SDVO SBCs to participate in joint ventures with small and large businesses. This commenter believed that SBA should increase the number of permitted joint ventures for SDVO SBCs. In response to this comment, SBA notes that the joint venture requirements are similar to those for SBA's other programs, including 8(a) and HUBZone. Further, SBA believes that it would not meet the purpose and intent of the VBA—to assist service-disabled veteran-owned SBCs through government contracting preferences—if such concerns were allowed to joint venture with an other-than-small business and together exceed the size requirements of the contract. In such instances, SBA believes the benefits would likely flow to the large business, and not the SDVO SBC and this does not serve the purpose of the VBA.

In addition, with respect to § 125.15(c), one commenter stated that SDVO SBC distributors should be allowed to supply the product of any business, large or small, above and below \$25,000. This commenter believes that the nonmanufacturer rule and the waiver process is tedious and onerous for the SBC. First, SBA would like to clarify that waivers to the nonmanufacturers rule are not requested

by a SBC as the result of a published Federal requirement. Rather, contracting officers can request a waiver to the rule when: (1) Market research indicates that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications (including period for performance) required by a particular solicitation; or (2) SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market. Section 121.406(b)(3) of SBA's size regulations further defines the guidelines for contracting officers to request a waiver. Waiver requests are processed after the contracting officer conducts market research and prior to the issuance of a Federal requirement by the contracting officer and are not a burden to a SBC. In this way, SBC non-manufacturers can compete in restricted procurements.

Second, SBA believes that the nonmanufacturer rule is necessary to maintain the small business industrial base. Further, the rule applies to all of SBA's programs. Thus, SBA has not amended the interim final rule to adopt this comment.

SBA received three comments on § 125.18, which addresses what requirements are not available for SDVO SBC contracts. The commenters recommended that only requirements made through the Federal Prison Industries, Inc. and Javits-Wagner-O'Day Programs be excluded from the SDVO SBC Program. The commenters stated that procurements under the 8(a) Business Development (BD) Program should be released for possible award under the SDVO SBC Program. In response to this comment, SBA notes that this regulation is necessary to ensure the integrity of the business development aspects of the 8(a) BD program. Generally, the requirement will be retained for exclusive 8(a) participation, but may be released by SBA as indicated in the regulation. Thus, SBA has not amended the interim final rule to adopt this comment.

Six commenters stated that SBA should change "may" to "shall" in § 125.19 and § 125.20. In other words, these commenters believe that a CO should be required to award set-aside and sole source contracts to SDVO SBCs and the program should therefore be mandatory rather than discretionary. In response, SBA notes that the VBA specifically states that the contracting officer of a procuring agency "may" award a sole source or set-aside contract to a SDVO SBC, if certain conditions are met. Thus, SBA's regulations are

following the statutory mandate and therefore the interim final rule has not been changed.

Seven commenters recommended changes to the regulations regarding the sole source provisions for SDVO SBCs set forth in 125.20. Two commenters recommended that the \$3 million threshold for contract opportunities, other than manufacturing, be clarified to read \$3 million annually. SBA cannot make that change. The statute specifically provides that a contracting officer may award a sole source contract to a SDVO SBC if the anticipated award price of the contract (including options) will not exceed \$3 million for contract opportunities other than manufacturing. Thus, the \$3 million is based upon the contract price, including options, and not the annual cost of the contract.

Five commenters stated that SDVO SBC Program sole source procurements should be equivalent to sole source procurements under the 8(a) BD Program. For example, in the 8(a) BD Program, a contracting officer may award a sole source contract to an 8(a) BD SBC even if there is a reasonable expectation that two or more 8(a) SBCs can perform the requirement. In contrast, a contracting officer may only award a sole source SDVO SBC contract if he or she does not have a reasonable expectation that two or more SDVO SBCs will submit offers on the requirements (and other criteria are met). In response to this comment, SBA notes that both sole source requirements, for the 8(a) BD Program and the SDVO SBC Program, are set forth in statute. SBA's regulations follow the statutory mandate for each program and therefore, SBA's regulation regarding SDVO SBC sole source contracts remains unchanged.

SBA also received three comments recommending that SDVO SBCs be given a 10% price evaluation preference similar to the SDB or the HUBZone Program. In response to this comment, SBA notes that the SDB and HUBZone price evaluation preferences are statutory mandates. There is no statutory mandate for SDVO SBCs to receive such a price evaluation preference. Therefore, SBA has not amended the regulation to provide for one.

Similarly, SBA received three comments recommending that the SDVO SBC Program be given program parity with the other socio-economic programs, in particular, the 8(a) BD Program. SBA notes that in § 125.19, regarding set-asides for SDVO SBCs, it states that contracting officers should consider setting aside the requirement for SDVO SBCs, 8(a) SBCs and

HUBZone SBCs before considering setting aside the requirement for SBCs in general. SBA believes that this regulation does provide parity for SDVO SBCs with SBA's other programs, to the extent the VBA and other sections of the Small Business Act, as implemented in the Federal Acquisition Regulations, permits such parity.

SBA has amended § 125.25 to clarify, with an example, an insufficient protest allegation. In addition, SBA has amended § 125.25(e), referrals to SBA of protests from the contracting officer. In § 125.25(e), SBA is also requesting the contracting officer inform SBA the date the protested concern submitted its offer and when the protester received notification about the apparent successful offeror. This information is necessary for SBA to determine whether the protest has been submitted on time and the date SBA must look at to determine eligibility.

SBA has amended § 125.26 based upon information it has received concerning service-disabled veteran status documents. SBA has learned that as a result of a fire sometime ago, many

of these records were destroyed. Thus, the affected veterans would have to contact the U.S. National Archives and Records Administration (NARA) for documents evidencing their status as a service-disabled veteran. Consequently, SBA has amended § 125.26 to state that a protest must present specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, U.S. Department of Defense (DoD), or NARA to show that they meet the definition of service-disabled veteran or service-disabled veteran with a permanent and severe disability as set forth in § 125.8.

SBA has amended the timeline for which a protested SDVO SBC concern must submit information in response to a protest. According to § 125.27(c)(1), the protested concern was required to submit information responding to the protest within five business days of receipt of the protest. SBA has amended this to state that the protested concern must submit information responding to the protest within ten business days of receipt of the protest. SBA notes that it has done extensive research on veteran

records. SBA has learned that it could take a service-disabled veteran up to ten days to receive information from NARA (a repository for official government documents), and perhaps longer from the different services, about their service-disabled veteran status. Thus, SBA has amended § 125.27 to take this into account, despite the fact SBA believes that each SDVO SBC certifying as such for a Federal procurement should have all of the necessary documents prior to making the representation.

SBA notes that copies of most military personnel and medical records are on file at the National Personnel Records Center in St Louis, MO; however some military personnel records are maintained by the Military Services depending on when the veteran was discharged. Veterans who filed or are filing a medical claim should contact the VA regional office in their state in order to determine if their medical record and claim for service connected disability is already on file. To request military personnel records, the below contact information is provided:

TABLE 1.—CONTACT INFORMATION TO REQUEST MILITARY PERSONNEL RECORDS

Branch of service	Discharge date	Information	Address
1. Air Force .....	Discharged or retired since September 25, 1947.	Full name, Social Security Number and/or Service Number (both when available), enlistment and discharge dates, date of birth and place of birth (city and state), rank upon discharge or release, address where record is to be mailed, and signature.	National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132-5100, (314) 801-0800, <a href="http://vetrecs.archives.gov">http://vetrecs.archives.gov</a> .
2. Army .....	Discharged or retired between November 1, 1912-September 30, 2002.	Full name, Social Security Number and/or Service Number (both when available), enlistment and discharge dates, date of birth and place of birth (city and state), rank upon discharge or release, address where record is to be mailed, and signature.	National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132-5100, (314) 801-0800, <a href="http://vetrecs.archives.gov">http://vetrecs.archives.gov</a> .
	Discharged or retired since October 1, 2002.	Full name, Social Security Number, enlistment and discharge dates, date of birth and place of birth (city and state), rank upon discharge or release, address where record is to be mailed, and signature.	U.S. Army Human Resources Command, ATTN: AHRC-PAV-V, 1 Reserve Way, St. Louis, MO 63132-5200, (314) 592-0521.
3. Marine Corps .....	Discharged or retired between 1905-Dec 31, 1998.	Full name, Social Security Number and/or Service Number (both when available), enlistment and discharge dates, date of birth and place of birth (city and state), rank upon discharge or release, address where record is to be mailed, and signature.	National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132-5100, (314) 801-0800, <a href="http://vetrecs.archives.gov">http://vetrecs.archives.gov</a> .
	Discharged or retired since 1999.	Full name, Social Security Number, date discharged from Marine Corps service, address where record is to be mailed, and signature of member.	Commandant of the Marine Corps, Headquarters, USMC (MMSB-10), 2008 Elliot Road, Quantico, VA 22134-5030.
4. Navy .....	Discharged or retired between 1885-Dec 31, 1994.	Full name, Social Security Number and/or Service Number (both when available), enlistment and discharge dates, date of birth and place of birth (city and state), rank/rate upon discharge or release, address where record is to be mailed, and signature.	National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132-5100, (314) 801-0800, <a href="http://vetrecs.archives.gov">http://vetrecs.archives.gov</a> .
	Discharged or retired since 1995.	Full name, Social Security Number, date discharged from Naval service, address where record is to be mailed, and signature of member.	Navy Personnel Command, PERS-312E, 5720 Integrity Drive, Millington, TN 38055-3120, DSN: 882-4885 or COM: 901-874-4885.

All requests for records and information must be in writing. Generally, there is no charge for military personnel and health record information provided to veterans. With respect to records regarding the status of a veteran with a permanent and severe disability, the VA has informed SBA that the veteran can request a document that specifically states that the veteran has a permanent and total disability for purposes of 38 CFR 3.340.

SBA has also clarified the stay provisions in § 125.27. In the interim final rule, SBA explained that the CO may award the contract if SBA does not issue its protest determination within the 15-day period required by the regulations. SBA has added a new paragraph (e) to allow the CO to award the contract after receipt of a protest if the CO determines in writing that an award must be made to protect the public interest. This provision has two purposes. First, it reinforces that the CO should stay the procurement until the protest and appeal process is completed. Second, SBA understands that in certain situations, the CO may be unable to wait until the process is completed. In those cases, the CO must make the determination in writing.

In response to one commenter, SBA has also amended §§ 125.27(g) and 125.28 to clarify the effects of a protest or appeal determination. With respect to both a protest and an appeal, if the contract has already been awarded and the protest is sustained, or on appeal the Office of Hearings and Appeals (OHA) Judge affirms that the SDVO SBC does not meet a status or ownership and control requirement set forth in these regulations, then the procuring agency cannot count the award as an award to a SDVO SBC. If a contract has not yet been awarded and the protest is sustained, or on appeal the OHA Judge affirms that the protested concern does not meet a status or ownership and control requirement set forth in these regulations, then the protested concern is ineligible for an SDVO SBC contract award. There is a statutory basis for this clarification. According to the VBA, sole source and set-aside contracts can only be awarded to SDVO SBCs as defined by statute and as implemented in SBA's regulations. If the concern is not an SDVO SBC, then it is not an award pursuant to the VBA to a SDVO SBC and should not be counted as such.

SBA received one comment asking for a clarification of the appeal procedures discussed in part 134. SBA has reviewed the OHA appeal procedures set forth in the interim final rule and agrees that further clarification is necessary. Consequently, SBA has

amended the rule to include a separate subpart in 13 CFR part 134 to specifically address appeals of SDVO SBC protests. SBA has issued those changes in a separate rule, however, and has requested further comment on the OHA appeal procedures in that rule.

In addition, SBA received several comments on the general nature of the SDVO SBC Program. For example, three commenters recommended that provisions be made for mentor-protégé relationships in the SDVO SBC Program. SBA has reviewed this issue thoroughly and believes that the SDVO SBC Program, unlike the 8(a) BD Program, is not developmental in nature. Rather, it is the result of a recognized need to increase the participation of "established" SDVO SBCs in the Federal marketplace. The first attempt, Public Law 106-50, instituted the 3% goal for SDVO SBCs. When data indicated that the desired results were not being achieved, Public Law 108-183 was enacted. Public Law 108-183 established tools (a restricted competition and sole source authority) for contracting officers to use to reach that segment of the small business population. Although there is no prohibition against SBA establishing an SDVO SBC Mentor-Protégé Program, at this juncture, SBA prefers to wait and see if implementation of the procurement tools in Public Law 108-183 will allow contracting activities to reach their SDVO SBC goals. SBA notes that there is no prohibition for SDVO SBCs, when eligible, to participate in the Mentor-Protégé Programs of other agencies.

One commenter recommended that Small Business Innovation and Research (SBIR) contracts be available under the SDVO SBC Program. SBA notes that the SBIR Program was established by the Small Business Innovation Development Act of 1982, codified at 15 U.S.C. 638. The statutory purpose of the SBIR Program is to strengthen the role of innovative SBCs in Federally-funded research and research and development (R/R&D). The SBIR Program is a phased process, uniform throughout the Federal Government, of soliciting proposals and awarding funding agreements for R/R&D to meet stated agency needs or missions. SBA believes that as a result of the nature and purpose of the program and the way it is structured, it would not be beneficial to allow for set-aside or sole source SBIR awards to a SBC simply because they are a SDVO SBC (or any other type of SBC such as a HUBZone or 8(a) BD concern). However, SBA can request agencies to conduct outreach efforts to find and place innovative SDVO SBCs in the SBIR Program

information system and encourage such business concerns to participate in the program. In addition, agencies may count SBIR contract awards to SDVO SBCs towards their small business goals.

One commenter stated that the Central Contractor Registration (CCR) should be more efficient at providing marketing assistance to SDVO SBCs. SBA believes that this comment is outside the scope of this rulemaking and therefore, SBA will take no further action on it.

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

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.

This action meets applicable standards set forth in §§ 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.

This regulation will not have substantial direct effects on the States, on the relationship between the Federal 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.

Because the rule was initially issued as an interim final rule, there was no requirement for SBA to prepare an Initial Regulatory Flexibility Act analysis. Therefore, there is no requirement for SBA to issue a final Regulatory Flexibility Act analysis. However, because OMB has determined that this rule constitutes a "significant regulatory action" under Executive Order 12866, SBA reported a Regulatory Impact Analysis (RIA) in the interim final rule. The Agency believes that this RIA is still accurate, and accordingly, sets forth a final RIA below.

**Regulatory Impact Analysis**

In June 2004, SBA's Office of Advocacy issued a report entitled "Characteristics of Federal Government Procurement Spending with Veteran-Owned Businesses FY2000-FY2003 (3Q)," stating that Agencies have made little use of veteran-owned businesses (<http://www.sba.gov/advo/research/#procurement>). As stated in the preamble above, SBA believes there is a

significant need for this regulatory action and implementing the changes in this rule would provide considerable benefits, including attracting more SDVO SBCs to the Federal procurement arena and assisting Agencies in achieving the statutorily mandated 3% government-wide goal for procurement from SDVO SBCs.

Congress found that agencies were falling far short of reaching this goal. Consequently, the legislative history specifically states that Congress urges SBA and the Office of Federal Procurement Policy to expeditiously and transparently implement the Service-Disabled Veteran-Owned Small Business Concern is program. SBA is implementing this program through regulations because there are no other viable alternatives.

SBA cannot accurately determine how many concerns will be competing for SDVO SBC contract awards because there is insufficient data on SDVO SBCs to support a reasonable estimate of the cost or benefit. The Federal Government has only been collecting procurement statistics on veteran-owned businesses since FY 2000. These statistics do not demarcate SDVO SBCs. According to the VA, there were 2.5 million veterans with a service connected disability. (See <http://www.va.gov/vetdata/demographics/index.htm>). This does not mean that each of those veterans own a SBC or own a business concern that would qualify for the program.

SBA reviewed information contained in DoD's CCR database (<http://www.ccr.gov>). Currently, there are 4,825 SDVO SBCs registered in CCR. This represents a small portion, 15.9%, of the 30,434 veteran-owned businesses registered in CCR. Again, it is not known what percentage of the service-disabled veterans based their representation on the "service-connected" disability as defined by 38 U.S.C. 101.

SBA also reviewed data from the Federal Procurement Data System (<http://www.fpds.gov>). In FY 2001, there were 9,142 contract actions awarded to SDVO SBCs in the amount of \$554,167,000. This represented .25% of all Federal contracts awarded. In FY 2002, 7,131 contract actions were awarded to SDVO SBCs in the amount of \$298,901,000. This represented .13% of all Federal contracts awarded. SBA believes that the number of contracts awarded to SDVO SBCs will increase as a result of this regulation implementing the VBA. Few contracts were awarded to SDVO SBCs in the Federal or State arena. This number could increase as a result of the implementation of the VBA through this regulation.

Although there are over 2 million service-disabled veterans, only a small portion own small businesses. However, it is assumed that the establishment of a sole source and set-aside procurement vehicle for SDVO SBCs will attract more of these entities to the Federal procurement arena.

This rule will potentially benefit all SDVO SBCs. However, SBA believes currently eligible SDVO SBCs will benefit immediately since they are ready and able to tender an offer for a Federal procurement. Nonetheless, SBA notes that because of the relatively small percentage of SDVO SBCs (2.4%) registered in the CCR (4,852), as compared to the total number of SBCs (201,742), SBA believes that this rule will not have a major impact on other SBCs in the Federal procurement arena. Federal Government agencies will also benefit from this regulation because they will be able to tap the resources of SDVO SBCs using a sole source or set-aside mechanism and therefore have more opportunities to achieve their SDVO SBC goals, including meeting their Federally-mandated goal to award contracts to SDVO SBCs.

SBA estimates that the Federal government will require no additional appropriations for agencies to implement this program. The awards would come from existing appropriated funds and current agency procurement needs and therefore there would be no increase in the cost to the Government.

SBA estimates that implementation of this regulation for SDVO SBCs will require no additional proposal costs under this program as compared to submitting proposals under any other small business set-aside program. In addition, SDVO SBCs currently represent their status for purposes of data collecting in small business goaling in accordance with 15 U.S.C. 644(g).

#### List of Subjects in 13 CFR Part 125

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

■ For the reasons set forth in the preamble, amend part 125 of title 13 of the Code of Federal Regulations 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, 644, and 657f; 31 U.S.C. 9701, 9702.

■ 2. In § 125.6, add a new paragraph (b)(5) to read as follows:

#### § 125.6 Prime contractor performance requirements (limitations on subcontracting).

\* \* \* \* \*

(b) \* \* \*  
(5) In accordance with § 125.15(b)(3), the SDVO SBC joint venture must perform the applicable percentage of work.

\* \* \* \* \*

■ 3. Amend § 125.8 to revise paragraphs (c), (d) and (h) to read as follows:

#### § 125.8 What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program?

\* \* \* \* \*

(c) *Permanent caregiver* is the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran with a permanent and severe disability. In the case of a service-disabled veteran with a permanent and severe disability lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody. There may be no more than one permanent caregiver per service-disabled veteran with a permanent and severe disability.

(d) *Service-Disabled Veteran with a Permanent and Severe Disability* means a veteran with a service-connected disability that has been determined by the VA, in writing, to have a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension.

\* \* \* \* \*

(h) *Spouse* has the meaning given the term in section 101(31) of Title 38, United States Code.

\* \* \* \* \*

■ 4. Correct the term "guarantee" in the Table of Contents in Subpart C to read "guarantee."

■ 5. Revise paragraph (a) introductory text of § 125.15 to read as follows:

#### § 125.15 What requirements must an SDVO SBC meet to submit an offer on a contract?

(a) *Representation of SDVO SBC status.* An SDVO SBC must submit the following representations with its initial offer (which includes price) on a specific contract:

\* \* \* \* \*

■ 6. Revise paragraphs (a), (b), and (e) of § 125.25 to read as follows:

**§ 125.25 How does one file a service disabled veteran-owned status protest?**

(a) *General.* The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether an eligible SDVO SBC is a "small" business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the SDVO SBC and whether the concern meets the SDVO SBC requirements set forth in § 125.15(a), SBA will process each protest concurrently, under the procedures set forth in part 121 of this chapter and this part. SBA does not review issues concerning the administration of an SDVO contract.

(b) *Format.* Protests must be in writing and must specify all the grounds upon which the protest is based. A protest merely asserting that the protested concern is not an eligible SDVO SBC, without setting forth specific facts or allegations is insufficient. *Example:* A protester submits a protest stating that the awardee's owner is not a service-disabled veteran. The protest does not state any basis for this assertion. The protest allegation is insufficient.

\* \* \* \* \*

(e) *Referral to SBA.* The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send all protests, along with a referral letter, directly to the Associate Administrator for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416 or by fax to (202) 205-6390, marked Attn: Service-Disabled Veteran Status Protest. The CO's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the CO; whether the contract was sole source or set-aside; whether the protester submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer (*i.e.*, made the self-representation that it was a SDVO SBC); whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the CO; when the protester received notification about the apparent

successful offeror, if applicable; and whether a contract has been awarded.

■ 7. Revise § 125.26 to read as follows:

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

(a) *Status.* In cases where the protest is based on service-connected disability, permanent and severe disability, or veteran status, the Associate Administrator for Government Contracting will only consider a protest that presents specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, DoD, or the U.S. National Archives and Records Administration to show that they meet the definition of service-disabled veteran or service disabled veteran with a permanent and severe disability as set forth in § 125.8.

(b) *Ownership and control.* In cases where the protest is based on ownership and control, the Associate Administrator for Government Contracting will consider a protest only if the protester presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protester must present credible evidence that the concern is not controlled by the veteran, spouse or permanent caregiver of such veteran.

■ 8. Revise § 125.27 to read as follows:

**§ 125.27 How will SBA process an SDVO protest?**

(a) *Notice of receipt of protest.* Upon receipt of the protest, SBA will notify the contracting officer and the protester of the date SBA received the protest and whether SBA will process the protest or dismiss it under paragraph (b) of this section.

(b) *Dismissal of protest.* If SBA determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, SBA will dismiss the protest and will send the contracting officer and the protester a notice of dismissal, citing the reason(s) for the dismissal. The dismissal notice must also advise the protester of his/her right to appeal the dismissal to SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

(c) *Notice to protested concern.* If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:

(1) Notify the protested concern of the protest and of its right to submit information responding to the protest within ten business days from the date of the notice; and

(2) Forward a copy of the protest to the protested concern, with a copy to the contracting officer if one has not already been made available.

(d) *Time period for determination.* SBA will determine the SDVO SBC status of the protested concern within 15 business days after receipt of the protest, or within any extension of that time which the contracting officer may grant SBA. If SBA does not issue its determination within the 15-day period, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

(e) *Award of contract.* The CO may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest.

(f) *Notification of determination.* SBA will notify the contracting officer, the protester, and the protested concern in writing of its determination.

(g) *Effect of determination.* SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the contracting officer cannot count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (*e.g.*, it changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8).

■ 9. Revise § 125.28 to read as follows:

**§ 125.28 What are the procedures for appealing an SDVO status protest?**

The protested concern, the protester, or the contracting officer may file an appeal of an SDVO status protest determination with OHA in accordance with part 134 of this chapter. If the contract has already been awarded and on appeal, the OHA Judge affirms that the SDVO SBC does not meet a status or ownership and control requirement set forth in these regulations, then the procuring agency cannot count the award as an award to a SDVO SBC. In addition, the protested concern cannot self-represent its status for another procurement until it has cured the eligibility issue. If a contract has not yet been awarded and on appeal the OHA Judge affirms that the protested concern does not meet the status or ownership and control requirement set forth in this part, then the protested concern is

ineligible for an SDVO SBC contract award.

Dated: December 1, 2005.

**Hector V. Barreto,**  
*Administrator.*

[FR Doc. 05-5466 Filed 3-22-05; 8:45 am]

BILLING CODE 8025-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2005-20584; Airspace  
Docket No. 05-AEA-05]

#### Revocation of Class E Airspace; Palmer, MA

**AGENCY:** Federal Aviation  
Administration (FAA), DOT.

**ACTION:** Direct final rule; request for  
comments.

**SUMMARY:** This action revokes the Class E airspace area at Palmer Metropolitan Airport, MA. This action is prompted by our cancellation of the standard instrument approach procedures to the airport when the airport converted from Instrument Flight Rule (IFR) public use to a Visual Flight Rule (VFR) private use airport.

**DATES:** Effective 0901 UTC, July 7, 2005.  
Comments for inclusion in the Rules Docket must be received on or before April 22, 2005.

**ADDRESSES:** Send comments on the rule to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001. You must identify the docket number, FAA-2005-20584/Airspace Docket No. 05-AEA-05, at the beginning of your comments. You may also submit comments on the Internet at <http://dms.dot.gov>. You may review the public docket containing the proposal, any comments received, and any final disposition in person at the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1-800-647-5527) is located on the plaza level of the Department of Transportation NASSIF Building at the street address stated above.

An informal docket may also be examined during normal business hours at the office of the Area Director, Eastern Terminal Operations, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, NY 11434-4809; telephone (718) 553-4501; fax (718) 995-5691.

**FOR FURTHER INFORMATION CONTACT:** Mr. Francis Jordan, Airspace Specialist, Airspace and Operations, ETSU, 1

Aviation Plaza, Jamaica, NY 11434-4809; telephone (718) 553-4521; fax (718) 995-5693.

#### SUPPLEMENTARY INFORMATION:

Class E airspace areas are designated to provide controlled airspace for those aircraft using standard instrument approach procedures (SIAPs) to an airport under Instrument Flight Rules (IFR). When the Palmer Metropolitan Airport (PMX) converted from public to private use, the IFR procedures were canceled and the airport changed to Visual Flight Rules (VFR) only operations. Therefore, Class E airspace is no longer required in the vicinity of Palmer Airport. Subsequently the airport identifier was changed from KPMX to 13MA. Class E airspace designations for airspace areas extending upward from 700 feet above the surface are published in paragraph 6005 of FAA Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be removed subsequently in this Order.

#### The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment, and, therefore, issues it as a direct final rule. The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Unless a written adverse or negative comment or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

#### Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications

must identify both docket numbers. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this action will be filed in the Rules Docket.

#### Agency Findings

This rule does not have federalism implications, as defined in Executive Order No. 13132, because it does not have a substantial direct effect 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. Accordingly, the FAA has not consulted with state authorities prior to publication of this rule.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as these routine matters will only affect air traffic procedures and air navigation. It is certified that these proposed rules will not have significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.