Annual Review
Mergers and Acquisition
Supplementary Materials

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In the United States Court of Federal Claims

No. 20-774C

(E-Filed: November 30, 2020)[1]

NAVARRO RESEARCH AND ENGINEERING, INC., Plaintiff, v. THE UNITED STATES, Defendant, and RSI ENTECH, LLC, Intervenor-defendant.	Post-Award Bid Protest; Motions for Judgment on the Administrative Record; RCFC 52.1(c); Plain Language Review; Agency Discretion.

Richard P. Rector, Washington, DC, for plaintiff. Samuel B. Knowles, Thomas E. Daley, Ryan P. Carpenter, of counsel.

Joshua E. Kurland, Trial Attorney, with whom appeared Michael D. Granston, Deputy Assistant Attorney General, Robert E. Kirschman, Jr., Director, and Douglas K. Mickle, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Monekia G. Franklin, United States Department of Energy, of counsel.

Damien C. Specht, McLean, VA, for intervenor-defendant. James A. Tucker, Caitlin A. Crujido, Lyle F. Hedgecock, of counsel.

OPINION

[1] This order was issued under seal on November 3, 2020. See ECF No. 45. The parties were invited to identify source selection, proprietary or confidential material subject to deletion on the basis that the material is protected/privileged. No redactions were proposed by the parties. See ECF No. 47 (notice). Thus, the sealed and public versions of this order are identical, except for the publication date and this footnote.

CAMPBELL-SMITH, Judge.

Plaintiff filed this bid protest to challenge the award of a contract for the provision of "Legacy Management Support Services" to "'sites in the United States and the territory of Puerto Rico associated with past radiological and nuclear material production and testing, and energy research.'" ECF No. 1 at 1, 8 (complaint). Plaintiff filed a motion for judgment on the administrative record (AR) on August 3, 2020, ECF No. 32; and both defendant and intervenor-defendant filed cross-motions for judgment on the AR and responses to plaintiff's motion on September 2, 2020, ECF No. 37 and ECF No. 38. Plaintiff filed its response to the cross-motions and reply in support of its motion on September 18, 2020, ECF No. 39, and defendant and intervenor-defendant filed their replies on October 5, 2020, ECF No. 40 and ECF No. 41. The motions are now fully briefed and ripe for ruling.

In ruling on these motions, the court has considered the following: (1) plaintiff's complaint, ECF No. 1; (2) the AR, ECF No. 27; (3) plaintiff's motion for judgment on the AR, ECF No. 32; (4) plaintiff's memorandum in support of its motion for judgment on the AR, ECF No. 33;[2] (5) defendant's supplement to the AR, ECF No. 36; (6) intervenor-defendant's response to plaintiff's motion for judgment on the AR, and its cross-motion for judgment on the AR, ECF No. 37; (7) defendant's response to plaintiff's motion for judgment on the AR, and its cross-motion for judgment on the AR, ECF No. 38; (8) plaintiff's reply in support of its motion for judgment on the AR, and its response to defendant's and intervenor-defendant's cross-motions for judgment on the AR, ECF No. 39; (9) defendant's reply in support of its cross-motion for judgment on the AR, ECF No. 40; (10) intervenor-defendant's reply in support of its cross-motion for judgment on the AR, ECF No. 41.

[2] Plaintiff attached three exhibits to its memorandum in support of its motion for judgment on the AR. See ECF No. 33-1; ECF No. 33-2; ECF No. 33-3. The first and second appear to be charts of labor rates and the third is a declaration from Ms. Susana Navarro-Valenti. See id. Defendant requested in its cross-motion that the court "strike or disregard the exhibits because they are outside the administrative record and supplementation is not necessary to allow 'meaningful judicial review' in this case." ECF No. 38 at 45. Plaintiff points out that the charts are already in the AR at ECF No. 27-15 at 613-18. See ECF No. 39 at 22. The declaration, however, is not. The court finds that supplementation is not necessary for meaningful judicial review in this matter and, therefore, the declaration is not appropriately considered in analyzing the motions before the court. See Axiom Res. Mgmt. v. United States, 564 F.3d 1374, 1379-80 (Fed. Cir. 2009) (holding that "supplementation of the record should be limited to cases in which the omission of extra-record evidence precludes judicial review") (quotation marks and citation omitted). The court thus has not taken the declaration into consideration in its review of this matter. The charts, however, are part of the AR in this matter and are considered in that context.

On October 29, 2020, plaintiff filed a motion for leave to file notice of supplemental authority "addressing a recent decision of the United States Government Accountability Office that is directly relevant" to this case. ECF No. 44.

For the reasons set forth below: (1) plaintiff's motion for leave to file notice of supplemental authority, ECF No. 44, is **DENIED**; (2) plaintiff's motion for judgment on the AR, ECF No. 32, is **DENIED**; (3) defendant's cross-motion for judgment on the AR, ECF No. 38, is **GRANTED**; and (4) intervenor-defendant's cross-motion for judgment on the AR, ECF No. 37, is **GRANTED**.

I. Background

A. The Solicitation

On July 1, 2019, the United States Department of Energy (DOE) issued a solicitation for a single award, indefinite-delivery, indefinite-quantity (IDIQ) contract for "Legacy Management Support Services (LMS)" conducting "post-closure site operations" "for protection of human health and the environment" at sites "associated with the legacy of the Cold War." ECF No. 27-3 at 1 (solicitation); ECF No. 27-7 at 114 (amended solicitation); ECF No. 27-6 at 120 (amended solicitation statement of work). The DOE anticipated awarding a five-year contract under which task orders would issue that could last for up to three years beyond the ordering period, with a minimum anticipated contract amount of $500,000, and a maximum of $1 billion. See ECF No. 27-7 at 114.

The solicitation specified both proposal preparation instructions and evaluation factors. See id. at 211-13; 218-23. The proposal preparation instructions were contained in Section L, titled Instructions, Conditions, and Notices to Offerors, and noted that "[p]roposals are expected to conform to all solicitation requirements and the instructions in this Section L." Id. at 197, 205. It further clarified that "[t]hese instructions are not evaluation factors. Evaluation factors are set out in Section M, Evaluation Factors for Award, of this solicitation. However, failure to provide the requested information may make an Offeror ineligible for award or adversely affect the Government's evaluation of an Offeror's proposal." Id. at 205.

Offerors were to include a separate technical proposal and price proposal. See id. at 205-06. In their technical proposals, offerors were to address each of four factors: (1) technical and capabilities approach; (2) management approach; (3) teaming approach; and (4) past performance. See id. at 211-14. Relevant to this protest, within the technical and capabilities approach, Section L instructed offerors to "demonstrate the extent of skills, knowledge and experience resident within the company personnel (key and non-key personnel) who have performed work within a similar environment and that is relevant to the IDIQ Statement of Work." Id. at 212. Likewise, as to offerors' corporate management, Section L directed offerors to "demonstrate the extent of skills, knowledge,

and experience resident across the corporate management who has performed oversight and integration of contracted services within a similar environment and that is relevant to the Statement of Work." Id.

Pursuant to Section M, titled Evaluation Factors for Award, the DOE planned to evaluate offerors' proposals to determine "the best value to the Government" by first having a source evaluation board (SEB) review and evaluate the technical proposals. Id. at 218. Following this initial evaluation, a designated source selection authority was to select an offeror for contract award. Id. at 219. "[T]he evaluation factors for the Technical Proposal, when combined, [were] significantly more important than the evaluated price." Id. at 218. Within the technical proposal, the technical and capabilities approach was to be "significantly more important than all other technical proposal factors . . . combined." Id. Section M informed offerors that a proposal would be deemed unacceptable "if it [did] not represent a reasonable initial effort to address itself to the essential requirement of the solicitation, or if it clearly demonstrate[d] that the offeror [did] not understand the requirements of the solicitation or if it [did] not substantially and materially comply with the proposal preparation instructions" of the solicitation. Id. at 219.

The solicitation provided that the SEB was to evaluate technical proposal factors one through three using adjectival ratings of outstanding, good, acceptable, marginal, and unacceptable. See id.; id. at 222 (defining each of the adjectival ratings). Factor four, past performance, was evaluated on a scale of significant confidence, satisfactory confidence, neutral, and little confidence. See id. at 223. Evaluators reviewing the technical and capabilities approach were looking for:

> [T]he extent to which the implementation of the approach demonstrates a thorough understanding of the objective, scope, and intent of the requirement; the skills, knowledge and experience, including the ability to integrate the contracted services, that contractor personnel and corporate management possess; and the extent to which the approach ensures quality services and quality work products.

Id. at 220. In arriving at their "overall adjectival rating for a factor," the SEB assigned strengths and weaknesses to the proposal using the following descriptions:

Significant Strength	Is an aspect of an Offeror's proposal that has **merit and significantly exceeds** specified performance or capability requirements in way that will be advantageous during contract performance and that will be **very low risk** to the Government.
Strength	Is an aspect of an Offeror's proposal that has **merit and exceeds** specified performance or capability requirements in way that will be advantageous during contract performance and that will be **low risk** the Government.
Weakness	Means a **flaw** in the proposal that **increases** the risk of unsuccessful contract performance.
Significant Weakness	Means, in the proposal, there is a **flaw** that **appreciably increases the risk** of unsuccessful contract performance.

Deficiency	Is a **material failure** of a proposal to meet a Government requirement or **a combination of significant weaknesses** in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.
It is possible for the Government to find the proposal "acceptable" without attributing any of the definitions above (e.g. Significant Strength, Strength, Weakness or Significant Weakness) to the findings. Findings may simply explain how the Government perceived Contractor met the requirement. Likewise, an observation may also be made about the proposal that merely express a finding without affecting a rating	

Id. at 221-22. The solicitation further defined the adjectival ratings, which were to be "used by the Government as a guide in assigning the overall rating" for the technical proposal factors, as follows:

Rating	Description
Outstanding	Proposal meets and exceeds requirements and indicates an exceptional approach and understanding of the requirements. Significant Strength(s) and/or Strength(s) Strength(s) far outweigh any weakness(es). Risk of unsuccessful performance is very low.
Good	Proposal meets and exceeds requirements and indicates a thorough approach and understanding of the requirements. Proposal contains Significant Strength(s) and/or Strengths which outweigh any Significant Weakness(es) and/or Weakness(es). Risk of unsuccessful performance is low.
Acceptable	Proposal meets requirements and indicates an adequate approach and understanding of the requirements. Significant Strength(s) and/or Strengths and Significant Weakness(es) and/or Weakness(es) are essentially offsetting. Risk of unsuccessful performance is moderate.
Marginal	Proposal does not clearly meet requirements or has not demonstrated an adequate approach and understanding of the requirements. Significant Weakness(es) and/or Weakness(es) essentially outweigh any Strength(s) or Significant Strengths. Risk of unsuccessful performance is high.
Unacceptable	Proposal does **not** meet requirements and contains one or more **deficiencies**. Proposal is unawardable. Proposals that are rated unacceptable in any of the factors will not be further considered for award.
***Risk* is defined as a **potential** for unsuccessful contract performance as determined by the Government. The consideration of risk assesses the degree to which an offeror's proposed approach to achieving the technical factor may involve risk of disruption of schedule, increased cost or degradation of performance, the need for increased Government oversight, and the likelihood of unsuccessful contract performance or other perceived impact on successful performance of the contract requirement.**	

Id. at 222.

The final evaluation factor, price, was not assigned an adjectival rating, but the "proposed total price for each year [would] be evaluated to determine whether the total IDIQ price for work on government facility is fair and reasonable." Id. at 221. The solicitation clarified that the DOE would "only evaluate the labor categories proposed based on the labor categories provided in the solicitation." Id. It further noted that, while the DOE was "more concerned with obtaining a superior technical proposal than making award at the lowest evaluated price," it would not "make an award at a price premium it consider[ed] disproportionate to the benefits associated with the evaluated superiority of one Offeror's technical and management proposal over another." Id. at 218. The solicitation anticipated that the "closer or more similar in merit that Offerors' technical proposals [were] evaluated to be, the more likely the evaluated price may be the determining factor in selection for award." Id.

B. Proposals and Award

The DOE received five proposals in response to the solicitation, all of which it evaluated and found to be complete and accurate proposals. See ECF No. 27-12 at 766-67 (source selection decision memorandum). The members of the SEB each

independently reviewed and rated the offerors' technical proposals using the Section M evaluation factors and ratings, then, working as a group, "developed a consensus" of the strengths and weaknesses of the proposals and assigned a rating for each of the review factors. Id. The SEB prepared a detailed report of their evaluation. See id. at 546-722 (SEB Report). The SEB rated the offerors relevant to this protest as follows:

Offeror	Technical & Capabilities Approach	Management Approach	Teaming Approach	Past Performance
LATA-Atkins Technical Services, LLC (LATS)	Outstanding	Outstanding	Outstanding	Significant Confidence
Navarro Research & Engineering, Inc.	Outstanding	Outstanding	Outstanding	Significant Confidence
RSI EnTech, LLC	Outstanding	Outstanding	Outstanding	Significant Confidence

Id. at 549. Once the ratings were finalized, the SEB provided their report to the contracting officer and to the source selection authority (SSA) for review. See id. at 764. The contracting officer completed a price evaluation separate from the technical evaluation and concluded that all offerors offered a fair and reasonable price proposal. See id.; see also id. at 723-62 (price analysis).

The SSA then reviewed the SEB report and the contracting officer's price analysis and determined that intervenor-defendant was "the firm that provides the best value to the Government when considering the non-price technical and price factors." Id. at 764. The SSA documented the rationale for the selection in the source selection decision memorandum. Id. at 763-81. Specifically, the SSA determined that intervenor-defendant's proposal had multiple discriminating factors that made intervenor-defendant stand out from the other offerors, "due to the merits of [intervenor-defendant's] strong approaches under Factors 1 and 2." Id. at 780; see also id. at 768, 771. The SSA further determined that LATS' proposal would be ranked second overall, with plaintiff's proposal ranked third. Id. at 780.

The DOE selected intervenor-defendant as the awardee and notified the unsuccessful offerors in March 2020. See id. at 791 (notice of intent to award); 878-79 (letter from the DOE to plaintiff regarding the award decision). Plaintiff filed a protest at the Government Accountability Office (GAO) on March 23, 2020. See ECF No. 27-13 at 1-462 (protest).

C. Plaintiff's Bid Protest

After its protest at the GAO was denied, plaintiff filed its complaint in this court on June 25, 2020. See ECF No. 27-15 at 625-39 (GAO decision); ECF No. 1 (complaint). Plaintiff alleged: (1) that the DOE's evaluation of offerors' proposed personnel and corporate management was inconsistent with the evaluation criteria, see ECF No. 1 at 26; (2) that the DOE failed to properly analyze the risks presented by intervenor-defendant's "unrealistically low labor rates," id. at 32; (3) that intervenor-defendant's proposal contained a material misrepresentation, see id. at 42; (4) that the DOE failed to properly evaluate the impact of intervenor-defendant's teaming partner's corporate transaction, see id. at 45; (5) that the DOE inflated other offerors' technical ratings and minimized plaintiff's, see id. at 52; and (6) that the DOE was unreasonable in its evaluation of the second-place offeror's proposal, see id. at 57.

The parties then filed their cross-motions for judgment on the administrative record, which are now fully briefed. Plaintiff requested oral argument in this matter in its response and reply brief. See ECF No. 39 at 6. The court has broad discretion to manage its docket, and in that discretion determines that oral argument is not necessary in this case. See Amado v. Microsoft Corp., 517 F.3d 1353, 1358 (Fed. Cir. 2008). Thus, this case is ripe for decision.

II. Legal Standards

The Tucker Act grants this court jurisdiction:

> to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement . . . without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1).

The court's analysis of a "bid protest proceeds in two steps." Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005). First, the court determines, pursuant to the Administrative Procedure Act standard of review, 5 U.S.C. § 706, whether the "agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law." Glenn Def. Marine (ASIA), PTE Ltd. v. United States, 720 F.3d 901, 907 (Fed. Cir. 2013) (citing 28 U.S.C. § 1491(b)(4) (adopting the standard of 5 U.S.C. § 706)). If the court finds that the agency acted in error, the court then must determine whether the error was prejudicial. See Bannum, 404 F.3d at 1351.

To establish prejudice, "a protester must show 'that there was a substantial chance it would have received the contract award but for that error.'" Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (quoting Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996)). "In other words, the protestor's chance of securing the award must not have been insubstantial." Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003). The substantial chance requirement does not mean that plaintiff must prove it was next in line for the award but for the government's errors. See Sci. & Mgmt. Res., Inc. v. United States, 117 Fed. Cl. 54, 62 (2014); see also Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996) ("To establish prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract."). Demonstrating prejudice does require, however, that the plaintiff show more than a bare possibility of receiving the award. See Bannum, 404 F.3d at 1358 (affirming the trial court's determination that the plaintiff had not demonstrated a substantial chance of award when its "argument rest[ed] on mere numerical possibility, not evidence").

Given the considerable discretion allowed contracting officers, the standard of review is "highly deferential." Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1058 (Fed. Cir. 2000). As the Supreme Court of the United States has explained, the scope of review under the "arbitrary and capricious" standard is narrow. See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974). "A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," and "[t]he court is not empowered to substitute its judgment for that of the agency.'" Id. (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)); see also Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1368-69 (Fed. Cir. 2009) (stating that under highly deferential rational basis review, the court will "sustain an agency action 'evincing rational reasoning and consideration of relevant factors'") (citing Advanced Data Concepts, 216 F.3d at 1058).

III. Analysis

In its motion for judgment on the AR, plaintiff argues that the DOE did not evaluate the offerors' proposals in accordance with the terms of the solicitation in several respects. See ECF No. 33 at 9. Plaintiff contends that the DOE's evaluation errors "compromise DOE's entire evaluation because none of the offerors' ratings were assigned pursuant to the evaluation criteria in the [s]olicitation." ECF No. 39 at 7. The court will address each of plaintiff's arguments in turn.

A. The DOE's Evaluation under Sections L and M of the Solicitation

In its motion for judgment on the AR plaintiff first argues that the DOE failed to evaluate offerors' proposals in accordance with the stated criteria. See ECF No. 33 at 20-

26. Specifically, plaintiff contends that the DOE should have taken into account the proposal preparation instructions contained in Section L of the solicitation and evaluated the "extent" of an offeror's ability to meet the Section L requirements. See id. 20-21. Defendant responds that plaintiff is misreading the solicitation and, in doing so, adding unstated evaluation criteria. See ECF No. 38 at 23-24. Defendant contends that the solicitation's plain language does not require an evaluation of "the extent" of the offerors' experience, and, if plaintiff believed it did include such a requirement, plaintiff should have sought clarification before submitting its offer. See id. at 25-26, 28. Intervenor-defendant agrees with defendant. See ECF No. 37 at 15-16.

Section L of the solicitation required offerors to "demonstrate the extent of skills, knowledge and experience resident within the company personnel (key and non-key personnel) who have performed work within a similar environment and that is relevant to the IDIQ Statement of Work." ECF No. 27-7 at 212. Likewise, as to offerors' corporate management, the solicitation directed offerors to "demonstrate the extent of skills, knowledge and experience resident across the corporate management who has performed oversight and integration of contracted services within a similar environment and that is relevant to the Statement of Work." Id. Plaintiff reads these instructions, in conjunction with Section M's requirement that offerors "substantially and materially comply" with the proposal instructions, to require the DOE to "evaluate the 'extent' of an offeror's ability to meet the requirements of Section L, not just whether an offeror could meet the minimum requirements." ECF No. 33 at 21 (citing ECF No. 27-7 at 219). Thus, plaintiff contends that the DOE should have considered "the extent to which the knowledge, skills, and experience of either an offeror's personnel or its corporate management were within a 'similar work environment'" or relevant to the solicitation statement of work as part of its Section M evaluation. Id. Such an evaluation, according to plaintiff, would have resulted in the DOE awarding plaintiff additional strengths based on plaintiff's direct experience with the program. Id. at 25-26.

The court disagrees. Interpretation of a solicitation begins with "the plain language of the document." Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1353 (Fed. Cir. 2004). "If the provisions of the solicitation are clear and unambiguous, they must be given their plain and ordinary meaning." Id. The plain language of the Section L provides proposal preparation instructions only. The solicitation states that "[t]hese instructions are not evaluation factors. Evaluation factors are set out in Section M, Evaluation Factors for Award, of this solicitation." ECF No. 27-7 at 205. The plain language unambiguously provides that Section L includes instructions, not factors for evaluation.

The court must, however, consider the solicitation "as a whole, interpreting it in a manner that harmonizes and gives reasonable meaning to all of its provisions." Banknote Corp., 365 F.3d at 1353. Section L makes clear that the "failure to provide the requested information may make an Offeror ineligible for award or adversely affect the

Government's evaluation of an Offeror's proposal." ECF No. 27-7 at 205. Section M provides that a proposal would be "deemed unacceptable if it [did] not represent a reasonable initial effort to address itself to the essential requirements of the solicitation, or if it clearly demonstrate[d] that the offeror [did] not understand the requirements of the solicitation or if it [did] not substantially and materially comply with the proposal preparation instructions" of the solicitation. Id. at 219. These sections, read together, with the provision describing Section L as containing the proposal instructions and Section M as setting forth the evaluation factors, make plain that the evaluators were looking for a complete proposal with all requested information included. But, these sections do not convert the proposal instructions of Section L into evaluation factors as plaintiff contends. Such a conversion would be counter to the plain language of the solicitation.

Plaintiff cites to several cases that it claims support its argument that Section L contains binding evaluation factors. See ECF No. 33 at 23-24. Unlike the circumstances before the court, however, each of the cited cases present a situation in which an offeror left information out of its proposal in violation of the proposal instructions and later argued that the instructions were not binding. See, e.g., Orion v. United States, 102 Fed. Cl. 218, 228 (2011) (reviewing plaintiff's contention that the specific pricing information called for in the solicitation was not a binding requirement and finding it contrary to the plain language of the solicitation). These cases are inapplicable here—where plaintiff argues that the Section L requirements are not only binding, but add additional requirements to the evaluation factors.[3]

Further, the court reads at least one of the cases cited by plaintiff as supporting defendant's position. Plaintiff cites Antarctic Support Associates v. United States, 46 Fed. Cl. 145 (2000), for the proposition that a capability discussed in Section L, but not Section M, can be considered as an evaluation factor. See ECF No. 39 at 7. In Antarctic,

[3] In its notice of supplemental authority, plaintiff reviews a GAO decision from September 23, 2020, Evergreen JV, B-418475.4, 2020 WL 5798042 (Comp. Gen. Sept. 23, 2020). See ECF No. 44-1 at 2-4. Plaintiff argues that this decision is relevant here because it involved the interpretation of a similar solicitation term regarding an evaluation of the extent of offerors' ability to demonstrate capabilities. Id. In Evergreen JV, the GAO held that "[w]here a solicitation indicates that the agency will evaluate the 'extent' a proposal meets a particular requirement, offerors can reasonably expect that a proposal exceeding the agency's minimum requirements will garner a more favorable evaluation than one that merely meets the requirements." Evergreen JV, 2020 WL 5798042 at *8. The solicitation at issue in Evergreen JV, unlike the solicitation here, included specific evaluation factors regarding the extent of an offeror's relevant capabilities. See id. at *2-3. The court is not persuaded by plaintiff's argument, and the outcome of this opinion would be unaffected by plaintiff's offered supplemental authority. Therefore, plaintiff's motion for leave to file notice of supplemental authority, ECF No. 44, is denied.

the plaintiff argued that the proposal instructions in the solicitation at issue referenced a requirement that was not listed in the evaluation factors. See Antarctic, 46 Fed. Cl. at 155. The court noted, however, that the requirement was included within an evaluation factor and that the evaluation report clearly and appropriately showed consideration of the requirement as part of the agency's consideration of the whole factor. Id.

Similarly, in this case, Section L instructed offerors to "demonstrate the extent of skills, knowledge and experience" their personnel and management had in similar environments, and the Section M evaluation criteria incorporated this directive, noting that the evaluation would consider "the extent to which the implementation of the approach demonstrates . . . the skills, knowledge and experience, including the ability to integrate the contracted services, that contractor personnel and corporate management possess." ECF No. 27-7 at 212, 220. Like in Antarctic, the requirement plaintiff identifies in Section L and argues must convey to Section M, is in fact included in Section M, even if not how plaintiff would like.[4]

The record in this case reveals that the DOE treated the Section L instructions as binding and evaluated the proposals received for completeness and accuracy, finding that each proposal satisfied the instructions. See ECF No. 27-12 at 767 (Source Selection Decision Memorandum stating that "[e]ach respective proposal included a complete Volume as instructed, and therefore [was] determined to be responsive"). The DOE also evaluated each offeror's technical capabilities pursuant to the evaluation factors outlined in Section M. See ECF No. 27-12 at 549-722; 764. That the DOE evaluated the skills, knowledge, and experience of each offerors' personnel and management in accordance with the Section M factors is clear in the record. See, e.g., id. at 617-18 (assigning plaintiff strengths for "Essential/Critical Personnel with Unique Depth of Knowledge of LM Site and Services" and for its personnel in general). Thus, the DOE appropriately evaluated the proposals according to the terms of the solicitation, and plaintiff's protest on this count must be denied.

B. The DOE's Evaluation of Performance Cost and Risk of Labor Rates

Plaintiff argues that intervenor-defendant's representation in its proposal that it would "'[p]rovide a compensation and benefits structure aligned with current salary and benefits,'" was a misrepresentation given that the prices it proposed "failed to cover just the base salary and fringe benefits of incumbent personnel" in a majority of the labor categories. ECF No. 33 at 38-39 (quoting ECF No. 27-9 at 86 (intervenor-defendant's proposal)). Plaintiff thus contends that intervenor-defendant should not have been

[4] Notwithstanding plaintiff's arguments regarding the exact language of the Section L instructions, the plain language of Section L does not support plaintiff's preferred reading. The court is not persuaded that the Section L instructions are ambiguous, and declines to read evaluation factors into the solicitation in the manner plaintiff desires.

eligible for award since its "approach to recruiting and retaining incumbent personnel is based on the knowingly false foundation that [intervenor-defendant] will offer salaries and benefits consistent with the incumbent salaries and benefits." Id. at 41.

Plaintiff further argues that because intervenor-defendant's proposal includes labor prices that are "unrealistically low," it represents a cost and performance risk that the DOE should have—but did not—take into account. ECF No. 33 at 27. Plaintiff contends that the Section M factor requiring the DOE to evaluate the "cost and performance risks of each Offeror's proposal" made it mandatory for the DOE to make "an assessment of whether the offeror's costs to the Agency are too low to support successful contract performance." Id. (quoting ECF No. 27-7 at 219 (solicitation Section M.3(b)(2))). In further support of its position, plaintiff cites to Federal Acquisition Regulation (FAR) 52.237-10(d), which is included in the solicitation, and provides that "[p]roposals that include unrealistically low labor rates, or that do not otherwise demonstrate cost realism, will be considered in a risk assessment and will be evaluated for award in accordance with that assessment." Id. at 28 (quoting and adding emphasis to ECF No. 27-2 at 197). Plaintiff contends that intervenor-defendant's labor rates should have been subjected to a risk analysis because it proposed to retain "'the majority'" of plaintiff's incumbent staff and the labor rates proposed "for 75% of the work at issue, do not even cover the paychecks of the incumbent workforce." ECF No. 33 at 27 (emphasis in original).

Both defendant and intervenor-defendant respond that it is plaintiff who mischaracterizes intervenor-defendant's proposal. See ECF No. 38 at 42; ECF No. 37 at 32-35. Defendant notes that intervenor-defendant's approach to recruiting incumbent personnel did not rely on maintaining the entire or the majority of the workforce, but rather "to prioritize and to target 'incumbents with critical institutional knowledge, superior management and leadership performance, and high skill levels'" and to maintain a majority of that staff. ECF No. 38 at 42 (quoting ECF No. 27-9 at 83). Both defendant and intervenor-defendant further point out that, because the solicitation requested fully-burdened labor rates, "the risk of the costs of performance lies with the contractor, and offerors may offer below-cost labor rates." Id. at 44; see also ECF No. 37 at 34.

Defendant and intervenor-defendant add that plaintiff's argument that the DOE should have evaluated intervenor-defendant's price—to determine whether they were too low—effectively requests a price realism analysis, which was not required by the solicitation. See ECF No. 38 at 30; ECF No. 37 at 21. The two parties also contend that, without an explicit requirement in the solicitation that the agency will conduct a price realism analysis, such an analysis is inappropriate and "an agency cannot reject an offer merely because it deems the price too low." ECF No. 38 at 31; ECF No. 37 at 22. Defendant points out that plaintiff's citation to FAR 52.237-10 is inapposite because that provision relates to uncompensated overtime—which intervenor-defendant's proposal did not include. Id. at 33. Rather, defendant argues, the solicitation only required that the proposed total price "'be evaluated to determine whether the total IDIQ price for work on

[the] government facility is fair and reasonable.'" Id. (quoting ECF No. 27-7 at 221). And, according to defendant, this is what the DOE did when the contracting officer performed the price analysis. Id. at 36.

As an initial matter, the court agrees with defendant and intervenor-defendant that intervenor-defendant's proposal did not include a misrepresentation. Intervenor-defendant clearly stated that it intended to hire the majority of a group of key incumbent personnel that it targeted for specific reasons. See ECF No. 27-9 at 83. Whether intervenor-defendant proposed prices that would support the salaries of the incumbent personnel does not change intervenor-defendant's intent. Rather, it informs the risk that the intervenor-defendant was willing to accept.

The court also agrees with defendant and intervenor-defendant that the solicitation in this case does not require a price realism analysis. It is well-settled that an agency may not evaluate a proposal using unstated evaluation criteria. See, e.g., Acra, Inc. v. United States, 44 Fed. Cl. 288, 293 (1999) ("[T]he government is not permitted to rely upon undisclosed evaluation criteria when evaluating proposals."). In the case of a fixed price contract, price realism is not ordinarily considered because, as defendant pointed out, a fixed-price contract assigns the risk of loss to the contractor. See NVE, Inc. v. United States, 121 Fed. Cl. 169, 180 (2015). Therefore, "it is improper for an agency to conduct a price realism analysis in a fixed-price procurement when the solicitation does not expressly or implicitly require a price realism analysis because such an analysis would employ unstated evaluation criteria." UnitedHealth Military & Veterans Servs., LLC v. United States, 132 Fed. Cl. 529, 561 (2017).

The solicitation in this case does not explicitly require a price realism analysis. The court finds that the only explicit reference to price realism to which plaintiff pointed in the solicitation is FAR 52.237-10(d). See ECF No. 33 at 28. When read in context, it is clear that this FAR provision relates to uncompensated overtime, and does not provide an independent basis for price realism review.

To determine whether the solicitation implicitly included a price realism analysis requirement, the court looks to the plain language of the solicitation. See UnitedHealth, 132 Fed. Cl. at 562. Plaintiff identified no term in the solicitation that required proposals to be rejected because their prices were too low; nor did plaintiff identify any term that required prices to be evaluated for anything other than fairness and reasonableness. See generally, ECF No. 33 at 27-37. Indeed, the solicitation stated clearly, more than once, that price would be evaluated for fairness, reasonableness, and completeness. See ECF No. 27-7 at 215, 218, 221. Without more, plaintiff's argument that the solicitation's statement that "cost and performance risks," along with the relative strengths and weaknesses of the proposals, would be assessed "against the evaluation factors in this Section M to determine the Offeror's ability to perform the contract" is sufficient to implicitly require a price realism analysis, must fail. ECF No. 33 at 27 (quoting and adding emphasis to ECF No. 27-7 at 218-19). The court finds that the plain language of

the solicitation neither explicitly nor implicitly provided for a price realism analysis. Therefore, the DOE appropriately did not conduct a price realism analysis in its evaluation of the proposals.

The DOE was required, however, to evaluate the "cost and performance risks" associated with the evaluation factors in Section M. See ECF No. 27-7 at 218-19. Plaintiff did not present, and the court did not find, any evidence that the DOE failed to perform this assessment. The fact that problems related to intervenor-defendant's labor rates and ability to recruit incumbent personnel may arise, simply does not mean that the agency failed to consider these potential problems rendering the award arbitrary and capricious or unreasonable. To the contrary, the DOE appears to have fully considered intervenor-defendant's recruitment plan and set forth its considerations. See ECF No. 27-12 at 643. The court will not substitute its judgment for that of the agency under such circumstances. See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (noting that review under the arbitrary and capricious standard is "narrow" and "a court is not to substitute its judgment for that of the agency"). Plaintiff's claim on this count must be denied.

C. The DOE's Evaluation of Intervenor-Defendant's Teaming Partner's Corporate Transaction

Plaintiff argues that the DOE failed to evaluate the impact of the sale of intervenor-defendant's teaming partner—AECOM N&E Technical Services, LLC (AECOM). See ECF No. 33 at 42-48. Plaintiff contends that, although intervenor-defendant included information in its proposal alerting the DOE to an impending corporate transaction involving AECOM, that transaction did not occur and another, slightly different transaction did. See id. at 43-44. According to plaintiff, the transaction that ultimately occurred affected intervenor-defendant's technical capabilities and past performance information, and the DOE should have evaluated the impact of that transaction. See id. at 44-46; ECF No. 39 at 25.

Defendant responds that the DOE "reasonably accepted [intervenor-defendant's] representations regarding AECOM and the transaction in its proposal." ECF No. 38 at 51. Defendant argues that intervenor-defendant notified the DOE of the impending transaction and represented that the contract would be "minimally impacted." Id. at 53. The DOE, defendant contends, was entitled to—and did—rely on that representation and "reasonably evaluated [intervenor-defendant's] proposal in light of its assurances." Id. at 56. Further, defendant argues, when the DOE learned that the transaction had been completed, the DOE followed up with intervenor-defendant and issued an "updated determination confirming [its] responsibility finding." Id. at 54.

The court agrees with defendant that the DOE was reasonably entitled to rely on intervenor-defendant's representations in its proposal related to its teaming partner and the impending transaction. The scope of review under the "arbitrary and capricious"

standard is narrow. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. "A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," and "[t]he court is not empowered to substitute its judgment for that of the agency.'" Bowman Transp., 419 U.S. at 285 (quoting Citizens to Preserve Overton Park, 401 U.S. at 416).

The DOE found intervenor-defendant's proposal to be thorough, found its teaming approach to be "complete, detailed, and comprehensive," and found its past performance to be "recent and relevant" providing "significant confidence that the offeror would successfully perform the requirement." ECF No. 27-12 at 767, 773-74. The only evidence plaintiff has provided that it was unreasonable for the DOE to rely on intervenor-defendant's representations as to the corporate transaction are qualifying statements in the United States Securities and Exchange Commission documents that AECOM released related to the transaction. See ECF No. 33 at 44. The court does not find these statements to be persuasive evidence that the DOE should not have relied on intervenor-defendant's assurances that the transaction would have a minimal impact on the contract. Without more, the court finds that the DOE performed a reasonable evaluation of intervenor-defendant's proposal that comported with the evaluation factors outlined in the solicitation. The court will not substitute its judgment for that of the agency as it relates to the impact of the AECOM corporate transaction on intervenor-defendant's proposal.

Further, the contracting officer, upon learning of the completion of the AECOM transaction, which occurred "just prior to award," decided that "it was in the best interest of DOE to perform an updated responsibility determination." ECF No. 27-15 at 503. The contracting officer evaluated the transaction and its results, reviewed a declaration provided by intervenor-defendant, and determined that "the latest information did not affect [intervenor-defendant's] responsibility status" and that intervenor-defendant was "still considered responsible." Id. Plaintiff describes the DOE's consideration of the declaration as a post hoc rationalization because it was completed after contract award and after plaintiff's protest at the GAO. See ECF No. 33 at 47-48. Defendant responds that it is appropriate for an agency to "reassess an issue like this one" if additional information becomes available. ECF No. 38 at 58.

The court agrees with defendant. Because the AECOM transaction occurred so close to the time of award, it was appropriate and reasonable for the contracting officer—when she became aware of the issue—to investigate and make a determination. Cf. Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1386 (Fed. Cir. 2011) (noting that in the context of organizational conflicts of interest (OCI), information may not come to light until after award, making a post-award OCI review appropriate). Thus, the DOE thoroughly considered the AECOM transaction and its impact on the award. Once again, the court will not second guess the agency's determination or substitute its judgment for

that of the agency. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. Plaintiff's claim on this point must fail.

D. The DOE's Evaluation of the Technical Ratings of Offerors

Plaintiff next argues that the DOE inappropriately evaluated the offerors' proposals by "'grade inflation'" for intervenor-defendant and the second-place proposal and by "minimizing the technical superiority of [plaintiff's] proposal" in a quest for the lowest price offer. ECF No. 33 at 49. Plaintiff contends that the DOE erred by not "meaningfully distinguish[ing]" between strengths and significant strengths, thereby "impermissibly level[ing] the offerors' technical proposals and chang[ing] the very nature of the procurement." Id. Plaintiff adds that the DOE also "flatten[ed] the remaining discriminators that worked in [plaintiff's] favor" by minimizing the weaknesses in the other proposals. Id.

Defendant responds that plaintiff's argument is "'mere disagreement'" with the evaluation, and that any suggestion that the DOE was angling for the lowest price offer is incorrect because the SEB did not consider the offerors' price proposals. ECF No. 38 at 59. Defendant points out that "[i]t is well-recognized" that evaluators' "judgment in assigning strengths or significant strengths . . . is inherently subjective." Id. at 60. Defendant argues that despite the subjective nature of this judgment, the record in this case demonstrates that both the SEB and the source selection authority "carefully documented the basis for every strength" awarded and "discussed those [intervenor-defendant] strengths [ ] found to be discriminators." Id. at 60-61.

Plaintiff replies that "it is implausible that the DOE rationally determined that 152 aspects of offerors' proposals exceeded the [s]olicitation's requirements, yet only one aspect significantly exceeded the [s]olicitation's requirements." ECF No. 39 at 30. This, plaintiff argues, led to four of the five offerors receiving "perfect technical and past performance ratings," and made DOE's award decision almost certain to be "only [ ] based on price." Id. at 31.

Plaintiff's quarrel with the DOE's ratings of the proposals amounts to a request that the court substitute its judgment for that of the agency. Plaintiff's only evidence that the DOE artificially inflated and deflated the offerors' ratings is its assumption that the ratings would have been less similar if the DOE had not done so. See ECF No. 33 at 49. The record reflects that the DOE performed an extensive evaluation of each offeror's proposal. Without more, the court will not substitute its judgment for that of the agency. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. Plaintiff's claim on this count must fail.

E. The DOE's Evaluation of the Second-Place (LATS) Proposal

Finally, plaintiff argues that "there are multiple flaws in DOE's evaluation" of the second-place offeror's proposal and in the source selection authority's conclusion

regarding the second-place ranking. ECF No. 33 at 52. Plaintiff repeats its earlier claims as to the DOE's evaluation of the proposals and contends that the second-place offeror was "neither eligible for award, nor technically equivalent to" plaintiff. Id. at 53. Specifically, plaintiff claims that one of the second-place offeror's key personnel is no longer employed by the company thereby rendering the company ineligible for award. Id. Plaintiff also argues that the DOE should not have found similar merit between plaintiff and the second-place offeror because, although they had similar number of strengths, the second-place offeror also had a weakness. Id. at 53-54.

Defendant responds that plaintiff's argument is "reprising the other counts of its protest" and "fail[s] for the same reasons" as defendant has previously argued. ECF No. 38 at 66. Defendant also asserts that plaintiff's claim related to the second-place offeror's personnel is based on extra-record evidence not before the agency at the time of its decision, while the employee's signed commitment letter was. Id. at 67. And, defendant argues, plaintiff's disagreement with the technical ratings is "mere disagreement with the agency's discretionary judgment" and "is not a valid basis for protest." Id.

Plaintiff replies that the second-place offeror was obligated to inform the DOE of changes in its proposed staffing and did not. See ECF No. 39 at 32. It requests that the court supplement the AR with evidence of the employee's change in employment to permit the court to evaluate whether the offeror "would have been eligible for award in light of [the employee's] departure." Id.

The court has already addressed the merits of the claims plaintiff repeats here as to the second-place offeror and has found each claim unavailing. The court, therefore, will not reexamine the claims it has already carefully considered.

Plaintiff's claim regarding the departure of a key employee of the second-place offeror does not persuade the court. The court agrees with defendant that the evidence presented by plaintiff falls outside of the AR, and finds that supplementation is not necessary for meaningful judicial review in this matter. Axiom Res. Mgmt., 564 F.3d at 1379-80. The DOE evaluated the proposals with the information that it had in front of it at the time of evaluation, including a letter of commitment from the key employee. See ECF No. 27-11 at 257 (letter of commitment included in the proposal). The court will not substitute its judgment for that of the agency with respect to the evaluation of the availability of the offeror's key personnel. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

The court also agrees with defendant that plaintiff's disagreement with the technical ratings is a disagreement with the agency's discretionary judgment. See ECF No. 38 at 67. As the court previously stated, the record reveals that the DOE performed an extensive evaluation of each offeror's proposal. Plaintiff did not point to any evidence in the record that the agency inappropriately evaluated the second-place offeror's

proposal outside its claim that because the company had a weakness that plaintiff did not, the second-place offeror's proposal should not have been so highly rated. See ECF No. 33 at 54. Without more, the court will not substitute its judgment for that of the agency. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. Plaintiff's claim on this count must fail.

IV. Conclusion

Accordingly, having found none of plaintiff's claims meritorious,

(1) Plaintiff's motion for leave to file notice of supplemental authority, ECF No. 44, is **DENIED**;

(2) Plaintiff's motion for judgment on the AR, ECF No. 32, is **DENIED**;

(3) Intervenor-defendant's cross-motion for judgment on the AR, ECF No. 37, is **GRANTED**;

(4) Defendant's cross-motion for judgment on the AR, ECF No. 38, is **GRANTED**;

(5) The clerk's office is directed to **ENTER** final judgment in defendant's and intervenor-defendant's favor **DISMISSING** plaintiff's complaint with prejudice; and

(6) On or before **November 25, 2020**, the parties are directed to **CONFER** and **FILE** a **notice** informing the court as to whether any redactions are required before the court makes this opinion publicly available, and if so, attaching an agreed-upon proposed redacted version of the opinion.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

Decision

Matter of: ASRC Federal Data Network Technologies, LLC

File: B-418028; B-418028.2

Date: December 26, 2019

Damien C. Specht, Esq., James Tucker, Esq., and Caitlin Crujido, Esq., Morrison & Foerster LLP, for the protester.
Katherine Burrows, Esq., and Nathanael Hartland, Esq., Nelson Mullins Riley & Scarborough LLP, for American Systems Corporation, the intervenor.
Timothy J. Haight, Esq., Jennifer M. Hesch, Esq., Song U. Kim, Esq., and Morgan Hilgendorf, Esq., Defense Health Agency; and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.
John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to make a small business innovation research (SBIR) phase III sole source award is sustained where the awardee is not eligible to receive SBIR phase III awards under the terms of the SBIR Program Policy Directive issued by the Small Business Administration.

DECISION

ASRC Federal Data Network Technologies, LLC (AFDNT), of McLean, Virginia, protests a small business innovation research (SBIR) phase III sole-source award to American Systems Corporation, of Chantilly, Virginia, by the Defense Health Agency (DHA). AFDNT contends that the agency's phase III award was improper because American Systems is not eligible to receive an SBIR phase III award; the award did not meet the definition of a phase III award because it did not derive from, extend, or complete a prior SBIR contract performed by American Systems; and the agency improperly awarded the contract as an undefinitized contract action.

We sustain the protest.

BACKGROUND

The SBIR program is designed to increase the participation of small business concerns in federally funded research or research and development (R/R&D). See SBIR Program Act of 1982, 15 U.S.C. § 638. Pursuant to this authority, certain federal agencies are required to provide a program under which a portion of the agency's R/R&D effort is reserved for award to small business concerns. See generally id.

The SBIR program has three phases. Under phase I, firms competitively apply for an award to test the scientific, technical, and commercial merit and feasibility of a certain concept. 15 U.S.C. § 638(e)(4)(A). If this is successful, a firm may be invited to apply for a phase II award to further develop the concept. Id. § 638(e)(4)(B). A phase III award is defined as work that "derives from, extends, or completes efforts made under prior funding agreements under the SBIR program." Id. § 638(e)(4)(C). Under this phase, firms are expected to obtain funding from non-SBIR government sources or the private sector to develop the concept into a product for sale in private sector or military markets.

This protest involves the Theater Medical Information Program - Joint (TMIP-J) healthcare delivery system, which comprises multiple different systems and products that collect a variety of data related to the healthcare of service members. See Contracting Officer's Statement at 3-4. According to the agency, the TMIP-J "enhances the clinical care and information capture at all levels of care in [t]heater, transmits critical information to the [t]heater [c]ommander, the evacuation chain for combat and non-combat casualties and forges the theater links of the longitudinal health record to the [military healthcare system] and the Department of Veterans Affairs." Id. at 2. In short, the TMIP-J is a "system of systems" that supports the various branches of the Armed Forces by providing critical healthcare data and logistics for service members deployed around the world. See Hearing Transcript (Tr.) at 14:9-21:14.

The TMIP-J system is currently in sustainment, which means that the agency is simply maintaining the current capabilities of the system. Tr. at 17:8-12. Multiple contractors perform the sustainment contracts for the various TMIP-J systems; AFDNT is the sustainment contractor for two of the systems. Protest at 2. The agency explained that much of the TMIP-J system has not been updated in almost 20 years and many of the systems are becoming obsolete. Tr. at 128:4-10. The agency has had various problems with the TMIP-J system, including an inability to gather and easily share healthcare data. Id. at 24:1-30:13. As a result, DHA seeks to transform the TMIP-J system by modernizing or replacing its various systems to become a cutting edge healthcare information technology system that can seamlessly capture and transmit data around the world to all branches of the Armed Forces. Id. at 51:2-61:6; 143:16-144:8.

On September 20, 2019, the agency issued to American Systems an SBIR phase III basic ordering agreement (BOA) that is intended to "build on efforts that derive from, extend, or complete efforts that were generated under previous SBIR [p]hase I and II

work." Agency Report (AR) Tab 3, BOA No. HT003819G0001 at 6. The BOA explained that it would "support the identification technology and organizational modernization needs and will leverage [p]hase I and II SBIR technologies, processes, services, tools, and methodologies to fill existing and emerging gaps within all aspects of organizational and technological transformation that will allow the DHA and [Program Executive Office Defense Healthcare Management Systems] to position their organizations as industry leaders in the healthcare domain." Id.

Also on September 20, DHA issued to American Systems the first order under the BOA to "transform and support [the] TMIP-J platform."[1] AR, Tab 4, BOA Order, at 3. The order stated that it was a phase III SBIR award and that the "[w]ork effort performed must derive from [p]hase I and II topics to be delineated during definitization, to include, at a minimum, 'Automated Readiness Measurement System (ARMS) SBIR Topic N00-123', as certified to the Contracting Officer on 05 SEP 2019." Id. at 5. The order described the work as follows:

> The requirement is to 1) unify the architecture of the full complement of TMIP-J products and provide the suite as a fully centrally managed solution driven by outcomes rather [than] [g]overnment specification, 2) make any appropriate technology changes to reduce the resources and time required for deployment and implementation, especially to [n]aval platforms, 3) make any appropriate technology changes to simplify the transition of the system into routine long-term continuity of operations, and 4) make any appropriate technology changes to simplify and ease the "sunset" of end-of-life components of the suite. While the [g]overnment is seeking to radically evolve the platform as rapidly as possible, it cannot afford to let the systems be disconnected.
>
> The [c]ontractor shall evaluate the required outcomes, develop an approach to satisfy them within the provided constraints, and hold iterative bilateral discussions with the [g]overnment to describe its approach and provide a [p]erformance [w]ork [s]tatement that captures the mutually agreed upon approach prior to definitization.

Id.

The SBIR topic N00-123 identified in the order placed with American Systems refers to a different SBIR phase III BOA that was awarded to a company called DDL Omni Engineering LLC (DDL Omni) in September 2014. AR, Tab 34, BOA No. N68335-14-G-

[1] The order was issued as an undefinitized contract action (UCA), meaning that the contract terms, specifications, or price were not agreed upon before performance began. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 217.7401. A UCA must contain a definitization schedule that sets forth when any open terms of the UCA are to be definitized. Id. § 217.7404-3.

0057. DDL Omni's phase III BOA derived from or extended the work of prior SBIR phase I and II contracts that had been awarded to and fully performed by DDL Omni. Id. at 6. In December 2018, American Systems acquired DDL Omni and executed an assignment and assumption agreement that identified DDL Omni's contracts, including DDL Omni's phase III BOA, that were assigned to American Systems. AR, Tab 32, Assignment and Assumption Agreement at 1. On May 9, 2019, the government executed a novation agreement through which it recognized American Systems as the successor in interest of DDL Omni for certain identified contracts listed in an exhibit attached to the novation agreement. AR, Tab 33, Novation Agreement, at 2. That list of contracts included DDL Omni's phase III BOA and two orders issued under that BOA; it did not include either of the SBIR phase I or II contracts on which DDL Omni had completed performance. Id. at 3-5.

On September 9, 2019, AFDNT filed an agency-level protest challenging the agency's decision to make a sole-source phase III award for the transformation of the TMIP-J system.[2] Protest, exh. B. AFDNT argued, among other things, that the award did not meet the definition of an SBIR phase III award because it did not derive from, extend, or complete prior SBIR work. Id. On September 19, the agency denied AFDNT's protest. Protest, exh. C.

After the denial of its agency-level protest, AFDNT timely protested the sole-source SBIR phase III award to our Office. In its protest, AFDNT stated that it was unclear whether the agency had made the SBIR phase III award to American Systems or to DDL Omni.[3] Protest at 5-6. After the request to intervene identified the awardee as American Systems, AFDNT timely filed a supplemental protest that raised an additional protest ground asserting that American Systems was ineligible for award.

PRELIMINARY MATTERS

The agency argues that this protest should be dismissed because (1) GAO does not have jurisdiction over the agency's decision to make a noncompetitive SBIR phase III award; or (2) AFDNT is not an interested party. We reject both of these arguments and find that we have jurisdiction to hear the protest and that AFDNT is an interested party.

[2] The agency had previously informed AFDNT via email of its intent to modernize and transform the TMIP-J, including potentially utilizing an SBIR phase III award. Protest, exh. A. In response to this email, AFDNT submitted a letter of concern to the agency regarding this approach. Protest at 3. After learning that the agency intended to move forward with a sole-source SBIR phase III award, AFDNT converted its letter of concern to an agency-level protest. Id.

[3] The agency's denial of AFDNT's agency-level protest did not identify by name the recipient of the phase III award. See Protest, exh. C.

In arguing that GAO does not have jurisdiction, the agency relies on Complere Inc., B-406553, June 25, 2012, 2012 CPD ¶ 189, in which the protester challenged the agency's decision not to make a phase III award to the protester after it completed phase II of the SBIR program. GAO found that "we do not have jurisdiction to review an agency's decision declining to enter into a noncompetitive phase III funding agreement." Complere Inc., supra at 2. Based on this case, the agency argues that because this protest involves a noncompetitive SBIR phase III award, for which the agency is granted broad discretion when determining what entity should receive such awards, GAO does not have jurisdiction over this protest. Agency Post-Hearing Comments at 4. We disagree.

Our jurisdiction is set forth under the Competition in Contracting Act (CICA) and our Bid Protest Regulations, which provide that we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award of contracts for procurement of property or services. See 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R § 21.1(a). Here, the SBIR statute and SBIR Program Policy Directive allow for a sole-source phase III award, but also specifically define what constitutes a phase III award and who is eligible to receive a phase III award. Therefore, when making a sole-source phase III award, an agency must comply with all relevant portions of the statute governing phase III of the SBIR program. AFDNT has challenged American Systems' eligibility for a phase III award and alleged that the award does not meet the statutory definition of a phase III award. In other words, AFDNT is challenging the agency's decision to make a phase III award, specifically whether that award complied with the express requirements of the SBIR statute and Policy Directive. We therefore find that the facts and allegations at issue in Complere Inc. are distinct from the facts and protest grounds at issue in this matter, and that we have jurisdiction over this protest to determine whether the agency complied with the applicable SBIR program requirements.

The agency also has argued throughout the protest that AFDNT is not an interested party because it has not performed an SBIR phase I or II contract and therefore is not eligible for award of a phase III contract. See Agency Post-Hearing Comments at 5-6.

An interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a)(1). Here, AFDNT argues that the award to American Systems was improper because American Systems was ineligible to receive award, and because the award does not meet the statutory definition of a phase III award. AFDNT further asserts that it is able to perform the work that the agency seeks, and the agency should meet these requirements through a full and open competition. Thus, AFDNT is an interested party because it may be able to compete for an award, should the agency's phase III award be found improper.

While the agency has made vague references to "other" contractors that performed SBIR phase I or II work and that also would be eligible for a phase III award for this work if this protest were to be sustained, it has not identified those contractors or

provided any explanation of their prior SBIR work. See, e.g., Tr. 285:7-286:7. Thus, there is no basis in the record to conclude that the proposed work would have to remain within the SBIR program and that the agency would be required to award the work to a company that had received a prior phase I or II award. Accordingly, on the record and facts before us in this case, we find that AFDNT is an interested party to challenge the agency's decision to make a sole-source SBIR phase III award to American Systems.

DISCUSSION

AFDNT alleges that American Systems is ineligible for an SBIR phase III award under relevant provisions of the SBIR statute and the SBIR Program Policy Directive promulgated by the Small Business Administration (SBA). AFDNT also asserts that the award does not meet the statutory definition of a phase III award because the work does not derive from, extend, or complete any of American Systems' prior SBIR agreements; and that the agency improperly awarded the contract as a UCA. As explained below, we sustain the protest because we find that American Systems is ineligible to receive a phase III award; as a result, we need not address AFDNT's remaining two protest grounds.

As relevant to the protester's allegation that American Systems is ineligible, the SBIR statute states:

> To the greatest extent practicable, [f]ederal agencies and [f]ederal prime contractors shall . . . issue, without further justification, [p]hase III awards relating to technology, including sole source awards, to the SBIR . . . award recipients that developed the technology.

15 U.S.C. § 638(r)(4). Consistent with this language, the SBIR Program Policy Directive, issued by the SBA to provide guidance for the general conduct of the SBIR programs, states that agencies "shall issue Phase III awards relating to the technology, including sole source awards, to the [a]wardee that developed the technology under an SBIR . . . award, to the greatest extent practicable."[4] SBIR Policy Directive § 4(c)(7). The Policy Directive further states that "[i]f pursuing the [p]hase III work with the [a]wardee is found to be practicable, the agency must award a non-competitive contract to the firm." Id. § 4(c)(7)(ii).

[4] The Small Business Act requires the SBA to issue policy directives for the operation of the SBIR program. 15 U.S.C. § 638(j). Under this authority, the SBA has promulgated the SBIR Program Policy Directive through notice and comment rulemaking. See 84 Fed. Reg. 12794-849 (Apr. 2, 2019). The most recent version of the Policy Directive (dated May 2, 2019) was published in the Federal Register on April 2, 2019 and is available on the SBA's SBIR program website. See SBIR Program Policy Directive, https://www.sbir.gov/sites/default/files/SBIR-STTR_Policy_Directive_2019.pdf (last visited Dec. 16, 2019). Citations to the Policy Directive in this decision refer to the sections of the Directive itself, not the pages of the Federal Register.

Section 6(a)(5) of the Policy Directive provides that "[a]n SBIR . . . [a]wardee may include, and SBIR . . . work may be performed by, those identified via a 'novated' or 'successor in interest' or similarly-revised [f]unding [a]greement. For example, in order to receive a Phase III award, the [a]wardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award."[5] Id. § 6(a)(5).

Based on the language from the statute and the Policy Directive quoted above, the protester argues that American Systems is ineligible for an SBIR phase III award because it has not performed, was not novated, and has not been recognized as a successor in interest to, an SBIR phase I or II award. Protester Post-Hearing Comments at 23-28. The protester asserts that the SBIR statute requires that sole-source phase III awards can be made only to the company that originally developed the technology, in this case, DDL Omni. Id. at 23-24. The protester further contends that the Policy Directive allows a phase III award to a company other than the one that originally developed the technology only when that company has been novated, or identified as a successor in interest to, a prior phase I or II award through a revised SBIR funding agreement. Id. at 24. The protester concludes that because American Systems has been novated only a prior phase III award, it does not meet the requirements set forth in the statute or Policy Directive, and is ineligible to receive a phase III award. Id.

The agency counters that by virtue of American Systems' acquisition of DDL Omni--the company that performed the SBIR phase I and II awards on which the novated phase III award is based--American Systems is the successor in interest to DDL Omni, and therefore is eligible to receive the phase III award under the Policy Directive. Agency Post-Hearing Comments at 7-8. The agency also contends that American Systems is eligible to receive a phase III award because it was novated DDL Omni's prior phase III award, and that novation of DDL Omni's prior phase I and II contracts was not required to make American Systems eligible for a phase III award. Id. at 6-9.

The agency's argument mirrors that made by the SBA, whose views our Office solicited and obtained because the protest raised legal questions regarding the SBIR program and the requirements of the SBA's SBIR Program Policy Directive. Specifically, the SBA argues that American Systems is eligible for award because of its acquisition of DDL Omni. In this regard, the SBA states that "a firm that owns all rights or interests in the work performed under an SBIR award, may be considered a successor-in-interest and receive a subsequent SBIR award without a prior novation, assuming the awardee meets all other eligibility requirements." SBA Comments at 6. The SBA also asserts

[5] A funding agreement is defined as "any contract, grant, or cooperative agreement entered into between any [f]ederal [a]gency and any [small business concern] for the performance of experimental, developmental, or research work, including products or services, funded in whole or in part by the [f]ederal [g]overnment." SBIR Policy Directive § 3(r).

that "[i]t is consistent with law, policy, and statutory intent, to permit a phase III award to a firm that has purchased all rights and interests in a small business awardee that received the phase I, phase II, or phase III SBIR awards. This is the case even when novation has not occurred, assuming all other eligibility requirements are met . . . ." Id. at 7. The agency argues that based on the SBA's comments, "there can be no remaining question as to American Systems' eligibility for the SBIR [p]hase III order." Agency Post-Hearing Comments at 6.

Our analysis begins with the interpretation of the relevant statute or regulation.[6] See Curtin Mar. Corp., B-417175.2, Mar. 29, 2019, 2019 CPD ¶ 117 at 9 (quoting Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the 'language of the statute.'")). In construing the statute or regulation, "[t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.'" Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2001) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). In this regard, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009). If the statutory or regulatory language is clear and unambiguous, the inquiry ends with the plain meaning. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Our Office likewise applies the "plain meaning" rule of statutory or regulatory interpretation. See, e.g., Curtin Mar. Corp., supra.

Here, we find that the plain language of the SBIR Policy Directive requires that in order to be eligible to receive a phase III award, a company has to have either performed, been novated, or been identified as a successor in interest to, a phase I or II award. The SBIR statute states that a phase III award must go to the "award recipients that developed the technology," but does not address a situation where a phase III award can be made to a company other than the one that received the original award and developed the technology. The Policy Directive, however, has identified specific circumstances for when this can occur.

As explained above, section 6(a)(5) of the Policy Directive states that an SBIR awardee may include "those identified via a 'novated' or 'successor in interest' or similarly-revised [f]unding [a]greement." SBIR Policy Directive § 6(a)(5). It then clearly explains that "in order to receive a Phase III award, the [a]wardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award." Id. We find that the use of the word "must" in this sentence makes clear that receipt or novation of a phase I or II award is a requirement to establish eligibility of a company to receive a

[6] Because the SBIR Policy Directive is promulgated through notice and comment rulemaking, we find that it is akin to an agency regulation for the purposes of this analysis and therefore apply the same analysis of interpretation to the Policy Directive that we would apply to a regulation.

phase III award. If a company cannot show that it meets these requirements, then it would be ineligible to receive a phase III award.

The SBA and the agency argue that the phrase "for example" at beginning of the sentence stating the requirements for when a company is eligible to receive a phase III award shows that this is only one example, and "not an exclusive list of all scenarios where an SBIR award could be made to a firm other than the recipient of a prior phase award." SBA Comments at 6; see also Agency Post-Hearing Comments at 9. Based on the plain language of the entirety of section 6(a)(5), we disagree.

Section 6(a)(5) begins with a sentence stating that "[a]n SBIR . . . [a]wardee may include, and SBIR . . . work may be performed by, those identified via a 'novated' or 'successor in interest' or similarly-revised [f]unding [a]greement." Policy Directive § 6(a)(5). This initial sentence is not limited to a particular phase of the SBIR program and therefore addresses situations involving possible phase I, phase II, or phase III SBIR awardees. In other words, the sentence contemplates situations involving an SBIR awardee--or a company performing an SBIR award--that is identified via a novated, or successor in interest, or similarly-revised funding agreement for either phase I, II, or III.

The next sentence reads: "For example, in order to receive a [p]hase III award, the [a]wardee must have either received a prior [p]hase I or [p]hase II award or been novated a [p]hase I or [p]hase II award." Id. We find that the phrase "for example" presents an example using phase III--instead of phase I or II--of when there can be an SBIR awardee identified through the novation of a prior SBIR award. In this sense, the SBA's argument that the sentence "is not an exclusive list of all scenarios where an SBIR award could be made to a firm other than the recipient of a prior phase award," SBA Comments at 6, is correct because there could be other scenarios involving a phase I or II award. However, while the Policy Directive uses a phase III awardee as an example, it also sets forth specific eligibility requirements for a phase III awardee, i.e., a company must have either performed or been novated a prior phase I or II award. In this sense, the language in the Policy Directive is an exclusive list of when a company is eligible to receive a phase III award; the Policy Directive does not leave open the possibility that there are scenarios other than the one stated where a company could be eligible for a phase III award. Accordingly, we find that the plain language of section 6(a)(5) provides the exclusive and specific eligibility requirements to receive an SBIR phase III award.[7]

Based on this analysis, we reject as incorrect the agency's claim that American Systems is eligible for a phase III award because it is the successor in interest to DDL

[7] Our analysis might be different if section 6(a)(5) stated: "In order to receive a phase III award, the awardee must have, for example, either received a prior phase I or phase II award or been novated a phase I or phase II award." But this is not what the Policy Directive states.

Omni by virtue of its acquisition of that company. The Policy Directive is clear on the eligibility requirements for a phase III awardee, and it does not provide that a company should be considered a successor in interest for purposes of SBIR phase III eligibility simply by acquiring another company that previously had performed an SBIR phase I or II award. For these same reasons, we reject the SBA's claim that "[i]t is consistent with law, policy, and statutory intent, to permit a phase III award to a firm that has purchased all rights and interests in a small business awardee that received the phase I, phase II, or phase III SBIR awards . . . even when novation has not occurred." SBA Comments at 7. While our Office is required to give great deference to an agency's reasonable interpretation of its own regulation, it is also true that where the language of a regulation is plain on its face, and its meaning is clear, there is no reason to move beyond the plain meaning of the text. See Edmond Scientific Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 7, n.9. Here, while the SBA may have intended this to be the policy, its interpretation is contradicted by the plain language of the Policy Directive and is therefore unreasonable.[8]

The agency and the SBA also argue that a phase III award can be based on having received or been novated a prior phase III award, and that American Systems is eligible to receive award because it was novated DDL Omni's prior SBIR phase III award. Agency Post-Hearing Comments at 6-9; SBA Comments at 6. In this regard, the agency and SBA point to section 4(c) of the Policy Directive, which generally defines and explains phase III work, and section 4(c)(5), which states that "[t]here is no limit on the time that may elapse between a phase I or phase II award and phase III award, or between a phase III award and any subsequent phase III award." SBIR Policy Directive §§ 4(c), 4(c)(5). Based on this language, the agency and the SBA argue that a phase III award based on a prior phase III award "is implied in section 4(c) . . . and explicitly discussed in section 4(c)(5)." SBA Comments at 6; see also Agency Post-Hearing Comments at 9. Here again, we find that this interpretation is not supported by the plain language of the Policy Directive and is therefore unreasonable.

Section 4(c) generally explains phase III of the SBIR program, stating that phase III "refers to work that derives from, extends, or completes an effort made under prior SBIR . . . [f]unding [a]greements" and that phase III work is typically for commercialization of SBIR research or technology. See Policy Directive § 4(c). The language in section 4(c)(5) explains that any amount of time can pass between a phase I or II award and a phase III award, or any other subsequent phase III award that is based on a prior phase I or II award. See id. § 4(c)(5). Indeed, the next two sentences in section 4(c)(5)--which both the agency and the SBA ignored in their arguments--state: "A [f]ederal [a]gency may enter into a [p]hase III SBIR…agreement at any time with a

[8] In fact, we are deferring to the SBA's interpretation of the SBIR program policy as reflected in the plain language of the most recent version of its own SBIR Program Policy Directive. To the extent the SBA suggests that the Policy Directive does not reflect the actual policy of the program, it should consider revising the Policy Directive.

[p]hase II awardee. Similarly, a [f]ederal [a]gency may enter into a [p]hase III SBIR . . . agreement at any time with a [p]hase I awardee." Id. These two sentences are entirely consistent with the language in section 6(a)(5) requiring a company to have either performed or been novated a phase I or II award to be eligible to receive a phase III award. They also clarify that a "subsequent phase III award" in section 4(c)(5) refers only to the timing of award, and not the eligibility of an awardee. Accordingly, we find nothing implicit or explicit in section 4(c) that allows for a phase III award to be made on the basis of having received or been novated only a prior phase III award. We therefore reject the SBA's and agency's argument that American Systems is eligible to receive this phase III award because it was novated a prior phase III award.[9]

In sum, as explained above, the order awarded to American Systems states that the work will derive from, extend, or complete efforts performed on a prior SBIR phase III award, which in turn derived from or extended phase I and II awards that DDL Omni had previously performed. The prior phase III award was novated to American Systems upon its acquisition of DDL Omni; however, the underlying phase I and II awards were never novated to American Systems. There is nothing in the record showing that American Systems performed a prior SBIR phase I or II award. Accordingly, based on the plain meaning of the Policy Directive, because American Systems never performed or was novated an SBIR phase I or II award, we find that it is ineligible to receive a phase III award.[10]

[9] The agency also argues that there is a difference between a "FAR based novation" and a novation as contemplated by the Policy Directive, and that to establish successor eligibility under the SBIR program, a "FAR based novation" is not required. Agency Post-Hearing Comments at 8-9. The agency asserts that "[w]hile a FAR based novation governs the relationship between a contractor and the [g]overnment, the reference to a novation in the SBA Policy Directive refers to the relationship between private companies and the establishment of transfer, sale, or other funding agreement between entities." Id. at 8. We find no support for this argument. The Policy Directive states that an SBIR awardee may include a company identified "via a 'novated' . . . funding agreement." Policy Directive § 6(a)(5). The Policy Directive defines a funding agreement as a "contract . . . entered into between any [f]ederal [a]gency and any [small business concern]." Id. § 3(r). Thus, there is no basis to conclude that the reference to a novated funding agreement in the Policy Directive refers to the relationship between private companies, and thus no basis to conclude that this reference is any different than a "FAR based novation."

[10] The intervenor argues that DDL Omni's phase I and II contracts were either expressly or constructively novated to American Systems. Intervenor Post-Hearing Comments at 30-32. Intervenor relies on language in the novation agreement between the government and American Systems which states "the term 'contracts' as used in the [n]ovation [a]greement means those listed in an attached exhibit A and all purchase/delivery/task orders and modifications thereto made between the Government and DDL Omni before the effective date of the [a]greement," and argues that this language incorporates the prior phase I and II contracts into the novation. Id. at 31. We

RECOMMENDATION

We recommend that the agency reevaluate its requirements and determine the best way to procure the services it needs to transform the TMIP-J system in a manner that is consistent with this decision and applicable law. We also recommend that the agency consult with the SBA to determine whether any revisions to the Policy Directive are necessary to more accurately reflect the policy and intent of the SBIR program regarding eligibility for phase III awardees. Finally, we recommend that AFDNT be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). AFDNT should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

disagree. The language “all purchase/delivery/task orders and modifications thereto made between the Government and DDL Omni before the effective date of the [a]greement” clearly refers to orders issued under, and modifications to, the contracts listed in the attached exhibit; it does not sweep into the novation agreement the entire universe of contracts DDL Omni has ever performed. As explained above, the attached exhibit listed only DDL Omni’s prior phase III contract, and not the prior phase I or II contracts.

Decision

Matter of: DynCorp International, LLC

File: B-417611.7; B-417611.8; B-417611.9

Date: September 24, 2020

Scott F. Lane, Esq., Jayna Marie Rust, Esq., Katherine S. Nucci, Esq., and Edward W. Gray, Jr., Esq., Thompson Coburn LLP, for the protester.
Craig S. King, Esq., Richard J. Webber, Esq., and Travis L. Mullaney, Esq., Arent Fox, LLP, for CACI Technologies, Inc., the intervenor.
Andrew J. Smith, Esq., Harry M. Parent, Esq., and Stephen Hernandez, Esq., Department of the Army, for the agency.
John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the awardee was ineligible for award, based on the name under which its proposal was submitted, is denied where the record shows that the entity to which award was made was eligible.

2. Protest challenging the agency's evaluation of proposals under the solicitation's management and technical factors is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

DynCorp International LLC (DynCorp), of McLean, Virginia, protests the issuance of a task order to CACI Technologies, Inc. (CACI), of Chantilly, Virginia, by the Department of the Army under request for task order proposals (RTOP) No. W911W4-18-R-ER02, for global intelligence logistics support. DynCorp alleges that the award was improper because CACI Technologies, Inc., was not the offering entity, no entity by that name exists, and therefore the awardee failed to comply with the requirement to maintain an accurate registration in the System for Award Management (SAM) at the time of proposal submission. DynCorp also challenges various aspects of the agency's evaluation of proposals and source selection decision.

We deny the protest.

The agency issued the RTOP for services to be provided under the Global Intelligence Support Services (GISS) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract. Agency Report (AR), Tab 51, RTOP at 2.[1] The services support the Army Intelligence and Security Command (INSCOM) G-4 unit, which provides "multi-disciplined engineering, facilities, maintenance, logistics and sustainment support" to the INSCOM headquarters and its subordinate units.[2] AR, Tab 5, Performance Work Statement (PWS) § 1.1 at 1. Performance would occur at various locations in the continental United States (CONUS) and outside the continental United States (OCONUS). *See* PWS § 1.6.2 at 3.

The RTOP contemplated award of a single task order on a cost-plus-fixed-fee basis for labor, and a cost-no-fee basis for other direct costs. RTOP at 2. Award would be made on a best-value tradeoff basis considering the following four factors: (1) management; (2) technical; (3) experience; and (4) cost/price. *Id.* at 30. The management factor consisted of two subfactors: program management office (PMO) plan, and transition plan. *Id.* The RTOP stated that the management factor was more important than the technical factor, and the technical factor was more important than the experience factor. *Id.* Within the management factor, the PMO plan subfactor was significantly more important than the transition plan subfactor. *Id.* The non-cost factors, when combined, were significantly more important than the cost/price factor.[3] *Id.*

Four offerors, including DynCorp and CACI, submitted proposals in response to the RTOP. AR, Tab 101, Source Selection Decision Document (SSDD) at 5. On May 3, 2019, the agency made award to CACI. DynCorp protested that award with our Office, and the agency took corrective action after our Office held an alternate dispute resolution conference call and informed the parties that we would likely sustain the protest based on the agency's conduct of misleading discussions. *See* Memorandum of Law (MOL) at 16. As part of its corrective action, the agency subsequently requested final proposal revisions (FPRs) from all offerors, which the agency received on

[1] The RTOP was amended six times; citations are to the final version of the RTOP.

[2] The required services encompass program management; logistics planning, programming, and services; engineering services; sustainment and maintenance of intelligence systems, including integrating new intelligence technologies and capabilities; hardware design and integration; network management; and support to technology development and application. RTOP at 2.

[3] The RTOP stated that the agency would assign adjectival ratings to the non-cost/price factors. For the management factor and subfactors and the technical factor, the adjectival ratings were outstanding, good, acceptable, marginal, or unacceptable; for the experience factor, the ratings were substantial confidence, satisfactory confidence, moderate confidence, limited confidence, and no confidence. RTOP at 30-31, 33.

January 6, 2020.[4] AR Tab 101, SSDD at 6. The source selection evaluation board (SSEB) evaluated the proposals and assigned the following final evaluation ratings for DynCorp and CACI:

Factors/Subfactors	CACI	DynCorp
Management	Outstanding	Outstanding
PMO Plan	Outstanding	Outstanding
Transition Plan	Outstanding	Good
Technical	Outstanding	Outstanding
Experience	Substantial	Substantial
Evaluated Cost/Price[5]	$717,519,581	$704,601,589

See id. In the SSDD, the source selection authority (SSA) summarized the evaluation results for each offeror by factor, discussed the technical rating and strengths and weaknesses assigned to each offeror's proposal, and then performed a comparative analysis of each offer to CACI's offer. *Id.* at 8-21, 30-33. As relevant to this protest, for the transition subfactor, the SSA found that "the CACI proposal rated [o]utstanding [is] approximately equal to the DynCorp proposal that was rated [g]ood." *Id.* at 18. Thus, the SSA disagreed with the SSEB's rating of good for DynCorp, and found that "the cumulative benefits of the proposals [were] approximately equal as they both demonstrated an exceptional approach and understanding of the requirements with multiple strengths (or an equivalent cumulative strength) and were low risk of unsuccessful performance." *Id.* at 19.

Ultimately, the SSA determined that CACI's proposal was slightly more advantageous than DynCorp's under the two most important factors, management and technical. *Id.* at 32. The SSA stated that he found "the cumulative advantages offered by CACI's proposal simply outweigh the cumulative advantages offered by DynCorp's proposal." *Id.* at 33. Because the non-cost/price factors were significantly more important than the cost/price factor, the SSA determined that "it is in the [g]overnment's best interest to pay a price premium of 1.83%, equal to $12,917,992 . . . to obtain the distinct and meaningful advantages provided by the CACI proposal." *Id.*

[4] Also as part of its corrective action, the agency initially requested revised proposals, but allowed offerors to make revisions only to their technical and price proposal volumes. AR, Tab 101, SSDD at 5. DynCorp filed a pre-award protest challenging the limitation on proposal revisions, and the agency again took corrective action, allowing offerors to revise all parts of their proposals in its request for FPRs. *Id.* at 5-6.

[5] The total evaluated cost reflects any adjustments that the agency made as a result of its cost realism evaluation; the agency made no adjustments to either CACI's or DynCorp's proposed costs.

This protest followed.[6]

DISCUSSION

DynCorp's protest asserts that: (1) CACI is ineligible for award based on allegedly submitting a proposal as the wrong corporate entity and inaccurate information in SAM; (2) the agency unreasonably and unequally evaluated proposals under the PMO plan and transition plan subfactors; and (3) the best-value determination was defective.[7] For the reasons discussed below, we deny the protest.

CACI's Eligibility for Award

DynCorp alleges that CACI Technologies, Inc. is ineligible for award because it does not hold the underlying GISS contract and no longer exists as a company, the agency was uncertain as to what company was the offering entity, and CACI's information in SAM was not accurate and current when CACI submitted its proposal. DynCorp's argument arises from CACI Technologies, Inc.'s conversion to CACI Technologies, LLC in December 2017. Based on our review of the record, we find that these arguments provide no basis to sustain the protest.

As additional background, in September 2014, CACI Technologies, Inc., was awarded a GISS IDIQ contract. AR, Tab 40, CACI GISS Contract at 1. In June 2015, that contract was modified to update CACI Technologies, Inc.'s commercial and government entity (CAGE) code to 8D014.[8] AR, Tab 41, CACI GISS Contract, Modification P00003 at 1. Effective December 31, 2017, CACI Technologies, Inc., converted to CACI

[6] The awarded value of the task order at issue exceeds $25 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts established under the authority in title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

[7] DynCorp also alleges that under the technical factor, the agency assessed to CACI's proposal three overlapping strengths for CACI's plan to train and certify its maintenance personnel. DynCorp argues that there were "no meaningful distinctions" between the three strengths. Comments & Supp. Protest at 28-30. We have thoroughly reviewed this allegation and find that it provides no basis to sustain this protest. The record shows that each of the three strengths at issue here reflected a particular aspect of CACI's proposed approach to maintenance, each of which the agency reasonably determined provided unique benefits. *See* AR, Tab 98, CACI Tech. Factor Eval. at 16-17. Therefore, we find the agency's assessment of these three strengths to be reasonable. DynCorp raises additional arguments and while our decision does not address every argument raised, we have considered all of DynCorp's allegations, and based on our review of the record, we find no basis to sustain the protest.

[8] CAGE codes are assigned to discrete business entities for a variety of purposes, and they dispositively establish the identity of a legal entity for contractual purposes. *United Valve Co.*, B-416277, B-416277.2, July 27, 2018, 2018 CPD ¶ 268 at 6.

Technologies, LLC, under Virginia law. CACI Technologies, LLC, retained the same 8D014 CAGE code as its predecessor entity.

After the conversion to a limited liability company, CACI worked with the Defense Contract Management Agency (DCMA) to effect a name change pursuant to Federal Acquisition Regulation (FAR) 42.1205. Intervenor Comments at 4. CACI represents that it reached an accord with DCMA on the terms of a conversion and name change agreement by March 2018, but that the agreement was not approved and finalized by DCMA until April 2020. *Id.* The agreement identified multiple contracts that CACI Technologies, Inc., held with the government, including the GISS IDIQ contract, and stated:

> The [g]overnment recognizes CACI Technologies, LLC as CACI Technologies, Inc.'s successor in interest in and to the contracts. Through the conversion, CACI Technologies, LLC became entitled to all rights, titles, and interests of CACI Technologies, Inc., in and to the [c]ontracts as if CACI Technologies, LLC were the original party to the contracts. The [c]ontracts covered by this Agreement are amended by substituting the name 'CACI Technologies, LLC' for the name 'CACI Technologies, Inc.' wherever it appears in the [c]ontracts, effective December 31, 2017.

AR, Tab 117, Conversion and Name Change Agreement at 4.

When CACI Technologies, Inc., submitted its FPR in January 2020, DCMA had not yet approved the conversion and name change agreement. Accordingly, CACI Technologies, Inc., submitted its proposal using the "Inc." name instead of the "LLC" name. *See, e.g.*, AR, Tab 86, CACI Proposal, Management Factor Volume. In April 2020, DCMA signed the conversion and name change agreement. AR, Tab 117, Conversion and Name Change Agreement at 5. On June 22, 2020, CACI updated its SAM entry to show that it was now a limited liability company. AR, Tab 46, SAM Registration. The SAM entry showed that the CAGE code for CACI Technologies, LLC was still 8D014. *Id.* at 2.

DynCorp argues that CACI is ineligible for award because CACI Technologies, Inc., the company that held the underlying GISS IDIQ contract, ceased to exist in December 2017 when it converted to CACI Technologies, LLC, and therefore could not submit a proposal or enter into a task order under the GISS IDIQ contract. Comments & Supp. Protest at 3-5. The agency asserts that the CAGE codes on CACI's GISS contract, CACI's proposal, and the awarded task order are all the same and therefore the agency made award to the correct entity. MOL at 49. We agree with the agency.

As noted above, the CAGE code associated with the CACI entities at issue here has remained constant. Moreover, at the time that CACI submitted its FPR in January 2020, DCMA had not finalized the conversion and name change agreement. As a result, the federal government had not yet officially acknowledged CACI's conversion and name change for any of its existing federal contracts, meaning the government still considered the GISS IDIQ contract to be held by CACI Technologies, Inc. Thus, for purposes of

submitting a proposal in this procurement, we find that CACI's use of CACI Technologies, Inc., as the entity name on the proposal was appropriate, as the name on the proposal matched the name that was still on the underlying GISS IDIQ contract. We find nothing objectionable with this approach and do not agree that the conversion to a limited liability company made CACI ineligible for award.[9]

DynCorp also argues that CACI is ineligible for award because the agency could not be certain that the offeror was CACI Technologies, Inc., where the record contained references to CACI entities other than CACI Technologies, Inc.[10] The agency argues that the FPR and contract award both reflect "CACI Technologies, Inc." and that the Army was certain of the offeror's identity. Based on our review of the record, DynCorp's argument does not provide a basis to sustain this protest.

The record shows that the FPR was submitted by CACI Technologies, Inc., with a CAGE code of 8D014. *See* AR, Tab 118, Letter from CACI to Agency, dated Oct. 12, 2018, at 1; AR, Tab 120, Letter from CACI to Agency, dated Jan. 6, 2020, at 1. The award was made to CACI Technologies, Inc., with a CAGE code of 8D014. AR, Tab 113, Award Notice at 2. This alone confirms that the offeror and awardee are the same entity and that the agency knew the identity of the offeror. The references in the record to CACI entities other than CACI Technologies, Inc., appear to be inadvertent references to other CACI entities, and do not reflect confusion on the part of the agency as to what company submitted the proposal or was awarded the contract.

Finally, DynCorp argues that CACI did not comply with the solicitation requirement that each offeror "shall ensure its SAM records are active and current as of the time of proposal submission." Comments & Supp. Protest at 9-10. DynCorp contends that the conversion to a limited liability company occurred in December 2017, but at the time of

[9] DynCorp's argument that CACI Technologies, Inc. ceased to exist is based on the Virginia law governing the conversion, which states that upon a conversion, "[t]he converting entity shall cease to be a corporation when the certificate of entity conversion becomes effective." Comments & Supp. Protest at 4 (quoting VA Code § 13.1-722.13(A)(7)). The agency counters that CACI Technologies, Inc., did not cease to exist because the same law also states that the resulting entity is deemed to "[b]e the same entity without interruption as the converting entity that existed before the conversion[.]" Supp. MOL at 3-4 (quoting VA Code § 13.1-722.13(A)(6)(b)). As explained above, shortly after the conversion, CACI took the appropriate steps to notify the government of the conversion, but continued to utilize the CACI Technologies, Inc., name for federal contract purposes until DCMA finalized the conversion and name change agreement. Based on our conclusions above, we need not conduct an analysis of Virginia conversion law to reject DynCorp's argument.

[10] For example, DynCorp notes that "CACI Technology, Inc." was the company name on CACI's initial proposal, the SSDD referred to "CACI, Incorporated," and CACI's subcontractors referred to it as "CACI, Inc." Comments & Supp. Protest at 6-7.

proposal submission in January 2020, CACI's SAM registration incorrectly listed the entity as CACI Technologies, Inc. We find no merit to this argument.

As noted above, when CACI submitted its proposal in January 2020, the government had not yet finalized the conversion and name change agreement. With the agreement still pending, for the purposes of CACI's federal contracts, the government had not yet recognized that the corporation had converted into a limited liability company. Accordingly, the federal government still considered the GISS IDIQ contract to be held by CACI Technologies, Inc., which is the same name CACI used on its FPR for this procurement. CACI did not update its SAM registration to show that it had converted into a limited liability company until June 2020, after the government finalized the conversion and name change agreement. Thus, given that the conversion and name change agreement was still pending when CACI submitted its proposal in January 2020, we find that the SAM registration accurately listed the entity as CACI Technologies, Inc.[11] All of DynCorp's challenges to the awardee's eligibility for award are denied.

Evaluation of the PMO Plan Subfactor

DynCorp argues that the agency unreasonably and unequally evaluated proposals under the PMO plan subfactor. In this regard, DynCorp asserts that the agency improperly failed to evaluate its proposed common operating picture (COP), a centralized data and information portal that offerors had to provide; engaged in disparate treatment in awarding CACI a strength for its proposed COP; applied an unstated evaluation criterion in awarding a strength to CACI's proposal to conduct [DELETED] for certain items; and unreasonably ignored the capabilities of DynCorp's proposed subcontractors. Comments & Supp. Protest at 17-24. The agency counters that its evaluation was reasonable and consistent with the RTOP's evaluation criteria.

In reviewing a protest challenging an agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency, as the evaluation of proposals is generally a matter within the agency's discretion. *The Pragma Corp.*, B-415354.2 *et al.*, May 29, 2018, 2018 CPD ¶ 198 at 6. Rather, we will review the record only to assess whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *FP-FAA Seattle, LLC*, B-411544, B-411544.2, Aug. 26, 2015, 2015 CPD ¶ 274 at 7. An offeror's disagreement with an agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. *Global Logistics Providers,*

[11] CACI also notes that it had to continue using the name CACI Technologies, Inc., in SAM while the conversion and name change agreement was pending in order to facilitate payments under its ongoing federal contracts. Intervenor Comments at 5. CACI explains that the government processes payments by matching the contractor's name in SAM with the name on the contract, and CACI Technologies, Inc., was still the name on all of CACI's existing federal contracts until that agreement was finalized. *Id.* at 5-6.

LLC, B-416843, Dec. 26, 2018, 2019 CPD ¶ 12 at 5; *Birdwell Bros. Painting & Refinishing*, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Under the PMO plan subfactor, the RTOP stated that the agency would evaluate "the risk that the proposed plan, to include PMO staffing levels and positions, will successfully accomplish the requirements of the PWS 1.9.1 [p]rogram [m]anagement." RTOP at 32. The RTOP provided that the agency "will also evaluate the [o]fferor's PMO [p]lan to assess the proposed approach to perform" three specific PWS 1.9.1 subtasks: quality assurance and controls; resource management (personnel/hiring/processing timeline); and reporting and deliverables management. *Id.* Section 1.9.1 of the PWS addressed program management requirements and contained bulleted lists of the various subtasks as well as other requirements the contractor would have to perform. PWS § 1.9.1 at 9-10.

As relevant to this protest ground, two of the requirements in PWS section 1.9.1 referenced the COP, stating that the contractor shall "[e]nsure all task/project information is reported and tracked through the . . . [COP]" and that the "[g]overnment shall have unrestricted access to all data in the COP." PWS § 1.9.1 at 10. The COP was described in section 5.2 of the PWS, which stated that the contractor "shall provide, host, update, and sustain a [f]acilities and [l]ogistics COP." PWS § 5.2 at 41. The COP will act as a central portal to provide visibility into operational procurement, warehouse management, property accountability, life cycle sustainment, readiness reporting, contract management, and access management. *Id.* The COP is to eventually replace the existing G-4 portal; the PWS stated that the COP has to be at initial operating capability approximately 6 months after the initial expected award date, and at full operating capability 1 year from the expected award date. *Id.* Prior to implementation of the contractor's COP solution, the contractor is expected to "maintain all existing capability of the existing G-4 [p]ortal[.]" *Id.*

DynCorp contends that the requirement to evaluate "the risk that the proposed plan . . . will successfully accomplish the requirements of the PWS 1.9.1" meant that the evaluation criteria "explicitly encompassed the plan to accomplish everything in PWS 1.9.1." Comments & Supp. Protest at 17. Thus, because PWS section 1.9.1 "specifically names the COP system twice as integral to the PMO functions," DynCorp argues that the agency was required to evaluate offerors' proposed COP solutions. *Id.* at 17-21.

The agency counters that the RTOP identified the three specific PWS 1.9.1 subtasks that the agency would evaluate, and did not specifically identify the COP as an evaluation criterion. MOL at 38. Based on this reading of the RTOP, the agency contends that while it did "consider and discuss" DynCorp's proposed COP solution, there was no stand-alone evaluation criterion for the agency to evaluate. *Id.* at 39, 64.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation

must be consistent with the solicitation when read as a whole and in a reasonable manner. *DAI Glob., LLC*, B-416992, Jan. 17, 2019, 2019 CPD ¶ 25 at 4. Here, we find the agency's interpretation to be reasonable as it gives meaning to all the provisions of the evaluation criteria for the PMO plan subfactor.

As noted above, the first sentence in the evaluation criterion for the PMO plan subfactor stated that the agency would evaluate "the risk that the proposed plan, to include PMO staffing levels and positions, will successfully accomplish the requirements of the PWS 1.9.1[.]" RTOP at 32. The second sentence stated that the agency also would evaluate the offeror's proposed approach to perform three specific subtasks identified in PWS 1.9.1. *Id.* The protester argues that the first sentence required the agency to evaluate the "entirety of PWS § 1.9.1," including the protester's COP solution, and not just the plan to perform the three identified subtasks. However, the protester's interpretation would render the second sentence superfluous. If the first sentence required an evaluation of all requirements of PWS section 1.9.1, then there would be no need for the RTOP to also provide that the agency would evaluate three specific subtasks; these subtasks would already be encompassed within the first sentence. Moreover, the RTOP identified three specific subtasks the agency would evaluate, but notably did not identify the COP as a specific evaluation criterion.

In addition, the first sentence focused on the risk as to whether an offeror's plan would successfully accomplish the requirements of PWS section 1.9.1, with an emphasis on the PMO staffing levels and positions. The second sentence focused on the offeror's actual plan to perform the three specific subtasks. The agency's evaluation was consistent with this interpretation. The evaluation organized the analysis of each offeror's proposal in a manner consistent with the evaluation criteria, with a section analyzing the risk of whether performance would be successful based on the PMO staffing levels and positions, followed by sections evaluating the offeror's approach to each of the three subtasks. *See*, *e.g.*, AR, Tab 93, DynCorp Mgmt. Factor Eval. at 3-24.

With respect to DynCorp's COP solution, the agency's evaluation stated that DynCorp's "enhanced COP . . . provide[s] the offeror the capability to provide near-real time visibility of task/project expenditures, labor hour efforts, and utilization." *Id.* at 22. However, the agency then stated "the COP is not a [m]anagement evaluation factor within the RTOP" and noted that while DynCorp's proposal provided the COP solutions to manage the three identified subtasks, DynCorp "did not provide information on how it would manage the areas until COP implementation." *Id.*; *see also id.* at 19 (noting that the COP was not evaluated and while DynCorp's proposal discussed its COP capability, it "did not discuss how it will utilize the G4 [p]ortal for personnel management until given authorization to use the COP.").

Given the language of the evaluation criteria for the PMO plan subfactor, we find the agency's decision not to separately evaluate an offeror's proposed COP solution was

reasonable and consistent with the terms of the solicitation.[12] We therefore deny this protest ground.[13]

DynCorp also argues that the agency disparately evaluated offerors because it assessed a strength to CACI's COP solution while stating that the COP was not an evaluation criterion. Comments & Supp. Protest at 10-13. The agency counters that CACI received a strength for its plan to manage the existing G-4 portal with respect to reporting and deliverables prior to implementation of the COP, whereas DynCorp's proposal focused primarily on its COP solution and not the approach prior to COP implementation. Supp. COS at 1-2; Supp. MOL at 6-7. Based on our review of the record, we agree with the agency and do not find that the agency engaged in disparate treatment.

Where a protester alleges unequal treatment in a technical evaluation, the protester must show that the differences in ratings did not stem from differences in the proposals. *IAP World Servs., Inc.*, B-415678, Feb. 12, 2018, 2018 CPD ¶ 73 at 4. Here, DynCorp has not made the requisite showing that the agency treated the offerors' proposals unequally. *See id.*

In describing its approach to reporting and deliverables, CACI stated that its portal experience and expertise would be available on the first day of performance under the contract. AR, Tab 97, CACI Mgmt. Factor Eval. at 20. CACI further explained that it would provide a [DELETED]. *Id.* CACI stated that through this approach, [DELETED] is available to the customer prior to COP implementation [DELETED] and that this [DELETED]. *Id.*

[12] DynCorp contends that its COP solution was "a highly beneficial and low-risk approach," Protest at 36, that "would go beyond the minimum requirements to ensure accurate, continuous reporting and tracking on the status of projects" and "would be easily accessed by government officials." Comments & Supp. Protest at 19. We note that PWS section 1.9.1 required offerors to ensure that task/project information is reported and tracked through the COP and that the government would have unrestricted access to all data in the COP. Thus, even if the agency was required to evaluate the COP, DynCorp has not demonstrated, and it is not clear from the record, how DynCorp's proposed COP would do more than meet the requirements outlined in the PWS.

[13] DynCorp also argues that the agency's evaluation under the technical factor was unreasonable because it did not assess a strength for DynCorp's proposed COP solution. Comments & Supp. Protest at 30-32. As with the PMO plan subfactor, the RTOP did not identify the COP as part of the evaluation criteria for the technical factor. RTOP at 32. Moreover, we have reviewed DynCorp's argument and the relevant record documents and find that the agency's decision not to assess a strength to DynCorp's proposed COP was reasonable.

The agency assessed a strength to CACI's proposal for this approach, stating that CACI "provided a COP solution . . . that includes a G-4 [p]ortal functionality that is considered a strength, as it is specific to providing reporting and deliverables." *Id.* at 21. The agency explained that CACI's [DELETED]. *Id.* The agency also found that CACI's approach to [DELETED] and [DELETED]. *Id.* In contrast, the agency found that DynCorp's proposal provided information about its COP solutions, but did not provide information on how it would manage the existing G-4 portal prior to COP implementation. AR, Tab 93, DynCorp Mgmt. Factor Eval. at 19, 22.

On this record, we find the agency's assessment of this strength to be unobjectionable, and in our view it does not constitute disparate treatment. As explained above, CACI's proposal explained how it intended to collect and manage data beginning on the first day of performance of the contract, prior to COP implementation, which would not occur for at least 6 months after contract award. While the agency referred to CACI's overall COP solution in assessing this strength, the evaluation makes clear that it was the "G-4 [p]ortal functionality that is considered a strength" and not the COP solution itself. Furthermore, the agency's statement that CACI's [DELETED] tracks to the statement in CACI's proposal that [DELETED] will be available "prior to COP implementation through [DELETED].

In other words, the agency's assessment of a strength recognized that CACI was proposing to provide in the G-4 portal [DELETED] the same data analytics and visualizations that will be available through its COP solution. Based on our review of the record, we find that the strength was assessed for CACI's approach [DELETED] in the existing G-4 portal, prior to COP implementation, and not for CACI's COP solution. Accordingly, we find there was no disparate treatment because the agency's assessment of a strength was based on the two offerors' differing approaches to G-4 portal management, and not for CACI's COP solution.

DynCorp also contends that the agency's assessment of a strength for CACI's proposed use of a [DELETED] program was "[p]atently [i]nconsistent [w]ith [t]he [e]valuation [c]riteria." Protester Supp. Comments at 12. CACI described its [DELETED] program as a procurement capability that [DELETED]. AR, Tab 97, CACI Mgmt. Factor Eval. at 18. The agency assessed a strength for this program, finding that it "will reduce risk to schedule and performance by decreasing the amount of touch time associated with lower value parts, which in turn creates more efficiencies within the PMO team." *Id.* at 19. The agency also stated that "[t]hese efficiencies will allow CACI to allocate more time to the PMO team to focus on more critical PMO activities" and that this would "improve[] overall performance efficiencies and reduce[] the risk of unsuccessful performance." *Id.*

DynCorp argues that assessment of this strength under the PMO plan subfactor was unreasonable because the RTOP did not provide that the ability to quickly respond to procurement requests would be evaluated under this subfactor. Protester Supp. Comments at 14. DynCorp also asserts that the agency had "no justifiable basis" to conclude that the [DELETED] program would increase the availability of the PMO staff

or provide the benefits identified in the evaluation because this was not reflected in CACI's proposal. *Id.* at 15-16.

While solicitations must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors set forth in the solicitation, agencies are not required specifically to list every area that may be taken into account, provided such areas are reasonably related to, or encompassed by, the stated criteria. *Adams & Assocs., Inc.*, B-417120.2, June 25, 2019, 2019 CPD ¶ 232 at 5.

As explained above, under the PMO plan subfactor, the agency evaluated the offerors' approach to three specific PWS 1.9.1 subtasks. The agency assessed this strength in its evaluation of the resource management (personnel/hiring/processing timeline) subtask. While the PWS does not contain an explanation of the specific requirements for this subtask, in our view, CACI's ability to [DELETED] and create efficiencies that will allow its PMO team to focus on more critical tasks is reasonably encompassed within an evaluation of whether its plan provides for resource management, including processing timelines.[14] Thus, we find the agency's assessment of this strength to be reasonable.

Finally, DynCorp argues that the agency unreasonably ignored the capabilities of its proposed subcontractors. In its response to DynCorp's protest, the agency states that subcontractor teaming arrangements were not part of the evaluation criteria, in part because they are not contractually binding, so the agency did not assess any strengths or weaknesses associated with teaming arrangements. MOL at 65. DynCorp argues that this was unreasonable because its proposal included detail about how a proposed subcontractor mitigates risk for program staffing and recruiting, which is directly relevant to the resource management (personnel/hiring/processing timeline) subtask. Comments & Supp. Protest at 22. Based on our review of the record, we find the agency's evaluation to be reasonable.

[14] In assessing this strength, the agency also noted that under PWS section 7.2, the contractor had to "provide quick response to procurement requests[.]" AR, Tab 97, CACI Mgmt. Factor Eval. at 19. DynCorp notes that this language is actually in PWS section 7.1, which summarizes performance requirements, and that while the requirement to provide quick response to procurement requests references certain PWS sections, it does not reference section 1.9.1. Protester Supp. Comments at 14. DynCorp therefore contends that the agency applied an unstated evaluation criterion because "the timing for contractor procurements had no nexus to PWS § 1.9.1." *Id.* While the agency's assessment of this strength referenced the PWS section 7.1 requirement (though incorrectly stated it was in PWS section 7.2), the strength was not assessed solely because CACI's [DELETED] program would allow for a [DELETED]. Rather, as the record shows, the agency assessed the strength because it would create efficiencies that would allow the PMO team to focus on critical PMO activities, which would reduce the risk of unsuccessful performance. These findings are reasonably encompassed within the evaluation criteria for the PMO plan subfactor.

DynCorp's proposal included a section titled "[b]uilding [DynCorp] [t]eam [c]apabilities and [r]educing [r]isk" in which it generally described the capabilities of its subcontractors. AR, Tab 58 DynCorp Prop. Mgmt. Vol. at 1. The agency's evaluation cited to this section, and stated that "[w]hile DynCorp has partnered with other large companies, section M of the RTOP did not include evaluation criteria associated with an offeror's teammates and, therefore, this additional information is noted, but was not evaluated." AR, Tab 93, DynCorp Mgmt. Factor Eval. at 16-17.

However, when evaluating DynCorp's approach to the resource management subtask, the agency quoted a lengthy section of DynCorp's proposal that discussed the role of its subcontractors in recruiting personnel.[15] *Id.* at 18. This section of DynCorp's proposal also explained how the "[DynCorp] Team" conducted recruitment and would build a talent pipeline for [DELETED] positions and [DELETED] positions. *Id.* DynCorp's proposal also stated that its recruiters would "identify and establish a pipeline of [DELETED]."[16] *Id.* Based on this language in DynCorp's proposal, the agency assessed a strength for DynCorp's "focused and dedicated recruiting process for highly specific positions such as [DELETED]" and stated that DynCorp's "hiring strategy of targeting [DELETED] is a strength that may reduce schedule and performance risk." *Id.* at 18-19.

Thus, contrary to DynCorp's argument, the evaluation record shows that the agency did consider the capabilities of DynCorp's subcontractors, including how they mitigated risk for program staffing and recruitment. The evaluation record is thus consistent with the agency's explanation that "[w]hile subcontractors were not evaluated as a stand-alone subfactor, the evaluators did take note of what [a subcontractor] brought to [p]rotester's proposal[.]" MOL at 40. On this record, DynCorp's argument that the agency unreasonably ignored the capabilities of its subcontractors is belied by the evaluation record and does not provide a reason to sustain this protest.[17]

[15] For example, the agency's evaluation included language from DynCorp's proposal stating that one subcontractor "has [DELETED] recruiters with [DELETED] having backgrounds in the Army or Intelligence related fields" and that the subcontractor's program security officer [DELETED]. AR, Tab 93, DynCorp Mgmt. Factor Eval. at 18.

[16] The agency's evaluation explained that [DELETED]. AR, Tab 93, DynCorp Mgmt. Factor Eval. at 18.

[17] DynCorp also alleges that the agency unequally evaluated the offerors' proposed subcontractors because the agency assessed strengths to aspects of CACI's proposal that were referenced as being performed by Team CACI, but the proposal did not expressly state that CACI itself would perform these particular aspects. Comments & Supp. Protest at 23-24. DynCorp also asserts that CACI received a strength for its staffing approach that was based entirely on the performance of a subcontractor. *Id.* at 24. As discussed above, DynCorp also received a strength for its recruiting and hiring plan that relied on the capabilities of a subcontractor and which was described in DynCorp's proposal as being performed by the "[DynCorp] Team." Thus, because the

Evaluation of the Transition Plan Subfactor

DynCorp argues that the agency also unreasonably and unequally evaluated proposals under the transition plan subfactor. Under this subfactor, the agency evaluated the offerors' "understanding of the processes, procedures, and associated timelines that the [o]fferor proposes to use to transition from an incumbent contractor within [Germany, Korea, Afghanistan, and Kuwait] . . . [and] the [o]fferor's understanding of the risks associated with the proposed methodologies and mitigation techniques to ensure a seamless transition[.]" RTOP at 32.

The agency assessed three strengths to CACI for its "exceptional" approach and understanding of the processes and procedures needed to transition into three different countries: Afghanistan, Germany, and Kuwait. AR, Tab 97, CACI Mgmt. Factor Eval. at 33-34. The agency further found that "[b]y identifying potential challenges and presenting tasks to mitigate those challenges, CACI demonstrated an exceptional understanding of the required transition processes within those sites, and demonstrated a full knowledge of the transition process and procedures for South Korea." *Id.* at 34. The agency rated CACI as outstanding under the transition plan subfactor. *Id.*

The agency assessed one strength to DynCorp's proposal for its "understanding of the various [combatant commands (COCOMS)] and specific locations supported[.]" AR, Tab 93, DynCorp Mgmt. Factor Eval. at 35. The agency found that "DynCorp demonstrated an exceptional understanding of the geographic regions and secondary locations within the [areas of responsibility] and how they relate to seamless and timely transitioning into the locations of Afghanistan, Germany, Korea, and Kuwait which has merit as it will reduce risk of unsuccessful performance." *Id.* at 35-36. The SSEB rated DynCorp only as good under this subfactor, in part because the SSEB found that DynCorp did not identify risk or mitigation techniques in areas including vendor agreements or system access. *Id.* at 36.

As explained above, the SSA ultimately disagreed with the SSEB's rating for DynCorp and found that as the incumbent contractor, DynCorp had an established workforce and existing vendor agreements, and its process to renew or enter into new vendor agreements or recruit new personnel served as a risk mitigation strategy. AR, Tab 101, SSDD at 19. When comparing DynCorp and CACI, the SSA found that CACI's proposal, rated outstanding, was "approximately equal" to DynCorp's proposal that was rated good. *Id.* at 18. The SSA further compared the strengths and benefits of each offeror:

> DynCorp's proposal indicated a thorough approach to seamlessly transition into Afghanistan, Germany, Korea, and Kuwait and has the

record shows that both offerors received strengths at least in part because of the capabilities of their respective subcontractors, DynCorp has not shown that the agency engaged in disparate treatment.

> identified benefit of demonstrating an understanding of the various COCOM requirements for the specific locations outlined in the RTOP and was assessed a strength for its exceptional understanding of the various COCOMS and specific locations supported. While CACI provided the unique added benefits of identifying the correlation between [DELETED] and providing a detailed understanding of the processes and procedures for obtaining country access within Kuwait. Both offerors identified specific secondary locations; however, CACI identified the secondary remote locations in Afghanistan whereas DynCorp identified secondary locations in Afghanistan, Germany, Korea, and Kuwait.

Id. at 19.

Ultimately, the SSA decided that DynCorp's single strength of its exceptional understanding of all four COCOM locations was "approximately equal" to CACI's three strengths for the "unique benefits and understanding" in three of the locations. *Id.* The SSA also found that "[t]he unique benefits outlined within CACI's strengths . . . offset DynCorp's additional exceptional understanding for transitioning to Korea." *Id.* Noting that he did not agree with the SSEB findings for this subfactor, the SSA concluded that "the cumulative benefits of the proposals [were] approximately equal as they both demonstrated an exceptional approach and understanding of the requirements with multiple strengths (or an equivalent cumulative strength) and were low risk of unsuccessful performance." *Id.*

DynCorp argues that the evaluation was unreasonable because the agency's evaluation included statements acknowledging the benefits of DynCorp's approach, but did not assess any strengths for these benefits. For example, DynCorp notes that the agency's evaluation stated that DynCorp was not required to undergo a full transition, that there would be no disruption at the transition sites, and that DynCorp had a clear understanding of the staffing needs, but the evaluation improperly concluded that DynCorp merely met the requirements. Comments & Supp. Protest at 24-25. We disagree.

The record contains a detailed evaluation of DynCorp's transition plan that discussed how DynCorp's approach met the evaluation criteria. *See* AR, Tab 93, DynCorp Mgmt. Factor Eval. at 24-36. The fact that DynCorp can identify specific statements in the evaluation that acknowledge certain benefits of DynCorp's approach does not demonstrate that the agency should have assessed strengths to these particular benefits. Indeed, the agency's conclusions that DynCorp would not need to undergo a full transition and could transition without disruption were consistent with the evaluation requirement that offerors "ensure a seamless transition," and were not necessarily deserving of strengths. DynCorp's disagreement with the agency's decision not to assess strengths to certain aspects of DynCorp's approach to transition does not provide a reason to sustain the protest.

DynCorp also argues that the agency unequally evaluated the offerors under the transition plan. Comments & Supp. Protest at 26-28. In this regard, DynCorp asserts

that while CACI was assessed three strengths for its approach to transition into three of the four locations, DynCorp was assessed only one strength for its approach to transition into all four locations. *Id.* at 27. DynCorp contends that if it had been treated the same way as CACI, it would have received four strengths. *Id.* DynCorp also maintains that while the SSA was correct to disagree with the SSEB's evaluation, the appropriate remedy was not to declare DynCorp and CACI's proposals to be equal. *Id.* Rather, DynCorp claims that "[i]t is materially and obviously better to have a seamless plan to transition all four . . . locations than only three . . . locations." *Id.*

As explained above, the agency assessed three strengths to CACI's proposal, one for each region for which it demonstrated an exceptional approach to transitioning. The record shows that for each of these three locations, CACI demonstrated an exceptional understanding and identified specific risks and challenges and processes to mitigate those risks, which led to the strengths.[18] AR, Tab 97, CACI Mgmt. Factor Eval. at 33-34. In contrast, DynCorp was assessed a strength for its understanding of the geographic and secondary locations for all four areas of responsibility. Ultimately, the SSA decided that CACI and DynCorp were approximately equal under this factor. However, the SSA also explained that there were "unique benefits" in CACI's strengths that offset DynCorp's understanding of transitioning into the fourth location, Korea. We find nothing objectionable about this evaluation. The SSEB and SSA described the benefits of each proposal, and the SSA explained why he believed that although CACI's proposal showed an exceptional understanding of transitioning for three locations versus DynCorp's understanding of all four, CACI's proposal had certain unique benefits that he believed offset DynCorp's understanding of the transition to the fourth location. On this record, we find the agency's evaluation to be reasonable and conclude that DynCorp's argument does not provide a basis to sustain the protest.

Best-Value Tradeoff Decision

Finally, DynCorp's contention that the best-value determination was flawed is predicated on the assumption that the award decision resulted from the underlying evaluation errors. Comments & Supp. Protest at 32-33. Given our conclusion that the evaluation was reasonable and supported by the record, there is no basis to object to the agency's award decision on the grounds asserted by DynCorp. Moreover, the record shows that the SSA provided a well-reasoned basis for a tradeoff that identified

[18] For example, with respect to Germany, the agency found that CACI articulated "an exceptional understanding of the processes and procedures required to obtain country access within Germany, as well as the associated potential challenges" and "an understanding of the direct correlation between the [DELETED]." AR, Tab 97, CACI Mgmt. Factor Eval. at 27-28. For Kuwait, the agency found that CACI "has an understanding of the Kuwait area of responsibility and the customers associated with it" and also that CACI "identified the secondary site . . . which further demonstrates that CACI has an exceptional understanding of the area thus reducing risk of unsuccessful performance by ensuring all country entry documents are completed in parallel." *Id.* at 29.

discriminators between two highly-rated proposals and justified paying CACI's higher price. As such, we deny this allegation. *PAE Aviation & Tech. Servs., LLC*, B-417639, Sept. 11, 2019, 2019 CPD ¶ 317 at 10 (agency's best-value tradeoff decision is unobjectionable where protester's evaluation challenges are denied).

The protest is denied.

Thomas H. Armstrong
General Counsel

Decision

Matter of: Knight Point Systems, LLC

File: B-418746

Date: August 24, 2020

Daniel R. Forman, Esq., Robert J. Sneckenberg, Esq., and Gabrielle D. Trujillo, Esq., Crowell & Moring LLP, for the protester.
Shandra J. Kotzun, Esq., Department of Homeland Security, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's decision to exclude quotation from consideration is sustained where record shows that quotation was eliminated based on considerations not contemplated by the solicitation's requirements.

2. Protest challenging agency's decision to exclude quotation from consideration is sustained where record shows that the agency's conclusion regarding the identity of the entity submitting the quotation is not supported by the record.

DECISION

Knight Point Systems, LLC, of Chantilly, Virginia, protests the Department of Homeland Security, United States Coast Guard's decision to exclude Knight Point's quotation from further consideration under request for quotation (RFQ) No. 70Z07920QPT203400, issued by the United States Coast Guard, for infrastructure management services (IMS). The protester argues that the agency unreasonably concluded that the quotation had been submitted by Knight Point's parent company, Perspecta, Inc., instead of by Knight Point, and therefore, that Knight Point was ineligible for award.

We sustain the protest.

BACKGROUND

The Coast Guard issued the RFQ on April 6, 2020, for a multi-phase procurement under Federal Acquisition Regulation (FAR) subpart 8.4, to vendors holding General Services Administration (GSA) Federal Supply Schedule contracts under Information Technology

Schedule 70. The solicitation contemplates the establishment of two, fixed-price blanket purchasing agreements (BPAs): the first with a vendor that holds a GSA schedule contract, with four required special item numbers (SINs),[1] to be the team leader responsible for the requirement as a whole (referred to herein as the IMS prime vendor); and the second with a small business vendor that is responsible for providing end user hardware devices (referred to as the hardware vendor).[2] The solicitation also anticipates the issuance of an initial task order (task order 1) under each BPA. The combined estimated value of the two BPAs is $969 million. Agency Report (AR), Tab 8, RFQ, amend. 0001, at iv.[3]

The RFQ provides for three evaluation phases: phase I (prior experience), phase II (technical approach), and phase III (performance and pricing). *Id.* at 18. As relevant here, phase I, prior experience, consists of: verifying that the IMS prime vendor possesses the four required GSA schedule SINs; confirming the IMS prime vendor meets the RFQ's small business subcontracting goals requiring that the IMS prime vendor allocate 40 percent of subcontracted dollars to small businesses, not including the dollars allocated to the hardware vendor; and evaluating the IMS prime vendor's prior experience submission. *Id.* at 20-22, 29-30.

The RFQ provides, as relevant here, that to be considered for a BPA and task order 1, the IMS prime vendor "shall submit a response for Phase I by the Quote Submission Deadline," and that "[f]ailure to submit a response in Phase I precludes an IMS prime vendor from participating in Phase II and Phase III." *Id.* at 15. The solicitation also provides that the IMS prime vendor shall submit a quotation that "clearly, concisely, and accurately describe[s] the IMS prime vendor's response to the RFQ." *Id.* at 18.

For small business subcontracting goals, the solicitation provides: "If an IMS prime vendor does not have an established GSA Subcontracting Plan, the IMS prime vendor shall submit a Small Business Subcontracting Plan [in accordance with] FAR 52.219-9(d)." *Id.* at 21. With regard to prior experience, the solicitation explains that the "IMS prime vendor shall provide up to four (4) examples of demonstrated experience as a Prime Contractor." *Id*. It also instructs that the "information provided shall be sufficiently detailed that the Government can determine whether the examples demonstrate the IMS Prime Vendor's experience," and that the agency "will not contact

[1] These GSA Schedule 70 SINs include: SIN 132-40, Cloud; 132-45D, Risk and Vulnerability Assessment; 132-51, IT Professional Services; and 70-500, Order-Level Materials (OLMs). RFQ at iii.

[2] The hardware vendor is required to have GSA Schedule 70 SIN 132-8, Purchase of New Equipment. *Id.* at 31.

[3] The RFQ has been amended once. Citations to the RFQ are to the amended copy, which fully incorporated the initial RFQ and was provided in the AR at tab 8.

references for the purposes of obtaining detail lacking from the IMS prime vendor's response." *Id.* at 20-22.

On April 20, 2020, the Coast Guard received a timely quotation on Perspecta letterhead. AR, Tab 16, Quotation. The quotation's cover page stated that the quotation had been prepared by "Knight Point Systems, LLC (a Perspecta company)."[4] AR, Tab 16, Quotation, Cover Page. The introductory paragraph of the quotation's cover letter stated as follows:

> Perspecta Inc., (Perspecta; NYSE: PRSP), submitting this proposal through its bidding entity, Knight Point Systems, LLC (Knight Point), is pleased to respond to the subject opportunity for the Department of Homeland Security (DHS), United States Coast Guard (USCG) for Infrastructure Managed Services (IMS). The Perspecta name used throughout this proposal is considered interchangeable among the legal bidding entity, Knight Point.

Id. at 2. The cover letter identified Knight Point as the IMS prime vendor, and included a single Dun & Bradstreet (DUNS) number and commercial and government entity (cage) code--both for Knight Point. *Id.* at 3. The quotation also included a copy of Knight Point's GSA Schedule contract, with the four SINs required by the RFQ. *Id.* at 5. The quotation was signed by an individual authorized to negotiate on Knight Point's behalf. *Id.* at 3.

In addition to the references to Knight Point, the quotation included multiple references to Perspecta. For example, the quotation cover letter stated that "Perspecta, through its bidding entity Knight Point, hereby acknowledges BPA RFQ IMS Amendment 01, dated 14-APR-2020." *Id.* at 2.

On April 24, 2020, the contracting officer sent a letter to "Knight Point Systems, LLC (a Perspecta company)."[5] AR, Tab 22, Communications Letter, at 1. The letter advised that the agency did not understand the "relationship between Perspecta and Knight Point," and sought clarification regarding the quotation's use of the term "Legal Bidding Entity." *Id.* The letter also asked what the quotation meant by saying that the "Perspecta and Knight Point company names are interchangeable," and asked whether Knight Point and Perspecta were independent entities with the ability to enter into their own contracts. *Id.*

[4] The cover page also contained a Freedom of Information Action Act exemption notice, which similarly identified "Knight Point Systems, LLC, a Perspecta company," as the owner of the quotation's information. AR, Tab 16, Quotation, Cover Page.

[5] The letter specified that the agency was "not requesting or accepting quote revisions," but rather, "requesting written responses" to the agency's questions. AR, Tab 22, Communications Letter, at 1.

In addition, as relevant here, the letter noted that the solicitation required that the IMS prime vendor submit prior experience examples where the IMS prime vendor was the prime contractor on the contract. *Id.* The agency advised, however, that although Knight Point had been identified as the IMS prime vendor, all "[p]rior [e]xperience examples identify Perspecta as the [p]rime [c]ontractor." *Id.* The agency therefore asked that the vendor explain why this "experience should be considered as the [p]rior [e]xperience of the IMS prime vendor, Knight Point." *Id.*

In response, the vendor explained that, "Perspecta Inc. (Perspecta) acquired Knight Point Systems, LLC (Knight Point)," on August 1, 2019, and that "Perspecta is the parent company that wholly owns Knight Point." AR, Tab 24, Communications Response, at 2. With regard to the term "Legal Bidding Entity" as used in the quotation, the response explained that this term "refers to the legal entity that is submitting the proposal for the [Coast Guard] IMS program," and that "[f]or this procurement, Knight Point is the legal bidding entity holding the required GSA IT Schedule 70 No. GS-35F-0646S entering into this contract, if awarded." *Id.*

In response to the inquiry about how the company names Perspecta and Knight Point can be interchangeable, the vendor reiterated that "[f]or the avoidance of any doubt, Knight Point is the bidding entity and Perspecta is the parent company." *Id.* The vendor then explained that, "[i]n order to demonstrate the full suite of capabilities, we included Prior Experience citations across the Perspecta enterprise as 'Perspecta,' and we regret the confusion this may have caused." *Id.* The vendor explained that "[b]ecause Knight Point is fully integrated into the Perspecta corporate enterprise operating model, (*i.e.* the Perspecta corporate family), Knight Point is able to offer [the Coast Guard] the full resources of not only Knight Point, but of its parent and affiliates as well." *Id.* The vendor also explained that "[o]ur Phase 1 submission included efforts performed by both Knight Point and Perspecta subsidiary [DELETED]." *Id.* Additionally, it noted that "Knight Point's offerings are significantly enhanced through its corporate affiliation with Perspecta and other Perspecta subsidiaries," and "[w]e anticipate that Knight Point will undergo a name change later this year to conform the entity name to the Perspecta brand." The vendor added, however, that "this will have no effect on Knight Point's ability to deliver the capabilities highlighted in our Phase 1 submission for the USCG IMS program." *Id.*

In response to the agency's question regarding why the prior experience in the quotation should be attributed to Knight Point as the IMS prime vendor, the vendor explained that the phase I quotation included [DELETED] from Knight Point and [DELETED] from [DELETED], both of which are operating as subsidiaries under the common control of the parent company, Perspecta. *Id.* at 3. The vendor stated that Knight Point, the IMS prime vendor, is the "prime contractor for the [DELETED] identified in the quotation, and [DELETED] "is the prime contractor" for the other [DELETED] identified. *Id.* The vendor also noted that "[e]ach of the [p]rior [e]xperience citations in our Phase I response individually met all of the relevant capabilities required by [the prior experience factor] of the RFQ." *Id.*

After reviewing the quotation and response from the vendor, the contracting officer determined that Perspecta, rather than Knight Point, submitted the quotation. Protest, exh. E, Coast Guard Decision, at 1. The contracting officer noted that "the letterhead, certifications, representations, and the majority of the quote all use the Perspecta name." *Id.* The contracting officer also found that "the Small Business Plan was submitted by Perspecta" and that "the four Prior Experience examples were submitted as Perspecta experience." *Id.* The contracting officer explained that the "RFQ instructions required that the IMS prime vendor submit a quote that clearly, concisely, and accurately describe[s] the IMS prime vendor's response to the RFQ." *Id.* at 2. He further noted that the solicitation also stated that "for each phase the Government will review the quote to ensure that all required volumes/information have been included for the current Phase," and that if "an IMS [p]rime [v]endor does not submit all required volumes/information for the current phase, the IMS [p]rime [v]endor's submission may be rejected and the IMS [p]rime [v]endor will be ineligible for award." *Id.* The contacting officer concluded that, although Knight Point was the IMS prime vendor, it was not the entity that had submitted the quotation, and therefore, the quotation did not meet the requirements of the RFQ. *Id.*

On May 6, 2020, the Coast Guard issued its decision to reject the quotation and exclude the protester from further consideration. After attempts to engage the Coast Guard in additional communications regarding this issue failed, Knight Point filed the instant protest.

DISCUSSION

Knight Point challenges the agency's decision to exclude its quotation from phase I of the procurement. The protester argues that the agency unreasonably concluded that the quotation was submitted by Knight Point's parent company, Perspecta, instead of by Knight Point. The protester asserts that the quotation as a whole shows that Knight Point--not Perspecta--prepared the quotation, submitted the quotation, and as the IMS prime vendor, will be the entity with which the Coast Guard is required to establish the BPA if its quotation is successful.

The agency argues that the solicitation required that the IMS prime vendor submit "all required information in response to the RFQ requirements," and that the agency's decision to reject the quotation here was reasonable because it was submitted by Perspecta, rather than by the IMS prime vendor. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. For the reasons discussed below, we conclude that the agency's determination to exclude the quotation from the competition was unreasonable and inconsistent with the terms of the solicitation, and sustain the protest on this basis.

We have concluded in past disputes that uncertainty as to the identity of a quoting entity renders the quotation technically unacceptable, since ambiguity as to the quoter's identity could result in there being no party that is bound to perform the obligations of the contract. *Dick Enterprises, Inc.*, B-259686.2, June 21, 1995, 95-1 CPD ¶ 286 at 1.

There is no such concern, however, where it is clear from the quotation which entity will be bound to perform. *See, e.g.*, *Kollsman, Inc.*, B-413485 *et al.*, Nov. 8, 2016, 2016 CPD ¶ 326 at 5 (finding no ambiguity where entity bound to perform contract was identified by unique CAGE code); *see Trandes Corp.*, B-271662, Aug. 2, 1996, 96-2 CPD ¶ 57 at 3 n.1 ("inclusion of the names of corporate affiliates in a proposal does not make the identity of the offeror ambiguous where . . . it is possible to sufficiently identify the offering entity so that it would not be able to avoid the obligations of the offer").

Knight Point argues that the quotation was not ambiguous as to whether it or its parent company, Perspecta, submitted the quotation. The protester asserts that Knight Point submitted the quotation because the submission identified Knight Point as the "offeror" and included, for example, a single CAGE code and a single DUNS number--both Knight Point's. In addition, Knight Point notes that the quotation consistently identified Knight Point as the "bidding entity" and included a copy of Knight Point's GSA schedule contract. The protester also asserts that there was no ambiguity in the quotation regarding which entity would be bound to perform the awarded BPA.

The Coast Guard acknowledges that the quotation identified Knight Point as the IMS prime vendor. The Coast Guard also acknowledges that the quotation clearly indicates that, if the quotation is successful, Knight Point will be the entity that is bound to perform because the Coast Guard will be required to establish a BPA with Knight Point. Protest, exh. E, Decision at 1-2 ("[I]n the event the [quotation] was the successful [quotation] in this competitive solicitation, the BPA would have to be awarded to Knight Point."). The Coast Guard argues, however, that, as noted above, the RFQ imposed the additional requirement that the IMS prime vendor submit all volumes/information for the current phase of the procurement. The agency asserts that the contracting officer reasonably determined that the quotation had been submitted by Perspecta, which was not identified in the quotation as the IMS prime vendor. COS/MOL at 14. The agency therefore asserts that its decision to exclude the quotation as ineligible for award complied with the terms of the RFQ and was reasonable.

In reviewing protests challenging an agency's evaluation of quotations, we do not independently evaluate quotations. Rather we review the record to determine whether the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. *See Innovative Mgmt. & Tech. Approaches, Inc.*, B-413084, B-413084.2, Aug. 10, 2016, 2016 CPD ¶ 217 at 4. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, inadequately documented, or not reasonably based. *See McCann-Erickson USA, Inc.*, B-414787, Sept. 18, 2017, 2017 CPD ¶ 300 at 3.

As explained below, we conclude that the agency's decision to exclude the quotation from the competition here was unreasonable. First, the record shows that the agency decided to exclude the quotation from the competition based on considerations not contemplated by the solicitation's requirements. In deciding to exclude the quotation, the agency relies upon solicitation language providing that "for each phase the

Government will review the quote to ensure that all required volumes/information have been included for the current Phase," and that "[i]f an IMS prime vendor does not submit all required volumes/information for the current phase, the IMS prime vendor's submission may be rejected and the IMS prime vendor will be ineligible for award." RFQ at 29.

The agency essentially argues that this provision precluded any entity other than the IMS prime vendor from contributing information to the quotation. *See, e.g.*, COS/MOL at 2 ("The RFQ was very specific on how vendors should propose in that the IMS prime vendor was to submit all required information in response to the RFQ requirements."); *see id.* at 23 (agency asserts that "two separate legal entities contributed information in the quote contrary to the RFQ requirements that the IMS prime vendor shall submit all required information.").

We find this was not a reasonable interpretation of the solicitation provision, which was clearly focused on the completeness of the information submitted, as opposed to the source of the information. Moreover, considering that this RFQ provision applies to all phases of the acquisition, the agency's interpretation appears inconsistent with the solicitation's contemplated incorporation of team members and subcontractors. RFQ at 32. Based on our review of the record and the terms of the solicitation, we conclude the agency's reliance on this provision to exclude the quotation from the competition was unreasonable.

Second, the record fails to support the contracting officer's conclusion that portions of the quotation, such as the small business subcontracting plan and the prior experience examples were submitted by Perspecta, Inc., rather than Knight Point. For example, with regard to the small business subcontracting plan, as indicated above, the agency determined that the plan was submitted by Perspecta, Inc. The agency made this determination in relevant part, because the plan stated that it was submitted by "a Large Business (LB) offeror" but, in contrast, according to a screenshot of Knight Point's GSA Schedule 70 contract, the contracting officer concluded that "Knight Point is a small business[.]" AR, Tab 25, Phase I Initial Review & Eval., at 7 ("[A]lthough the quote says Perspecta is submitting the Small Business Subcontracting Plan through its legal bidding entity, Knight Point, within the Small Business Subcontracting Plan attachment, Perspecta states, "As a large Business (LB) offeror, Perspecta respectfully submits this Small Business Subcontracting Plan to the [Coast Guard]", but Knight Point is a small business."); COS/MOL at 8; AR, Tab 16, Quotation, at 2-1. As the protester points out, however, in light of Knight Point's acquisition by Perspecta, Knight Point is no longer a small business.[6]

[6] The record also shows that the contracting officer was aware of Perspecta's acquisition of Knight Point at the time of the agency's evaluation. See AR, Tab 24, Communications Response, at 2. The protester also maintains that Knight Point is not (and was not) identified as a small business in SAM.gov at the time of quotation submission.

The record also shows that the cover page of the small business subcontracting plan stated that the plan had been prepared by "Knight Point Systems, LLC, a Perspecta company." The plan's introduction stated it was an "individual plan" that was "developed specifically for this contract," and identified: "Knight Point Systems, LLC." AR, Tab 20, Quotation, attach. 2, Small Business Subcontracting Plan (SBSP), Cover Page, 1. The evaluation of the plan also shows that the agency found that it "met the Small Business Subcontracting Goals of the RFQ." AR, Tab 25, Phase I Initial Review & Eval., at 4. On this record, we find the agency's determination that the small business subcontracting plan was submitted by Perspecta is not supported by the record, and therefore, unreasonable.

Similarly, the agency determined that all the prior experience examples in the quotation are from Perspecta, and none from Knight Point. AR, Tab 25, Phase I Initial Review & Eval., at 7. This conclusion, however, is also not supported by the record. As discussed above, in response to the agency's inquiry, Knight Point clarified that the prior experience examples included in the quotation were performed by Knight Point and [DELETED], both of which are subsidiaries of Perspecta, Inc. *Id.* at 5; AR, Tab 24, Communications Response, at 4 (Knight Point "is the prime contractor for the [DELETED]," and its affiliate, [DELETED], "is the prime contractor on the [DELETED]."). The response further explained that "Knight Point has access to the resources of the entire Perspecta family, and is relying on those resources in this procurement." *Id.* at 3. In light of the clarification that Knight Point and [DELETED] were the prime contractors for the prior experience examples, we find the agency's rationale--that the quotation was submitted by Perspecta, Inc., instead of Knight Point, because all four of the prior experience examples involved Perspecta, Inc. (instead of Knight Point)--is not supported by the record.[7]

[7] After the vendor clarified that Knight Point was the prime contractor for [DELETED] of the prior experience examples in the quotation, the agency concluded that "to accept the assertion . . . the Phase I quote would have to be revised." AR, Tab 25, Phase I Initial Review & Eval., at 5. This conclusion, however, appears to be based, at least in part, on the agency's interpretation of the same RFQ requirement, which as discussed previously, we find was unreasonable. See *id.* ("This is a direct contradiction to the RFQ requirements that the IMS prime vendor submit Prior Experience examples where they were the [p]rime [c]ontractor."). The record reflects that the quotation identified the following specific information for all four of the prior experience examples included in the quotation, as required by the RFQ: agency name, contract number, period of performance, total end users, and client contact information, and then detailed the experience on the contract. AR, Tab 16, Quotation, at 3-1–3-14; RFQ at 22.

Accordingly, all of the pertinent information regarding the prior experience [DELETED] for which Knight Point was the prime contractor was included in the quotation. AR, Tab 16, Quotation, at 3-1-3-4. Additionally, as discussed above, the quotation explained that the name Perspecta as used in the quotation was interchangeable with the entity, Knight Point. *Id.* at 1. All that was provided in the communications response letter was

Finally, we are not persuaded that the use of the name "Perspecta" in multiple places in the quotation reasonably supports the conclusion that the quotation was submitted by Perspecta, Inc., rather than Knight Point. The agency argues in this regard that the "cover letter clearly provided designated shorthand names for the two companies; 'Perspecta, Inc. (Perspecta)' and 'Knight Point Systems, LLC (Knight Point),'" and that, "[b]ased on this shorthand it was logical to conclude that the use of the name Perspecta was shorthand for Perspecta Inc. and the name Knight Point was shorthand for Knight Point Systems, LLC, not each other." COS/MOL at 15. The agency asserts that "[t]his shorthand also indicates that Perspecta and Knight Point were two separate legal entities, not the same entity," and "[a]s a result, it was reasonable for the [agency] to determine that any use of the name Perspecta actually referred to Perspecta, Inc., not the IMS [p]rime [v]endor." *Id.*

Based on the plain language in the quotation, we find the agency's conclusion in this regard unreasonable. Although the quotation's cover letter included shorthand names for Perspecta, Inc., and Knight Point Systems, LLC, it also clearly advised that: "The Perspecta name used throughout this proposal is considered interchangeable among the legal bidding entity, Knight Point." AR, Tab 16, Quotation, at 1. This sentence makes clear that the Perspecta "name" is interchangeable with the legal entity--Knight Point. Knight Point's response further explained how the two company names were interchangeable, noting that "[f]or the avoidance of any doubt, Knight Point is the bidding entity and Perspecta is the parent company" but that Knight Point "[i]n order to demonstrate the full suite of capabilities," included Prior Experience citations across the Perspecta enterprise as 'Perspecta[.] AR, Tab 24, Communications Response, at 2.

Knight Point also explained that, "[b]ecause Knight Point is fully integrated into the Perspecta corporate enterprise operating model, (*i.e.* the Perspecta corporate family), Knight Point is able to offer [the Coast Guard] the full resources of not only Knight Point, but of its parent and affiliates as well," and that "Knight Point's offerings are significantly enhanced through its corporate affiliation with Perspecta and other Perspecta subsidiaries." *Id.* Accordingly, although Perspecta, Inc. and Knight Point are separate legal entities, we find that the quotation, as a whole, sufficiently identified the relationship between the two entities. Additionally, we find that the quotation left no doubt as to which entity--*i.e.*, Knight Point, was submitting the quotation and would be the legal entity responsible for entering into the BPA with the Coast Guard if successful.

clarification that Knight Point was the prime contractor for the [DELETED] in the quotation. We see no reason why the quotation would need to be revised in order for the agency to consider the correct identity of the prime contractors provided in the quotation's prior experience examples for purposes of evaluating the experience factor. We further note that the solicitation also provided that the agency may "contact references provided to confirm the accuracy of the information provided in the IMS [p]rime [v]endor's response." RFQ at 22. On this record, we do not agree with the agency that the quotation would necessarily need to be revised.

On this record, we conclude that the agency's evaluation that the quotation was submitted by Perspecta, Inc., rather than Knight Point, is not supported by the record. We further conclude that the agency's evaluation that the quotation failed to adhere to an RFQ requirement based on the conclusion that the quotation was submitted by Perspecta, Inc., rather than Knight Point, is inconsistent with the terms of the RFQ. We sustain the protest on these two bases.

RECOMMENDATION

We recommend that the Coast Guard reevaluate Knight Point's quotation in accordance with the solicitation and our decision, and make a new determination regarding advancement of the quotation to the next phase of the competition. We also recommend that Knight Point be reimbursed its costs of filing and pursing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

SMALL BUSINESS ADMINISTRATION

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

RIN 3245–AG94

Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: In response to President Trump's government-wide regulatory reform initiative, the U.S. Small Business Administration (SBA) initiated a review of its regulations to determine which might be revised or eliminated. As a result, this rule merges the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This rule also eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award, revises several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants, and clarifies other related regulatory provisions to eliminate confusion among small businesses and procuring activities. In addition, in response to public comment, the rule requires a business concern to recertify its size and/or socioeconomic status for all set-aside orders under unrestricted multiple award contracts, unless the contract authorized limited pools of concerns for which size and/or status was required.

DATES: This rule is effective on November 16, 2020, except for § 127.504 which is effective October 16, 2020.

FOR FURTHER INFORMATION CONTACT: Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–7625; *mark.hagedorn@sba.gov*.

SUPPLEMENTARY INFORMATION:

I. Background Information

On January 30, 2017, President Trump issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs'', which is designed to reduce unnecessary and burdensome regulations and to control costs associated with regulations. In response to the President's directive to simplify regulations, SBA initiated a review of its regulations to determine which might be revised or eliminated. Based on this analysis, SBA identified provisions in many areas of its regulations that can be simplified or eliminated.

On November 8, 2019, SBA published in the **Federal Register** a comprehensive proposal to merge the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA; eliminate the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture to SBA for review and approval prior to contract award; revise several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants; and clarify other related regulatory provisions to eliminate confusion among small businesses and procuring activities. 84 FR 60846. Some of the proposed changes involved technical issues. Others were more substantive and resulted from SBA's experience in implementing the current regulations. The proposed rule initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289.

As part of the rulemaking process, SBA also held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, Anchorage, AK, Albuquerque, NM and Oklahoma City, OK to provide interested tribal representatives with an opportunity to discuss their views on various 8(a) BD-related issues. *See* 84 FR 66647. These consultations were in addition to those held by SBA before issuing the proposed rule in Anchorage, AK (*see* 83 FR 17626), Albuquerque, NM (*see* 83 FR 24684), and Oklahoma City, OK (*see* 83 FR 24684). SBA considers tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allowed for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and Alaska Native Corporation (ANC) owned firms participating in the 8(a) BD Program. Additionally, SBA held a Listening Session in Honolulu, HI to obtain comments and input from key 8(a) BD program stakeholders in the Hawaiian small business community, including 8(a) applicants and Participants owned by Native Hawaiian Organizations (NHOs).

During the proposed rule's 91-day comment period, SBA received 189 timely comments, with a high percentage of commenters favoring the proposed changes. A substantial number of commenters applauded SBA's effort to clarify and address misinterpretations of the rules. For the most part, the comments supported the substantive changes proposed by SBA.

This rule merges the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program. The rule also eliminates the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award in every instance. Additionally, the rule makes several other changes to the 8(a) BD Program to eliminate or reduce unnecessary or excessive burdens on 8(a) Participants.

The rule combines the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program in order to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. SBA originally established a mentor-protégé program for 8(a) Participants a little more than 20 years ago. 63 FR 35726, 35764 (June 30, 1998). The purpose of that program was to encourage approved mentors to provide various forms of business assistance to eligible 8(a) Participants to aid in their development. On September 27, 2010, the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111–240 was enacted. The Jobs Act was designed to protect the interests of small businesses and increase opportunities in the Federal marketplace. The Jobs Act was drafted by Congress in recognition of the fact that mentor-protégé programs serve an important business development function for small businesses and therefore included language authorizing SBA to establish separate mentor-protégé programs for the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program, the HUBZone Program, and the Women-Owned Small Business (WOSB)

Program, each of which was modeled on SBA's existing mentor-protégé program available to 8(a) Participants. *See* section 1347(b)(3) of the Jobs Act. Thereafter, on January 2, 2013, the National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Public Law 112–239 was enacted. Section 1641 of the NDAA 2013 authorized SBA to establish a mentor-protégé program for all small business concerns. This section further provided that a small business mentor-protégé program must be identical to the 8(a) BD Mentor-Protégé Program, except that SBA could modify each program to the extent necessary, given the types of small business concerns to be included as protégés.

Subsequently, SBA published a Final Rule in the **Federal Register** combining the authorities contained in the Jobs Act and the NDAA 2013 to create a mentor-protégé program for all small businesses. 81 FR 48558 (July 25, 2016).

The mentor-protégé program available to firms participating in the 8(a) BD Program has been used as a business development tool in which mentors provide diverse types of business assistance to eligible 8(a) BD protégés. This assistance may include, among other things, technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing Federal prime contracts through joint venture arrangements. The explicit purpose of the 8(a) BD Mentor-Protégé relationship has been to enhance the capabilities of protégés and to improve their ability to successfully compete for both government and commercial contracts. Similarly, the All Small Mentor-Protégé Program is designed to require approved mentors to aid protégé firms so that they may enhance their capabilities, meet their business goals, and improve their ability to compete for contracts. The purposes of the two programs are identical. In addition, the benefits available under both programs are identical. Small businesses and 8(a) Program Participants receive valuable business development assistance and any joint venture formed between a protégé firm and its SBA-approved mentor receives an exclusion from affiliation, such that the joint venture will qualify as a small business provided the protégé individually qualifies as small under the size standard corresponding to the NAICS code assigned to the procurement. A protégé firm may enter a joint venture with its SBA-approved mentor and be eligible for any contract opportunity for which the protégé qualifies. If a protégé firm is an 8(a) Program Participant, a joint venture between the protégé and its mentor could seek any 8(a) contract, regardless of whether the mentor-protégé agreement was approved through the 8(a) BD Mentor-Protégé Program or the All Small Mentor-Protégé Program. Moreover, a firm could be certified as an 8(a) Participant after its mentor-protégé relationship has been approved by SBA through the All Small Mentor-Protégé Program and be eligible for 8(a) contracts as a joint venture with its mentor once certified.

Because the benefits and purposes of the two programs are identical, SBA believes that having two separate mentor-protégé programs is unnecessary and causes needless confusion in the small business community. As such, this rule eliminates a separate 8(a) BD Mentor-Protégé Program and continues to allow any 8(a) Participant to enter a mentor-protégé relationship through the All Small Mentor-Protégé Program. Specifically, the rule revises § 124.520 to merely recognize that an 8(a) Participant, as any other small business, may participate in SBA's Small Business Mentor-Protégé Program. In merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor- Protégé Program, the rule also makes conforming amendments to SBA's size regulations (13 CFR part 121), the joint venture provisions (13 CFR 125.8), and the All Small Mentor-Protégé Program regulations (13 CFR 125.9).

A mentor-protégé relationship approved by SBA through the 8(a) BD Mentor-Protégé Program will continue to operate as an SBA-approved mentor-protégé relationship under the All Small Mentor-Protégé Program. It will continue to have the same remaining time in the All Small Mentor-Protégé Program as it would have had under the 8(a) BD Mentor-Protégé Program if that Program continued. Any mentor-protégé relationship approved under the 8(a) BD Mentor-Protégé Program will count as one of the two lifetime mentor-protégé relationships that a small business may have under the All Small Mentor-Protégé Program.

As stated previously, SBA has also taken this action partly in response to the President's directive that each agency review its regulations. Therefore, this rule also revises regulations pertaining to the 8(a) BD and size programs in order to further reduce unnecessary or excessive burdens on small businesses and to eliminate confusion or more clearly delineate SBA's intent in certain regulations. Specifically, this rule makes additional changes to the size and socioeconomic status recertification requirements for orders issued against multiple award contracts (MACs). A detailed discussion of these changes is contained below in the Section-by-Section Analysis.

II. Section-by-Section Analysis

Section 121.103(b)(6)

The rule amends the references to SBA's mentor-protégé programs in this provision, specifying that a protégé firm cannot be considered affiliated with its mentor based solely on assistance received by the protégé under the mentor-protégé agreement. The rule eliminates the cross-reference to the regulation regarding the 8(a) BD Mentor- Protégé Program (13 CFR 124.520), leaving only the reference to the regulation regarding the All Small Business Mentor-Protégé Program.

Section 121.103(f)(2)(i)

Under § 121.103(f)(2), SBA may presume an identity of interest (and thus affiliate one concern with another) based upon economic dependence if the concern in question derived 70 percent or more of its receipts from another concern over the previous three fiscal years. The proposed rule provided that this presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser. Commenters supported this change, appreciating that SBA seemed to be making economic dependence more about the issue of control, where they thought it should be. SBA adopts this language as final.

Section 121.103(g)

The rule amends the newly organized concern rule contained in § 121.103(g) by clarifying that affiliation may be found where both former and ''current'' officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees. The rule merely adds the word ''current'' to the regulatory text to ensure that affiliation may arise where the key individuals are still associated with the first company. SBA believes that such a finding of affiliation has always been authorized,

but merely seeks to clarify its intent to make sure there is no confusion. Several commenters were concerned that the rule was not clear with respect to entity-owned firms, specifically that the newly organized concern rule should not apply to tribes, ANCs and NHOs. SBA believes that entities and entity-owned firms are already excepted from affiliation under the newly organized concern rule by § 121.103(b)(2). A few commenters recommended that SBA put in clarifying language to ensure that the rule cannot be read to contradict § 124.109(c)(4)(iii), which permits a manager of a tribally-owned concern to manage no more than two Program Participants at the same time. The final rule adds such clarifying language.

Section 121.103(h)

The proposed rule sought to amend the introductory text to § 121.103(h) to revise the requirements for joint ventures. SBA believes that a joint venture is not an on-going business entity, but rather something that is formed for a limited purpose and duration. If two or more separate business entities seek to join together through another entity on a continuing, unlimited basis, SBA views that as a separate business concern with each partner affiliated with each other. To capture SBA's intent on limited scope and duration, SBA's current regulations provide that a joint venture is something that can be formed for no more than three contracts over a two-year period. The proposed rule sought to eliminate the three-contract limit for a joint venture, but continue to prescribe that a joint venture cannot exceed two years from the date of its first award. In addition, the proposed rule clarified SBA's current intent that a novation to the joint venture would start the two-year period if that were the first award received by the joint venture. Commenters generally supported the proposal to eliminate the three-contract limit, saying that the change will eliminate significant and unnecessary confusion. Commenters also believed that requiring partners to form a second or third joint venture after they received three contract awards created an undue administrative burden on joint ventures, and they viewed this change as an elimination of an unnecessary burden. Several commenters recommended further amending the rule to extend the amount of time that a joint venture could seek contracts to some point greater than two years. These commenters recommended two approaches, either allowing all joint ventures to seek contracts for a period greater than two years or allowing only joint ventures between a protégé and its mentor to seek contracts beyond two years. In the mentor-protégé context, commenters reasoned that a joint venture between a protégé and its mentor should be either three years (the length of the initial mentor-protégé agreement) or six years (the total allowable length of time for a mentor-protégé relationship to exist). It is SBA's view that the requirements for all joint ventures should be consistent, and that they should not be different with respect to joint ventures between protégé firms and their mentors. One of the purposes of this final rule is to remove inconsistencies and confusion in the regulations. SBA believes that having differing requirements for different types of joint ventures would add to, not reduce, the complexity and confusion in the regulations. Regarding extending the amount of time a joint venture could operate and seek additional contracts generally, SBA opposes such an extension. As SBA noted in the supplementary information to the proposed rule, SBA believes that a joint venture should not be an on-going entity, but, rather, something formed for a limited purpose with a limited duration. SBA believes that allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture. If the parties intend to jointly seek work beyond two years from the date of the first award, the regulations allow them to form a new joint venture. That new entity would then be able to seek additional contracts over two years from the date of its first award. Although requiring the formation of several joint venture entities, SBA believes that is the correct approach. To do otherwise would be to ignore what a joint venture is intended to do.

In addition, one commenter sought further clarification regarding novations. The rule makes clear that where a joint venture submits an offer prior to the two-year period from the date of its first award, the joint venture can be awarded a contract emanating from that offer where award occurs after the two-year period expires. The commenter recommended that SBA add clarifying language that would similarly allow a novation to occur after the two-year period if the joint venture submits a novation package for contracting officer approval within the two-year period. SBA agrees, and has added clarifying language to one of the examples accompanying the regulatory text.

In the proposed rule, SBA also asked for comments regarding the exception to affiliation for joint ventures composed of multiple small businesses in which firms enter and leave the joint venture based on their size status. In this scenario, in an effort to retain small business status, joint venture partners expel firms that have exceeded the size standard and then possibly add firms that qualify under the size standard. This may be problematic where the joint venture is awarded a Federal Supply Schedule (FSS) contract or any other MAC vehicle. A joint venture that is awarded a MAC could receive many orders beyond the two-year limitation for joint venture awards (since the contract was awarded within that two-year period), and could remain small for any order requiring recertification simply by exchanging one joint venture partner for another (*i.e.,* a new small business for one that has grown to be other than small). SBA never intended for the composition of joint ventures to be fluid. The joint venture generally should have the same partners throughout its lifetime, unless one of the partners is acquired. SBA considers a joint venture composed of different partners to be a different joint venture than the original one. To reflect this understanding, the proposed rule asked for comments as to whether SBA should specify that the size of a joint venture outside of the mentor-protégé program will be determined based on the current size status and affiliations of all past and present joint venture partners, even if a partner has left the joint venture. SBA received several comments responding to this provision on both sides of the issue. Several commenters believed that SBA should not consider the individual size of partners who have left the joint venture in determining whether the joint venture itself continues to qualify as small. These commenters thought that permitting substitution of joint venture partners allows small businesses to remain competitive for orders under large, complex MACs. Other commenters acknowledged that SBA has accurately recognized a problem that gives a competitive advantage to joint ventures over individual small businesses. They agreed that SBA likely did not contemplate a continuous turnover of joint venture partners when it changed its affiliation rules to allow a joint venture to qualify as small provided that each of its partners individually qualified as small (instead of aggregating the receipts or employees of all joint venture partners as was previously the case). SBA notes that this really is an issue only with respect to MACs. For a single award contract, size is

determined at one point in time—the date on which an offeror submits its initial offer including price. Where an offeror is a joint venture, it qualifies as small provided each of the partners to the joint venture individually qualifies as small on the date of the offer. The size of the joint venture awardee does not change if an individual member of the joint venture grows to be other than small during the performance of the contract. As detailed elsewhere in this rule, for a MAC that is not set-aside for small business, however, size may be determined as of the date a MAC holder submits its offer for a specific order that is set-aside for small business. In such a case, if a partner to the joint venture has grown to be other than small, the joint venture would not be eligible as a small business for the order. One commenter recommended that once a multi-small business joint venture wins its first MAC, its size going forward (for future contracts or any recertification required under the awarded MAC) should be determined based on the size of the joint venture's present members and any former members that were members as of the date the joint venture received its first MAC. This would allow a joint venture to remove members for legitimate reasons before the first award of the first MAC, but not allow the joint venture to change members after such an award just to be able to recertify as small for an order under the MAC. SBA thoroughly considered all the comments in response to this issue. After further considering the issue, SBA does not believe that reaching back to consider the size of previous partners (who are no longer connected to the joint venture) would be workable. A concern that is no longer connected to the joint venture has no incentive to cooperate and provide information relating to its size, even if it still qualified individually as small. Thus, SBA is not making any changes to the regulatory text to address this issue in this final rule.

The rule also proposed to add clarifying language to the introductory text of § 121.103(h) to recognize that, although a joint venture cannot be populated with individuals intended to perform contracts awarded to the joint venture, the joint venture can directly employ administrative personnel and such personnel may specifically include Facility Security Officers. SBA received overwhelming support of this change and adopts it as final in this rule.

The proposed rule also sought comments on the broader issue of facility clearances with respect to joint ventures. SBA understands that some procuring agencies will not award a contract requiring a facility security clearance to a joint venture if the joint venture itself does not have such clearance, even if both partners to the joint venture individually have such clearance. SBA does not believe that such a restriction is appropriate. Under SBA's regulations, a joint venture *cannot* hire individuals to perform on a contract awarded to the joint venture (the joint venture cannot be ''populated''). Rather, work must be done individually by the partners to the joint venture so that SBA can track who does what and ensure that some benefit flows back to the small business lead partner to the joint venture. SBA proposed allowing a joint venture to be awarded a contract where either the joint venture itself or the lead small business partner to the joint venture has the required facility security clearance. In such a case, a joint venture lacking its own separate facility security clearance could still be awarded a contract requiring such a clearance provided the lead small business partner to the joint venture had the required facility security clearance and committed to keep at its cleared facility all records relating to the contract awarded to the joint venture. Additionally, if it is established that the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, then the non-lead partner to the joint venture (which may include a large business mentor) could possess such clearance. The majority of commenters supported this proposal, agreeing that it does not make sense to require the joint venture to have the necessary facility security clearance where the joint venture entity itself is not performing the contract. These commenters believed that as long as the joint venture partner(s) performing the necessary security work had the required facility security clearance, the Government would be adequately protected.

This rule also removes current § 121.103(h)(3)(iii), which provides that a joint venture between a protégé firm and its mentor that was approved through the 8(a) BD Mentor-Protégé Program is considered small provided the protégé qualifies as individually small. Because this rule eliminates the 8(a) BD Mentor-Protégé Program as a separate program, this provision is no longer needed.

The proposed rule also clarified how to account for joint venture receipts and employees during the process of determining size for a joint venture partner. The joint venture partner must include its percentage share of joint venture receipts and employees in its own receipts or employees. The proposed rule provided that the appropriate percentage share is the same percentage figure as the percentage figure corresponding to the joint venture partner's share of work performed by the joint venture. Commenters generally agreed with the proposed treatment of receipts. Several commenters sought further clarification regarding subcontractors, specifically asking how to treat revenues generated through subcontracts from the individual partners. One commenter recommended that the joint venture partner responsible for a specific subcontract should take on that revenue as its share of the contract's total revenues. As with all contracts, SBA does not exclude revenues generated by subcontractors from the revenues deemed to be received by the prime contractor. Where a joint venture is the prime contractor, 100 percent of the revenues will be apportioned to the joint venture partners, regardless of how much work is performed by other subcontractors. The joint venture must perform a certain percentage of the work between the partners to the joint venture (generally 50 percent, but 15 percent for general construction). SBA does not believe that it matters which partner to the joint venture the subcontract flows through. Of the 50 percent of the total contract that the joint venture partners must perform, SBA will look at how much is performed by each partner. That is the percentage of total revenues that will be attributed to each partner. This rule makes clear that revenues will be attributed to the joint venture in the same percentage as that of the work performed by each partner.

A few commenters thought that that same approach should not be applied to the apportionment of employees. They noted that some or all of the joint venture's employees may also be employed concurrently by a joint venture partner. Without taking that into account, the proposed methodology would effectively double count employees who were also employed by one of the joint venture partners. In response, SBA has amended this paragraph to provide that for employees, the appropriate way to apportion individuals employed by the joint venture is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in the employee count of one of the partners.

Section 121.402

The proposed rule amended how NAICS codes are applied to task orders to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed. Consistent with the final rule for FAR Case 2014–002, 85 FR 11746 (Feb. 27, 2020), a contracting officer must assign a single NAICS code for each order issued against a MAC, and that NAICS code must be a NAICS code that is included in the underlying MAC and represents the principal purpose of the order. SBA believes that the NAICS code assigned to a task order must reflect the principal purpose of that order. Currently, based on the business rules of the Federal Procurement Data System (FPDS) and the FAR, all contracts including MACs are restricted to only being assigned a single NAICS code, and if a MAC is assigned a service NAICS code, then that service NAICS code flows down to each individual order under that MAC. SBA does not believe it is appropriate for a task order that is nearly entirely for supplies to have a service NAICS code. In such a case, a firm being awarded such an order would not have to comply with the nonmanufacturer rule. In particular, set-aside orders should be assigned a manufacturing/supply NAICS code, so that the nonmanufacturer rule will apply to the order if it is awarded to a nonmanufacturer. Additionally, the current method for NAICS code assignment can also be problematic where a MAC is assigned a NAICS code for supplies but a particular order under that MAC is almost entirely for services. In such a case, firms that qualified as small for the larger employee-based size standard associated with a manufacturing/supply NAICS code may not qualify as small businesses under a smaller receipts-based services size standard. As such, because the order is assigned the manufacturing/supply NAICS code associated with the MAC, firms that should not qualify as small for a particular procurement that is predominantly for services may do so. SBA recognizes that § 121.402(c) already provides for a solution that will ensure that NAICS codes assigned to task and delivery orders accurately reflect the work being done under the orders. Specifically, the requirement for certain MACs to be assigned more than one NAICS code (*e.g.*, service NAICS code and supply NAICS code) will allow for orders against those MACs to reflect both a NAICS code assigned to the MAC and also a NAICS code that accurately reflects work under the order. The requirement to assign certain MACs more than one NAICS code has already been implemented in the FAR at 48 CFR 19.102(b)(2)(ii) but it will not go into effect until October 1, 2022. The future effective date is when FPDS is expected to implement the requirement and it allows all the Federal agencies to budget and plan for internal system updates across their multiple contracting systems to accommodate the requirement. Thus, this rule makes only minor revisions to the existing regulations to ensure that the NAICS codes assigned to specific procurement actions, and the corresponding size standards, are an accurate reflection of the contracts and orders being awarded and performed.

Commenters supported SBA's intent. They noted that allowing contracting officers to assign a NAICS code to an order that differs from the NAICS code(s) already contained in the MAC could unfairly disadvantage contractors who did not compete for the MAC because they did not know orders would be placed under NAICS codes not in the MAC's solicitation. A commenter noted, however, that the proposed rule added a new § 121.402(c)(2)(ii) when it appears that a revision to § 121.402(c)(2)(i) might be more appropriate. SBA agrees and has revised § 121.402(c)(2)(i) in this final rule to clarify that orders must reflect a NAICS code assigned to the underlying MAC.

In addition, the rule makes a minor change to § 121.402(e) by removing the passive voice in the regulatory text. The rule also clarifies that in connection with a size determination or size appeal, SBA may supply an appropriate NAICS code designation, and accompanying size standard, where the NAICS code identified in the solicitation is prohibited, such as for set-aside procurements where a retail or wholesale NAICS code is identified.

Sections 121.404(a)(1), 124.503(i), 125.18(d), and 127.504(c)

Size Status

SBA has been criticized for allowing agencies to receive credit towards their small business goals for awards made to firms that no longer qualify as small. SBA believes that much of this criticism is misplaced. Where a small business concern is awarded a small business set-aside contract with a duration of not more than five years and grows to be other than small during the performance of the contract, some have criticized the exercise of an option as an award to an other than small business. SBA disagrees with such a characterization. Small business set-aside contracts are restricted only to firms that qualify as small as of the date of a firm's offer for the contract. A firm's status as a small business is relevant to its qualifying for the award of the contract. If a concern qualifies as small for a contract with a duration of not more than five years, it is considered a small business throughout the life of that contract. Even for MACs that are set-aside for small business, once a concern is awarded a contract as a small business it is eligible to receive orders under that contract and perform as a small business. In such a case, size was relevant to the initial award of the contract. Any competitor small business concern could protest the size status of an apparent successful offeror for a small business set-aside contract (whether single award or multiple award), and render a concern ineligible for award where SBA finds that the concern does not qualify as small under the size standard corresponding to the NAICS code assigned to the contract. Furthermore, firms awarded long-term small business set-aside contracts must recertify their size status at five years and every option thereafter. Firms are eligible to receive orders under that contract and perform as a small business so long as they continue to recertify as small at the required times (*e.g.*, at five years and every option thereafter). Not allowing a concern that legitimately qualified at award and/or recertified later as small to receive orders and continue performance as a small business during the base and option periods, even if it has naturally grown to be other than small, would discourage firms from wanting to do business with the Government, would be disruptive to the procurement process, and would disincentivize contracting officers from using small business set-asides.

SBA believes, however, that there is a legitimate concern where a concern self-certifies as small for an unrestricted MAC and at some point later in time when the concern no longer qualifies as small the contracting officer seeks to award an order as a small business set-aside and the firm uses its self-certification as a small business for the underlying unrestricted MAC. A firm's status as a small business does not generally affect whether the firm does or does not qualify for the award of an unrestricted MAC contract. As such, competitors are very unlikely to protest the size of a concern that self-certifies as small for an unrestricted MAC. In SBA's view, where a contracting officer sets aside an order for small business under

an unrestricted MAC, the order is the first time size status is important. That is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size status. To allow a firm's self-certification for the underlying MAC to control whether a firm is small at the time of an order years after the MAC was awarded does not make sense to SBA.

In considering the issue, SBA looked at the data for orders that were awarded as small business set-asides under unrestricted base multiple award vehicles in FY 2018. In total, 8,666 orders were awarded as small business set-asides under unrestricted MACs in FY 2018. Of those set-aside orders, 10 percent are estimated to have been awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order award. Further, it is estimated that 7.0 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (510 out of 7,266 orders). That amounted to 12.6 percent of the dollars set-aside for small business under the FSS ($129.6 million to firms that were no longer small in SAM out of a total of $1.0723 billion in small business set-aside orders). Whereas, it is estimated that 49.4 percent of small business set-aside orders under government-wide acquisition contracts (GWACs) were awarded to firms that were no longer small in SAM under the NAICS code size standard at the time of the order (261 out of 528 orders). That amounted to 67 percent of the dollars set-aside for small business under GWACs ($119.6 million to firms that were no longer small in SAM out of a total of $178.6 million in small business set-aside orders). SBA then considered the number and dollar value of new orders that were awarded as small business set-asides under unrestricted base multiple award vehicles in FY 2018 using the size standard ''exceptions'' that apply in some of SBA's size standards (*e.g.*, the IT Value-Added Reseller exception to NAICS 541519). Taking into account all current size standards exceptions, which allow a firm to qualify under an alternative size standard for certain types of contracts, it is estimated that 6.4 percent of small business set-aside orders under the FSS were awarded to firms that were no longer small in SAM at the time of the order (468 out of 7,266 orders). That amounted to 11.3 percent of the dollars set-aside for small business under the FSS ($120.7 million to firms that were no longer small in SAM out of a total of $1.0723 billion in small business set-aside orders). Considering exceptions for set-aside orders under GWACs, it is estimated that 11.6 percent were awarded to firms that were no longer small in SAM at the time of the order (61 out of 528 orders). That amounted to 39.5 percent of the dollars set-aside for small business under GWACs ($70.5 million to firms that were no longer small in SAM out of a total of $178.6 million in small business set-aside orders). It is not possible to tell from FPDS whether the ''exception'' size standard applied to the contract or whether the agency applied the general size standard for the identified NAICS code. Thus, all that can be said with certainty is that for small business set-aside orders under the FSS, between 11.3 percent and 12.1 percent of the order dollars set-aside for small business were awarded to firms that were no longer small in SAM. This amounted to somewhere between $120.7 million and $129.6 that were awarded to firms that were no longer small in SAM. For GWACs, the percentage of orders and order dollars being awarded to firms that no longer qualify as small is significantly greater. Between 39.5 percent and 67.0 percent of the order dollars set-aside for small business under GWACs were awarded to firms that were no longer small in SAM. This amounted to somewhere between $70.5 million and $119.6 million that were awarded to firms that were no longer small in SAM.

Because discretionary set-asides under the FSS programs have proven effective in making awards to small business under the program and SBA did not want to add unnecessary burdens to the program that might discourage the use of set-asides, the proposed rule provided that, except for orders or Blanket Purchase Agreements issued under any FSS contract, if an order under an unrestricted MAC is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as such at the time it submits its initial offer, which includes price, for the particular order.

SBA received a significant number of comments on this issue. Many commenters supported the proposed language as a needed approach to ensure that firms that are not small do not receive orders set-aside for small businesses and procuring agencies do not inappropriately take credit for awards to small business when the awardees are not in fact small. Many of these commenters believed that it was not fair to them as small businesses to have to compete for small business set-aside orders under unrestricted MACs with concerns that did not currently qualify as small and may not have done so for several years. Other commenters opposed the proposal for various reasons. Some believed that the regulations should be intended to foster and promote growth in small businesses and that the recertification requirement could stifle that growth. Others believed that the proposal undermines the general rule that a concern maintains its small business status for the life of a contract. SBA does not believe that a rule that requires a concern to actually be what it claims to be (*i.e.*, a small business) in any way stifles growth. Of course, SBA supports the growth of small businesses generally. SBA encourages concerns to grow naturally and permits concerns that have been awarded small business set-aside contracts to continue to perform those contracts as small businesses throughout the life of those contracts (*i.e.*, for the base and up to four additional option years). This rule merely responds to perceptions that SBA has permitted small business awards to concerns that do not qualify as small. As noted above, it is intended to apply only to unrestricted procurements where size and status were not relevant to the award of the underlying MAC. SBA also disagrees that this provision is inconsistent with the general rule that once a concern qualifies as small for a contract it can maintain its status as a small business throughout the life of that contract. SBA does not believe that a representation of size or status that does not affect the concern's eligibility to be awarded a contract should have the same significance as one that does.

Several commenters agreed with SBA's intent but believed that the rule needed to more accurately take into account today's complex acquisition environment. These commenters noted that many MACs now seek to make awards to certain types of business concerns (*i.e.*, small, 8(a), HUBZone, WOSB, SDVO) in various reserves or ''pools,'' and that concerns may be excluded from a particular pool if they do not qualify as eligible for the pool. These commenters recommended that a concern being awarded a MAC for a particular pool should be able to carry the size and/or status of that pool to each order made to the pool. SBA agrees. As noted above, SBA proposed recertification in connection with orders

set-aside for small business under an unrestricted MAC because that is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size and/or status. However, where a MAC solicitation seeks to make awards to reserves or pools of specific types of small business concerns, the concerns represent that they are small or qualify for the status designated by the pool and having that status or not determines whether the firm does or does not qualify for the award of a MAC contract for the pool. In such a case, SBA believes that size and status should flow from the underlying MAC to individual orders issued under that MAC, and the firm can continue to rely on its representations for the MAC itself unless a contracting officer requests recertification of size and/or status with respect to a specific order. SBA makes that revision in this final rule.

Many commenters also believed that there was no legitimate programmatic reason for excluding the FSS program from this recertification requirement. The commenters, however, miss that the FSS program operates under a separate statutory authority and that set-asides are discretionary, not mandatory under this authority. SBA and GSA worked closely together to stand up and create this discretionary authority and it has been very successful. This discretionary set-aside authority was authorized by the Small Business Jobs Act of 2010 (Pub. L. 111–240) and implemented in FAR 8.405–5 in November 2011. As a result, benefits to small businesses have been significant. The small business share of GSA Schedule sales rose from 30% in fiscal year 2010 (the last full fiscal year before the authority was implemented) to 39% in fiscal year 2019. That equates to an additional $1 billion going to small businesses in fiscal year 2019. Although SBA again considered applying the recertification requirement to the FSS program (and allow the FSS, as with any other MAC, to establish reserves or pools for business concerns with a specified size or status), SBA believes that is unworkable at this time. Consequently, consistent with the proposed rule, this final rule does not apply the modified recertification requirement to the FSS program. Doing so would pose an unnecessary risk to a program currently yielding good results for small business.

For a MAC that is set aside for small business (*i.e.,* small business set-aside, 8(a) small business, SDVO small business, HUBZone small business, or WOSB), the rule generally sets size status as of the date of the offer for the underlying MAC itself. A concern that is small at the time of its offer for the MAC will be considered small for each order issued against the contract, unless a contracting officer requests a size recertification in connection with a specific order. As is currently the case, a contracting officer has the discretion to request recertification of size status on MAC orders. If that occurs, size status would be determined at the time of the order. That would not be a change from the current regulations.

Socioeconomic Status

Where the required status for an order differs from that of the underlying contract (*e.g.,* the MAC is a small business set-aside award, and the procuring agency seeks to restrict competition on the order to only certified HUBZone small business concerns), SBA believes that a firm must qualify for the socioeconomic status of a set-aside order at the time it submits an offer for that order. Although size may flow down from the underlying contract, status in this case cannot. Similar to where a procuring agency seeks to compete an order on an unrestricted procurement as a small business set-aside and SBA would require offerors to qualify as small with respect to that order, (except for orders under FSS contracts),), SBA believes that where the socioeconomic status is first required at the order level, an offeror seeking that order must qualify for the socioeconomic status of the set-aside order when it submits its offer for the order.

Under current policy and regulations, where a contracting officer seeks to restrict competition of an order under an unrestricted MAC to eligible 8(a) Participants only, the contracting officer must offer the order to SBA to be awarded through the 8(a) program, and SBA must accept the order for the 8(a) program. In determining whether a concern is eligible for such an 8(a) order, SBA would apply the provisions of the Small Business Act and its current regulations which require a firm to be an eligible Program Participant as of the date set forth in the solicitation for the initial receipt of offers for the order.

This final rule makes these changes in § 121.404(a)(1) for size, § 124.503(i) for 8(a) BD eligibility, § 125.18(d) for SDVO eligibility, and § 127.504(c) for WOSB eligibility.

Several commenters voiced concern with allowing the set-aside of orders to a smaller group of firms than all holders of a MAC. They noted that bid and proposal preparation costs can be significant and a concern that qualified for the underlying MAC as a small business or some other specified type of small business could be harmed if every order was further restricted to a subset of small business. For example, where a MAC is set-aside for small business and every order issued under that MAC is set-aside for 8(a) small business concerns, SDVO small business concerns, HUBZone small business concerns and WOSBs, those firms that qualified only as small business concerns would be adversely affected. In effect, they would be excluded from competing for every order. SBA agrees that is a problem. That is not what SBA intended when it authorized orders issued under small business set-aside contracts to be further set-aside for a specific type of small business. SBA believes that an agency should not be able to set-aside all of the orders issued under a small business set-aside MAC for a further limited specific type of small business. As such, this final rule provides that where a MAC is set-aside for small business, the procuring agency can set-aside orders issued under the MAC to a more limited type of small business. Contracting officers are encouraged to review the award dollars under the MAC and to aim to make available for award at least 50 percent of the award dollars under the MAC to all contract holders of the underlying MAC.

In addition, a few commenters asked for further clarification as to whether orders issued under a MAC set-aside for 8(a) Participants, HUBZone small business concerns, SDVO small business concerns or WOSBs/EDWOSBs could be further set aside for a more limited type of small business. These commenters specifically did not believe that allowing the further set-aside of orders issued under a multiple award set-aside contract should be permitted in the 8(a) context. The commenters noted that the 8(a) program is a business development program of limited duration (*i.e.,* nine years), and felt that it would be detrimental to the business development of 8(a) Participants generally if an agency could issue an order set-aside exclusively for 8(a) HUBZone small business concerns, 8(a) SDVO small business concerns, or 8(a) WOSBs. The current regulatory text of § 125.2(e)(6)(i) provides that a ''contracting officer has the authority to set aside orders against Multiple Award Contracts, including contracts that were set aside for small business,'' for small and subcategories of small businesses. SBA intended to allow a contracting officer to issue orders for subcategories of small businesses only under small

business set-aside contracts. This rule clarifies that intent.

Section 121.404

In addition to the revision to § 121.404(a)(1) identified above, the rule makes several other changes or clarifications to § 121.404. In order to make this section easier to use and understand, the rule adds headings to each subsection, which identify the subject matter of the subsection.

The proposed rule amended § 121.404(b), which requires a firm applying to SBA's programs to qualify as a small business for its primary industry classification as of the date of its application. The proposed rule eliminated references to SBA's small disadvantaged business (SDB) program as obsolete, and added a reference to the WOSB program. SBA received no comments on these edits and adopts them as final in this rule.

The proposed rule also amended § 121.404(d) to clarify that size status for purposes of compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding. Currently, only compliance with the nonmanufacturer rule is specifically addressed in this paragraph, but SBA's policy has been to apply the same rule to determine size with respect to the ostensible subcontractor rule and joint venture agreement requirements. This would not be a change in policy, but rather a clarification of existing policy. Several commenters misconstrued this to be a change in policy or believed that this would be a departure from the snapshot in time rule for determining size as of the date a concern submits its initial offer including price. As noted, SBA has intended this to be the current policy and is merely clarifying it in the regulatory text. In addition, SBA does not view this as a departure from the snapshot in time rule. The receipts/employees are determined at one specific point in time—the date on which a concern submits its initial offer including price. SBA believes that compliance with the nonmanufacturer rule, the ostensible subcontractor rule and joint venture agreement requirements can justifiably change during the negotiation process. If an offer changes during negotiations in a way that would make a large business mentor joint venture partner be in control of performance, for example, SBA does not believe that the joint venture should be able to point back to its initial offer in which the small business protégé partner to the joint venture appeared to be in control.

The proposed rule also added a clarifying sentence to § 121.404(e) that would recognize that prime contractors may rely on the self-certifications of their subcontractors provided they do not have a reason to doubt any specific self-certification. SBA believes that this has always been the case, but has added this clarifying sentence, nevertheless, at the request of many prime contractors. SBA received positive comments on this change and adopts it as final in this rule.

The proposed rule made several revisions to the size recertification provisions in § 121.404(g). First, the recertification rule pertaining to a joint venture that had previously received a contract as a small business was not clear. If a partner to the joint venture has been acquired, is acquiring or has merged with another business entity, the joint venture must recertify its size status. In order to remain small, however, it was not clear whether only the partner which has been acquired, is acquiring or has merged with another business entity needed to recertify its size status or whether all partners to the joint venture had to do so. The proposed rule clarified that only the partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity must recertify its size status in order for the joint venture to recertify its size. Commenters generally supported this revision. One commenter believed that a joint venture should be required to recertify its size only where the managing venture, or the small business concern upon which the joint venture's eligibility for the contract was based, is acquired by, is acquiring, or has merged with another business entity. SBA disagrees. SBA seeks to make the size rules pertaining to joint ventures similar to those for individual small businesses. Where an individual small business awardee grows to be other than small, its performance on a small business contract continues to count as an award to small business. Similarly, where a joint venture partner grows to be other than small naturally, that should not affect the size of the joint venture. However, under SBA's size rules, in order for a joint venture to be eligible as small, each partner to the joint venture must individually qualify as small. Size is not determined solely by looking at the size of the managing venture. Just as an individual small business awardee must recertify its size if it is acquired by, is acquiring, or has merged with another business entity, so too should the partner to a joint venture that is acquired by, is acquiring, or has merged with another business entity. As such, SBA adopts the proposed language as final in this rule.

Additionally, the proposed rule clarified that if a merger or acquisition causes a firm to recertify as an other than small business concern between time of offer and award, then the recertified firm is not considered a small business for the solicitation. Under the proposed rule, SBA would accept size protests with specific facts showing that an apparent awardee of a set-aside has recertified or should have recertified as other than small due to a merger or acquisition before award. SBA received comments on both sides of this issue. Some commenters supported the proposed provision as a way to ensure that procuring agencies do not make awards to firms who are other than small. They thought that such awards could be viewed as frustrating the purpose of small business set-asides. Other commenters opposed the proposed change. A few of these commenters believed that a firm should remain small if it was small at the time it submitted its proposal. SBA wants to make it clear that is the general rule. Size is generally determined only at the date of offer. If a concern grows to be other than small between the date of offer and the date of award (*e.g.,* another fiscal year ended and the revenues for that just completed fiscal year render the concern other than small), it remains small for the award and performance of that contract. The proposed rule dealt only with the situation where a concern merged with or was acquired by another concern after offer but before award. As stated in the supplementary information to the proposed rule, SBA believes that situation is different than natural growth. Several other commenters opposing the proposed rule believed such a policy could adversely affect small businesses due to the often lengthy contract award process. Contract award can often occur 18 months or more after the closing date for the receipt of offers. A concern could submit an offer and have no plans to merge or sell its business at that time. If a lengthy amount of time passes, these commenters argued that the concern should not be put in the position of declining to make a legitimate business decision concerning the possible merger or sale of the concern simply because the concern is hopeful of receiving the award of a contract as a small business. Several commenters recommended an intermediate position where recertification must occur if the merger or acquisition occurs within a certain amount of time from either the concern's offer or the date for the receipt

of offers set forth in the solicitation. This would allow SBA to prohibit awards to concerns that may appear to have simply delayed an action that was contemplated prior to submitting their offers, but at the same time not prohibit legitimate business decisions that could materialize months after submitting an offer. Commenters recommended requiring recertification when merger or acquisition occurs within 30 days, 90 days and 6 months of the date of an offer. SBA continues to believe that recertification should be required when it occurs close in time to a concern's offer, but agrees that it would not be beneficial to discourage legitimate business transactions that arise months after an offer is submitted. In response, the final rule continues to provide that if a merger, sale or acquisition occurs after offer but prior to award the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer, the concern will be ineligible for the award of the contract. If it occurs after 180 days, award can be made, but it will not count as an award to small business.

The proposed rule also clarified that recertification is not required when the ownership of a concern that is at least 51 percent owned by an entity (*i.e.*, tribe, ANC, or Community Development Corporation (CDC)) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. When the small business continues to be owned to the same extent by the tribe, ANC or CDC, SBA does not believe that the real ownership of the concern has changed, and, therefore, that recertification is not needed. Commenters overwhelmingly supported this change, and SBA adopts it as final in this rule. The rule makes this same change to § 121.603 for 8(a) contracts as well.

Finally, the proposed rule sought to amend § 121.404(g)(3) to specifically permit a contracting officer to request size recertification as he or she deems appropriate at any point in a long-term contract. SBA believes that this authority exists within the current regulatory language but is merely articulating it more clearly in this rule. Several commenters opposed this provision, believing that it would undermine the general rule that a concern's size status should be determined as of the date of its initial offer. They believe that establishing size at one point in time provides predictability and consistency to the procurement process. SBA agrees that size for a single award contract that does not exceed five years should not be reexamined during the life of a contract. SBA believes, however, that the current regulations allow a contracting officer to seek recertifications with respect to MACs. Pursuant to § 121.404(g), ''if a business concern is small at the time of offer for a Multiple Award Contract . . ., then it will be considered small for each order issued against the contract with the same NAICS code and size standard, *unless* a contracting officer requests a new size certification in connection with a specific order.'' (Emphasis added). The regulations at § 121.404(g)(3) also provide that for a MAC with a duration of more than five years, a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. Under this provision, a business concern is not required to recertify its size status until prior to the end of the fifth year of that contact. However, SBA also interprets § 121.404(g)(3) as not prohibiting a contracting officer from requesting size recertification prior to the 120-day point in the fifth year of the long-term contract. As noted above, the general language of § 121.404(g) allows a contracting officer to request size recertification with respect to each order. SBA believes that the regulations permit a contracting officer the discretion to request size recertification at the contract level prior to the end of the fifth year if explicitly requested for the contract at issue and if requested of all contract holders. In this respect, the authority to request size recertification at the contract level prior to the fifth year is an extension of the authority to request recertification for subsequent orders. As such, this final rule clarifies that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point only for a long-term MAC.

Section 121.406

The rule merely corrects a typographical error by replacing the word ''provided'' with the word ''provide.''

Section 121.702

The proposed rule clarified the size requirements applicable to joint ventures in the Small Business Innovation Research (SBIR) program. Although the current regulation authorizes joint ventures in the SBIR program and recognizes the exclusion from affiliation afforded to joint ventures between a protégé firm and its SBA-approved mentor, it does not specifically apply SBA's general size requirements for joint ventures to the SBIR program. The proposed rule merely sought to apply the general size rule for joint ventures to the SBIR program. In other words, a joint venture for an SBIR award would be considered a small business provided each partner to the joint venture, including its affiliates, meets the applicable size standard. In the case of the SBIR program, this means that each partner does not have more than 500 employees. Comments favored this proposal and SBA adopts it as final in this rule.

Section 121.1001

SBA proposed to amend § 121.1001 to provide authority to SBA's Associate General Counsel for Procurement Law to independently initiate or file a size protest, where appropriate. Commenters supported this provision, and SBA adopts it as final in this rule. In response to a comment, the final rule also revises § 121.1001(b) to reflect which entities can request a formal size determination. Specifically, a commenter pointed out that although § 121.1001(b) gave applicants for and participants in the HUBZone and 8(a) BD programs the right to request formal size determinations in connection with applications and continued eligibility for those programs, it did not provide that same authority to WOSBs/EDWOSBs and SDVO small business concerns in connection with the WOSB and SDVO programs. The final rule harmonizes the procedures for SBA's various programs as part of the Agency's ongoing effort to promote regulatory consistency.

Sections 121.1004, 125.28, 126.801, and 127.603

This rule adds clarifying language to § 121.1004, § 125.28, § 126.801, and § 127.603 regarding size and/or socioeconomic status protests in connection with orders issued against a MAC. Currently, the provisions authorize a size protest where an order is issued against a MAC if the contracting officer requested a recertification in connection with that order. This rule specifically authorizes a size protest relating to an order issued against a MAC where the order is set-aside for small business and the underlying MAC was awarded on an unrestricted basis, except for orders or Blanket Purchase Agreements issued under any FSS contract. The rule also specifically authorizes a socioeconomic protest relating to set-aside orders based on a different socioeconomic status from the underlying set-aside MAC.

Section 121.1103

An explanation of the change is provided with the explanation for § 134.318.

Section 124.3

In response to concerns raised to SBA by several Program Participants, the proposed rule added a definition of what a follow-on requirement or contract is. Whether a procurement requirement may be considered a follow-on procurement is important in several contexts related to the 8(a) BD program. First, SBA's regulations provide that where a procurement is awarded as an 8(a) contract, its follow- on or renewable acquisition must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. 13 CFR 124.504(d)(1).
SBA's regulations also require SBA to conduct an adverse impact analysis when accepting requirements into the 8(a) BD program. However, an adverse impact analysis is not required for follow-on or renewal 8(a) acquisitions or for new requirements. 13 CFR 124.504(c). Finally, SBA's regulations provide that once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on procurement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, NHO, or CDC. 13 CFR 124.109(c)(3)(ii), 124.110(e) and 124.111(d).

In order to properly assess what each of these regulations requires, the proposed rule defined the term ''follow-on requirement or contract''. The definition identified certain factors that must be considered in determining whether a particular procurement is a follow-on requirement or contract: (1) Whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; (2) whether the magnitude or value of the requirement has changed by at least 25 percent; and (3) whether the end user of the requirement has changed. These considerations should be a guide, and not necessarily dispositive of whether a requirement qualifies as ''new.'' Applying the 25 percent rule contained in this definition rigidly could permit procuring agencies and entity-owned firms to circumvent the intent of release, sister company restriction, and adverse impact rules.

For example, a procuring agency may argue that two procurement requirements that were previously awarded as individual 8(a) contracts can be removed from the 8(a) program without requesting release from SBA because the value of the combined requirement would be at least 25 percent more than the value of either of the two previously awarded individual 8(a) contracts, and thus would be considered a new requirement. Such an application of the new requirement definition would permit an agency to remove two requirements from the 8(a) BD program without requesting and receiving SBA's permission for release from the program. We believe that would be inappropriate and that a procuring agency in this scenario must seek SBA's approval to release the two procurements previously awarded through the 8(a) BD program. Likewise, if an entity-owned 8(a) Participant previously performed two sole source 8(a) contracts and a procuring agency sought to offer a sole source requirement to the 8(a) BD program on behalf of another Participant owned by the same entity (tribe, ANC, NHO, or CDC) that, in effect, was a consolidation of the two previously awarded 8(a) procurements, we believe it would be inappropriate for SBA to accept the offer on behalf of the sister company. Similarly, if a small business concern previously performed two requirements outside the 8(a) program and a procuring agency wanted to combine those two requirements into a larger requirement to be offered to the 8(a) program, SBA should perform an adverse impact analysis with respect to that small business even though the combined requirement had a value that was greater than 25 percent of either of the previously awarded contracts.

SBA received a significant number of comments regarding what a follow-on requirement is and how SBA's rules regarding what a follow-on contract is should be applied to the three situations identified above. Many commenters believed that the proposed language was positive because it will help alleviate confusion in determining whether a requirement should be considered a follow-on or not. In terms of taking requirements or parts of requirements that were previously performed through the 8(a) program out of the program, commenters overwhelmingly supported SBA's involvement in the release process. Commenters were concerned that agencies have increased the value of procurement requirements marginally by 25 percent merely to call the procurements new and remove them from the 8(a) program without going through the release process. These commenters were particularly concerned where the primary and vital requirements of a procurement remained virtually identical and an agency merely intended to add ancillary work in order to freely remove the procurement from the 8(a) BD program. A few commenters also recommended that SBA provide clear guidance when the contract term of the previously awarded 8(a) contract is different than that of a successor contracting action. Specifically, these commenters believed that an agency should not be able to compare a contract with an overall $2.5 million value (consisting of a one year base period and four one-year options each with a $500,000 value) with a successor contract with an overall value of $1.5 million (consisting of a one year base period and two one-year options each with a $500,000 value) and claim it to be new. In such a case, the yearly requirement is identical and commenters believed the requirement should not be removed without going through the release process. SBA agrees. The final rule clarifies that equivalent periods of performance relative to the incumbent or previously-competed 8(a) requirement should be compared.

Many commenters agreed that the 25 percent rule should not be applied rigidly, as that may open the door for the potential for (more) contracts to be taken out of the 8(a) BD program. Commenters also believed that SBA should be more involved in the process, noting that firms currently performing 8(a) contracts often do not discover a procuring agency's intent to reprocure that work outside the 8(a) BD program by combining it with other work and calling it a new requirement until very late in the procurement process. Once a solicitation is issued that combines work previously performed through an 8(a) contract with other work, it is it difficult to reverse even where SBA believes that the release process should have been followed. Several commenters recommended adding language that would require a procuring agency to obtain SBA concurrence that a procurement containing work previously performed through an 8(a) contract does not represent a follow-on requirement before issuing a solicitation for the procurement. Although SBA does not believe that concurrence should be required, SBA does agree that a procuring activity should notify SBA if work previously performed through the 8(a) program will be performed through a different means. A contracting officer will make the determination as to whether a requirement is new, but SBA should be given the opportunity to look at the procuring activity's strategy and supply input where appropriate. SBA has added such language to § 124.504(d) in this final rule.

Several commenters supported the proposed definition of a follow-on procurement for release purposes where they agreed that a procuring agency should not be able to remove two requirements from the 8(a) program merely by combining them and calling the consolidated requirement new because it exceeds the 25 percent increase in magnitude. These commenters, however, recommended that the 25 percent change in magnitude be a ''bright-line rule'' with respect to whether a requirement should be considered a follow-on requirement to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same tribe, ANC, Native Hawaiian Organization (NHO), or CDC. SBA understands the desire to have clear, objective rules. However, as noted previously, SBA opposes a bright-line 25 percent change in magnitude rule in connection with release. In addition, because SBA does not believe that it is good policy to have one definition of what a follow-on requirement is for one purpose and have a different definition for another purpose, SBA opposes having a bright-line 25 percent change in magnitude rule in determining whether to allow a sister company to perform a particular sole source 8(a) contract and then provide discretion only in the context of whether certain work can be removed from the 8(a) program. SBA continues to believe that the language as proposed that allows discretion when appropriate is the proper alternative. In the context of determining whether to allow a sister company to perform a particular sole source 8(a) contract, SBA agrees that a 25 percent change in magnitude should be sufficient for SBA to approve a sole source contract to a sister company. It would be the rare instance where that is not the case.

Section 124.105

The proposed rule amended § 124.105(g) to provide more clarity regarding situations in which an applicant has an immediate family member that has used his or her disadvantaged status to qualify another current or former Participant. The purpose of the immediate family member restriction is to ensure that one individual does not unduly benefit from the 8(a) BD program by participating in the program beyond nine years, albeit through a second firm. This most often happens when a second family member in the same or similar line of business seeks 8(a) BD certification. However, it is not necessarily the type of business which is a problem, but, rather, the involvement in the applicant firm of the family member that previously participated in the program. The current regulatory language requires an applicant firm to demonstrate that ''no connection exists'' between the applicant and the other current or former Participant. SBA believes that requiring no connections is a bit extreme. If two brothers own two totally separate businesses, one as a general construction contractor and one as a specialty trade construction contractor, in normal circumstances it would be completely reasonable for the brother of the general construction firm to hire his brother's specialty trade construction firm to perform work on contracts that the general construction firm was doing. Unfortunately, if either firm was a current or former Participant, SBA's rules prevented SBA from certifying the second firm for participation in the program, even if the general construction firm would pay the specialty trade firm the exact same rate that it would have to pay to any other specialty trade construction firm. SBA does not believe that makes sense. An individual should not be required to avoid all contact with the business of an immediate family member. He or she should merely have to demonstrate that the two businesses are truly separate and distinct entities.

To this end, SBA proposed that an individual would not be able to use his or her disadvantaged status to qualify a concern for participation in the 8(a) BD program if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and the concerns are connected by any common ownership or management, regardless of amount or position, or the concerns have a contractual relationship that was not conducted at arm's length. In the first instance, if one of the two family members (or business entities owned by the family member) owned *any* portion of the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. Similarly, if one of the two family members had any role as a director, officer or key employee in the business owned by the other family member, the second in time family member could not qualify his or her business for the 8(a) BD program. In the second instance, the second in time family member could not qualify his or her business for the 8(a) BD program if it received or gave work to the business owned by the other family member at other than fair market value. With these changes, SBA believes that the rule more accurately captures SBA's intent not to permit one individual from unduly benefitting from the program, while at the same time permitting normal business relations between two firms. Commenters generally supported this change. A few commenters supported the provision but believed that an additional basis for disallowing a new immediate family member applicant into the 8(a) BD program should be where the applicant shared common facilities with a current or former Participant owned and controlled by an immediate family member. SBA agrees that an applicant owned by an immediate family member of a current or former Participant should not be permitted to share facilities with that current or former Participant. This rule adds that situation as a basis for declining an applicant. Several commenters sought further clarification as to whether a presumption against immediate family members in the same or similar line of business would continue from the previous regulations into this revised provision, and whether some sort of waiver will be needed to allow an immediate family member applicant to be certified into the 8(a) BD program. In particular, a few commenters were concerned that if an immediate family member attempted to certify an applicant concern in the same primary NAICS as the current or former Participant and the individual applying for certification has no management or technical experience in that NAICS code, that the owner/manager of the current or former Participant would play a significant role in the applicant concern even though a formal role was not identified. As noted above, SBA believes that the rules pertaining to immediate family members seeking to participate in the 8(a) BD program have been too harsh. The rule seeks to allow an applicant owned and controlled by an immediate family member of current or former Participant into the program, even in the same or similar line of business, provided certain conditions do not exist. SBA agrees with the comments that an individual seeking to certify an applicant concern in a primary NAICS code that is the same primary NAICS code of a current or former Participant operated by an immediate family member must have management or technical experience in that primary NAICS code. SBA agrees that without such a requirement, there is a risk that the owner/manager of the current or former Participant would have some role in the management or control of the applicant concern. This

rule adds a requirement that an individual applying in the same primary NAICS code as an immediate family member must have management or technical experience in that primary NAICS code, which would include experience acquired from working for an immediate family member's current or former Participant. Aside from that refinement, there is no presumption against such an applicant. The applicant must, however, demonstrate that there is no common ownership, control or shared facilities with the current or former Participant, and that any contractual relations between the two companies are arm's length transactions. One commenter questioned whether the revised requirement in proposed § 124.105(g)(2) that SBA would annually assess whether the two firms continue to ''operate independently'' of one another after being admitted to the program was inconsistent with the language in § 124.105(g)(1) that allows fair market contractual relations between the two firms. That language was not meant to imply that those arm's length transactions cannot occur once the second firm is admitted to the program. As part of an annual review, SBA will determine that ownership, management, and facilities continue to be separate and that any contractual relations are at fair market value. SBA would not initiate termination proceedings merely because the two firms entered into fair market value contracts after the second firm is admitted to the program. One commenter recommended that SBA should place a limit on the amount of contractual, arm's length transactions that have occurred between the firms (either dollar value or percentage of revenue). SBA disagrees. SBA does not believe a firm should be penalized for having an immediate family member participate in the 8(a) BD program. It does not make sense that a business concern owned by one family member cannot hire the business concern owned by another family member as a subcontractor at the same rate that it could hire any other business concern. Business relationships are often built upon trust. If a subcontractor has done a good job at a fair price, it is likely that the prime contractor will hire that firm again when the need arises to do that kind of work. Based upon the comments received in response to proposed § 121.103(f) (which loosened the presumption of economic dependence where one concern derived at least 70 percent of its revenues from one other business concern), most commenters believed there should not be a hard restriction on the amount of work one business concern should be able to do with another. SBA believes the same should apply in the immediate family member context as long as a clear line of fracture exists between the two business concerns. As such, SBA does not adopt this recommendation in this final rule.

The proposed rule also amended the 8(a) BD change of ownership requirements in § 124.105(i). First, the proposed rule lessened the burden on 8(a) Participants seeking minor changes in ownership by providing that prior SBA approval is not needed where a previous owner held less than a 20 percent interest in the concern both before and after the transaction. This is a change from the previous requirement which allows a Participant to change its ownership without SBA's prior approval where the previous owner held less than a 10 percent interest. This change from 10 percent to 20 percent permits Participants to make minor changes in ownership more frequently without requiring them to wait for SBA approval.

In addition, the proposed rule eliminated the requirement that all changes of ownership affecting the disadvantaged individual or entity must receive SBA prior approval before they can occur. Specifically, proposed revisions to § 124.105(i)(2) provided that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of the Participant will increase the percentage of his or her (its) ownership interest. SBA believes that prior approval is not needed in such a case because if SBA determined that an individual or entity owned and controlled a Participant before a change in ownership and the change in ownership only increases the ownership interest of that individual or entity, there could be no question as to whether the Participant continues to meet the program's ownership and control requirements. This change will decrease the amount of times and the time spent by Participant firms seeking SBA approval of a change in ownership. SBA received unanimous support on these provisions and adopts them as final in this rule.

Section 124.109

In order to eliminate confusion, this rule clarifies several provisions relating to tribally-owned (and ANC-owned) 8(a) applicants and Participants. First, SBA amends § 124.109(a)(7) and § 124.109(c)(3)(iv) to clarify that a Participant owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. SBA believes that a tribe or ANC should be able to replace one wholly-owned intermediary company with another without going through the change of ownership process and obtaining prior SBA approval. In each of these cases, SBA believes that the underlying ownership of the Participant is not changing substantively and that requiring a Participant to request approval from SBA is unnecessary. The recommendation and approval process for a change of ownership can take several months, so this change will relieve Participants owned by tribes and ANCs from this unnecessary burden and allow them to proactively conduct normal business operations without interruption.

Second, the rule amends § 124.109(c)(3)(ii) to clarify the rules pertaining to a tribe/ANC owning more than one Participant in the 8(a) BD program. The rule adds two subparagraphs and an example to § 124.109(c)(3)(ii) for ease of use and understanding. In addition, SBA clarifies that if the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe could immediately submit an application to qualify another of its firms for participation in the 8(a) BD program under the primary NAICS code that was previously held by the Participant whose primary NAICS code was changed. A change in a primary NAICS code under § 124.112(e) should occur only where SBA has determined that the greatest portion of a Participant's revenues for the past three years are in a NAICS code other than the one identified as its primary NAICS code. In such a case, SBA has determined that in effect the second NAICS code really has been the Participant's primary NAICS code for the past three years. Commenters supported these provisions, and SBA adopts them as final.

The rule also clarifies SBA current policy that because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants. This flows directly from the statutory provision which allows an individual to manage two tribally-owned firms. Commenters supported this change, noting that if statutory and regulatory requirements explicitly allow an individual to manage two 8(a) firms,

then it would be illogical to impose the full-time work requirement on such a manager. This rule adopts the proposed language as final.

Finally, the proposed rule clarified the 8(a) BD program admission requirements governing how a tribally-owned applicant may demonstrate that it possesses the necessary potential for success. SBA's regulations previously permitted the tribe to make a firm written commitment to support the operations of the applicant concern to demonstrate a tribally-owned firm's potential for success. Due to the increased trend of tribes establishing tribally-owned economic development corporations to oversee tribally owned businesses, SBA recognizes that in some circumstances it may be adequate to accept a letter of support from the tribally-owned economic development company rather than the tribal leadership. The proposed rule permitted a tribally-owned applicant to satisfy the potential for success requirements by submitting a letter of support from the tribe itself, a tribally-owned economic development corporation or another relevant tribally-owned holding company. In order for a letter of support from the tribally-owned holding company to be sufficient, there must be sufficient evidence that the tribally-owned holding company has the financial resources to support the applicant and that the tribally-owned company is controlled by the tribe. Commenters supported this change. They noted that an economic development corporation or tribally-owned holding company is authorized to act on behalf of the tribe and is essentially an economic arm of the tribe, and that oftentimes due to the size of the tribe it can be difficult and take significant amounts of time and resources to obtain a commitment letter from the tribe itself. SBA adopts this provision as final in this rule.

Section 124.110

The proposed rule would make some of the same changes to § 124.110 for applicants and Participants owned and controlled by NHOs as it would to § 124.109 for tribally-owned applicants and Participants. Specifically, the proposed rule would subdivide § 124.110(e) for ease of use and understanding and would clarify that if the primary NAICS code of an NHO-owned Participant is changed pursuant to § 124.112(e), the NHO could submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

Section 124.111

The proposed rule made the same change for CDCs and CDC-owned firms as for tribes and ANCs mentioned above. It clarified that a Participant owned by a CDC need not request a change of ownership from SBA where the CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant. It also subdivided the current subparagraph (d) into three smaller paragraphs for ease of use and understanding, and clarified that if the primary NAICS code of a CDC-owned Participant is changed pursuant to § 124.112(e), the CDC could submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed. SBA did not receive any comments in response to these changes. As such, SBA adopts them as final in this rule.

Section 124.112

SBA proposed to amend § 124.112(d)(5) regarding excessive withdrawals in connection with entity-owned 8(a) Participants. The proposed rule permitted an 8(a) Participant that is owned at least 51 percent by a tribe, ANC, NHO or CDC to make a distribution to a non-disadvantaged individual that exceeds the applicable excessive withdrawal limitation dollar amount if it is made as part of a pro rata distribution to all shareholders. Commenters supported this change as a needed clarification to allow an entity-owned firm to increase its distribution to the tribe, ANC, NHO or CDC, and thus enable it to provide additional resources to the tribal or disadvantaged community. A few commenters were concerned with having dollar numbers in the examples set forth in the regulatory text. They were concerned that $1 million would become the default unless done in pro rata share. SBA believes these commenters misunderstood the intent of this provision. The example in the regulation provides that where a tribally-owned Participant pays $1,000,000 to a non-disadvantaged manager that was not part of a pro rata distribution to all shareholders, SBA would consider that to be an excessive withdrawal. SBA continues to believe that a $1 million payout to a non-disadvantaged individual in that context is excessive. If a tribe, ANC, NHO, or CDC owns 100 percent of an 8(a) Participant and wants to give back to the native or underserved community, nothing in this regulation would prohibit it from doing so. That Participant could give a distribution of $1 million or more back to the tribe, ANC, NHO, or CDC in order to ensure that the native or underserved community receives substantial benefits. The clarification regarding pro rata distributions was intended to allow greater distributions to tribal communities, not to restrict such distributions. The final rule adopts that provision.

In 2016, SBA amended § 124.112(e) to implement procedures to allow SBA to change the primary NAICS code of a Participant where SBA determined that the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. 81 FR 48558, 48581 (July 25, 2016). The procedures require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate. The proposed rule authorized an appeal process, whereby a Participant whose primary NAICS code was changed by its servicing district office could seek further review of that determination at a different level. Commenters supported this provision and SBA adopts it as final in this rule.

Section 124.201

The proposed rule did not amend § 124.201. However, SBA sought comments as to whether SBA should add a provision that would require a small business concern that seeks to apply for participation in the 8(a) BD program to first take an SBA-sponsored preparatory course regarding the requirements and expectations of the 8(a) BD program. Commenters were split on this proposal. Some felt it would be helpful to those firms who did not have a clear understanding of the expectations of participating in the 8(a) BD program. Others thought it would merely delay their participation in the program needlessly. Some commenters were concerned that there might be time commitments and travel expenses if a live course were required and recommended having the option to provide such training via a web-based platform. Commenters also noted that for entity-owned applicants, this requirement should not apply beyond the entity's first company to enter the 8(a) BD program. After reviewing the

comments, SBA believes that such a preparatory course should be an option, but not a requirement. As such, SBA does not believe that the regulatory text needs to be revised in this final rule.

Section 124.203

Section 124.203 requires applicants to the 8(a) BD program to submit certain specified supporting documentation, including financial statements, copies of signed Federal personal and business tax returns and individual and business bank statements. In 2016, SBA removed the requirement that an applicant must submit a signed Internal Revenue Service (IRS) Form 4506T, Request for Copy or Transcript of Tax Form, in all cases. 81 FR 48558, 48569 (July 25, 2016). At that time, SBA agreed with a commenter to the proposed rule that questioned the need for every applicant to submit IRS Form 4506T. In eliminating that requirement for every applicant, SBA reasoned that it always has the right to request any applicant to submit specific information that may be needed in connection with a specific application. As long as SBA's regulations clearly provide that SBA may request any additional documents SBA deems necessary to determine whether a specific applicant is eligible to participate in the 8(a) BD program, SBA will be able to request that a particular firm submit IRS Form 4506T where SBA believes it to be appropriate. SBA proposed to amend § 124.203 to add back the requirement that every applicant to the 8(a) BD program submit IRS Form 4506T (or when available, IRS Form 4506C) because not having the Form readily available when needed has unduly delayed the application process for those affected applicants. In addition, SBA believed that requiring Form 4506T in every case would serve as a deterrent to firms that may think it is not necessary to fully disclose all necessary financial information.

However, during the comment period SBA determined that neither Form is a viable option for independent personal income verification purposes at this time. On July 1, 2019, the IRS removed the third-party mailing option from the Form 4506T after it was determined that this delivery method presents a risk to sensitive taxpayer information. As a result, the IRS will no longer send tax return transcripts directly to SBA; rather, transcripts must be mailed to the taxpayer's address of record. Because SBA may not receive tax return transcripts directly from the IRS under Form 4506T, the Agency no longer believes it is an effective tool for independent income verification. In addition, current IRS guidance indicates that Form 4506C is available only to industry lenders participating in the Income Verification Express Service program.

SBA nevertheless continues to recognize the importance of obtaining authorization to receive taxpayer information at the time of application. It is SBA's understanding that the IRS is currently developing a successor form or program through which SBA and other Federal agencies may directly receive a taxpayer's tax return information for income verification purposes. As such, the final rule provides that each individual claiming disadvantaged status must authorize SBA to request and receive tax return information directly from the IRS if such authorization is required. Although SBA does not anticipate using this authorization often to verify an applicant's information, SBA believes that this additional requirement imposes a minimal burden on 8(a) BD program applicants. Additionally, SBA believes that this required authorization will help to maintain the integrity of the program.

Section 124.204

This rule provides that SBA will suspend the time to process an 8(a) application where SBA requests clarifying, revised or other information from the applicant. While SBA is waiting on the applicant to provide clarifying or responsive information, the Agency is not continuing to process the application. This is not a change in policy, but rather a clarification of existing policy. Commenters did not have any issue with this change, believing that it already is SBA's existing practice and that the regulatory change will simply clarify/formalize this practice. As such, SBA adopts it as final in this rule.

Sections 124.205, 124.206 and 124.207

The proposed rule amended § 124.207 to allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. Under the current regulations, a firm is required to wait 12 months from the date of the final agency decision to reapply. SBA believes that this change will reduce the number of appeals to SBA's Office of Hearings and Appeals (OHA) and greatly reduce the costs associated with appeals borne by disappointed applicants. In addition, because a firm that is declined could submit a new application 90 days after the decline decision, SBA requested comments on whether the current reconsideration process should be eliminated. Commenters enthusiastically supported the proposed change to allow firms to remedy eligibility deficits and reapply after 90 days instead of one year. In conjunction with this proposed change, many commenters supported eliminating the reconsideration process as unnecessary due to the shorter reapplication time period. A few commenters supported both the reduction in time to reapply and elimination of the reconsideration process, but asked SBA to ensure that SBA provide comprehensive denial letters to fully apprise applicants of any issues or shortcomings with their applications. SBA agrees that denial letters must fully inform applicants of any issues with their applications, and will continue to explain as specifically as possible the shortcomings in any declined application. Several commenters opposed changing the current reconsideration process because they believed that it could take longer for an applicant to ultimately be admitted to the program if all it had to do was change one or two minor things, and that doing so during reconsideration would be quicker than SBA looking at a re-application anew. Contrary to what some commenters believed, SBA looks at all eligibility criteria during reconsideration and may find additional reasons to decline an application during reconsideration that were not clearly identified in the initial application process. Where that occurs, a firm may be entitled to an additional reconsideration process which may potentially prolong the review process even further. SBA believes reducing the timeframe to address identified deficits and reapply from one year to 90 days will obviate the need for a separate, possibly drawn-out reconsideration process. One commenter believed that allowing the shortened 90-day waiting period to re-apply to the 8(a) BD program would encourage concerns that are clearly ineligible to repeatedly apply for certification. Although SBA does not believe that this would be a significant problem, SBA does understand that its limited resources could be overburdened if clearly ineligible business concerns are able to re-apply to the program every 90 days. As such, this final rule amends § 124.207 to incorporate a 90-day wait period to reapply generally, but adds language that provides that where a concern has been declined three times within 18 months of the date of the first final agency decision finding the concern ineligible, the concern cannot submit a new application for admission to the

program until 12 months from the date of the third final Agency decline decision. The final rule also amends § 124.205 to eliminate a separate reconsideration process and § 124.206 to delete paragraph (b) as unnecessary.

Section 124.300 and 124.301

The proposed rule redesignated the current § 124.301 (which discusses the various ways a business may leave the 8(a) BD program) as § 124.300 and added a new § 124.301 to specifically enunciate the voluntary withdrawal and early graduation procedures. The rule set forth SBA's current policy that a Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. In addition, where a Participant believes it has substantially achieved the goals and objectives set forth in its business plan, the Participant may elect to voluntarily early graduate from the 8(a) BD program. That too is SBA's current policy, and the proposed rule merely captured it in SBA's regulations.

The proposed rule, however, changed the level at which voluntary withdrawal and voluntary early graduation could be finalized by SBA. Prior to this final rule, a firm submitted its request to voluntarily withdraw or early graduate to its servicing SBA district office. Once the district office concurs, the request was sent to the Associate Administrator for Business Development (AA/BD) for final approval. SBA believes that requiring several layers of review to permit a concern to voluntarily exit the 8(a) BD program is unnecessary. SBA proposed that a Participant must still request voluntary withdrawal or voluntary early graduation from its servicing district office, but the action would be complete once the District Director recognizes the voluntary withdrawal or voluntary early graduation. SBA believes this will eliminate unnecessary delay in processing these actions. Commenters supported giving voluntary withdrawal and voluntary early graduation decisions to the district office level, agreeing with SBA that the change will assist in reducing processing times. As such, SBA adopts the proposed changes as final.

Section 124.304

The proposed rule clarified the effect of a decision made by the AA/BD to terminate or early graduate a Program Participant. Under SBA's current procedures, once the AA/BD renders a decision to early graduate or terminate a Participant from the 8(a) BD program, the affected Participant has 45 days to appeal that decision to SBA's OHA. If no appeal is made, the AA/BD's decision becomes the final agency decision after that 45-day period. If the Participant appeals to OHA, the final agency decision will be the decision of the administrative law judge at OHA. There has been some confusion as to what the effect of the AA/BD decision is pending the decision becoming the final agency decision. The proposed rule clarified that where the AA/BD issues a decision terminating or early graduating a Participant, the Participant would be immediately ineligible for additional program benefits. SBA does not believe that it would make sense to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. If OHA ultimately overrules the AA/BD decision, SBA would treat the amount of time between the AA/BD's decision and OHA's decision on appeal similar to how it treats a suspension. Upon OHA's decision overruling the AA/BD's determination, the Participant would immediately be eligible for program benefits and the length of time between the AA/BD's decision and OHA's decision on appeal would be added to the Participant's program term. Commenters generally supported this clarification. One commenter opposed the change, believing ineligibility or suspension should not be automatic, but rather, occur only where SBA ''determines that suspension is needed to protect the interests of the Federal Government, such as because where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists'' as set forth in § 124.305(a). SBA believes this comment misses the point. The suspension identified in § 124.305(a) is an interim determination pending a final action by the AA/BD as to whether a Participant should be terminated from the program. The suspension identified here flows from the AA/BD's final decision that termination is appropriate. As noted above, SBA believes it is contradictory to allow a Participant to continue to receive program benefits after the AA/BD has terminated or early graduated the firm from the program. As such, SBA adopts the proposed language as final in this rule.

Sections 124.305 and 124.402

Section 124.402 requires each firm admitted to the 8(a) BD program to develop a comprehensive business plan and to submit that business plan to SBA. Currently, § 124.402(b) provides that a newly admitted Participant must submit its business plan to SBA as soon as possible after program admission and that the Participant will not be eligible for 8(a) BD benefits, including 8(a) contracts, until SBA approves its business plan. Several firms have complained that they missed contract opportunities because SBA did not approve their business plans before procuring agencies sought to award contracts to fulfill certain requirements. The proposed rule amended § 124.402(b) to eliminate the provision that a Participant cannot receive any 8(a) BD benefits until SBA has approved its business plan. Instead, the proposed rule provided that SBA would suspend a Participant from receiving 8(a) BD program benefits if it has not submitted its business plan to the servicing district office and received SBA's approval within 60 days after program admission. A firm coming in to the 8(a) BD program with commitments from one or more procuring agencies will immediately be able to be awarded one or more 8(a) contracts. Commenters appreciated SBA's recognition of the delays and possible missed opportunities caused by the current requirements and supported this change. They believed that the change will enable Participants to start receiving the benefits of the program in a more timely manner and enjoy their full nine-year term. A few commenters recommended that a new Participant should not be suspended where it has submitted its business plan within 60 days of being certified into the program but SBA has not approved it within that time. These commenters believed that a Participant should be suspended in this context only for actions within the Participant's control (*i.e.*, where the Participant did not submit its business plan within 60 days, not where SBA has not approved it within that time). That is SBA's intent. The proposed rule provided that SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission. As long as a Participant has submitted its business plan to SBA within the 60-day timeframe, it will not be suspended. SBA believes that is clear in the regulatory text as proposed and that no further clarification is needed. As such, SBA adopts the proposed language as final in this rule.

This rule also corrects a typographical error contained in § 124.305(h)(1)(ii). Under § 124.305(h)(1)(ii), an 8(a) Participant can elect to be suspended from the 8(a) program where a disadvantaged individual who is involved in controlling the day-to-day

management and control of the Participant is called to active military duty by the United States. Currently, the regulation states that the Participant may elect to be suspended where the individual's participation in the firm's management and daily business operations is critical to the firm's continued eligibility, and the Participant elects not to designate a non-disadvantaged individual to control the concern during the call-up period. That should read where the Participant elects not to designate another disadvantaged individual to control the concern during the call-up period. It was not SBA's intent to allow a non-disadvantaged individual to control the firm during the call-up period and permit the firm to continue to be eligible for the program. Finally, one commenter questioned why SBA required a suspension action to generally be initiated simultaneous with or after the initiation of a BD program termination action. The commenter believed that if the Government's interests needed to be protected quickly, SBA should be able to suspend a particular Program Participant without also simultaneously initiating a termination proceeding. The commenter argued that the Government should be able to stop inappropriate or fraudulent conduct immediately. Although SBA envisions initiating a termination proceeding simultaneously with a suspension action in most cases, SBA concurs that immediate suspension without termination may be needed in certain cases. As such, the final rule amends § 124.305(a) to allow the AA/BD to immediately suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government.

Sections 124.501 and 124.507

Section 124.501 is entitled ''What general provisions apply to the award of 8(a) contracts?'' SBA must determine that a Participant is eligible for the award of both competitive and sole source 8(a) contracts. However, the requirement that SBA determine eligibility is currently contained only in the 8(a) competitive procedures at § 124.507(b)(2). Although SBA determines eligibility for sole source 8(a) awards at the time it accepts a requirement for the 8(a) BD program, that process is not specifically stated in the regulations. The proposed rule moved the eligibility determination procedures for competitive 8(a) contracts from § 124.507(b)(2) to the general provisions of § 124.501 and specifically addressed eligibility determinations for sole source 8(a) contracts. To accomplish this, the proposed rule revised current § 124.501(g). Commenters did not object to this clarification. One commenter sought further clarification regarding eligibility for 8(a) sole source contracts. The commenter noted that for a sole source 8(a) procurement, SBA determines eligibility of a nominated 8(a) firm at the time of acceptance. The commenter recommended that the regulation clearly notify 8(a) firms and procuring agencies that if a firm graduates from the program before award occurs, the award cannot be made. Although SBA believes that is currently included within § 124.501(g), this final rule adds additional clarifying language to remove any confusion. One commenter also sought further clarification for two-step competitive procurements to be awarded through the 8(a) BD program. The commenter noted that the solicitation has two dates, and asked SBA to clarify which date controls for eligibility for the 8(a) competitive award. In response, this final rule adds a new § 124.507(d)(3) that provides that for a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

Similarly, SBA believes that the provisions requiring a bona fide place of business within a particular geographic area for 8(a) construction awards should also appear in the general provisions applying to 8(a) contracts set forth in § 124.501. Section 8(a)(11) of the Small Business Act, 15 U.S.C. 637(a)(11), requires that to the maximum extent practicable 8(a) construction contracts ''shall be awarded within the county or State where the work is to be performed.'' SBA has implemented this statutory provision by requiring a Participant to have a bona fide place of business within a specific geographic location. Currently, the bona fide place of business rules appear only in the procedures applying to competitive 8(a) procurements in § 124.507(c)(2). The proposed rule moved those procedures to a new § 124.501(k) to clearly make them applicable to both sole source and competitive 8(a) awards. Based on the statutory language, SBA believes that the requirement to have a bona fide place of business in a particular geographic area currently applies to both sole source and competitive 8(a) procurements, but moving the requirement to the general applicability section removes any doubt or confusion. Commenters did not object to these changes and SBA adopts them as final in this rule.

In response to concerns raised by Participants, the proposed rule also imposed time limits within which SBA district offices should process requests to add a bona fide place of business. SBA has heard that several Participants missed out on 8(a) procurement opportunities because their requests for SBA to verify their bona fide places of business were not timely processed. In order to alleviate this perceived problem, SBA proposed to provide that in connection with a specific 8(a) competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical boundaries within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. SBA also requested comments on whether a Participant that has filed a request to have a bona fide place of business recognized by SBA in time for a particular 8(a) construction procurement may submit an offer for that procurement where it has not received a response from SBA before the date offers are due. Commenters supported imposing time limits in the regulations for SBA to process requests to establish bona fide places of business. Commenters also supported Participants being able to presume approval and submit an offer as an eligible Participant where SBA has not issued a decision within the specified time limits. One commenter asked SBA to clarify what happens if a Participant submits an offer based on this presumption and SBA later does not verify the Participant's bona fide place of business. SBA does not believe that verification will not occur before award. The final rule allows a Participant to presume that SBA has approved its request for a bona fide place of business if SBA does not respond in the time identified. This allows a Participant to submit an offer where a bona fide place of business is required. However, clarification is added at 124.501(k)(2)(iii)(B) that in order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not acted prior to the time that a Participant is identified as the apparent successful offeror, SBA will make such a determination within 5 days of receiving a procuring activity's request for an eligibility determination unless the procuring activity grants additional time for review.

Several commenters recommended that SBA broaden the geographic

boundaries as to what it means to have a bona fide place of business within a particular area. As identified above, the bona fide place of business concept evolved from the statutory requirement that to the maximum extent practicable 8(a) construction contracts must be awarded within the county or State where the work is to be performed. Commenters believed that strict state line boundaries may not be appropriate where a given area is routinely served by more than one state. A commenter recommended that SBA use Metropolitan Statistical Areas (MSAs) to better define the area within which a business should be located in order to be deemed to have a bona fide place of business in the area. The Office of Management and Budget has defined an MSA as ''A Core Based Statistical Area associated with at least one urbanized area that has a population of at least 50,000. The MSA comprises the central county or counties containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county or counties as measured through commuting.'' 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 FR 37246–37252 (June 28, 2010). The commenter noted that metropolitan areas frequently do not fit within one state and believed that a state does not always represent a single geography or economy. As an example, the commenter pointed to the Philadelphia, Pennsylvania MSA, which includes counties in four states, Delaware, Maryland, New Jersey and Pennsylvania. This MSA represents one regional economy, but is serviced by four different SBA District Offices: Baltimore, Philadelphia, Delaware and New Jersey. SBA believes that such an expansion makes sense in today's complex business environment. However, the use of MSAs will mostly impact the more densely populated coasts of the country, and not necessarily more rural or less populated areas. SBA believes the same rationale could be used in those areas, but instead use contiguous counties. A Participant located on the other side of a state border may be closer to the construction site than a Participant located in the same state as the construction site. It does not make sense to exclude a Participant immediately across the border from where construction work is to be done merely because that Participant is serviced by a different SBA district office, but to allow another Participant that may be located on the other side of the state where construction work is to be done (and be hundreds of miles further away from the construction site than the Participant in the other state) to be eligible because it is serviced by the correct SBA district office. As such this final rule defines bona fide place of business to be the geographic area serviced by the SBA district office, a MSA, or a contiguous county to (whether in the same or different state) where the work will be performed.

Section 124.503

The proposed rule amended § 124.503(e) to clarify SBA's current policy regarding what happens if after SBA accepts a sole source requirement on behalf of a particular Participant the procuring agency determines, prior to award, that the Participant cannot do the work or the parties cannot agree on price. In such a case, SBA allows the agency to substitute one 8(a) Participant for another if it believes another Participant could fulfill its needs. If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency may withdraw the original offering letter and fulfill its needs outside the 8(a) BD program. This change to the regulatory text was merely an attempt to codify existing procedures to make the process more transparent. No one objected to this provision, and SBA adopts it as final in this rule.

Currently, § 124.503(g) provides that a Basic Ordering Agreement (BOA) is not a contract under the Federal Acquisition Regulation (FAR). Rather, each order to be issued under the BOA is an individual contract. As such, a procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself. Once a Participant leaves the 8(a) BD program or otherwise becomes ineligible for future 8(a) contracts (*e.g.*, becomes other than small under the size standard assigned to a particular contract) it cannot receive further 8(a) orders under a BOA. Similarly, a blanket purchase agreement (BPA) is also not a contract. A BPA under FAR part 13 is not a contract because it neither obligates funds nor requires placement of any orders against it. Instead, it is an understanding between an ordering agency and a contractor that allows the agency to place future orders more quickly by identifying terms and conditions applying to those orders, a description of the supplies or services to be provided, and methods for issuing and pricing each order. The government is not obligated to place any orders, and either party may cancel a BPA at any time.

Although current § 124.503(g) addresses BOAs, it does not specifically mention BPAs. This rule amends § 124.503 to merely specifically recognize that BPAs are also not contracts and should be afforded the same treatment as BOAs.

Section 124.504

SBA proposed several changes to § 124.504.

The proposed rule amended § 124.504(b) to alter the provision prohibiting SBA from accepting a requirement into the 8(a) BD program where a procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and receiving SBA's formal acceptance of the requirement. SBA believes that the restriction as written is overly harsh and burdensome to procuring agencies. Several contracting officers have not offered a follow-on procurement to the 8(a) program prior to conducting a competition restricted to eligible 8(a) Participants because they believed that because a follow-on requirement must be procured through the 8(a) program, such offer and SBA's acceptance were not required. They issued solicitations identifying them as competitive 8(a) procurements, selected an apparent successful offeror and then sought SBA's eligibility determination prior to making an award. A strict interpretation of the current regulatory language would prohibit SBA from accepting such a requirement. Such an interpretation could adversely affect an agency's procurement strategy in a significant way by unduly delaying the award of a contract. That was never SBA's intent. As long as a procuring agency clearly identified a requirement as a competitive 8(a) procurement and the public fully understood it to be restricted only to eligible 8(a) Participants, SBA should be able to accept that requirement regardless of when the offering occurred. Commenters supported this change as a logical remedy to an unintended consequence, and SBA adopts it as final in this rule.

The proposed rule clarified SBA's intent regarding the requirement that a procuring agency must seek and obtain SBA's concurrence to release any follow-on procurement from the 8(a) BD program. This is not a change in policy, but rather a clarification of SBA's current policy and the position SBA has taken in several protests before the Government Accountability Office. Some agencies have attempted to remove a follow-on procurement from

the incumbent 8(a) contractor and re-procure the requirement through a different contract vehicle (a MAC or Government-wide Acquisition Contract (GWAC) that is not an 8(a) contract) without seeking release by saying that they intend to issue a competitive 8(a) order off the other contract vehicle. In other words, because the order under a MAC or GWAC would be offered to and accepted for award through the 8(a) BD program and the follow-on work would be performed through the 8(a) BD program, some procuring agencies believe that release is not needed. SBA does not agree. In such a case, the underlying contract is not an 8(a) contract. The procuring agency may be attempting to remove a requirement from the 8(a) program to a contract that is not an 8(a) contract. That is precisely what release is intended to apply to. Moreover, because § 124.504(d)(4) provides that the requirement to seek release of an 8(a) requirement from SBA does not apply to orders offered to and accepted for the 8(a) program where the underlying MAC or GWAC is not itself an 8(a) contract, allowing a procuring agency to move an 8(a) contract to an 8(a) order under a non-8(a) contract vehicle would allow the procuring agency to then remove the next follow-on to the 8(a) order out of the 8(a) program entirely without any input from SBA. A procuring agency could take an 8(a) contract with a base year and four one-year option periods, turn it into a one-year 8(a) order under a non-8(a) contract vehicle, and then remove it from the 8(a) program entirely after that one-year performance period. That was certainly not the intent of SBA's regulations.

SBA has received additional comments recommending that release should also apply even if the underlying pre-existing MAC or GWAC to which a procuring agency seeks to move a follow-on requirement is itself an 8(a) contract. These commenters argue that an 8(a) incumbent contractor may be seriously hurt by moving a procurement from a general 8(a) competitive procurement to an 8(a) MAC or GWAC to which the incumbent is not a contract holder. In such a case, the incumbent would have no opportunity to win the award for the follow-on contract, and, would have no opportunity to demonstrate that it would be adversely impacted or to try to dissuade SBA from agreeing to release the procurement. Commenters believe that this directly contradicts the business development purposes of the 8(a) BD program. In response, the rule provides that a procuring activity must notify SBA where it seeks to re-procure a follow-on requirement through a limited contracting vehicle which is not available to all 8(a) BD Program Participants (*e.g.*, any multiple award or Governmentwide acquisition contract, whether or not the underlying MAC or GWAC is itself an 8(a) contract). If an agency seeks to re-procure a current 8(a) requirement as a competitive 8(a) award for a new 8(a) MAC or GWAC vehicle, SBA's concurrence will not be required because such a competition would be available to all 8(a) BD Program Participants.

The proposed rule also clarified that in all cases where a procuring agency seeks to fulfill a follow-on requirement outside of the 8(a) BD program, except where it is statutorily or otherwise required to use a mandatory source (*see* FAR subpart 8.6 and 8.7), it must make a written request to and receive the concurrence of SBA to do so. In such a case, the proposed rule would require a procuring agency to notify SBA that it will take a follow-on procurement out of the 8(a) procurement because of a mandatory source. Such notification would be required at least 30 days before the end of the contract period to give the 8(a) Participant the opportunity to make alternative plans.

In addition, SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach. As such, SBA does not typically consider a bridge contract as part of the new requirement analysis, unless there is some basis to believe that the agency is altering the duration of the option periods to avoid particular regulatory requirements. Whether to consider the bridge contract is determined on a case-by-case basis given the facts of the procurement at issue. SBA sought comments as to whether this long-standing policy should also be incorporated into the regulations. Although SBA did not receive many comments on this issue, those who did comment believed it made sense to clarify this in the regulatory text. This final rule does so.

Section 124.505

As noted above, SBA received a significant number of comments recommending more transparency in the process by which procuring agencies seek to remove follow-on requirements from the 8(a) BD program. In particular, commenters believed SBA should be able to question whether a requirement is new or a follow-on to a previously awarded contract. In response, the final rule adds language to § 124.505(a) authorizing SBA to appeal a decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in § 124.504(d).

Section 124.509

The proposed rule revised § 124.509(e), regarding how a Participant can obtain a waiver to the requirement prohibiting it from receiving further sole source 8(a) contracts where the Participant does not meet its applicable non-8(a) business activity target. Currently, the regulations require the AA/BD to process a Participant's request for a waiver in every case. The proposed rule substituted SBA for the AA/BD to allow flexibility to SBA to determine the level of processing in a standard operating procedure outside the regulations. SBA believes that at least at some level, the district office should be able to process such requests for waiver.

The current regulation also requires the SBA Administrator on a non-delegable basis to decide requests for waiver from a procuring agency. In other words, if the Participant itself does not request a waiver to the requirement prohibiting it from receiving further sole source 8(a) contracts, but an agency does so because it believes that the award of a sole source contract to the identified Participant is needed to achieve significant interests of the Government, the SBA Administrator must currently make that determination. Requiring such a request to be processed by several levels of SBA reviewers and then by the Administrator slows down the processing. If a procuring agency truly needs something quickly, it could be harmed by the processing time. The proposed rule changed the Administrator from making these determinations to SBA. Commenters believed that waiver requests should be processed at the district office level, as adding additional layers of review significantly delays the processing time, which harms both the Participant and the procuring agency and causes additional work for SBA. SBA has adopted these changes as final in this rule. This should allow these requests to be processed more quickly.

SBA also received a few comments regarding the business activity targets contained in § 124.509. Commenters supported the proposed revisions that changed requiring Participants to make ''maximum efforts'' to obtain business outside the 8(a) BD program, and

''substantial and sustained efforts'' to attain the targeted dollar levels of non-8(a) revenue, to requiring them to make good faith efforts. These commenters also felt that the non-8(a) business activity target percentages for firms in the transitional stage of program participation are too high. The commenters noted that the Small Business Act did not require any specific percentages of non-8(a) work and believed that SBA was free to adjust them in order to promote the business development purposes of the program. They also believed that the current rules rigidly apply sole source restrictions without taking into account extenuating circumstances such as a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, and having prime contractors award less work to small business subcontractors than originally contemplated. They recommended that the sole source restrictions should be discretionary, depending upon circumstances and efforts made by the Participant to obtain non-8(a) revenues. SBA first notes that although the Small Business Act itself does not establish specific non-8(a) business activity targets, the conference report to the Business Opportunity Development Reform Act of 1988, Public Law 100–656, which established the competitive business mix requirement, did recommend certain non-8(a) business activity targets. That report noted that Congress intended that the non-8(a) business activity targets should generally require about 25 percent of revenues from sources other than 8(a) contracts in the fifth and sixth years of program participation and about 50 percent in the seventh and eighth years of program participation. H. Rep. No. 100–1070, at 63 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5485, 5497. In response to the comments, this rule slightly adjusts the non-8(a) business activity targets to be more in line with the Congressional intent. In addition, SBA believes that the strict application of sole source restrictions may be inappropriate in certain extenuating circumstances. That same conference report provides that SBA ''should consider a full range of options to encourage firms to achieve the competitive business targets,'' and that these options might ''include conditioning the award of future sole-source contracts or business development assistance on the firm's taking specified steps, such as changes in marketing or financing strategies.'' *Id.* In addition, the conference report provides that SBA should take appropriate remedial actions, ''including reductions in sole-source contracting,'' to ensure that firms complete the program with optimum prospects for success in a competitive business environment. *Id.* Thus, Congress intended SBA to place conditions on firms to allow then to continue to receive one or more future 8(a) contracts and that sole source ''reductions'' should be an alternative. It appears that a strict ban on receiving any future 8(a) contracts is not appropriate in all instances. SBA believes that may make sense as a remedial measure if a particular Participant has made no efforts to seek non-8(a) awards, but it should not automatically occur if a firm fails to meet its applicable non-8(a) business activity target. The final rule recognizes that a strict prohibition on a Participant receiving new sole source 8(a) contracts should be imposed only where the Participant has not made good faith efforts to meet its applicable non-8(a) business activity target. Where a Participant has not met its applicable non-8(a) business activity target, however, SBA will condition the eligibility for new sole source 8(a) contracts on the Participant taking one or more specific actions, which may include obtaining business development assistance from an SBA resource partner such as a Small Business Development Center. The final rule also rearranges several current provisions for ease of use.

Section 124.513

Currently, § 124.513(e) provides that SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture. This requirement applies to both competitive and sole source 8(a) procurements. SBA does not approve joint venture agreements in any other context, including a joint venture between an 8(a) Participant and its SBA-approved mentor (which may be other than small) in connection with a non-8(a) contract (*i.e.*, small business set-aside, HUBZone, SDVO small business, or WOSB contract). In order to be considered an award to a small disadvantaged business (SDB) for a non-8(a) contract, a joint venture between an 8(a) Participant and a non-8(a) Participant must be controlled by the 8(a) partner to the joint venture and otherwise meet the provisions of § 124.513(c) and (d). If the non-8(a) partner to the joint venture is also a small business under the size standard corresponding to the NAICS code assigned to the procurement, the joint venture could qualify as small if the provisions of § 124.513(c) and (d) were not met (*see* § 121.103(h)(3)(i), where a joint venture can qualify as small as long as each party to the joint venture individually qualifies as small), but the joint venture could not qualify as an award to an SDB in such case. If the joint venture were between an 8(a) Participant and its large business mentor, the joint venture could not qualify as small if the provisions of § 124.513(c) and (d) were not met. The size of a joint venture between a small business protégé and its large business mentor is determined without looking at the size of the mentor only when the joint venture complies with SBA's regulations regarding control of the joint venture. Where another offeror believes that a joint venture between a protégé and its large business mentor has not complied with the applicable control regulations, it may protest the size of the joint venture. The applicable Area Office of SBA's Office of Government Contracting would then look at the joint venture agreement to determine if the small business is in control of the joint venture within the meaning of SBA's regulations. If that Office determines that the applicable regulations were not followed, the joint venture would lose its exclusion from affiliation, be found to be other than small, and, thus, ineligible for an award as a small business. This size protest process has worked well in ensuring that small business joint venture partners do in fact control non-8(a) contracts with their large business mentors. Because size protests are authorized for competitive 8(a) contracts, SBA believes that the size protest process could work similarly for competitive 8(a) contracts. As such, the proposed rule eliminated the need for 8(a) Participants to seek and receive approval from SBA of every initial joint venture agreement and each addendum to a joint venture agreement for competitive 8(a) contracts. Commenters supported this change, noting that this will eliminate an unnecessary burden and noting that this will also eliminate the significant expense firms often incur during the SBA approval process. SBA believes that this will significantly lessen the burden imposed on 8(a) small business Participants. Participants will not be required to submit additional paperwork to SBA and will not have to wait for SBA approval in order to seek competitive 8(a) awards. This rule finalizes that change.

Section 124.515

The proposed rule amended § 124.515 regarding the granting of a waiver to the statutorily mandated termination for

convenience requirement where the ownership or control of an 8(a) Participant performing an 8(a) contract changes. The statute and regulations allow the ownership and control of an 8(a) Participant performing one or more 8(a) contracts to pass to another 8(a) Participant that would otherwise be eligible to receive the 8(a) contracts directly. Specifically, the proposed rule amended § 124.515(d) to provide that SBA determines the eligibility of an acquiring Participant by referring to the items identified in § 124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought. SBA will not grant a waiver for any contract if the work to be performed under the contract is not similar to the type of work previously performed by the acquiring concern. A few commenters objected to this last provision in the context of an entity-owned firm seeking to acquire an 8(a) Participant currently performing one or more 8(a) contracts. These commenters believed that this provision should not apply to entity-owned Participants because prior performance in a specific industry is not required for entity-owned firms seeking to enter the program. SBA disagrees. Those are two entirely separate requirements. In the case of program entry, SBA allows an entity-owned applicant to be eligible for the program where the entity (tribe, ANC, NHO or CDC) demonstrates a firm commitment to back the applicant concern. In other words, SBA will waive the general potential for success provision requiring an applicant to have at least two years of business in its primary NAICS code where the entity represents that it will support the applicant concern. In such case, SBA is assured that the applicant concern will be able to survive despite having little or no experience in its designated primary NAICS code. The termination for convenience and waiver provisions are statutory and serve an entirely different purpose. The general rule is that an 8(a) contract must be performed by the 8(a) Participant to which that contract was initially awarded. Where the ownership or control of the Participant awarded an 8(a) contract changes, the statute requires a procuring agency to terminate that contract unless the SBA Administrator grants a waiver based on one of five statutory reasons. One of those reasons is where the ownership and control of an 8(a) Participant will pass to another otherwise eligible 8(a) Participant. The proposed rule merely clarifies SBA's current policy that in order to be an ''eligible'' Participant, the acquiring firm must be responsible to perform the contract, and responsibility is determined prior to the transfer, just as responsibility is determined prior to the award of any contract. This has nothing to do with the entity-owned firm's potential for success in the program, but, rather, whether that firm would be deemed a responsible contractor and whether a procuring agency contracting officer would find the firm capable of performing the work required under the contract before any change of ownership or control occurs. Because SBA believes that this responsibility issue is relevant of all Participants acquiring another Participant that has been awarded one or more 8(a) contracts, the final rule adopts the language as proposed.

Section 124.518

The final rule clarifies when one 8(a) Participant can be substituted for another in order to complete performance of an 8(a) contract without receiving a waiver to the termination for convenience requirement set forth in of § 124.515. Specifically, the rule provides that SBA may authorize another Participant to complete performance of an 8(a) contract and, in conjunction with the procuring activity, permit novation of the contract where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded an 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

Section 124.519

Section 124.519 limits the ability of 8(a) Participants to obtain additional sole source 8(a) contracts once they have reached a certain dollar level of overall 8(a) contracts. Currently, for a firm having a receipts-based size standard corresponding to its primary NAICS code, the limit above which a Participant can no longer receive sole source 8(a) contracts is five times the size standard corresponding to its primary NAICS code, or $100,000,000, whichever is less. For a firm having an employee-based size standard corresponding to its primary NAICS code, the limit is $100,000,000. In order to simplify this requirement, this proposed rule provided that a Participant may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of $100,000,000 during its participation in the 8(a) BD program, regardless of its primary NAICS code. In addition, the proposed rule clarified that in determining whether a Participant has reached the $100 million limit, SBA would consider only the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications. Finally, the proposed rule amended what types of small dollar value 8(a) contracts should not be considered in determining whether a Participant has reached the 8(a) revenue limit. Currently, SBA does not consider 8(a) contracts awarded under $100,000 in determining whether a Participant has reached the applicable 8(a) revenue limit. The proposed rule replaced the $100,000 amount with a reference to the Simplified Acquisition Threshold (SAT). SBA has delegated to procuring agencies the ability to award sole source 8(a) contracts without offer and acceptance for contracts valued at or below the SAT. Because SBA does not accept such procurements into the 8(a) BD program, it is difficult for SBA to monitor these awards. The proposed rule merely aligned the 8(a) revenue limit with that authority. Commenters generally supported each of these changes. SBA adopts them as final in this rule.

Section 125.2

The proposed rule added a new paragraph (g) requiring contracting officers to consider the capabilities and past performance of first tier subcontractors in certain instances. This consideration is statutorily required for bundled or consolidated contracts (15 U.S.C. 644(e)(4)(B)(i)) and for multiple award contracts valued above the substantial bundling threshold of the Federal agency (15 U.S.C. 644(q)(1)(B)). Following the statutory provisions, the proposed rule required a contracting officer to consider the past performance and experience of first tier subcontractors in those two categories of contracts. The proposed rule did not require a contracting officer to consider the past performance, capabilities and experience of each first tier subcontractor as the capabilities and past performance of the small business prime contractor in other instances. Instead, it provided discretion to

contracting officers to consider such past performance, capabilities and experience of each first tier subcontractor where appropriate. SBA specifically requested comments as to whether as a policy matter such consideration should be required in all cases, or limited only to the statutorily required instances as proposed. The comments overwhelmingly supported the same treatment for all contracts. Most commenters believed that there was a valid policy reason to consider the capabilities and past performance of first tier subcontractors in every case since it is clear that those identified subcontractors will be responsible for some performance of the contract should the corresponding prime contractor be awarded the contract. Some commenters believed that small businesses may have the necessary capabilities, past performance and experience to perform smaller, non-bundled contracts on their own. Therefore, these commenters felt that it may not be necessary for an agency to consider the capabilities and past performance of first tier subcontractors in all cases. SBA believes that first tier subcontractors should be considered if the capabilities and past performance of the small business prime contractor does not demonstrate capabilities and past performance for award. As such this final rule adds language requiring a procuring agency to consider the capabilities and past performance of first tier subcontractors where the first-tier subcontractors are specifically identified in the proposal and the capabilities and past performance of the small business prime do not independently demonstrate capabilities and past performance necessary for award.

Section 125.3

The Small Business Act explicitly prohibits the Government from requiring small businesses to submit subcontracting plans. 15 U.S.C. 637(d)(8). This prohibition is set forth in § 125.3(b) of SBA's regulations and in FAR 19.702(b)(1). Under the Alaska Native Claims Settlement Act (ANCSA), a contractor receives credit towards the satisfaction of its small or small disadvantaged business subcontracting goals when contracting with an ANC-owned firm. 43 U.S.C. 1626(e)(4)(B). There has been some confusion as to whether an ANC-owned firm that does not individually qualify as small but counts as a small business or a small disadvantaged business for subcontracting goaling purposes under 43 U.S.C. 1626(e)(4)(B) must itself submit a subcontracting plan. SBA believes that such a firm is not currently required to submit a subcontracting plan, but proposed to add clarifying language to § 125.3(b) to clear up any confusion. The proposed rule clarified that all firms considered to be small businesses, whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract or is deemed to be treated as a small business concern by statute, are not be required to submit subcontracting plans. Commenters supported this provision and this rule adopts it as final.

The final rule also fixes typographical errors contained in paragraphs 125.3(c)(1)(viii) and 125.3(c)(1)(ix).

Section 125.5

The proposed rule clarified that SBA does not use the certificate of competency (COC) procedures for 8(a) sole source contracts. This has long been SBA's policy. *See* 62 FR 43584, 43592 (Aug. 14, 1997). Instead of using SBA COC procedures, an agency that finds a potential 8(a) sole source awardee to be non-responsible should proceed through the substitution or withdrawal procedures in the proposed § 124.503(e). SBA did not receive any comments on this provision and adopts it as final in this rule.

Section 125.6

The final rule first fixes a typographical error contained in the introductory text of § 125.6(a). It also amends § 125.6(b). Section 125.6(b) provides guidance on which limitation on subcontracting requirement applies to a ''mixed contract.'' The section currently refers to a mixed contract as one that combines both services and supplies. SBA inadvertently did not include the possibility that a mixed contract could include construction work, although in practice SBA has applied this section to a contract requiring, for example, both services and construction work. The proposed rule merely recognized that a mixed contract is one that integrates any combination of services, supplies, or construction. A contracting officer would then select the appropriate NAICS code, and that NAICS code is determinative as to which limitation on subcontracting and performance requirement applies. SBQ did not receive any comments on this change, and adopts it as final in this rule.

SBA also asked for comments in the proposed rule regarding how the nonmanufacturer rule should be applied in multiple item procurements (reference § 125.6(a)(2)(ii)). Currently, for a multiple item procurement where a nonmanufacturer waiver is granted for one or more items, compliance with the limitation on subcontracting requirement will not consider the value of items subject to a waiver. As such, more than 50 percent of the value of the products to be supplied by the nonmanufacturer that are not subject to a waiver must be the products of one or more domestic small business manufacturers or processors. The regulation gives an example where a contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. The projected value of the item that is waived is $10,000. Under the current regulatory language, at least 50 percent of the value of the items not subject to a waiver, or $495,000 (50 percent of $990,000), must be supplied by one or more domestic small business manufacturers, and the prime small business nonmanufacturer may act as a manufacturer for one or more items. Several small business nonmanufacturers have disagreed with this provision. They believe that in order to qualify as a small business nonmanufacturer, at least 50 percent of the value of the contract must come from either small business manufacturers or from any businesses for items which have been granted a waiver (or that small business manufacturers plus waiver must equal at least 50 percent). In other words, in the above example, $500,000 (50 percent of the value of the contract) must come from small business manufacturers or be subject to a waiver. If items totaling $10,000 are subject to a waiver, then only $490,000 worth of items must come from small business manufacturers, thus requiring $5,000 less from small business manufacturers. The proposed rule asked for comments on whether this approach makes sense. Several commenters supported the change outlined in the proposed rule, believing that implementation of the change will provide less confusion to both small businesses and procuring agencies as the math is easier to understand. One commenter believed that was how the nonmanufacturer rule was already being applied in multiple item procurements, was concerned others too may have misinterpreted the rule, and, thus, supported the change. The final rule provides that a procurement should be set aside where at least 50 percent of the value of the contract comes from either small business manufacturers or from any business where a nonmanufacturer rule

waiver has been granted (or, in other words, a set aside should occur where small plus waiver equals at least 50 percent).

Section 125.8

The proposed rule made conforming changes to § 125.8 in order to take into account merging the 8(a) BD Mentor-Protégé Program with the All Small Mentor-Protégé Program. The comments supported these changes, and those changes are finalized in this rule.

Proposed § 125.8(b)(2)(iv) permitted the parties to a joint venture to agree to distribute profits from the joint venture so that the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them. Although several commenters questioned whether mentors would be willing to agree to distribute profits in such a manner, most commenters supported this proposed change. As such, SBA adopts it as final in this rule.

In response to the proposed rule, SBA also received comments seeking clarification of certain other requirements applicable to joint ventures. First, commenters sought guidance regarding the performance of work or limitation on subcontracting requirements in § 125.8(c). Specifically, commenters questioned whether the same rules as those set forth in § 125.6 apply to the calculation of work performed by a protégé in a joint venture and whether the 40 percent performance requirement for a protégé firm could be met through performance of work by a similarly situated subcontractor. SBA has always intended that the same rules as those set forth in § 125.6 should generally apply to the calculation of a protégé firm's workshare in the context of a joint venture. This means that the rules concerning supplies, construction and mixed contracts apply to the joint venture situation and certain costs are excluded from the limitation on subcontracting calculation. For instance, the cost of materials would first be excluded in a contract for supplies or products before determining whether the joint venture is not subcontracting more than 50 percent of the amount paid by the Government. However, SBA has never intended that a protégé firm could subcontract its 40 percent performance requirement to a similarly situated entity. In other words, SBA has always believed that the protégé itself must perform at least 40 percent of the work to be performed by a joint venture between the protégé firm and its mentor, and that it cannot subcontract such work to a similarly situated entity. The only reason that a large business mentor is able to participate in a joint venture with its protégé for a small business contract is to promote the business development of the protégé firm. Where a protégé firm would subcontract some or all of its requirement to perform at least 40 percent of the work to be done by the joint venture to a similarly situated entity, SBA does not believe that this purpose would be met. The large business mentor is authorized to participate in a joint venture as a small business only because its protégé is receiving valuable business development assistance through the performance of at least 40 percent of the work performed by the joint venture. Thus, although a similarly situated firm can be used to meet the 50 percent performance requirement, it cannot be used to meet the 40 percent performance requirement for the protégé itself. For example, if a joint venture between a protégé firm and its mentor were awarded a $10 million services contract and a similarly situated entity were to perform $2 million of the required services, the joint venture would be required to perform $3 million of the services (*i.e.,* to get to a total of $5 million or 50 percent of the value of the contract between the joint venture and the similarly situated entity). If the joint venture were to perform $3 million of the services, the protégé firm, and only the protégé firm, must perform at least 40 percent of $3 million or $1.2 million. The final rule clarifies that rules set forth in § 125.6 generally apply to joint ventures and that a protégé cannot meet the 40 percent performance requirement by subcontracting to one or more similar situated entities.

Comments also requested further guidance on the requirement in § 125.8(b)(2)(ii) that a joint venture must designate an employee of the small business managing venture as the project manager responsible for performance of the contract. These commenters pointed out that many contracts do not have a position labeled ''project manager,'' but instead have a position named ''program manager,'' ''program director,'' or some other term to designate the individual responsible for performance. SBA agrees that the title of the individual is not the important determination, but rather the responsibilities. The provision seeks to require that the individual responsible for performance must come from the small business managing venture, and this rule makes that clarification. For consistency purposes, SBA has made these same changes to § 124.513(c) for 8(a) joint ventures, to § 125.18(b)(2) for SDVO small business joint ventures, to § 126.616(c) for HUBZone joint ventures, and to § 127.506(c) for WOSB joint ventures.

Several commenters sought additional clarification to the rules pertaining to joint ventures for the various small business programs. Specifically, these commenters believed that the rules applicable to small business set-asides in § 125.8(a) were not exactly the same as those set forth in §§ 125.18(b)(1)(i) (for SDVO joint ventures), 126.616(b)(1) (for WOSB joint ventures) and 127.506(a)(1) (for HUBZone joint ventures), and that a mentor-protégé joint venture might not be able to seek the same type of contract, subcontract or sale in one program as it can in another. In response, SBA has added language to § 125.9(d)(1) to make clear that a joint venture between a protégé and mentor may seek a Federal prime contract, subcontract or sale as a small business, HUBZone small business, SDB, SDVO small business, or WOSB provided the protégé individually qualifies as such.

One commenter recommended a change to proposed § 125.8(e) regarding the past performance and experience of joint venture partners. The proposed rule provided that when evaluating the past performance and experience of a joint venture submitting an offer for a contract set aside or reserved for small business, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. The commenter agreed with that provision, but recommended that it be further refined to prohibit a procuring activity from requiring the protégé to individually meet any evaluation or responsibility criteria. SBA understands the concern that some procuring activities have required unreasonable requirements of protégé small business partners to mentor-protégé joint ventures. SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract. However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor. The reason that any small business joint ventures with another business entity, whether a mentor-protégé joint venture or a joint venture with another small business concern, is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner. SBA

believes that a solicitation provision that requires both a protégé firm and a mentor to each have the same level of past performance (*e.g.*, each partner to have individually previously performed 5 contracts of at least $10 million) is unreasonable, and should not be permitted. However, SBA disagrees that a procuring activity should not be able to require a protégé firm to individually meet any evaluation or responsibility criteria. SBA intends that the protégé firm gain valuable business development assistance through the joint venture relationship. The protégé must, however, bring something to the table other than its size or socio-economic status. The joint venture should be a tool to enable it to win and perform a contract in an area that it has some experience but that it could not have won on its own.

Section 125.9

This final rule first reorganizes some of the current provisions in § 125.9 for ease of use and understanding. The rule reorganizes and clarifies § 125.9(b). It clarifies that in order to qualify as a mentor, SBA will look at three things, whether the proposed mentor: Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement; does not appear on the Federal list of debarred or suspended contractors; and can impart value to a protégé firm. Instead of requiring SBA to look at and determine that a proposed mentor possesses good character in every case, the rule amends this provision to specify that SBA will decline an application if SBA determines that the mentor does not possess good character. The rule also clarifies that a mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés. That has always been SBA's intent (the current rule specifies that a second mentor-protégé relationship cannot be a competitor of the first), but SBA wants to make this clear in response to questions SBA has received regarding this issue. Commenters generally supported these clarifications. One commenter asked SBA to clarify the provision prohibiting a mentor that has more than one protégé from submitting competing offers in response to a solicitation for a specific procurement. Specifically, the commenter noted that many multiple award procurements have separate pools of potential awardees. For example, an agency may have a single solicitation that calls for awarding indefinite delivery indefinite quantity (IDIQ) contracts in unrestricted, small business, HUBZone, 8(a), WOSB, and SDVO small business pools. All offerors submit proposals in response to the same solicitation and indicate the pool(s) for which they are competing. The commenter sought clarification as to whether a mentor with two different protégés could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool. SBA first notes that in order for SBA to approve a second mentor-protégé relationship for a specific mentor, the mentor must demonstrate that the additional mentor-protégé relationship will not adversely affect the development of either protégé firm. In particular, the mentor must show that the second protégé will not be a competitor of the first protégé. Thus, the mentor has already assured SBA that the two protégés would not be competitors. If the two mentor-protégé relationships were approved in the same NAICS code, then the mentor must have already made a commitment that the two firms would not compete against each other. This could include, for example, a commitment that the one mentor-protégé relationship would seek only HUBZone and small business set-aside contracts while the second would seek only 8(a) contracts. That being the case, the same mentor could submit an offer as a joint venture with one protégé for one pool and another offer as a joint venture with a second protégé for a different pool on the same solicitation because they would not be deemed competitors with respect to that procurement. SBA does not believe, however, that a change is needed from the proposed regulatory text since that is merely an interpretation of what ''competing offers'' means. SBA adopts the proposed language as final in this rule.

The proposed rule also sought comments as to whether SBA should limit mentors only to those firms having average annual revenues of less than $100 million. Currently, any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor. This includes large businesses of any size. This proposal was in response to suggestions from ''mid-size'' companies (*i.e.*, those that no longer qualify as small under their primary NAICS codes, but believe that they cannot adequately compete against the much larger companies) that a mentor-protégé program that excluded very large businesses would be beneficial to the mid-size firms and allow them to more effectively compete. This was the single most commented-on issue in the proposed rule. SBA received more than 150 comments in response to this alternative. The vast majority of commenters strongly opposed this proposal. Commenters agreed with SBA's stated intent that the focus of the mentor-protégé program should be on the protégé firm, and how best valuable business development assistance can be provided to a protégé to enable that firm to more effectively compete on its own in the future. They believed that such a restriction would harm small businesses, as it would restrict the universe of potential mentors which could provide valuable business assistance to them. Commenters believed that the size of the mentor should not matter as long as that entity is providing needed business development assistance to its protégé. Commenters believed that SBA's priority should be to ensure that needed business development assistance will be provided to protégé firms though a mentor-protégé agreement, and the size of the mentor should not be a relevant consideration. All that should matter is whether the proposed mentor demonstrates a commitment and the ability to assist small business concerns. Several commenters believed that larger business entities actually serve as better mentors since they are involved in the program to help the protégé firm and not to gain further access to small business contracting (through joint ventures) for themselves. In response, SBA will not adopt the proposal, but rather will continue to allow any business entity, regardless of size, that demonstrates a commitment and the ability to assist small business concerns to act as a mentor.

This rule also implements Section 861 of the National Defense Authorization Act (NDAA) of 2019, Public Law 115–232, to make three changes to the mentor-protégé program in order to benefit Puerto Rican small businesses. First, the rule amends § 125.9(b) regarding the number of protégé firms that one mentor can have at any one time. Currently, the regulation provides that under no circumstances can a mentor have more than three protégés at one time. Section 861 of the NDAA provides that the restriction on the number of protégé firms a mentor can have shall not apply to up to two mentor-protege relationships if such relationships are with a small business that has its principal office located in the Commonwealth of Puerto Rico. As such, § 125.9(b)(3)(ii) provides that a

mentor generally cannot have more than three protégés at one time, but that the first two mentor-protégé relationships between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico will not count against the limit of three protégés that a mentor can have at one time. Thus, if a mentor did have two protégés that had their principal offices in Puerto Rico, it could have an additional three protégés, or a total of five protégés, and comply with SBA's requirements. The rule also adds a new § 125.9(d)(6) to implement a provision of Section 861 of NDAA 2019, which authorizes contracting incentives to mentors that subcontract to protégé firms that are Puerto Rico businesses. Specifically, § 125.9(d)(6) provides that a mentor that provides a subcontract to a protégé that has its principal office located in Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protégé toward the subcontracting goals contained in the subcontracting plan of the mentor. Commenters supported these provisions, and SBA adopts them as final in this rule. A few commenters asked for clarification as to whether these provisions applied to entity-owned firms located in Puerto Rico. The statute and proposed regulatory text notes that it applies to any business concern that has its principal office in Puerto Rico. If a tribally-owned or ANC-owned firm has its principal office in Puerto Rico, then the provision applies to it. SBA does not believe further clarification is needed. The principal office requirement should be sufficient. One commenter also questioned the provision in the proposed rule allowing mentor training costs to count toward a mentor's small subcontracting goals, believing that training costs should never be allowed as subcontracting costs. That is not something SBA proposed on its own. That provision was specifically authorized by Section 861 of NDAA 2019. As such, that provision is unchanged in this final rule.

A few commenters also recommended that SBA allow a mentor to have more than three protégés at a time generally (*i.e.*, not only where small businesses in Puerto Rico are involved). These commenters noted that very large business concerns operate under multiple NAICS codes and have the capability to mentor a large number of small protégé firms that are not in competition with each other. Although SBA understands that many large businesses have the capability to mentor more than three small business concerns at one time, SBA does not believe it is good policy for anyone to perceive that one or more large businesses are unduly benefitting from small business programs. The rules allow a mentor to joint venture with its protégé and be deemed small for any contract for which the protégé individually qualifies as small, and to perform 60 percent of whatever work the joint venture performs. Moreover, a mentor can also own an equity interest of up to 40 percent in the protégé firm. If a large business mentor were able to have five (or more) protégés at one time, it could have a joint venture with each of those protégés and perform 60 percent of every small business contract awarded to the joint venture. It also could (though unlikely) have a 40 percent equity interest in each of those small protégé firms. In such a case, SBA believes that it would appear that the large business mentor is unduly benefitting from contracting programs intended to be reserved for small businesses. As such, this rule does not increase the number of protégé firms that one mentor can have.

The proposed rule clarified the requirements for a firm seeking to form a mentor-protégé relationship in a NAICS code that is not the firm's primary NAICS code (§ 125.9(c)(1)(ii)). SBA has always intended that a firm seeking to be a protégé could choose to establish a mentor-protégé relationship to assist its business development in any business area in which it has performed work as long as the firm qualifies as small for the work targeted in the mentor-protégé agreement. The proposed rule highlighted SBA's belief that a firm must have performed some work in a secondary industry or NAICS code in order for SBA to approve such a mentor-protégé relationship. SBA does not want a firm that has grown to be other than small in its primary NAICS codes to form a mentor-protégé relationship in a NAICS code in which it had no experience simply because it qualified as small in that other NAICS code. SBA believes that such a situation (*i.e.*, having a protégé with no experience in a secondary NAICS code) could lead to abuse of the program. It would be hard for a firm with no experience in a secondary NAICS code to be the lead on a joint venture with its mentor. Similarly, a mentor with all the experience could easily take control of a joint venture and perform all of the work required of the joint venture. The proposed rule clarified that a firm may seek to be a protégé in any NAICS code for which it qualifies as small and can form a mentor-protégé relationship in a secondary NAICS code if it qualifies as small and has prior experience or previously performed work in that NAICS code. Several commenters sought further clarification of this provision. Commenters noted that a procuring activity may assign different NAICS codes to the same basic type of work. These commenters questioned whether a firm needed to demonstrate that it performed work in a specific NAICS code or could demonstrate that it has performed the same type of work, whatever NAICS code was assigned to it. Similarly, other commenters again questioned whether a firm must demonstrate previous work performed in a specific NAICS code, or whether similar work that would logically lead to work in a different NAICS code would be permitted. SBA agrees with these comments. SBA believes that similar work performed by the prospective protégé to that for which a mentor-protégé relationship is sought should be sufficient, even if the previously performed work is in a different NAICS code than that for which a mentor-protégé agreement is sought. In addition, if the NAICS code in which a mentor-protégé relationship is sought is a logical progression from work previously performed by the intended protégé firm, that too should be permitted. SBA's intent is to encourage business development, and any relationship that promotes a logical business progression for the protégé firm fulfills that intent.

The proposed rule also responded to concerns raised by small businesses regarding the regulatory limit of permitting only two mentor-protégé relationships even where the small business protégé receives no or limited assistance from its mentor through a particular mentor-protégé agreement. SBA believes that a relationship that provides no business development assistance or contracting opportunities to a protégé should not be counted against the firm, or that the firm should not be restricted to having only one additional mentor-protégé relationship in such a case. However, SBA did not want to impose additional burdens on protégé firms that would require them to document and demonstrate that they did not receive benefits through their mentor-protégé relationships. In order to eliminate any disagreements as to whether a firm did or did not receive any assistance under its mentor-protégé agreement, SBA proposed to establish an easily understandable and objective basis for counting or not counting a

mentor-protégé relationship. Specifically, the proposed rule amended § 125.9(e)(6) to not count any mentor-protégé relationship toward a firm's two permitted lifetime mentor-protégé relationships where the mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement. The vast majority of commenters supported a specific, objective amount of time within which a protégé could end a mentor-protégé relationship without having it count against the two in a lifetime limit. Commenters pointed out, however, that the supplementary information to and the regulatory text in the proposed rule were inconsistent (*i.e.*, the supplementary information saying 18 months and the regulatory text saying one year). Several comments recommended increasing the lifetime number of mentor-protégé relationships that a small business concern could have. Finally, a few commenters opposed the proposed exemption to the two-in-lifetime rule because allowing protégé firms such an easy out within 18 months, whether or not the protégé received beneficial business development assistance, could act as a detriment to firms that would otherwise be willing to serve as mentors. One commenter was concerned that if a bright line 18-month test is all that is required, nothing would prevent an unscrupulous business from running through an endless chain of relatively short-lived mentor-protégé relationships. SBA does not believe that will be a frequent occurrence.

Nevertheless, in response, the final rule provides that if a specific small business protégé appears to use the 18-month test as a means of using many short-term mentor-protégé relationships, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

The proposed rule also eliminated the reconsideration process for declined mentor-protégé agreements in § 125.9(f) as unnecessary. Currently, if SBA declines a mentor-protégé agreement, the prospective small business protégé may make changes to its agreement and seek reconsideration from SBA within 45 days of SBA's decision to decline the mentor-protégé relationship. The current regulations also allow the small business to submit a new (or revised) mentor-protégé agreement to SBA at any point after 60 days from the date of SBA's final decision declining a mentor-protégé relationship. SBA believes that this ability to submit a new or revised mentor-protégé agreement after 60 days is sufficient. Most commenters supported this change, agreeing that a separate reconsideration process is unnecessary. A few commenters disagreed, believing that requiring a small business to wait 60 days to submit a revised mentor-protégé agreement and then start SBA's processing time instead of submitting a revised agreement within a few days of a decline decision could add an additional two months of wait time to an ultimate approval. SBA continues to believe that the small amount of time a small business must wait to resubmit a new/revised mentor-protégé agreement to SBA for approval makes the reconsideration process unnecessary. As such, this rule finalizes the elimination of a separate reconsideration process.

The proposed rule added clarifying language regarding the annual review of mentor-protégé relationships. It is important that SBA receive an honest assessment from the protégé of how the mentor-protégé relationship is working, whether the protégé has received the agreed-upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. SBA needs to know if the mentor is not providing the agreed-upon business development assistance to the protégé. This would affect that firm's ability to be a mentor in the future. Several commenters were also concerned about mentors that did not live up to their commitments. A few commenters recommended that a protégé firm should be able to ask SBA to intervene if it thought it was not receiving the assistance promised by the mentor or if it thought that the assistance provided was not of the quality it anticipated. SBA believes that makes sense and this rule adds a provision allowing a protégé to request SBA to intervene on its behalf with the mentor. Such a request would cause SBA to notify the mentor that SBA had received adverse information regarding its participation as a mentor and allow the mentor to respond to that information. If the mentor did not overcome the allegations, SBA would terminate the mentor-protégé agreement. The final rule also adds a provision that allows a protégé to substitute another firm to be its mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit. If two years had already elapsed in the mentor-protégé agreement, the protégé could substitute another firm to be its mentor for a total of four years.

Prior to the proposed rule, SBA had also received several complaints from small business protégés whose mentor-protégé relationships were terminated by the mentor soon after a joint venture between the protégé and mentor received a Government contract as a small business. The proposed rule asked for comments about the possibility of adding a provision requiring a joint venture between a protégé and its mentor to recertify its size if the mentor prematurely ended the mentor-protégé relationship. Commenters did not support this possible approach, believing that such a recertification requirement would have a much more serious impact on the protégé than on the mentor. In effect, such a provision would punish a protégé for its mentor's failure to meet its obligations under the mentor-protégé agreement. Upon further review, SBA believes that better options are provided in current § 125.9(h), which provides consequences for when a mentor does not provide to the protégé firm the business development assistance set forth in its mentor-protégé agreement. Under the current regulations, where that occurs, the firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement, SBA may recommend to the relevant procuring agency to issue a stop work order for each Federal contract for which the mentor and protégé are performing as a small business joint venture, and SBA may seek to substitute the protégé firm for the joint venture if the protégé firm is able to independently complete performance of any joint venture contract without the mentor. SBA believes that provision should be sufficient to dissuade mentors from terminating mentor-protégé agreements early.

Section 125.18

In addition to the revision to § 125.18(c) identified above, this rule amends the language in § 125.18(a) to clarify what representations and certifications a business concern seeking to be awarded a SDVO contract must submit as part of its offer.

Section 126.602

On November 26, 2019, SBA published a final rule amending the HUBZone regulations. 84 FR 65222. As part of that rule, SBA revised 13 CFR 126.200 by reorganizing the section to make it more readable. However, SBA inadvertently overlooked a cross-reference to section 126.200 contained in § 126.602(c). This rule merely fixes the cross-reference in § 126.602(c).

Section 126.606

The final rule amends § 126.606 to make it consistent with the release requirements of § 124.504(d). Current § 126.606 authorizes SBA to release a follow-on requirement previously performed through the 8(a) BD program for award as a HUBZone contract only where neither the incumbent nor any other 8(a) Participant can perform the requirement. SBA believes that is overly restrictive and inconsistent with the release language contained in § 124.504(d). As such, the final rule provides that a procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

Sections 126.616 and 126.618

This rule makes minor revisions to §§ 126.616 and 126.618 by merely deleting references to the 8(a) BD Mentor-Protégé Program, since that program would no longer exist as a separate program.

Sections 127.503(h) and 127.504

In addition to the revision to § 127.504(c) identified above, the proposed rule made other changes or clarifications to § 127.504. The proposed rule renamed and revised § 127.504 for better understanding and ease of use. It changed the section heading to ''What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB contract?''. SBA received no comments on these changes and adopts them as final in this rule.

This rule also moves the recertification procedures for WOSBs from § 127.503(h) to § 127.504(e).

Sections 134.318 and 121.1103

This rule amends § 134.318 to make it consistent with SBA's size regulations. In this regard, § 121.1103(c)(1)(i) of SBA's size regulations provides that upon receipt of the service copy of a NAICS code appeal, the contracting officer must ''stay the solicitation.'' However, when that rule was implemented, a corresponding change was not made to the procedural rules for SBA's OHA contained in part 134. As such, this rule simply requires that the contracting officer must amend the solicitation to reflect the new NAICS code whenever OHA changes a NAICS code in response to a NAICS code appeal. In addition, for clarity purposes, the rule revises § 121.1103(c)(1)(i) to provide that a contracting officer must stay the date of the closing of the receipt of offers instead of requiring that he or she must stay the solicitation.

III. Compliance With Executive Orders 12866, 12988, 13132, 13175, 13563, 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

In combining the 8(a) BD Mentor-Protégé Program and the All Small Mentor-Protégé Program, SBA seeks to eliminate confusion regarding perceived differences between the two Programs, remove unnecessary duplication of functions within SBA, and establish one, unified staff to better coordinate and process mentor-protégé applications. In addition, eliminating the requirement that SBA approve every joint venture in connection with an 8(a) contract will greatly reduce the time required for 8(a) BD Participants to come into and SBA to ensure compliance with SBA's joint venture requirements.

SBA is also making several changes to clarify its regulations. Through the years, SBA has spoken with small business and representatives and has determined that several regulations need further refinement so that they are easier to understand and implement. This rule makes several changes to ensure that the rules pertaining to SBA's various small business procurement programs are consistent. SBA believes that making the programs as consistent and similar as possible, where practicable, will make it easier for small businesses to understand what is expected of them and to comply with those requirements.

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

This rule seeks to address or clarify several issues, which will provide clarity to small businesses and contracting personnel. Further, SBA is eliminating the burden that 8(a) Participants seeking to be awarded a competitive 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. There are currently approximately 4,500 8(a) BD Participants in the portfolio. Of those, about 10 percent or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. Under the current rules, SBA must approve the initial joint venture agreement itself and each addendum to the joint venture agreement—identifying the type of work and what percentage each partner to the joint venture would perform of a specific 8(a) procurement—prior to contract award. SBA reviews the terms of the joint venture agreement for regulatory compliance and must also assess the 8(a) BD Participant's capacity and whether the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. It is difficult to calculate the costs associated with submitting a joint venture agreement to SBA because the review process is highly fact-intensive and typically requires that 8(a) firms provide additional information and clarification. However, in the Agency's best professional judgment, it is estimated that an 8(a) Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission. That equates to approximately 1,350 hours at an estimated rate of $44.06 per hour—the median wage plus benefits for accountants and auditors according to 2018 data from the Bureau of Labor Statistics—for an annual total cost savings to 8(a) Participants of about $59,500. In addition to the initial joint venture review and approval process, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum. Not every joint venture is awarded more than one contract, but those that do are often awarded the maximum allowed of three contracts. SBA estimates that Participants submit an additional 300 addendum actions, with each action taking about 1.5 hours for the Participant. That equates to approximately 450 hours at an estimated rate of $44.06 per hour for an annual total cost savings to 8(a) Participants of about $19,800. Between both initial and addendum actions, this equates to an annual total cost savings to 8(a) Participants of about $79,300.

In addition, merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program would also provide cost savings. Firms seeking a mentor-protégé relationship through the All Small Mentor-Protégé Program apply through an on-line, electronic application system. 8(a) Participants seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD

program do not apply through an on-line, electronic system, but rather apply manually through their servicing SBA district office. In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and responding manually to questions regarding that submission is estimated at two hours. SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually, which equates to an annual savings to prospective protégé firms of about 300 hours. At an estimated rate of $44.06 per hour, the annual savings in costs related to the reduced time for mentor-protégé applications through the All Small Mentor Protégé process is about $13,000 per year. In a similar vein, eliminating the manual review and approval process for 8(a) BD Mentor-Protégé Program applications will provide cost savings to the Federal government. As previously noted, an 8(a) Participant seeking SBA's approval of a mentor-protégé relationship through the 8(a) BD program must submit an application manually to its servicing district office. The servicing district office likewise conducts a manual review of each application for completeness and for regulatory compliance. This review process can be cumbersome since the analyst must first download and organize all application materials by hand. In contrast, the on-line, electronic application system available to prospective protégés in the All Small Mentor-Protégé Program has significantly streamlined SBA's review process in two ways. First, it logically organizes application materials for the reviewer, resulting in a more efficient and consistent review of each application. Second, all application materials are housed in a central document repository and are accessible to the reviewer without the need to download files. In the Agency's best professional judgment, this streamlined application review process delivers estimated savings of 30 percent per application as compared to the manual application review process under the 8(a) BD Mentor-Protégé Program. SBA further estimates that it takes approximately three hours to review an application for the All Small Mentor Protégé Program. That equates to approximately 135 hours (*i.e.*, 150 applications multiplied by three hours multiplied by 30 percent) at an estimated rate of $44.06 per hour for an annual total cost savings to the Federal government of about $5,900 per year. The elimination of manual application process creates a total cost savings of $18,900 per year.

Moreover, eliminating the 8(a) BD Mentor-Protégé Program as a separate program and merging it with the All Small Mentor-Protégé Program will eliminate confusion between the two programs for firms seeking a mentor-protégé relationship. When SBA first implemented the All Small Mentor-Protégé Program, it intended to establish a program substantively identical to the 8(a) BD Mentor-Protégé Program, as required by Section 1641 of the NDAA of 2013. Nevertheless, feedback from the small business community reveals a widespread misconception that the two programs offer different benefits. By merging the 8(a) BD Mentor-Protégé Program into the All Small-Mentor Protégé Program, firms will not have to read the requirements for both programs and try to decipher perceived differences. SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship. Based on approximately 600 mentor-protégé applications each year (about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program), this would equate to an annual cost savings to prospective protégé firms of about 600 hours. At an estimated rate of $44.06 per hour, the annual savings in costs related to the elimination of confusion caused by having two separate programs is about $26,400.

Thus, in total, the merger of the 8(a) BD mentor-protégé program into the All Small Business Mentor-Protégé Program would provide a cost savings of about $45,300 per year.

In addition, it generally takes between 60 and 90 days for SBA to approve a mentor-protégé relationship through the 8(a) BD program. Conversely, the average time it takes to approve a mentor-protégé relationship through the All Small Mentor-Protégé Program is about 20 working days. To firms seeking to submit offers through a joint venture with their mentors, this difference is significant. Such joint ventures are only eligible for the regulatory exclusion from affiliation if they are formed after SBA approves the underlying mentor-protégé relationship. It follows that firms applying through the 8(a) BD Mentor-Protégé Program could miss out on contract opportunities waiting for their mentor-protégé relationships to be approved. These contract opportunity costs are inherently difficult to measure, but are certainly significant to the firms missing out on specific contract opportunities. However, in SBA's best judgment, faster approval timeframes will mitigate such costs by giving program participants more certainty in planning their proposal strategies.

This rule will also eliminate the requirement that any specific joint venture can be awarded no more than three contracts over a two year period, but will instead permit a joint venture to be awarded an unlimited number of contracts over a two year period. The change removing the limit of three awards to any joint venture will reduce the burden of small businesses being required to form additional joint venture entities to perform a fourth contract within that two-year period. SBA has observed that joint ventures are often established as separate legal entities—specifically as limited liability corporations—based on considerations related to individual venture liability, tax liability, regulatory requirements, and exit strategies. Under the current rule, joint venture partners must form a new joint venture entity after receiving three contracts lest they be deemed affiliated for all purposes. The rule, which allows a joint venture to continue to seek and be awarded contracts without requiring the partners to form a new joint venture entity after receiving its third contract, will save small businesses significant legal costs in establishing new joint ventures and ensuring that those entities meet all applicable regulatory requirements.

This rule also makes several changes to reduce the burden of recertifying small business status generally and requesting changes of ownership in the 8(a) BD program. Specifically, the rule clarifies that a concern that is at least 51 percent owned by an entity (*i.e.*, tribe, ANC, or Community Development Corporation (CDC)) need not recertify its status as a small business when the ownership of the concern changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity. In addition, the rule also provides that a Participant in SBA's 8(a) BD program that is owned by an ANC or tribe need not request a change of ownership from SBA where the ANC or tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC/tribe and the Participant. Both changes will save entity-owned small business concerns time and money. Similarly, the rule provides that prior SBA approval is not needed where the disadvantaged individual (or entity) in control of a Participant in the 8(a) BD program will increase the percentage of his or her (its) ownership interest.

The rule will also allow a concern that has been declined for 8(a) BD program participation to submit a new application 90 days after the date of the Agency's final decision to decline. This changes the current rule which requires a concern to wait 12 months from the date of the final Agency decision to reapply. This will allow firms that have been declined from participating in the 8(a) BD program the opportunity to correct deficiencies, come into compliance with program eligibility requirements, reapply and be admitted to the program and receive the benefits of the program much more quickly. SBA understands that by reducing the re-application waiting period there is the potential to strain the Agency's resources with higher application volumes. In the Agency's best judgment, any costs associated with the increase in application volume would be outweighed by the potential benefit of providing business development assistance and contracting benefits sooner to eligible firms.

This rule also clarifies SBA's position with respect to size and socioeconomic status certifications on task orders under MACs. Currently, size certifications at the order level are not required unless the contracting officer, in his or her discretion, requests a recertification in connection with a specific order. The rule requires a concern to submit a recertification or confirm its size and/or socioeconomic status for all set-aside orders (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) under unrestricted MACs, except for orders or Blanket Purchase Agreements issued under any FSS contracts. Additionally, the rule requires a concern to submit a recertification or confirm its socioeconomic status for all set-aside orders where the required socioeconomic status for the order differs from that of the underlying set aside MAC. The rule does not require recertification, however, if the agency issues the order under a pool or a reserve, and the pool or reserve already was set aside in the same category as the order.

If the firm's size and status in SAM is current and accurate when the firm submits its offer, the concern will not need to submit a new certification or submit any additional documentation with its offer. SBA recognizes that confirming accurate size and socioeconomic status imposes a burden on a small business contract holder, but the burden is minimal. SBA intends that confirmation of size and status under this rule will be satisfied by confirming that the firm's size and status in SAM is currently accurate and qualifies the firm for award.

FPDS–NG indicates that, in Fiscal Year 2019, agencies set aside 1,800 orders under unrestricted MACs, excluding orders under FSS contracts. Agencies also set aside 15 pools or reserves using already-established MACs other than FSS contracts. SBA adopts the assumption from FAR Case 2014–002 that on average there are three offers per set-aside order. SBA also assumes that agencies will award five orders from each set-aside pool or set-aside reserve per year, using the same set-aside category as the pool or reserve. These pool or reserve orders do not require recertification at time of order; therefore, SBA subtracts the pool or reserve orders from the number of orders subject to the rule, leaving 1,725 orders subject to the rule.

The annual number of set-aside orders under unrestricted MACs, excluding FSS orders and orders under set-aside pools or reserves, therefore is calculated as 1,725 orders · 3 offers per order = 5,175. The ease of complying with the rule varies depending on the size of a firm. If the firm's size is not close to the size standard, compliance is simple; the firm merely confirms that it has a SAM registration. SBA estimates those firms spend 5 minutes per offer to comply with this rule. For a firm whose size is close to the size standard, compliance requires determining whether the firm presently qualifies for the set-aside—primarily, whether the firm is presently a small business. SBA adopts the estimate from OMB Control No. 9000–0163 that these firms spend 30 minutes per offer to comply with this rule.

The share of small businesses that are within 10 percent of the size standard is 1.3 percent. Therefore, the annual public burden of requiring present size and socioeconomic status is (5,175 offers · 98.7 percent · 5 minutes · $44.06 cost per hour) + (5,175 offers · 1.3 percent · 30 minutes · $44.06 cost per hour) = $20,250.

FPDS–NG indicates that, in Fiscal Year 2019, agencies set aside about 130 orders under set-aside MACs (other than FSS contracts) in the categories covered by this rule. These categories are WOSB or EDWOSB set-aside/sole-source orders under small business set-aside MACs; SDVOSB set-aside/sole-source orders under small business set-aside MACs; and HUBZone set-aside/sole source orders set-aside/sole-source orders under small business set-aside MACs. The ease of complying on these set-aside within set-asides varies depending on whether the firm has had any of these recent actions: (i) An ownership change, (ii) a corporate change that alters control of the firm, such as change in bylaws or a change in corporate officers, or (iii) for the HUBZone program, a change in the firm's HUBZone certification status under SBA's recently revised HUBZone program procedures. Although data is not available, SBA estimates that up to 25 percent of firms would have any of those recent actions. Firms in that category will spend 30 minutes per offer determining whether the firm presently qualifies for a set-aside order. The remaining 75 percent of firms will spend 5 minutes merely confirming that the firm has an active SAM registration.

Following the same calculations, the annual cost of requiring present socioeconomic status on set-aside orders under set-aside MACs is calculated as (130 orders · 3 offers/order · 75 percent · 5 minutes · $44.06 cost per hour) + (130 orders · 3 offers/order · 25 percent · 30 minutes · $44.06 cost per hour). This amounts to an annual cost of about $3,220.

As reflected in the calculation, SBA believes that being presently qualified for the required size or socioeconomic status on an order, where required, would impose a burden on small businesses. A concern already is required by regulation to update its size and status certifications in SAM at least annually. As such, the added burden to industry is limited to confirming that the firm's certification is current and accurate. The Federal Government, however, will receive greater accuracy from renewed certification which will enhance transparency in reporting and making awards.

The added burden to ordering agencies includes the act of checking a firm's size and status certification in SAM at the time of order award. Since ordering agencies are already familiar with checking SAM information, such as to ensure that an order awardee is not debarred, suspended, or proposed for debarment, this verification is minimal. Further, checking SAM at the time of order award replaces the check of the offeror's contract level certification. SBA also recognizes that an agency's market research for the order level may be impacted where the agency intends to issue a set-aside order under an unrestricted vehicle (or a socioeconomic set-aside under a small business set-aside vehicle) except under FSS contracts. The ordering agency may need to identify MAC-eligible vendors and then find their status in SAM. This is particularly the case where the agency is applying the Rule of Two and verifying that there are at least two

small businesses or small businesses with the required status sufficient to set aside the order. SBA does not believe that conducting SAM research is onerous.

Using the same set-aside order data, the annual cost of checking certifications and conducting additional market research efforts is calculated as (1725 orders off unrestricted + 130 orders off set-asides) · 30 minutes · $44.06/hours = $46,600 in annual government burden.

Currently, recertification at the contract level for long term contracts is specifically identified only at specific points. This rule makes clear that a contracting officer has the discretion to request size recertification as he or she deems appropriate at any point for a long-term MAC. FPDS–NG indicates that, in Fiscal Year 2019, agencies awarded 399 MACs to small businesses. SBA estimates that procuring activities will use their discretion to request recertification at any point in a long term contract approximately 10% of the time. SBA adopts the estimate from OMB Control No. 9000–0163 that procuring activities will spend 30 minutes to comply with this rule. The annual cost of allowing recertification at any point on a long-term contract to procuring activities is calculated as (399 MACs · 10%) · 30 minutes · $44.06 cost per hour. This amounts to an estimated annual cost of $880. Where requested, this recertification would impose a burden on small businesses. Following this same calculation, SBA estimates that the impact to firms will also be $880 ((399 number of MACs · 10%) · 30 minutes · $44.06 per hour). The total cost is $880 · 2 = $1,760.

The annual cost is partially offset by the cost savings that result from other changes in this rule. This change goes more to accountability and ensuring that small business contracting vehicles truly benefit small business concerns. In addition, commenters responding to the costs associated with recertification supported the proposed rule that requires a firm to recertify its size and/or socioeconomic status for set-aside task orders under unrestricted MACs. These commenters agreed that certifying in the System for Award Management (*sam.gov*) should meet this requirement.

3. What are the alternatives to this rule?

As noted above, this rule makes a number of changes intended to reduce unnecessary or excessive burdens on small businesses, and clarifies other regulatory provisions to eliminate confusion among small businesses and procuring activities. SBA has also considered other alternative proposals to achieve these ends. Concerning SBA's role in approving 8(a) joint venture agreements, the Agency could also eliminate the requirement that SBA must approve joint ventures in connection with sole source 8(a) awards. However, as noted above, SBA believes that such approval is an important enforcement mechanism to ensure that the joint venture rules are followed. With respect to the requirement that a concern must wait 90 days to re-apply to the 8(a) BD program after the date of the Agency's final decline decision, SBA could instead eliminate the application waiting period altogether. This would allow a concern to re-apply as soon as it reasonably believed it had overcome the grounds for decline. However, SBA believes that such an alternative would encompass significant administrative burden on SBA.

Under the rule, if an order under an unrestricted MAC is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), or the order is set aside in a different category than was the set-aside MAC, a concern must be qualified for the required size and socioeconomic status at the time it submits its initial offer, which includes price, for the particular order. In SBA's view, the order is the first time size or socioeconomic status is important where the underlying MAC is unrestricted or set aside in a different category than the set-aside MAC, and therefore, that is the date at which eligibility should be examined. SBA considered maintaining the status quo; namely, allowing a one-time certification as to size and socioeconomic status (*i.e.*, at the time of the initial offer for the underlying contract) to control all orders under the contract, unless one of recertification requirements applies (*see* 121.404(g)). SBA believes the current policy does not properly promote the interests of small business. Long-term contracting vehicles that reward firms that once were, but no longer qualify as, small or a particular socioeconomic status adversely affect truly small or otherwise eligible businesses.

Another alternative is to require business concerns to notify contracting agencies when there is a change to a concern's socioeconomic status (*e.g.*, HUBZone, WOSB, etc.), such that they would no longer qualify for set-aside orders. The contracting agency would then be required to issue a contract modification within 30 days, and from that point forward, ordering agencies would no longer be able to count options or orders issued pursuant to the contract for small business goaling purposes. This could be less burdensome than recertification of socioeconomic status for each set-aside order.

Summary of Costs and Cost Savings

Table 1: Summary of Incremental Costs and Cost Savings, below, sets out the estimated net incremental cost/(cost saving) associated with this rule. Table 2: Detailed Breakdown of Incremental Costs and Cost Savings, below, provides a detailed explanation of the annual cost/(cost saving) estimates associated with this rule. This rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule, discounted at 7% relative to 2016 over a perpetual time horizon, is $37,166 in 2016 dollars with a net present value of $530,947 in 2016 dollars.

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
1	Eliminating SBA approval of initial and addendums to joint venture agreements to perform competitive 8(a) contracts and eliminating approval for two additional contracts which would require additional submissions and explanations for any such joint venture addendum.	($79,300)
2	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of manual application process.	(18,900)
3	Merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program—Elimination of confusion among firms seeking a mentor-protégé relationship.	(26,400)
4	Requiring recertification for set-aside orders issued under unrestricted Multiple Award Contracts	20,250

TABLE 1—SUMMARY OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item	Annual cost/ (cost saving) estimate
5	Requiring recertification for set-aside orders issued under set-aside Multiple Award Contracts	3,220
6	Additional Government detailed market research to identify qualified sources for set-aside orders and verify status.	46,600
7	Contracting officer discretion to request size recertification at any point for a long-term MAC	1,760

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
1	*Regulatory change:* SBA is eliminating the burden that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture must submit the joint venture to SBA for review and approval prior to contract award. In addition, each joint venture can be awarded two more contracts which would require additional submissions and explanations for any such joint venture addendum.	
	Estimated number of impacted entities: There are currently approximately 4,500 8(a) BD Participants in the portfolio. Of those, about 10% or roughly 450 Participants have entered a joint venture agreement to seek the award of an 8(a) contract. There are approximately 300 addendums per year.	450 entities and 300 additional addendums.
	*Estimated average impact * (labor hour):* SBA estimates that an 8(a) BD Participant currently spends approximately three hours submitting a joint venture agreement to SBA and responding to questions regarding that submission. Each addendum requires 1.5 hours of time.	3 hours and 1.5 hours per additional addendum.
	*2018 Median Pay ** (per hour):* Most 8(a) firms use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	($79,300).
2	*Regulatory change:* SBA is merging the 8(a) BD Mentor-Protégé Program into the All Small Mentor-Protégé Program and eliminating the manual application process. This will reduce the burden on 8(a) Participants seeking a mentor-protégé agreement and on SBA to no longer process paper applications.	
	Estimated number of impacted entities: SBA receives approximately 150 applications for 8(a) mentor-protégé relationships annually.	150 entities.
	*Estimated average impact * (labor hour):* In SBA's best professional judgment, the additional cost for submitting a manual mentor-protégé agreement to SBA for review and approval and respond- ing manually to questions regarding that submission is estimated at two hours. For SBA employ- ees, reviewing the manual mentor-protégé agreements takes 3 hours and this change is expected to save SBA 30% of the time required.	2 hours for applicants and less than 1 hour for SBA.
	*2018 Median Pay ** (per hour):* Most 8(a) firms use an accountant or someone with similar skills for this task..	44.06 per hour.
	Estimated Cost/(Cost Saving)	($18,900).
3	*Regulatory change:* SBA is merging the 8(a) BD Mentor-Protégé Program into the All Small Men- tor-Protégé Program. In doing so, firms will not have to read the requirements for both programs and try to decipher any perceived differences.	
	Estimated number of impacted entities: SBA receives approximately 600 mentor-protégé applications each year—about 450 for the All Small Mentor-Protégé Program and about 150 for the 8(a) BD Mentor-Protégé Program.	600 entities.
	*Estimated average impact * (labor hour):* SBA estimates that having one combined program will eliminate about one hour of preparation time for each firm seeking a mentor-protégé relationship.	1 hour.
	*2018 Median Pay ** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	($26,400).
4	*Regulatory change:* SBA is requiring that a firm be accurately certified and presently qualified as to size and/or status for set-aside orders issued under Multiple Award Contracts that were not set aside or set aside in a separate category, except for the Federal Supply Schedule.	
	Estimated number of impacted entities: Approximately 1,725 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, including the Federal Supply Schedule, outside of set-aside pools. SBA estimates that three offers are submitted for each order.	5,175 offers.
	*Estimated average impact * (labor hour):* SBA estimates that a small business that is close to its size standard will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer. A small business that is not close to its size standard will spend an average of 5 minutes confirming that it has a SAM registration.	0.5 hours for firms within 10 percent of size standard (1.3% of firms); 5 minutes otherwise (98.7% of firms).
	*2018 Median Pay ** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$20,250.
5	*Regulatory change:* SBA is requiring that a firm be accurately certified and presently qualified as to socioeconomic status for set-aside orders issued under Multiple Award Contracts that were set aside in a separate category, except for the Federal Supply Schedule contracts.	

TABLE 2—DETAILED BREAKDOWN OF INCREMENTAL COSTS AND COST SAVINGS—Continued

Item No.	Regulatory action item details	Annual cost/ (cost saving) estimate breakdown
	Estimated number of impacted entities: Approximately 130 set-aside orders are issued annually on Multiple Award Contracts that are not set aside in the same category, other than on the Federal Supply Schedule, are affected by this rule. SBA estimates that three offers are submitted for each order for a total of 390 offers.	390 offers.
	*Estimated average impact * (labor hour):* SBA estimates that a small business will spend an average of 30 minutes confirming that size and status is accurate prior to submitting an offer, if it has had a change in ownership, control, or certification. Otherwise, the small business will spend an average of 5 minutes confirming that it has a SAM registration.	0.5 hours for firms with a change in ownership, control, or HUBZone certification (25% of firms); 5 minutes otherwise (75% of firms).
	*2018 Median Pay ** (per hour):* Most small business concerns use an accountant or someone with similar skills for this task.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$3,220.
6	*Regulatory change:* SBA is requiring that firms be accurately certified and presently qualified as to size and socioeconomic status for certain set-aside orders issued under Multiple Award Contracts, except for the Federal Supply Schedule contracts. This change impacts the market research required by ordering activities to determine if a set-aside order for small business or for any of the socioeconomic programs may be pursued and whether the awardee is qualified for award.	
	Estimated number of impacted entities: Approximately 2,115 set-aside orders are issued annually as described in the rule.	2,115 orders.
	Estimated average impact (labor hour):* SBA estimates that ordering activities applying the Rule of Two will spend an average of 30 additional minutes to locate contractors awarded Multiple Award Contracts, looking up the current business size for each of the contractors in SAM to determine if a set-aside order can be pursued, and confirming the status of the awardee.	0.5 hours.
	*2018 Median Pay ** (per hour):* Contracting officers typically perform the market research for the acquisition plan.	$44.06 per hour.
	Estimated Cost/(Cost Saving)	$46,600.
7	*Regulatory Change: Contracting officer discretion to request size recertification at any point for a long-term MAC*.	
	Estimated number of impacted entities: Approximately 400 long term MACs are awarded annually to small businesses. SBA estimates that contracting officers will exercise this discretion 10% of the time.	40 contracts.
	*Estimated average impact * (labor hour):* SBA estimates that ordering activities will spend an average of 30 additional minutes to request this recertification. Contractors will spend an average of 30 additional minutes to respond to the request.	0.5 hours for agencies; 0.5 hours for businesses.
	*2018 Median Pay ** (per hour):* Contracting officers will request this recertification	$44.06.
	Estimated Cost/(Cost Saving)	$1,760.

* This estimate is based on SBA's best professional judgment.
** Source: Bureau of Labor Statistics, Accountants and Auditors.

Executive Order 12988

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

Executive Order 13132

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

Executive Order 13175

As part of this rulemaking process, SBA held tribal consultations pursuant to Executive Order 13175, Tribal Consultations, in Minneapolis, MN, Anchorage, AK, Albuquerque, NM and Oklahoma City, OK to provide interested tribal representatives with an opportunity to discuss their views on various 8(a) BD-related issues. *See* 84 FR 66647. These consultations were in addition to those held by SBA in Anchorage, AK (*see* 83 FR 17626), Albuquerque, NM (*see* 83 FR 24684), and Oklahoma City, OK (*see* 83 FR 24684) before issuing a proposed rule. This executive order reaffirms the Federal Government's commitment to tribal sovereignty and requires Federal agencies to consult with Indian tribal governments when developing policies that would impact the tribal community. The purpose of the above-referenced tribal consultation meetings was to provide interested parties with an opportunity to discuss their views on the issues, and for SBA to obtain the views of SBA's stakeholders on approaches to the 8(a) BD program regulations. SBA has always considered tribal consultation meetings a valuable component of its deliberations and believes that these tribal consultation meetings allow for constructive dialogue with the Tribal community, Tribal Leaders, Tribal Elders, elected members of Alaska Native Villages or their appointed representatives, and principals of tribally-owned and ANC-owned firms participating in the 8(a) BD program.

In general, tribal stakeholders were supportive of SBA's intent to implement changes that will make it easier for small business concerns to understand and comply with the regulations

governing the 8(a) BD program, and agreed that this rulemaking will make the program more effective and accessible to the small business community. SBA received significant comments on its approaches to the proposed regulatory changes, as well as several recommendations regarding the 8(a) BD program not initially contemplated by this planned rulemaking. SBA has taken these discussions into account in drafting this final rule.

Executive Order 13563

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

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

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System—Next Generation (FPDS–NG), Dynamic Small Business Search (DSBS) and System for Award Management (SAM).

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

The proposed rule initially called for a 70-day comment period, with comments required to be made to SBA by January 17, 2020. SBA received several comments in the first few weeks after the publication to extend the comment period. Commenters felt that the nature of the issues raised in the rule and the timing of comments during the holiday season required more time for affected businesses to adequately review the proposal and prepare their comments. In response to these comments, SBA published a notice in the **Federal Register** on January 10, 2020, extending the comment period an additional 21 days to February 7, 2020. 85 FR 1289. All comments received were posted on *www.regulations.gov* to provide transparency into the rulemaking process. In addition, SBA submitted the final rule to the Office of Management and Budget for interagency review.

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

Yes, the rule is intended to reduce unnecessary or excessive burdens on 8(a) Participants, and clarify other regulatory-related provisions to eliminate confusion among small businesses and procuring activities.

Executive Order 13771

This rule is an E.O. 13771 deregulatory action. The annualized cost savings of this rule is $37,166 in 2016 dollars with a net present value of $530,947 over perpetuity, in 2016 dollars. A detailed discussion of the estimated cost of this proposed rule can be found in the above Regulatory Impact Analysis.

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

This rule imposes additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. The rule provides a number of size and/or socioeconomic status recertification requirements for set-aside orders under MACs. The annual total public reporting burden for this collection of information is estimated to be 82 total hours ($3,625), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 165.
Responses per respondent: 1.
Total annual responses: 165.
Preparation hours per response: 0.5 (30 min).
Total response burden hours: 82.
Cost per hour: $44.06.
Estimated cost burden to the public: $3,625.

Additionally, the rule adds procuring agency discretion to request recertification at any point for long term MACs. The annual total public reporting burden for this collection of information is estimated to be 20 total hours ($880), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing information reporting.

Respondents: 40.
Responses per respondent: 1.
Total annual responses: 40.
Preparation hours per response: 0.5 (30 min).
Total response burden hours: 20.
Cost per hour: $44.06.
Estimated cost burden to the public: $880.This added information collection burden will be officially reflected through OMB Control Number 9000–0163 when the rule is implemented. SBA received no comments on the PRA analysis set forth in the proposed rule.

SBA also has an information collection for the Mentor-Protégé Program, OMB Control Number 3245–0393. This collection is not affected by these amendments.

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

The Regulatory Flexibility Act (RFA) 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. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.''

This rule concerns aspects of SBA's 8(a) BD program, the All Small Mentor-Protégé Program, and various other small business programs. As such, the rule relates to small business concerns but would not affect ''small organizations'' or ''small governmental jurisdictions'' because those programs generally apply only to ''business concerns'' as defined by SBA regulations, in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns''

within the meaning of SBA's regulations.

There are currently approximately 4,500 8(a) BD Participants in the portfolio. Most of the changes are clarifications of current policy or designed to reduce unnecessary or excessive burdens on 8(a) BD Participants and therefore should not impact many of these concerns. There are about 385 Participants with 8(a) BD mentor-protégé agreements and about another 850 small businesses that have SBA-approved mentor-protégé agreements through the All Small Mentor-Protégé Program. The consolidation of SBA's two mentor-protégé programs into one program will not have a significant economic impact on small businesses. In fact, it should have no affect at all on those small businesses that currently have or on those that seek to have an SBA-approved mentor-protégé relationship. The rule eliminates confusion regarding perceived differences between the two Programs, removes unnecessary duplication of functions within SBA, and establishes one unified staff to better coordinate and process mentor-protégé applications. The benefits of the two programs are identical, and will not change under the rule.

SBA is also requiring a business to be qualified for the required size and status when under consideration for a set-aside order off a MAC that was awarded outside of the same set-aside category. Pursuant to the Small Business Goaling Report (SBGR) Federal Procurement Data System—Next Generation (FPDS–NG) records, about 236,000 new orders were awarded under MACs per year from FY 2014 to FY 2018. Around 199,000, or 84.3 percent, were awarded under MACs established without a small business set aside. For this analysis, small business set-asides include all total or partial small business set-asides, and all 8(a), WOSB, SDVOSB, and HUBZone awards. There were about 9,000 new orders awarded annually with a small business set-aside under unrestricted MACs. These orders were issued to approximately 2,600 firms. The 9,000 new orders awarded with a small business set-aside under a MAC without a small business set aside were 4.0 percent of the 236,000 new orders under MACs in a year (Table 3).

TABLE 3—0.47% OF NEW MAC ORDERS IN A FY ARE NON-FSS ORDERS SET ASIDE FOR SMALL BUSINESS WHERE UNDERLYING BASE CONTRACT NOT SET ASIDE FOR SMALL BUSINESS

	FY014	FY015	FY016	FY017	FY018	AVG
Total new orders under MACs in FY	244,664	231,694	245,978	234,304	223,861	236,100
Orders awarded with SB set aside under unrestricted MAC	10,089	9,347	9,729	9,198	8,666	9,406
Non-FSS orders awarded with SB set aside without MAC IDV SB set aside ..	902	780	1,019	1,422	1,400	1,105
Percent	0.37	0.34	0.41	0.61	0.63	0.47

If all firms receiving a non-FSS small business set-aside order under a MAC that was not itself set aside for small business were adversely affected by the rule (*i.e.,* every such firm receiving an award as a small business had grown to be other than a small business or no longer qualified as 8(a), WOSB, SDVO, or HUBZone), the rule requiring a business to be certified as small for non-FSS small business set-aside orders under MACs not set aside for small business would impact only 0.47 percent of annual new MAC orders. The proposed rule sought comments as to whether the rule would have a significant economic impact on a substantial number of small entities. SBA did not receive any comments responding to such request. As such, SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, throughout the supplementary information to this proposed rule, SBA has identified the reasons why the changes are being made, the objectives and basis for the rule, a description of the number of small entities to which the rule will apply, and a description of alternatives considered.

List of Subjects

13 CFR Part 121

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

13 CFR Part 124

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

13 CFR Part 125

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

13 CFR Part 126

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

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Claims, Equal employment opportunity, Lawyers, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, 127, and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

- 2. Amend § 121.103 by:
- a. Revising the first sentence of paragraphs (b)(6) and (9);
- b. Revising paragraph (f)(2)(i) and Example 2 to paragraph (f);
- c. Revising the first sentence of paragraph (g);
- d. Revising paragraph (h) introductory text and Examples 1, 2, and 3 to paragraph (h) introductory text;
- e. Removing paragraphs (h)(1) and (h)(2);
- f. Redesignating paragraphs (h)(3) through (h)(5) as paragraphs (h)(1) through (h)(3), respectively;
- g. Revising the paragraph heading for the newly redesignated paragraph (h)(1) and adding two sentences to the end of newly redesignated paragraph (h)(1)(ii);

- h. Removing newly redesignated paragraph (h)(1)(iii);
- i. Adding a paragraph heading for redesignated paragraph (h)(2);
- j. Revising newly redesignated paragraph (h)(3); and
- k. Adding paragraph (h)(4).

The revisions and additions read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 125.9 of this chapter is not affiliated with its mentor or protégé firm solely because the protégé firm receives assistance from the mentor under the agreement. * * *

* * * * *

(9) In the case of a solicitation for a bundled contract or a Multiple Award Contract with a value in excess of the agency's substantial bundling threshold, a small business contractor may enter into a Small Business Teaming Arrangement with one or more small business subcontractors and submit an offer as a small business without regard to affiliation, so long as each team member is small for the size standard assigned to the contract or subcontract. * * *

* * * * *

(f) * * *

(2) * * *

(i) This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.

* * * * *

Example 2 to paragraph (f). Firm A has been in business for five years and has approximately 200 contracts. Of those contracts, 195 are with Firm B. The value of Firm A's contracts with Firm B is greater than 70% of its revenue over the previous three years. Unless Firm A can show that its contractual relations with Firm B do not restrict it from selling the same type of products or services to another purchaser, SBA would most likely find the two firms affiliated.

(g) *Affiliation based on the newly organized concern rule.* Except as provided in § 124.109(c)(4)(iii), affiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. * * *

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer including price prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. A joint venture: Must be in writing; must do business under its own name and be identified as a joint venture in the System for Award Management (SAM) for the award of a prime contract; may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (*i.e.,* the joint venture may have its own separate employees to perform administrative functions, including one or more Facility Security Officer(s), but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture pursuant to paragraph (h)(4) of this section. For purposes of this paragraph (h), contract refers to prime contracts, novations of prime contracts, and any subcontract in which the joint venture is treated as a similarly situated entity as the term is defined in part 125 of this chapter.

Example 1 to paragraph (h) introductory text. Joint Venture AB receives a contract on April 2, year 1. Joint Venture AB may receive additional contracts through April 2, year 3. On June 6, year 2, Joint Venture AB submits an offer for Solicitation 1. On July 13, year 2, Joint Venture AB submits an offer for Solicitation 2. On May 27, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 1. On July 22, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 2. Even though the award of the two contracts emanating from Solicitations 1 and 2 would occur after April 2, year 3, Joint Venture AB may receive those awards without causing general affiliation between its joint venture partners because the offers occurred prior to the expiration of the two-year period.

Example 2 to paragraph (h) introductory text. Joint Venture XY receives a contract on August 10, year 1. It may receive two additional contracts through August 10, year 3. On March 19, year 2, XY receives a second contract. It receives no other contract awards through August 10, year 3 and has submitted no additional offers prior to August 10, year 3. Because two years have passed since the date of the first contract award, after August 10, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Example 3 to paragraph (h) introductory text. Joint Venture XY receives a contract on December 15, year 1. On May 22, year 3 XY submits an offer for Solicitation S. On December 8, year 3, XY submits a novation package for contracting officer approval for

Contract C. In January, year 4 XY is found to be the apparent successful offeror for Solicitation S and the relevant contracting officer seeks to novate Contract C to XY. Because both the offer for Solicitation S and the novation package for Contract C were submitted prior to December 15 year 3, both contract award relating to Solicitation S and novation of Contract C may occur without a finding of general affiliation.

(1) *Size of joint ventures.* (i) * * *

(ii) * * * Except for sole source 8(a) awards, the joint venture must meet the requirements of § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate, at the time it submits its initial offer including price. For a sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of § 124.513(c) and (d) prior to the award of the contract.

* * * * *

(2) *Ostensible subcontractors.* * * *

(3) *Receipts/employees attributable to joint venture partners.* For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the concern and its joint ventures (*e.g.*, subcontracts from a joint venture entity to joint venture partners). In determining the number of employees, a concern must include in its total number of employees its proportionate share of joint venture employees. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee count.

Example 1 to paragraph (h)(3). Joint Venture AB is awarded a contract for $10M. The joint venture will perform 50% of the work, with A performing $2M (40% of the 50%, or 20% of the total value of the contract) and B performing $3M (60% of the 50% or 30% of the total value of the contract). Since A will perform 40% of the work done by the joint venture, its share of the revenues for the entire contract is 40%, which means that the receipts from the contract awarded to Joint Venture AB that must be included in A's receipts for size purposes are $4M. A must add $4M to its receipts for size purposes, unless its receipts already account for the $4M in transactions between A and Joint Venture AB.

(4) *Facility security clearances.* A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.

(i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.

(ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

* * * * *

- 3. Amend § 121.402 by revising the first sentence of paragraph (b)(2), and paragraphs (c)(1)(i), (c)(2)(i), and (e) to read as follows:

§ 121.402 What size standards are applicable to Federal Government Contracting programs?

* * * * *

(b) * * *

(2) A procurement is generally classified according to the component which accounts for the greatest percentage of contract value. * * *

(c) * * *

(1) * * *

(i) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract; or

* * * * *

(2) * * *

(i) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. The NAICS code assigned to an order must be a NAICS code included in the underlying Multiple Award Contract. When placing an order under a Multiple Award Contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principal purpose of each order. In cases where an agency can issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition. If the NAICS code corresponding to the principal purpose of the order is not contained in the underlying Multiple Award Contract, the contracting officer may not use the Multiple Award Contract to issue that order.

* * * * *

(e) When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited, SBA may clarify, complete, or supply a NAICS code designation or size standard, as appropriate, in connection with a formal size determination or size appeal.

* * * * *

- 4. In § 121.404:
- a. Amend paragraph (a) by:
- i. Revising paragraphs (a) introductory text and (a)(1); and
- ii. Adding a paragraph heading to paragraph (a)(2);
- b. Revising paragraph (b);
- c. Adding a paragraph heading to paragraph (c);
- d. Revising paragraph (d);
- e. Adding a paragraph heading to paragraph (e) and a sentence at the end of the paragraph;
- f. Adding a paragraph heading to paragraph (f);
- g. Amend paragraph (g) by:
- i. Redesignating paragraph (g)(2)(ii)(D) as paragraph (g)(2)(iii);
- ii. Revising paragraphs (g) introductory text, (g)(2)(ii)(C) and newly redesignated paragraph(g)(2)(iii); and
- iii. Adding paragraph (g)(2)(iv) and a new third sentence to paragraph (g)(3) introductory text; and
- h. Adding a paragraph heading to paragraph (h).

The additions and revisions read as follows:

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

(a) *Time of size*—(1) *Multiple award contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) *Single NAICS.* If a single NAICS code is assigned as set forth in § 121.402(c)(1)(i), SBA determines size status for the underlying Multiple Award Contract at the time of initial offer (or other formal response to a solicitation), which includes price, based upon the size standard set forth in the solicitation for the Multiple Award Contract, unless the concern was

required to recertify under paragraph (g)(1), (2), or (3) of this section.

(A) Unrestricted Multiple Award Contracts. For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for goaling purposes for each order issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) Set-aside Multiple Award Contracts. For a Multiple Award Contract that is set aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for each order or Blanket Purchase Agreement issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement.

(ii) *Multiple NAICS.* If multiple NAICS codes are assigned as set forth in § 121.402(c)(1)(ii), SBA determines size status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for a Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.*, CLIN, SIN, Sector, FA or equivalent) for which the business concern submits an offer and represents that it qualifies as small for the Multiple Award Contract, unless the business concern was required to recertify under paragraph (g)(1), (2), or (3) of this section. If the business concern (including a joint venture) submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent).

(A) Unrestricted Multiple Award Contracts. For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for goaling purposes for each order issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or Blanket Purchase Agreement for a discrete category under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.*, small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract for discrete categories has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) Set-aside Multiple Award Contracts. For a Multiple Award Contract that is set aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for each order or Agreement issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase.

(iii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or Agreement issued against a Multiple Award Contract if the contracting officer requests a new size certification for the order or Agreement.

(2) *Agreements.* * * *

(b) *Eligibility for SBA programs.* A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a HUBZone small business (under part 126 of this chapter), or as a women-owned small business concern (under part 127 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification.

(c) *Certificates of competency.* * * *

(d) *Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Size status is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding for the following purposes: compliance with the nonmanufacturer rule set forth in § 121.406(b)(1), the ostensible subcontractor rule set forth in § 121.103(h)(4), and the joint venture agreement requirements in § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.

(e) *Subcontracting.* * * * A prime contractor may rely on the self-certification of subcontractor provided it does not have a reason to doubt the concern's self-certification.

(f) *Two-step procurements.* * * *

(g) *Effect of size certification and recertification.* A concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract. Similarly, a concern that represents itself as a small business and qualifies as small after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business until throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business,

except that a required recertification as other than small under paragraph (g)(1), (2), or (3) of this section changes the firm's status for future options and orders. The following exceptions apply to this paragraph (g):

* * * * *

(2) * * *

(ii) * * *

(C) In the context of a joint venture that has been awarded a contract or order as a small business, from any partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity.

(iii) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal) occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract. If the merger, sale or acquisition (including agreements in principal) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

(iv) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

Example 1 to paragraph (g)(2)(iii). Indian Tribe X owns 100% of small business ABC. ABC wins an award for a small business set-aside contract. In year two of contract performance, X changes the ownership of ABC so that X owns 100% of a holding company XYZ, Inc., which in turn owns 100% of ABC. This restructuring does not require ABC to recertify its status as a small business because it continues to be 100% owned (indirectly rather than directly) by Indian Tribe X.

(3) * * * A contracting officer may also request size recertification, as he or she deems appropriate, prior to the 120-day point in the fifth year of a long-term multiple award contract. * * *

* * * * *

(h) *Follow-on contracts.* * * *

§ 121.406 [Amended]

· 5. Amend § 121.406 by removing the word ''provided'' and adding in its place the word ''provide'' in paragraph (a) introductory text.

· 6. Amend § 121.603 by adding paragraph (c)(3) to read as follows:

§ 121.603 How does SBA determine whether a Participant is small for a particular 8(a) BD subcontract?

* * * * *

(c) * * *

(3) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

* * * * *

· 7. Amend § 121.702 by revising paragraph (c)(6) to read as follows:

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

* * * * *

(c) * * *

(6) *Size requirement for joint ventures.* Two or more small business concerns may submit an application as a joint venture. The joint venture will qualify as small as long as each concern is small under the size standard for the SBIR program, found at § 121.702(c), or the joint venture meets the exception at § 121.103(h)(3)(ii) for two firms approved to be a mentor and protégé under SBA's All Small Mentor-Protégé Program.

* * * * *

· 8. Amend § 121.1001 by revising paragraphs (a)(1)(iii), (a)(2)(iii), (a)(3)(iv), (a)(4)(iii), (a)(6)(iv), (a)(7)(iii), (a)(8)(iv), (a)(9)(iv), (b)(7), and (b)(12) to read as follows:

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

(a) * * *

(1) * * *

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, the Director, Office of Government Contracting, or the Associate General Counsel for Procurement Law; and

* * * * *

(2) * * *

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(3) * * *

(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting, or the SBA's Associate General Counsel for Procurement Law; and

* * * * *

(4) * * *

(iii) The responsible SBA Government Contracting Area Director; the Director, Office of Government Contracting; the Associate Administrator, Investment Division, or the Associate General Counsel for Procurement Law.

* * * * *

(6) * * *

(iv) The SBA Director, Office of HUBZone, or designee, or the SBA Associate General Counsel for Procurement Law.

(7) * * *

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(8) * * *

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(9) * * *

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(b) * * *

(7) In connection with initial or continued eligibility for the WOSB program, the following may request a formal size determination:

(i) The applicant or WOSB/EDWOSB; or

(ii) The Director of Government Contracting or the Deputy Director, Program and Resource Management, for the Office of Government Contracting.

* * * * *

(12) In connection with eligibility for the SDVO program, the following may request a formal size determination:

(i) The SDVO business concern; or

(ii) The Director of Government Contracting or designee.

* * * * *

· 9. Amend § 121.1004 by revising paragraph (a)(2)(ii) and adding paragraph (a)(2)(iii) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(2) * * *

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a size recertification in connection with that order; or

(iii) Except for orders or Blanket Purchase Agreements issued under any

Federal Supply Schedule contract, an order or Blanket Purchase Agreement set-aside for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

* * * * *

■ 10. Amend § 121.1103 by revising paragraph (c)(1)(i) to read as follows:

§ 121.1103 What are the procedures for appealing a NAICS code or size standard designation?

* * * * *

(c) * * *

(1) * * *

(i) Stay the date for the closing of receipt of offers;

* * * * *

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

■ 11. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 12. Amend § 124.3 by adding in alphabetical order a definition for ''Follow-on requirement or contract'' to read as follows:

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

* * * * *

Follow-on requirement or contract. The determination of whether a particular requirement or contract is a follow-on includes consideration of whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.

* * * * *

■ 13. Amend § 124.105 by revising paragraph (g) and paragraphs (i)(2) and (4) to read as follows:

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

* * * * *

(g) *Ownership of another current or former Participant by an immediate family member.* (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and any of the following circumstances exist:

(i) The concerns are connected by any common ownership or management, regardless of amount or position;

(ii) The concerns have a contractual relationship that was not conducted at arm's length;

(iii) The concerns share common facilities; or

(iv) The concerns operate in the same primary NAICS code and the individual seeking to qualify the applicant concern does not have management or technical experience in that primary NAICS code.

Example 1 to paragraph (g)(1). X applies to the 8(a) BD program. X is 95% owned by A and 5% by B, A's father and the majority owner in a former 8(a) Participant. Even though B has no involvement in X, X would be ineligible for the program.

Example 2 to paragraph (g)(1). Y applies to the 8(a) BD program. C owns 100% of Y. However, D, C's sister and the majority owner in a former 8(a) Participant, is acting as a Vice President in Y. Y would be ineligible for the program.

Example 3 to paragraph (g)(1). X seeks to apply to the 8(a) BD program with a primary NAICS code in plumbing. X is 100% owned by A. Z, a former 8(a) participant with a primary industry in general construction, is owned 100% by B, A's brother. For general construction jobs, Z has subcontracted plumbing work to X in the past at normal commercial rates. Subcontracting work at normal commercial rates would not preclude X from being admitted to the 8(a) BD program. X would be eligible for the program.

(2) If the AA/BD approves an application under paragraph (g)(1) of this section, SBA will, as part of its annual review, assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member. SBA may initiate proceedings to terminate a firm from further participation in the 8(a) BD program if it is apparent that there are connections between the two firms that were not disclosed to the AA/BD at the time of application or that came into existence after program admittance.

* * * * *

(i) * * *

(2) Prior approval by the AA/BD is not needed where all non-disadvantaged individual (or entity) owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction, the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, or the disadvantaged individual or entity in control of the Participant will increase the percentage of its ownership interest. The concern must notify SBA within 60 days of such a change in ownership.

Example 1 to paragraph (i)(2). Disadvantaged individual A owns 90% of 8(a) Participant X; non-disadvantaged individual B owns 10% of X. In order to raise additional capital, X seeks to change its ownership structure such that A would own 80%, B would own 10% and C would own 10%. X can accomplish this change in ownership without prior SBA approval. Non-disadvantaged owner B is not involved in the transaction and non-disadvantaged individual C owns less than 20% of X both before and after the transaction.

Example 2 to paragraph (i)(2). Disadvantaged individual C owns 60% of 8(a) Participant Y; non-disadvantaged individual D owns 30% of Y; and non-disadvantaged individual E owns 10% of Y. C seeks to transfer 5% of Y to E. Prior SBA approval is not needed. Although non-disadvantaged individual D owns more than 20% of Y, D is not involved in the transfer. Because the only non-disadvantaged individual involved in the transfer, E, owns less than 20% of Y both before and after the transaction, prior approval is not needed.

Example 3 to paragraph (i)(2). Disadvantaged individual A owns 85% of 8(a) Participant X; non-disadvantaged individual B owns 15% of X. A seeks to transfer 15% of X to B. Prior SBA approval is needed. Although B, the non-disadvantaged owner of X, owns less than 20% of X prior to the transaction, prior approval is needed because B would own more than 20% after the transaction.

Example 4 to paragraph (i)(2). ANC A owns 60% of 8(a) Participant X; non-disadvantaged individual B owns 40% of X. B seeks to transfer 15%

to A. Prior SBA approval is not needed. Although a non-disadvantaged individual who is involved in the transaction, B, owns more than 20% of X both before and after the transaction, SBA approval is not needed because the change only increases the percentage of A's ownership interest in X.

* * * * *

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA may suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

* * * * *

- 14. Amend § 124.109 by:
- a. Revising the section heading;
- b. Adding paragraph (a)(7);
- c. Revising paragraph (c)(3)(ii);
- d. Adding paragraphs (c)(3)(iv) and (c)(4)(iii)(C); and
- e. Revising paragraphs (c)(6)(iii) and (c)(7)(ii).

The revisions and additions to read as follows:

§ 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to and remaining eligible for the 8(a) BD program?

(a) * * *

(7) Notwithstanding § 124.105(i), where an ANC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 60 days of the transfer.

* * * * *

(c) * * *

(3) * * *

(ii) A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern.

(A) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. However, a tribally-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(B) If the primary NAICS code of a tribally-owned Participant is changed pursuant to § 124.112(e), the tribe can submit an application and qualify another firm owned by the tribe for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

Example 1 to paragraph (c)(3)(ii)(B). Tribe X owns 100% of 8(a) Participant A. A entered the 8(a) BD program with a primary NAICS code of 236115, New Single-Family Housing Construction (except For-Sale Builders). After four years in the program, SBA noticed that the vast majority of A's revenues were in NAICS Code 237310, Highway, Street, and Bridge Construction, and notified A that SBA intended to change its primary NAICS code pursuant to § 124.112(e). A agreed to change its primary NAICS Code to 237310. Once the change is finalized, Tribe X can immediately submit a new application to qualify another firm that it owns for participation in the 8(a) BD program with a primary NAICS Code of 236115.

* * * * *

(iv) Notwithstanding § 124.105(i), where a Tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the Tribe and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(4) * * *

(iii) * * *

(C) Because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants.

* * * * *

(6) * * *

(iii) The Tribe, a tribally-owned economic development corporation, or other relevant tribally-owned holding company vested with the authority to oversee tribal economic development or business ventures has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(7) * * *

(ii) The officers, directors, and all shareholders owning an interest of 20% or more (other than the tribe itself) of a tribally-owned applicant or Participant must demonstrate good character (*see* § 124.108(a)) and cannot fail to pay significant Federal obligations owed to the Federal Government (*see* § 124.108(e)).

- 15. Amend § 124.110 by revising the section heading and paragraph (e) to read as follows:

§ 124.110 Do Native Hawaiian Organizations (NHOs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

* * * * *

(e) An NHO cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. An NHO may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the NHO operates in the 8(a) BD program as its primary NAICS code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same NHO. However, an NHO-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(2) If the primary NAICS code of a Participant owned by an NHO is changed pursuant to § 124.112(e), the NHO can submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

* * * * *

- 16. Amend § 124.111 by revising the section heading, adding paragraph

(c)(3), and revising paragraph (d) to read as follows:

§ 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

* * * * *

(c) * * *

(3) Notwithstanding § 124.105(i), where a CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the CDC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(d) A CDC cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A CDC may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary SIC code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same CDC. However, a CDC-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program.

(2) If the primary NAICS code of a Participant owned by a CDC is changed pursuant to § 124.112(e), the CDC can submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

* * * * *

· 17. Amend § 124.112 by revising paragraph (d)(5), redesignating paragraph (e)(2)(iv) as paragraph (e)(2)(v), and adding a new paragraph (e)(2)(iv).

The revision and addition read as follows:

§ 124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

* * * * *

(d) * * *

(5) The excessive withdrawal analysis does not apply to Participants owned by Tribes, ANCs, NHOs, or CDCs where a withdrawal is made for the benefit of the Tribe, ANC, NHO, CDC or the native or shareholder community. It does, however, apply to withdrawals from a firm owned by a Tribe, ANC, NHO, or CDC that do not benefit the relevant entity or community. Thus, if funds or assets are withdrawn from an entity-owned Participant for the benefit of a non-disadvantaged manager or owner that exceed the withdrawal thresholds, SBA may find that withdrawal to be excessive. However, a non-disadvantaged minority owner may receive a payout in excess of the excessive withdrawal amount if it is a pro rata distribution paid to all shareholders (*i.e.,* the only way to increase the distribution to the Tribe, ANC, NHO or CDC is to increase the distribution to all shareholders) and it does not adversely affect the business development of the Participant.

Example 1 to paragraph (d)(5). Tribally-owned Participant X pays $1,000,000 to a non-disadvantaged manager. If that was not part of a pro rata distribution to all shareholders, that would be deemed an excessive withdrawal.

Example 2 to paragraph (d)(5). ANC-owned Participant Y seeks to distribute $550,000 to the ANC and $450,000 to non-disadvantaged individual A based on their 55%/45% ownership interests. Because the distribution is based on the pro rata share of ownership, this would not be prohibited as an excessive withdrawal unless SBA determined that Y would be adversely affected.

(e) * * *

(2) * * *

(iv) A Participant may appeal a district office's decision to change its primary NAICS code to SBA's Associate General Counsel for Procurement Law (AGC/PL) within 10 business days of receiving the district office's final determination. The AGC/PL will examine the record, including all information submitted by the Participant in support of its position as to why the primary NAICS code contained in its business plan continues to be appropriate despite performing more work in another NAICS code, and issue a final agency decision within 15 business days of receiving the appeal.

* * * * *

· 18. Amend § 124.203 by revising the first two sentences and adding a new third sentence to read as follows:

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

Each 8(a) BD applicant concern must submit information and supporting documents required by SBA when applying for admission to the 8(a) BD program. This information may include, but not be limited to, financial data and statements, copies of filed Federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional information or documents SBA deems necessary to determine eligibility. Each individual claiming disadvantaged status must also authorize SBA to request and receive tax return information directly from the Internal Revenue Service. * * *

· 19. Amend § 124.204 by adding a sentence to the end of paragraph (a) to read as follows:

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

(a) * * * Where during its screening or review SBA requests clarifying, revised or other information from the applicant, SBA's processing time for the application will be suspended pending the receipt of such information.

* * * * *

· 20. Revise § 124.205 to read as follows:

§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

There is no reconsideration process for applications that have been declined. An applicant which has been declined may file an appeal with SBA's Office of Hearings and Appeals pursuant to § 124.206, or reapply to the program pursuant to § 124.207.

§ 124.206 [Amended]

· 21. Revise § 124.206 by removing and reserving paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

· 22. Revise § 124.207 to read as follows:

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

A concern which has been declined for 8(a) BD program participation may submit a new application for admission to the program at any time after 90 days from the date of the Agency's final decision to decline. However, a concern that has been declined three times within 18 months of the date of the first

final Agency decision finding the concern ineligible cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decision to decline.

§ 124.301 [Redesignated as § 124.300]

- 23. Redesignate § 124.301 as § 124.300.
- 24. Add new § 124.301 to read as follows:

§ 124.301 Voluntary withdrawal or voluntary early graduation.

(a) A Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. Where a Participant has substantially achieved the goals and objectives set forth in its business plan, it may elect to voluntarily early graduate from the 8(a) BD program.

(b) To initiate withdrawal or early graduation from the 8(a) BD program, a Participant must notify its servicing SBA district office of its intent to do so in writing. Once the SBA servicing district office processes the request and the District Director recognizes the withdrawal or early graduation, the Participant is no longer eligible to receive any 8(a) BD program assistance.

- 25. Amend § 124.304(d) by revising the paragraph heading and adding a sentence at the end of paragraph (d) to read as follows:

§ 124.304 What are the procedures for early graduation and termination?

* * * * *

(d) *Notice requirements and effect of decision.* * * * Once the AA/BD issues a decision to early graduate or terminate a Participant, the Participant will be immediately ineligible to receive further program assistance. If OHA overrules the AA/BD's decision on appeal, the length of time between the AA/BD's decision and OHA's decision on appeal will be added to the Participant's program term.

* * * * *

- 26. Amend § 124.305 by:
- a. Revising paragraph (a);
- b. Revising the introductory text of paragraph (d);
- c. Revising paragraph (d)(3);
- d. Revising the introductory text of paragraph (h)(1);
- d. Revising paragraphs (h)(1)(ii) and (iv);
- e. Adding paragraph (h)(1)(v);
- f. Redesignating paragraph (h)(6) as (h)(7); and
- g. Adding a new paragraph (h)(6).

The revisions and additions read as follows:

§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

(a) Except as set forth in paragraph (h) of this section, the AA/BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

* * * * *

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension.

* * * * *

(3) OHA's review is limited to determining whether the Government's interests need to be protected, unless a termination action has also been initiated and the Administrative Law Judge consolidates the suspension and termination proceedings. In such a case, OHA will also consider the merits of the termination action.

* * * * *

(h)(1) Notwithstanding paragraph (a) of this section, SBA will suspend a Participant from receiving further 8(a) BD program benefits where:

* * * * *

(ii) A disadvantaged individual who is involved in controlling the day-to-day management and control of the Participant is called to active military duty by the United States, his or her participation in the firm's management and daily business operations is critical to the firm's continued eligibility, the Participant does not designate another disadvantaged individual to control the concern during the call-up period, and the Participant requests to be suspended during the call-up period;

* * * * *

(iv) Federal appropriations for one or more Federal departments or agencies have lapsed, a Participant would lose an 8(a) sole source award due to the lapse in appropriations (*e.g.*, SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant or an agency could not offer a sole source 8(a) requirement to the program on behalf of the Participant due to the lapse in appropriations, and the Participant's program term would end during the lapse), and the Participant elects to suspend its participation in the 8(a) BD program during the lapse in Federal appropriations; or

(v) A Participant has not submitted a business plan to its SBA servicing office within 60 days after program admission.

* * * * *

(6) Where a Participant is suspended pursuant to paragraph (h)(1)(iii) or paragraph (h)(1)(v) of this section, the length of the suspension will be added to the concern's program term.

* * * * *

- 27. Amend § 124.402 by revising paragraph (b) to read as follows:

§ 124.402 How does a Participant develop a business plan?

* * * * *

(b) *Submission of initial business plan.* Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission.

* * * * *

- 28. Amend § 124.501 by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, by adding new paragraphs (g) and (k), and by revising newly redesignated paragraph (h) to read as follows:

§ 124.501 What general provisions apply to the award of 8(a) contracts?

* * * * *

(g) Before a Participant may be awarded either a sole source or competitive 8(a) contract, SBA must determine that the Participant is eligible for award. SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract, and after the apparent successful offeror is identified for a competitive 8(a) contract. Eligibility is based on 8(a) BD program criteria, including whether the Participant:

(1) Qualifies as a small business under the size standard corresponding to the NAICS code assigned to the requirement;

(2) Is in compliance with any applicable competitive business mix targets established or remedial measure imposed by § 124.509 that does not include the denial of future sole source 8(a) contracts;

(3) Complies with the continued eligibility reporting requirements set forth in § 124.112(b);

(4) Has a bona fide place of business in the applicable geographic area if the procurement is for construction;

(5) Has not received 8(a) contracts in excess of the dollar limits set forth in § 124.519 for a sole source 8(a) procurement;

(6) Has complied with the provisions of § 124.513(c) and (d) if it is seeking a sole source 8(a) award through a joint venture; and

(7) Can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 124.510.

(h) For a sole source 8(a) procurement, a concern must be a current Participant in the 8(a) BD program at the time of award. If a firm's term of participation in the 8(a) BD program ends (or the firm otherwise exits the program) before a sole source 8(a) contract can be awarded, award cannot be made to that firm. This applies equally to sole source orders issued under multiple award contracts. For a competitive 8(a) procurement, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation as provided in § 124.507(d).

* * * * *

(k) In order to be awarded a sole source or competitive 8(a) construction contract, a Participant must have a bona fide place of business within the applicable geographic location determined by SBA. This will generally be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area (MSA), or a contiguous county to (whether in the same or different state) where the work will be performed. SBA may determine that a Participant with a bona fide place of business anywhere within the state (if the state is serviced by more than one SBA district office), one or more other SBA district offices (in the same or another state), or another nearby area is eligible for the award of an 8(a) construction contract.

(1) A Participant may have bona fide places of business in more than one location.

(2) In order for a Participant to establish a bona fide place of business in a particular geographic location, the SBA district office serving the geographic area of that location must determine if the location in fact qualifies as a bona fide place of business under SBA's requirements.

(i) A Participant must submit a request for a bona fide business determination to the SBA district office servicing it. Such request may, but need not, relate to a specific 8(a) requirement. In order to apply to a specific competitive 8(a) solicitation, such request must be submitted at least 20 working days before initial offers that include price are due.

(ii) The servicing district office will immediately forward the request to the SBA district office serving the geographic area of the particular location for processing. Within 10 working days of receipt of the submission, the reviewing district office will conduct a site visit, if practicable. If not practicable, the reviewing district office will contact the Participant within such 10-day period to inform the Participant that the reviewing office has received the request and may ask for additional documentation to support the request.

(iii) In connection with a specific competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical area within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. If the request is not related to a specific procurement, the reviewing office will make a determination within 30 working days of its receipt of the request from the servicing district office, if practicable.

(A) Where SBA does not provide a determination within the identified time limit, a Participant may presume that SBA has approved its request for a bona fide place of business and submit an offer for a competitive 8(a) procurement that requires a bona fide place of business in the requested area.

(B) In order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not provided a determination prior to the time that a Participant is identified as the apparent successful offeror, SBA will make the bona fide place of business determination as part of the eligibility determination set forth in paragraph (g)(4) of this section within 5 days of receiving a procuring activity's request for an eligibility determination, unless the procuring activity grants additional time for review. If, due to deficiencies in a Participant's request, SBA cannot make a determination, and the procuring activity does not grant additional time for review, SBA will be unable to verify the Participant's eligibility for award and the Participant will be ineligible for award.

(3) The effective date of a bona fide place of business is the date that the evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.

(4) Except as provided in paragraph (k)(2)(iii) of this section, in order for a Participant to be eligible to submit an offer for an 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement.

(5) Once a Participant has established a bona fide place of business, the Participant may change the location of the recognized office without prior SBA approval. However, the Participant must notify SBA and provide documentation demonstrating an office at that new location within 30 days after the move. Failure to timely notify SBA will render the Participant ineligible for new 8(a) construction procurements limited to that geographic area.

- 29. Amend § 124.503 by:
- a. Removing the phrase ''in § 124.507(b)(2)'' and adding in its place the phrase ''in § 124.501(g)'' in paragraph (a)(1);
- b. Redesignating paragraphs (e) through (j) as paragraphs (f) through (k), respectively;
- c. Adding a new paragraph (e);
- d. Revising newly redesignated paragraph (g);
- e. Revising the introductory text of the newly redesignated paragraph (h);
- f. Adding the phrase ''or BPA'' after the phrase ''BOA'', wherever it appears, in the newly redesignated paragraphs (h)(1) through (4);
- g. Revising newly redesignated paragraph (i)(1)(iii);
- h. Adding a sentence at the end of newly redesignated paragraph (i)(1)(iv); and
- i. Revising newly redesignated paragraphs (i)(2)(ii) and (i)(2)(iv).

The additions and revisions read as follows:

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

* * * * *

(e) *Withdrawal/substitution of offered requirement or Participant.* After SBA has accepted a requirement for award as a sole source 8(a) contract on behalf of a specific Participant (whether nominated by the procuring agency or identified by SBA for an open requirement), if the procuring agency believes that the identified Participant is not a good match for the procurement—including for such reasons as the procuring agency finding the Participant non-responsible or the negotiations between the procuring agency and the Participant otherwise failing—the procuring agency may seek to substitute another Participant for the originally

identified Participant. The procuring agency must inform SBA of its concerns regarding the originally identified Participant and identify whether it believes another Participant could fulfill its needs.

(1) If the procuring agency and SBA agree that another Participant can fulfill its needs, the procuring agency will withdraw the original offering and reoffer the requirement on behalf of another 8(a) Participant. SBA will then accept the requirement on behalf of the newly identified Participant and authorize the procuring agency to negotiate directly with that Participant.

(2) If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency will withdraw the original offering letter and fulfill its needs outside the 8(a) BD program.

(3) If the procuring agency believes that another Participant cannot fulfill its needs, but SBA does not agree, SBA may appeal that decision to the head of the procuring agency pursuant to § 124.505(a)(2).

* * * * *

(g) *Repetitive acquisitions.* A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award.

(1) This enables SBA to determine:

(i) Whether the requirement should be a competitive 8(a) award;

(ii) A nominated firm's eligibility, whether or not it is the same firm that performed the previous contract;

(iii) The affect that contract award would have on the equitable distribution of 8(a) contracts; and

(iv) Whether the requirement should continue under the 8(a) BD program.

(2) Where a procuring agency seeks to reprocure a follow-on requirement through an 8(a) contracting vehicle which is not available to all 8(a) BD Program Participants (*e.g.*, a multiple award or Governmentwide acquisition contract that is itself an 8(a) contract), and the previous/current 8(a) award was not so limited, SBA will consider the business development purposes of the program in determining how to accept the requirement.

* * * * *

(h) *Basic Ordering Agreements (BOAs) and Blanket Purchase Agreements (BPAs).* Neither a Basic Ordering Agreement (BOA) nor a Blanket Purchase Agreement (BPA) is a contract under the FAR. *See* 48 CFR 13.303 and 48 CFR 16.703(a). Each order to be issued under a BOA or BPA is an individual contract. As such, the procuring activity must offer, and SBA must accept, each order under a BOA or BPA in addition to offering and accepting the BOA or BPA itself.

* * * * *

(i)

(1) * * *

(iii) A concern awarded a task or delivery order contract or Multiple Award Contract that was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants may generally continue to receive new orders even if it has grown to be other than small or has exited the 8(a) BD program, and agencies may continue to take SDB credit toward their prime contracting goals for orders awarded to 8(a) Participants. A procuring agency may seek to award an order only to a concern that is a current Participant in the 8(a) program at the time of the order. In such a case, the procuring agency will announce its intent to limit the award of the order to current 8(a) Participants and verify a contract holder's 8(a) BD status prior to issuing the order. Where a procuring agency seeks to award an order to a concern that is a current 8(a) Participant, a concern must be an eligible Participant in accordance with § 124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation.

(iv) * * * To be eligible for the award of a sole source order, a concern must be a current Participant in the 8(a) BD program at the time of award.

(2) * * *

(ii) The order must be competed exclusively among only the 8(a) awardees of the underlying multiple award contract;

* * * * *

(iv) SBA must verify that a concern is an eligible 8(a) Participant in accordance with § 124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation. If a concern has exited the 8(a) BD program prior to that date, it will be ineligible for the award of the order.

* * * * *

- 30. Amend § 124.504 by:
- a. Revising the section heading and paragraph (b);
- b. Removing the term ''Simplified Acquisition Procedures'' and adding in its place the phrase ''the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101)'' in paragraph (c) introductory text;
- c. Removing the word ''will'' and adding in its place the word ''may'' in paragraph (c)(1)(ii)(C);
- d. Adding a paragraph (c)(4); and
- e. Revising the paragraph heading for paragraph (d) and paragraphs (d)(1) introductory text and (d)(4).

The revisions and addition read as follows:

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

* * * * *

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and did not clearly evidence its intent to conduct an 8(a) competitive acquisition.

* * * * *

(c) * * *

(4) SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach.

(d) *Release for non-8(a) or limited 8(a) competition.* (1) Except as set forth in paragraph (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency must notify SBA that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new. Additionally, a procuring agency must notify SBA where it seeks to reprocure a follow-on requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants and the previous/current 8(a) award was not so limited. If a procuring agency would like to fulfill a follow-on requirement outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the AA/BD to do so. In determining whether to release a requirement from the 8(a) BD program, SBA will consider:

* * * * *

(4) The requirement that a follow-on procurement must be released from the

8(a) BD program in order for it to be fulfilled outside the 8(a) BD program does not apply:

(i) Where previous orders were offered to and accepted for the 8(a) BD program pursuant to § 124.503(i)(2); or

(ii) Where a procuring agency will use a mandatory source (*see* FAR Subparts 8.6 and 8.7(48 CFR subparts 8.6 and 8.7)). In such a case, the procuring agency should notify SBA at least 30 days prior to the end of the contract or order.

- 31. Amend § 124.505 by:
- a. Removing the word ''and'' at the end of paragraph (a)(2);
- b. Redesignating paragraph (a)(3) as paragraph (a)(4); and
- c. Adding new paragraph (a)(3).

The addition reads as follows:

§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?

(a) * * *

(3) A decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in § 124.504(d); and

* * * * *

- 32. Amend § 124.507 by:
- a. Revising paragraph (b)(2);
- b. Removing paragraph (b)(3);
- c. Redesignating paragraphs (b)(4) through (6) as paragraphs (b)(3) through (5), respectively;
- d. Removing paragraph (c)(1);
- e. Redesignating paragraphs (c)(2) and (3) as paragraphs (c)(1) and (2), respectively;
- f. Revising newly redesignated paragraph (c)(1); and
- g. Adding a new paragraph (d)(3).

The revisions and addition read as follows:

§ 124.507 What procedures apply to competitive 8(a) procurements?

* * * * *

(b) * * *

(2) SBA determines a Participant's eligibility pursuant to § 124.501(g).

* * * * *

(c) * * *

(1) *Construction competitions.* Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only those Participants with bona fide places of business within the appropriate geographical boundaries are eligible to submit offers.

* * * * *

(d) * * *

(3) For a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

- 33. Amend § 124.509 by:
- a. Removing the word ''maximum'' and adding in its place the words ''good faith'' in paragraph (a)(1);
- b. Removing the words ''substantial and sustained'' and adding in their place the words ''good faith'' in paragraph (a)(2);
- c. Revising the table in paragraph (b)(2);
- d. Revising paragraph (d); and
- e. Revising paragraph (e).

The revisions read as follows:

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

* * * * *

(b) * * *

TABLE 1 TO PARAGRAPH (b)

Participants year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

* * * * *

(d) *Consequences of not meeting competitive business mix targets.* (1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year must demonstrate to SBA the specific efforts it made during that year to obtain non-8(a) revenue.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA will increase its monitoring of the Participant's contracting activity during the ensuing program year.

(3) As a condition of eligibility for new 8(a) sole source contracts, SBA may require a Participant that fails to achieve the non-8(a) business activity targets to take one or more specific actions. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling from an SBA resource partner or otherwise, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation. Where any such condition is imposed, SBA will not accept a sole source requirement offered to the 8(a) BD program on behalf of the Participant until the Participant demonstrates to SBA that the condition has been met.

(4) If SBA determines that a Participant has not made good faith efforts to meet its applicable non-8(a) business activity target, the Participant will be ineligible for sole source 8(a) contracts in the current program year. SBA will notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in paragraphs (d)(4)(i) and (ii) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current

program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

(A) To qualify for reinstatement during the first six months of the current program year (*i.e.,* at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non-8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards.

(B) To qualify for reinstatement during the last six months of the current program year (*i.e.,* at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity target as of that point in the current program year.

Example 1 to paragraph (d)(4). Firm A had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of $8.5 million and non-8(a) revenues of $1.5 million (15 percent). Based on total revenues of $10 million, Firm A should have had at least $2.5 million in non-8(a) revenues. Thus, Firm A missed its target by $1 million (its target ($2.5 million) minus its actual non-8(a) revenues ($1.5 million)). Because Firm A did not achieve its non-8(a) business activity target and SBA determined that it did not make good faith efforts to obtain non-8(a) revenue, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling $1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(4). Firm B had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which $8.5 million were 8(a) revenues and $1.5 million were non-8(a) revenues, and SBA determined that Firm B did not make good faith efforts to meet its non-8(a) business activity target. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least $1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

(5) In determining whether a Participant has achieved its required non-8(a) business activity target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non-8(a) business at its nine-month review, SBA will measure 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(6) SBA may initiate proceedings to terminate a Participant from the 8(a) BD program where the firm makes no good faith efforts to obtain non-8(a) revenues.

(e) Waiver of sole source prohibition. (1) Despite a finding by SBA that a Participant did not make good faith efforts to meet its non-8(a) business activity target, SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target.

(2) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to SBA that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

(3) The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

(4) A waiver generally applies to a specific sole source opportunity. If SBA grants a waiver with respect to a specific procurement, the firm will be able to self-market its capabilities to the applicable procuring activity with respect to that procurement. If the Participant seeks an additional sole source opportunity, it must request a waiver with respect to that specific opportunity. Where, however, a Participant can demonstrate that the same extenuating circumstances beyond its control affect its ability to receive specific multiple 8(a) contracts, one waiver can apply to those multiple contract opportunities.

- 34. Amend § 124.513 by revising paragraphs (c)(2) and (4), the second sentence of paragraph (c)(5), and paragraph (e) to read as follows:

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

* * * * *

(c) * * *

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the 8(a) Participant at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the 8(a) Participant if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the 8(a) Participant for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or a percentage agreed to by the parties to the joint venture whereby the 8(a) Participant(s) receive profits from the

joint venture that exceed the percentage commensurate with the work performed by the 8(a) Participant(s);

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(e) *Prior approval by SBA.* (1) When a joint venture between one or more 8(a) Participants seeks a sole source 8(a) award, SBA must approve the joint venture prior to the award of the sole source 8(a) contract. SBA will not approve joint ventures in connection with competitive 8(a) awards (*but see* § 124.501(g) for SBA's determination of Participant eligibility).

(2) Where a joint venture has been established for one 8(a) contract, the joint venture may receive additional 8(a) contracts provided the parties create an addendum to the joint venture agreement setting forth the performance requirements for each additional award (and provided any contract is awarded within two years of the first award as set forth in § 121.103(h)). If an additional 8(a) contract is a sole source award, SBA must also approve the addendum prior to contract award.

* * * * *

· 35. Amend § 124.514 by revising paragraph (b) to read as follows:

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

* * * * *

(b) *Priced options.* Except as set forth in § 124.521(e)(2), the procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

* * * * *

· 36. Amend § 124.515 by revising paragraph (d) to read as follows:

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

* * * * *

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in § 124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must certify that it is a small business for the size standard corresponding to the NAICS code assigned to each contract for which a waiver is sought. SBA will not grant a waiver for any contract if the work to be performed under the contract is not similar to the type of work previously performed by the acquiring concern.

* * * * *

· 37. Amend § 124.518 by revising paragraph (c) to read as follows:

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

* * * * *

(c) *Substitution of one 8(a) contractor for another.* SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of an 8(a) contract without invoking the termination for convenience or waiver provisions of § 124.515 where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded the 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

· 38. Amend § 124.519 by:
· a. Revising paragraph (a);
· b. Removing paragraph (c);
· c. Redesignating paragraph (b) as paragraph (c); and
· d. Adding a new paragraph (b).

The revision and addition read as follows:

§ 124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?

(a) A Participant (other than one owned by an Indian Tribe, ANC, NHO, or CDC) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of $100,000,000 during its participation in the 8(a) BD program.

(b) In determining whether a Participant has reached the limit identified in paragraph (a) of this section, SBA:

(1) Looks at the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications; and

(2) Will not consider 8(a) contracts awarded under the Simplified Acquisition Threshold.

* * * * *

· 39. Revise § 124.520 to read as follows:

§ 124.520 Can 8(a) BD Program Participants participate in SBA's Mentor-Protégé program?

(a) An 8(a) BD Program Participant, as any other small business, may participate in SBA's All Small Mentor-Protégé Program authorized under § 125.9 of this chapter.

(b) In order for a joint venture between a protégé and its SBA-approved mentor to receive the exclusion from affiliation with respect to a sole source or competitive 8(a) contract, the joint venture must meet the requirements set forth in § 124.513(c) and (d).

· 40. Amend § 124.521 by revising the last sentence of paragraph (e)(1) to read as follows:

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

* * * * *

(e) *Recertification.* (1) * * * Except as set forth in paragraph (e)(2) of this section, where a concern later fails to qualify as an 8(a) Participant, the procuring agency may exercise options and still count the award as an award to a Small Disadvantaged Business (SDB).

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

· 41. The authority citation for part 125 continues to read as follows:

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

· 42. Amend § 125.2 by revising paragraph (e)(6)(i) and adding a new paragraph (g) to read as follows:

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

* * * * *

(e) * * *

(6) * * *

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 4106(c), a contracting officer may set aside orders for small businesses, eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against full and open Multiple Award Contracts. In addition, a contracting officer may set aside orders for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs

against total small business set-aside Multiple Award Contracts, partial small business set-aside Multiple Award Contracts, and small business reserves of Multiple Award Contracts awarded in full and open competition. Although a contracting officer can set aside orders issued under a small business set-aside Multiple Award Contract or reserve to any subcategory of small businesses, contracting officers are encouraged to review the award dollars under the Multiple Award Contract and aim to make available for award at least 50% of the award dollars under the Multiple Award Contract to all contract holders of the underlying small business set-aside Multiple Award Contract or reserve. However, a contracting officer may not further set aside orders for specific types of small business concerns against Multiple Award Contracts that are set-aside or reserved for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs (*e.g.*, a contracting officer cannot set-aside an order for 8(a) Participants that are also certified HUBZone small business concerns against an 8(a) Multiple Award Contract).

* * * * *

(g) *Capabilities, past performance, and experience.* When an offer of a small business prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the head of the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

- 43. Amend § 125.3 by adding a sentence to the end of paragraph (b)(2), and by revising the first sentence of paragraph (c)(1)(viii) and paragraph (c)(1)(ix) to read as follows:

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

* * * * *

(b) * * *

(2) * * * This applies whether the firm qualifies as a small business concern for the size standard corresponding to the NAICS code assigned to the contract, or is deemed to be treated as a small business concern by statute (*see e.g.*, 43 U.S.C. 1626(e)(4)(B)).

* * * * *

(c) * * *

(1) * * *

(viii) The contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) for which a small business concern received a preference. * * *

(ix) As a best practice, the contractor may provide the pre-award written notification cited in paragraph (c)(1)(viii) of this section to unsuccessful and small business offerors on subcontracts at or below the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) and should do so whenever practical; and

* * * * *

- 44. Amend § 125.5 by:
- a. Revising the third sentence of paragraph (a)(1);
- b. Redesignating paragraphs (f)(2) and (f)(3) as paragraphs (f)(3) and (f)(4) respectively;
- c. Adding a new paragraph (f)(2);
- d. Removing the phrase ''$100,000 or less, or in accordance with Simplified Acquisition Threshold procedures'' and adding in its place the phrase ''Less than or equal to the Simplified Acquisition Threshold'' in paragraph (g);
- e. Removing the phrase ''Between $100,000 and $25 million'' and adding in its place the phrase ''Above the Simplified Acquisition Threshold and less than or equal to $25 million'' in paragraph (g);
- f. Removing the term ''$100,000'' and adding in its place ''the simplified acquisition threshold'' in paragraphs (h) and (i).

The revision and addition read as follows:

§ 125.5 What is the Certificate of Competency Program?

(a) * * *

(1) * * * The COC Program is applicable to all Government procurement actions, with the exception of 8(a) sole source awards but including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. * * *

* * * * *

(f) * * *

(2) An offeror seeking a COC has the burden of proof to demonstrate that it possesses all relevant elements of responsibility and that it has overcome the contracting officer's objection(s).

* * * * *

- 45. Amend § 125.6 by:
- a. Revising paragraph (a) introductory text;
- b. Revising paragraph (a)(2)(ii)(B);
- c. Revising Examples 2, 3 and 4 to paragraph (a)(2);
- d. Revising the paragraph (b) introductory text; and
- e. Adding Example 3 to paragraph (b).

The revisions and addition read as follows:

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

(a) *General.* In order to be awarded a full or partial small business set-aside contract with a value greater than the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101), an 8(a) contract, an SDVO SBC contract, a HUBZone contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

* * * * *

(2) * * *

(ii) * * *

(B) For a multiple item procurement where a waiver as described in § 121.406(b)(5) of this chapter is granted for one or more items, compliance with the limitation on subcontracting requirement will be determined by combining the value of the items supplied by domestic small business manufacturers or processors with the value of the items subject to a waiver. As such, as long as the value of the items to be supplied by domestic small business manufacturers or processors plus the value of the items to be supplied that are subject to a waiver account for at least 50% of the value of the contract, the limitations on subcontracting requirement is met.

* * * * *

Example 2 to paragraph (a)(2). A procurement is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the item for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the one item for which

class waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 3 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that only four of these items are manufactured by small businesses. The value of the items manufactured by small business is estimated to be $400,000. The contracting officer seeks and is granted contract specific waivers on the other six items. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the items for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the six items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 4 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that three of the items can be sourced from small business manufacturers at this particular time, and the estimated value of these items is $300,000. There are no class waivers subject to the remaining seven items. In order for this procurement to be set aside for small business, a contracting officer must seek and be granted a contract specific waiver for one or more items totaling $200,000 (so that $300,000 plus $200,000 equals 50% of the value of the entire procurement). Once a contract specific waiver is received for one or more items, at least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or processors or by manufacturers or processors of the items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

* * * * *

(b) *Mixed contracts.* Where a contract integrates any combination of services, supplies, or construction, the contracting officer shall select the appropriate NAICS code as prescribed in § 121.402(b) of this chapter. The contracting officer's selection of the applicable NAICS code is determinative as to which limitation on subcontracting and performance requirement applies. Based on the NAICS code selected, the relevant limitation on subcontracting requirement identified in paragraphs (a)(1) through (4) of this section will apply only to that portion of the contract award amount. In no case shall more than one limitation on subcontracting requirement apply to the same contract.

* * * * *

Example 3 to paragraph (b). A procuring activity is acquiring both services and general construction through a small business set-aside. The total value of the requirement is $10,000,000, with the construction portion comprising $8,000,000, and the services portion comprising $2,000,000. The contracting officer appropriately assigns a construction NAICS code to the requirement. The 85% limitation on subcontracting identified in paragraph (a)(3) would apply to this procurement. Because the services portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the limitation on subcontracting requirement is $8,000,000. As such, the prime contractor cannot subcontract more than $6,800,000 to non-similarly situated entities, and the prime and/or similarly situated entities must perform at least $1,200,000.

* * * * *

· 46. Amend § 125.8 by:
· a. Revising paragraphs (b)(2)(ii) and (iv), the second sentence of paragraph (b)(2)(v), and paragraphs (b)(2)(xi) and (xii);
· b. Adding a new sentence at the end of paragraph (c)(1);
· c. Adding paragraph (c)(4); and
· d. Revising paragraphs (e), and (h)(2).

The revisions and additions read as follows:

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

* * * * *

(b) * * *

(2) * * *

(ii) Designating a small business as the managing venturer of the joint venture, and designating a named employee of the small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

* * * * *

(iv) Stating that the small business participant(s) must receive profits from the joint venture commensurate with the work performed by them, or a percentage agreed to by the parties to the joint venture whereby the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them, and that at the conclusion of the joint venture contract(s) and/or the termination of a joint venture, any funds remaining in the joint venture bank account shall distributed at the discretion of the joint venture members according to percentage of ownership;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(xi) Stating that annual performance-of-work statements required by paragraph (h)(1) must be submitted to SBA and the relevant contracting officer not later than 45 days after each operating year of the joint venture; and

(xii) Stating that the project-end performance-of-work required by paragraph (h)(2) must be submitted to SBA and the relevant contracting officer no later than 90 days after completion of the contract.

* * * * *

(c) * * *

(1) * * * Except as set forth in paragraph (c)(4) of this section, the 40% calculation for protégé workshare

follows the same rules as those set forth in § 125.6 concerning supplies, construction, and mixed contracts, including the exclusion of the same costs from the limitation on subcontracting calculation (*e.g.*, cost of materials excluded from the calculation in construction contracts).

* * * * *

(4) Work performed by a similarly situated entity will not count toward the requirement that a protégé must perform at least 40% of the work performed by a joint venture.

* * * * *

(e) *Capabilities, past performance and experience.* When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

* * * * *

(h) * * *

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by § 125.9, and upon request by SBA or the relevant contracting officer, the small business partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

* * * * *

- 47. Amend § 125.9 by:
- a. Revising paragraphs (b), (c)(1)(ii), and (c)(2) introductory text;
- b. Removing paragraph (c)(4);
- c. Revising paragraphs (d)(1) introductory text, (d)(1)(iii) introductory text, and (d)(1)(iii)(B);
- d. Adding paragraph (d)(6);
- e. Removing ''(*e.g.*, management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor)'' in paragraph (e)(1) introductory text, and adding in its place ''(*e.g.*, management and or technical assistance; loans and/or equity investments; bonding; use of equipment; export assistance; assistance as a subcontractor under prime contracts being performed by the protégé; cooperation on joint venture projects; or subcontracts under prime contracts being performed by the mentor)'';
- f. Revising paragraphs (e)(1)(i) and (e)(5);
- g. Redesignating paragraphs (e)(6) through (8) as paragraphs (e)(7) through (9), respectively;
- h. Adding new paragraph (e)(6);
- i. Revising paragraph (f);
- j. Revising paragraph (g) introductory text;
- k. Revising paragraph (g)(4);
- l. Adding paragraph (g)(5); and
- m. Revising paragraph (h)(1) introductory text.

The revisions and additions to read as follows:

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

* * * * *

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

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

(ii) Does not appear on the Federal list of debarred or suspended contractors; and

(iii) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) SBA will decline an application if SBA determines that the mentor does not possess good character or a favorable financial position, employs or otherwise controls the managers of the protégé, or is otherwise affiliated with the protégé. Once approved, SBA may terminate the mentor-protégé agreement if the mentor does not possess good character or a favorable financial position, was affiliated with the protégé at time of application, or is affiliated with the protégé for reasons other than the mentor-protégé agreement or assistance provided under the agreement.

(3) In order for SBA to agree to allow a mentor to have more than one protégé at time, the mentor and proposed additional protégé must demonstrate that the added mentor-protégé relationship will not adversely affect the development of either protégé firm (*e.g.*, the second firm may not be a competitor of the first firm).

(i) A mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés.

(ii) A mentor generally cannot have more than three protégés at one time. However, the first two mentor-protégé relationships approved by SBA between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico do not count against the limit of three proteges that a mentor can have at one time.

(c) * * *

(1) * * *

(ii) Where a small business concern seeks to qualify as a protégé in a secondary NAICS code, the concern must demonstrate how the mentor-protégé relationship will help it further develop or expand its current capabilities in that secondary NAICS code. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the small business concern has no prior experience. SBA may approve a mentor-protégé relationship where the small business concern can demonstrate that it has performed work in one or more similar NAICS codes or where the NAICS code in which the small business concern seeks a mentor-protégé relationship is a logical business progression to work previously performed by the concern.

(2) A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship, and:

* * * * *

(d) * * * (1) A protégé and mentor may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or

WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor). Similarly, a joint venture between a protégé and mentor may seek a subcontract as a HUBZone small business, small disadvantaged business, SDVO small business, or WOSB provided the protégé individually qualifies as such.

* * * * *

(iii) A joint venture between a protégé and its mentor will qualify as a small business for any procurement for which the protégé individually qualifies as small. Once a protégé firm no longer qualifies as a small business for the size standard corresponding to the NAICS code under which SBA approved its mentor-protégé relationship, any joint venture between the protégé and its mentor will no longer be able to seek additional contracts or subcontracts as a small business for any NAICS code having the same or lower size standard. A joint venture between a protégé and its mentor could seek additional contract opportunities in NAICS codes having a size standard for which the protégé continues to qualify as small. A change in the protégé's size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

* * * * *

(B) For contracts with durations of more than five years (including options), where size re-certification is required under § 121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to the NAICS code assigned to the contract, the joint venture will not be able re-certify itself to be a small business for that contract. The rules set forth in § 121.404(g)(3) of this chapter apply in such circumstances.

* * * * *

(6) A mentor that provides a subcontract to a protégé that has its principal office located in the Commonwealth of Puerto Rico may (i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protege toward the subcontracting goals contained in the subcontracting plan of the mentor.

(e) * * *

(1) * * *

(i) Specifically identify the business development assistance to be provided and address how the assistance will help the protégé enhance its growth and/or foster or acquire needed capabilities;

* * * * *

(5) The term of a mentor-protégé agreement may not exceed six years. If an initial mentor-protégé agreement is for less than six years, it may be extended by mutual agreement prior to the expiration date for an additional amount of time that would total no more than six years from its inception (*e.g.*, if the initial mentor-protégé agreement was for two years, it could be extended for an additional four years by consent of the two parties; if the initial mentor-protégé agreement was for three years, it could be extended for an additional three years by consent of the two parties). Unless rescinded in writing as a result of an SBA review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm.

(6) A protégé may generally have a total of two mentor-protégé agreements with different mentors.

(i) Each mentor-protégé agreement may last for no more than six years, as set forth in paragraph (e)(5) of this section.

(ii) If a mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement, that mentor-protégé relationship will generally not count as one of the two mentor-protégé relationships that a small business may enter as a protégé. However, where a specific small business protégé appears to enter into many short-term mentor-protégé relationships as a means of extending its program eligibility as a protégé, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

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

* * * * *

(f) *Decision to decline mentor-protégé relationship.* Where SBA declines to approve a specific mentor-protégé agreement, SBA will issue a written decision setting forth its reason(s) for the decline. The small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor-protégé relationship.* SBA will review the mentor-protégé relationship annually. SBA will ask the protégé for its assessment of how the mentor-protégé relationship is working, whether or not the protégé received the agreed upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

* * * * *

(4) At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

(5) SBA may decide not to approve continuation of a mentor-protégé agreement where:

(i) SBA finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement;

(ii) SBA finds that the assistance provided by the mentor has not resulted in any material benefits or developmental gains to the protégé; or

(iii) A protégé does not provide information relating to the mentor-protégé relationship, as set forth in paragraph (g).

(h) *Consequences of not providing assistance set forth in the mentor-protégé agreement.* (1) Where SBA determines that a mentor may not have provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided may not have been satisfactory, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The

mentor must respond within 30 days of the notification, presenting information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement or explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not adequately provide information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

* * * * *

- 48. Amend § 125.18 by:
- a. Revising paragraph (a);
- b. Removing ''(*see* §§ 125.9 and 124.520 of this chapter)'' in paragraph (b)(1)(ii) and adding in its place ''(*see* § 125.9)'';
- c. Removing ''§ 124.520 or § 125.9 of this chapter'' in paragraph (b)(2) introductory text and adding in its place ''§ 125.9'';
- d. Revising paragraphs (b)(2)(ii) and (iv) and the second sentence of paragraph (b)(2)(v);
- e. Removing ''or § 124.520 of this chapter'' in paragraph (b)(3)(i);
- f. Redesignating paragraphs (d)(1) through (4) as paragraphs (d)(2) through (5), respectively; and
- g. Adding a new paragraph (d)(1).

The revisions and addition read as follows:

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

(a) *General.* In order for a business concern to submit an offer and be eligible for the award of a specific SDVO contract, the concern must submit the appropriate representations and certifications at the time it submits its initial offer which includes price (or other formal response to a solicitation) to the contracting officer, including, but not limited to, the fact that:

(1) It is small under the size standard corresponding to the NAICS code(s) assigned to the contract;

(2) It is an SDVO SBC; and

(3) There has been no material change in any of its circumstances affecting its SDVO SBC eligibility.

* * * * *

(b) * * *

(2) * * *

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and designating a named employee of the SDVO SBC managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the SDVO SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the SDVO SBC if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the SDVO SBC for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(iv) Stating that the SDVO SBC must receive profits from the joint venture commensurate with the work performed by the SDVO SBC, or a percentage agreed to by the parties to the joint venture whereby the SDVO SBC receives profits from the joint venture that exceed the percentage commensurate with the work performed by the SDVO SBC;

(v) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

(d) *Multiple Award Contracts.* (1) *SDVO status.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) SBA determines SDVO small business eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as an SDVO small business concern as part of its initial offer (or other formal response to a solicitation), which includes price, unless the firm was required to recertify under paragraph (e) of this section.

(A) Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than SDVO. For an unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for SDVO, if a business concern is an SDVO small business concern at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business concern for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for SDVO small business, a concern must recertify that it qualifies as an SDVO small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which SDVO small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the SDVO small business pool, concerns need not recertify their status as SDVO small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *SDVO Set-Aside Multiple Award Contracts.* For a Multiple Award Contract that is specifically set aside for SDVO small business, if a business concern is an SDVO small business at the time of offer and contract-level recertification for the Multiple Award Contract, it is an SDVO small business for each order issued against the contract, unless a contracting officer requests recertification as an SDVO small business for a specific order or Blanket Purchase Agreement.

(ii) SBA will determine SDVO small business status at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new SDVO small business certification for the order or Agreement.

* * * * *

- 49. Amend § 125.28 by revising the section heading and adding a sentence to the end of paragraph (d)(1) to read as follows:

§ 125.28 What are the requirements for filing a service-disabled veteran-owned status protest?

* * * * *

(d) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contract, for an order or a Blanket Purchase Agreement that is set-aside for SDVO small business under a Multiple Award Contract that is not itself set aside for SDVO small business or have a reserve for SDVO small business (or any SDVO order where the contracting officer has requested recertification of SDVO status), an interested party must submit its protest challenging the SDVO status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

* * * * *

PART 126—HUBZONE PROGRAM

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

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

§ 126.500 [Amended]

■ 51. Amend § 126.500 by removing the words ''(whether by SBA or a third-party certifier)'' in paragraph (b) introductory text.

§ 126.602 [Amended]

■ 52. Amend 126.602 in paragraph (c) by removing ''§ 126.200(a)'' and adding in its place ''§ 126.200(c)(2)(ii)''.

■ 53. Revise § 126.606 to read as follows:

§ 126.606 May a procuring activity request that SBA release a requirement from the 8(a) BD program for award as a HUBZone contract?

A procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

■ 54. Amend § 126.616 by removing ''(or, if also an 8(a) BD Participant, with an approved mentor authorized by § 124.520 of this chapter)'' in paragraph (a), and by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible to perform on a HUBZone contract?

* * * * *

(c) * * *

(2) Designating a certified HUBZone small business concern as the managing venturer of the joint venture, and designating a named employee of the certified HUBZone small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified HUBZone small business concern at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified HUBZone small business concern if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified HUBZone small business concern for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(4) Stating that the certified HUBZone small business concern must receive profits from the joint venture commensurate with the work performed by the certified HUBZone small business concern, or a percentage agreed to by the parties to the joint venture whereby the certified HUBZone small business concern receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified HUBZone small business concern;

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

§ 126.618 [Amended]

■ 55. Amend § 126.618 by removing ''(or, if also an 8(a) BD Participant, under § 124.520 of this chapter)'' in paragraph (a).

■ 56. Amend § 126.801 by adding a sentence to the end of paragraph (d)(1) to read as follows:

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

* * * * *

(d) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contact, in connection with an order or an Agreement that is set-aside for a certified HUBZone small business concern under a Multiple Award Contract that is not itself set aside for certified HUBZone small business concerns or have a reserve for certified HUBZone small business concerns, (or any HUBZone set-aside order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the HUBZone status of a concern for the order or Agreement by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

* * * * *

PART 127—WOMEN–OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 57. The authority citation for part 127 continues to read as follows:

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

§ 127.503 [Amended]

■ 58. Amend § 127.503 by removing paragraph (h).

■ 59. Revise § 127.504 to read as follows:

§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?

(a) *General.* In order for a concern to submit an offer on a specific EDWOSB or WOSB set-aside requirement, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract, and either be a certified EDWOSB or WOSB pursuant to § 127.300, or represent that it has submitted a complete application for WOSB or EDWOSB certification to SBA or a third-party certifier and has not received a negative determination regarding that application from SBA or the third party certifier.

(1) If a concern becomes the apparent successful offeror while its application for WOSB or EDWOSB certification is pending, either at SBA or a third-party certifier, the contracting officer for the particular contract must immediately inform SBA's D/GC. SBA will then prioritize the concern's WOSB or EDWOSB application and make a

determination regarding the firm's status as a WOSB or EDWOSB within 15 calendar days from the date that SBA received the contracting officer's notification. Where the application is pending with a third-party certifier, SBA will immediately contact the third-party certifier to require the third-party certifier to complete its determination within 15 calendar days.

(2) If the contracting officer does not receive an SBA or third-party certifier determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer may presume that the apparently successful offeror is not an eligible WOSB or EDWOSB and may make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(b) Sole source EDWOSB or WOSB requirements. In order for a concern to seek a specific sole source EDWOSB or WOSB requirement, the concern must be a certified EDWOSB or WOSB pursuant to § 127.300 and qualify as small under the size standard corresponding to the requirement being sought.

(c) *Joint ventures.* A business concern seeking an EDWOSB or WOSB contract as a joint venture may submit an offer if the joint venture meets the requirements as set forth in § 127.506.

(d) *Multiple Award Contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(1) SBA determines EDWOSB or WOSB eligibility for the underlying Multiple Award Contract as of the date a concern certifies its status as an EDWOSB or WOSB as part of its initial offer (or other formal response to a solicitation), which includes price, unless the concern was required to recertify its status as a WOSB or EDWOSB under paragraph (f) of this section.

(i) Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than EDWOSB or WOSB. For an unrestricted Multiple Award Contract or other Multiple Award Contract not set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set aside exclusively for EDWOSB or WOSB, a concern must recertify it qualifies as an EDWOSB or WOSB at the time it submits its initial offer, which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of WOSB or EDWOSB concerns for which WOSB or EDWOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the WOSB or EDWOSB pool, concerns need not recertify their status as WOSBs or EDWOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(ii) *EDWOSB or WOSB Set-Aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement.

(2) SBA will determine EDWOSB or WOSB status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new EDWOSB or WOSB certification for the order or Agreement.

(e) *Limitations on subcontracting.* A business concern seeking an EDWOSB or WOSB requirement must also meet the applicable limitations on subcontracting requirements as set forth in § 125.6 of this chapter for the performance of EDWOSB or WOSB contracts (both sole source and those totally set aside for EDWOSB or WOSB), the performance of the set-aside portion of a partial set-aside contract, or the performance of orders set-aside for EDWOSB or WOSB.

(f) *Non-manufacturers.* An EDWOSB or WOSB that is a non-manufacturer, as defined in § 121.406(b) of this chapter, may submit an offer on an EDWOSB or WOSB contract for supplies, if it meets the requirements under the non-manufacturer rule set forth in § 121.406(b) of this chapter.

(g) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside service contract, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside service contract, the prime contractor is not eligible for award of a WOSB or EDWOSB contract.

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a WOSB or EDWOSB status protest, as described in subpart F of this part. When the subcontractor is other than small or alleged to be other than small for the size standard assigned to the procurement, this issue may be a ground for a size protest, as described at § 121.103(h)(4) of this chapter.

(2) SBA will find that a prime WOSB or EDWOSB contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

(h) *Recertification.* (1) Where a contract being performed by an EDWOSB or WOSB is novated to another business concern, the concern that will continue performance on the contract must recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it does not qualify as an EDWOSB or WOSB, (or qualify as a certified EDWOSB or WOSB for a WOSB contract) within 30 days of the novation approval. If the concern cannot recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(2) Where an EDWOSB or WOSB concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it no longer qualifies as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a

WOSB contract). If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(3) For purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option. If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(4) A business concern that did not certify as an EDWOSB or WOSB, either initially or prior to an option being exercised, may recertify as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) for a subsequent option period if it meets the eligibility requirements at that time. The agency must modify the contract to reflect the new status, and may count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(5) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(6) A concern's status will be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

■ 60. Amend § 127.506 by revising paragraphs (c)(2) and (c)(4) and the second sentence of paragraph (c)(5) to read as follows:

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

* * * * *

(c) * * *

(2) Designating a WOSB or EDWOSB as the managing venturer of the joint venture, and designating a named employee of the WOSB or EDWOSB managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the WOSB or EDWOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the WOSB or EDWOSB if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the WOSB or EDWOSB for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

* * * * *

(4) Stating that the WOSB or EDWOSB must receive profits from the joint venture commensurate with the work performed by the WOSB or EDWOSB, or a percentage agreed to by the parties to the joint venture whereby the WOSB or EDWOSB receives profits from the joint venture that exceed the percentage commensurate with the work performed by the WOSB or EDWOSB;

(5) * * * This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. * * *

* * * * *

■ 61. Amend § 127.603 by revising the section heading and adding a sentence to the end of paragraph (c)(1) to read as follows:

§ 127.603 What are the requirements for filing an EDWOSB or WOSB status protest?

* * * * *

(c) * * *

(1) * * * Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contact, for an order or a Blanket Purchase Agreement that is set-aside for EDWOSB or WOSB small business under a Multiple Award Contract that is not itself set aside for EDWOSB or WOSB small business or have a reserve for EDWOSB or WOSB small business (or any EDWOSB or WOSB order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the EDWOSB or WOSB status of a concern for the order or Blanket Purchase Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

* * * * *

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 62. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t, and 687(c); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 38 U.S.C. 8127(f)(8)(B).

Subpart K issued under 38 U.S.C. 8127(f)(8)(A).

■ 63. Amend § 134.318 by adding a paragraph heading to paragraph (a) and revising paragraph (b) to read as follows:

§ 134.318 NAICS Appeals.

(a) *General.* * * *

(b) *Effect of OHA's decision.* If OHA grants the appeal (changes the NAICS code), the contracting officer must amend the solicitation to reflect the new NAICS code. The decision will also apply to future solicitations for the same supplies or services.

* * * * *

Jovita Carranza,

Administrator.

[FR Doc. 2020–19428 Filed 10–15–20; 8:45 am]

BILLING CODE 8026–03–P

office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2020–33, and should be submitted on or before September 8, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–17828 Filed 8–14–20; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

RIN 3245–AH31

Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directive

AGENCY: Small Business Administration.

ACTION: Notice of technical amendment; request for comment request for comments.

SUMMARY: The Small Business Administration is amending the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs Policy Directive to clarify that successor-in-interest entities are eligible to receive phase III awards.

DATES: These revisions to the SBIR/STTR Policy Directive take effect on October 1, 2020, without further action, unless significant adverse comment is received by September 16, 2020. If significant adverse comment is received, SBA will publish a timely withdrawal of the notice in the **Federal Register.**

ADDRESSES: You may submit comments, identified by number SBA–2020–XXXX through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

SBA will post all comments on *www.regulations.gov.* Please do not submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Shieh at (202) 205–6817 or *Jennifer.shieh@sba.gov.*

SUPPLEMENTARY INFORMATION:

[19] 17 CFR 200.30–3(a)(12).

I. Executive Summary

The mission of the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs is to engage small business concerns (SBCs) to support scientific excellence and technological innovation through the investment of Federal research and research and development (R/R&D) funding in critical American priorities to build a strong national economy. Both programs follow a three-phase process throughout the Federal Government to solicit proposals and award funding agreements for R/R&D: Phase I, Phase II, and Phase III.

The Small Business Act (the Act) requires that the Small Business Administration (SBA) issue a policy directive setting forth guidance to the Federal Agencies participating in the SBIR and STTR programs (Participating Agencies). The SBIR and STTR (SBIR/STTR) Policy Directive outlines how agencies must generally conduct their programs. Each Participating Agency, however, may tailor its program to meet the needs of the individual Agency, as long as the general principles of the program set forth in the Act and directive are followed. Therefore, when incorporating SBIR/STTR policy into agency-specific regulations and procedures, Participating Agencies may develop and apply processes needed to implement the policy effectively; however, no Participating Agency may develop and apply policies, directives, or clauses, that contradict, weaken, or conflict with the policy as stated in the directive.

SBA reviews its Policy Directive regularly to determine areas that need updating and further clarification. It has come to SBA's attention that the language in section 6(a)(5) requires clarification to confirm for Participating Agencies and applicants that successor-in-interest entities are eligible to receive phase III SBIR/STTR awards. Section 6(a) of the Policy Directive addresses eligibility to receive SBIR/STTR awards. Paragraph (5) of this section specifically relates to the eligibility of entities that have received a novated award, a similarly-revised award, or are successor-in-interest entities. SBA is clarifying this paragraph in order to confirm the Agency's long-standing interpretation that permits successor-in-interest entities to receive phase III SBIR/STTR awards.

II. Amendment

Section 6—Eligibility and Application (Proposal) Requirements

The Small Business Act describes the three-phase nature of the programs. The first phase (phase I) award generally does not exceed $150,000 and is intended to fund the determination of the technical and scientific merit, and feasibility of ideas that appear to have commercial potential. *See* 15 U.S.C. 638(e)(4)(A). The second phase (phase II) award generally does not exceed $1,000,000 and is intended to further develop proposals with commercial potential. *See id.* at § 638(e)(4)(B). The final third phase award (phase III) is defined, as follows:

> (C) where appropriate, a third phase for work that *derives from, extends, or completes efforts made under prior funding agreements under the SBIR program*—
>
> (i) in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards; or
>
> (ii) for which awards from non-SBIR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or merit-based selection procedures;

15 U.S.C. 638(e)(4)(C) (emphasis added). One way that an SBC has achieved commercialization is through a phase III award.

A major feature of the SBIR/STTR programs, and incentive for SBC participation, is that the Government receives a limited rights license in data developed under an SBIR/STTR award, which fosters a competitive advantage for the SBC, as opposed to potential larger competitors, to achieve commercialization. The Government's limited rights license in SBIR/STTR data, combined with the statutory requirement for Participating Agencies to pursue phase III awards on a non-competitive basis with the SBC that performed prior SBIR/STTR awards, is a central aspect of the program.

The SBIR/STTR programs are intended to economically assist SBCs performing R/R&D work by creating an advantage for those firms to receive Government funding at the early often riskiest stage, from an investment perspective, through commercialization. This intention may be hindered if the SBC's rights and interests in SBIR/STTR data cannot be assigned through a merger or sale with another business concern, along with the attendant incentives for non-competitive phase III awards. Such a policy interpretation would create inefficiencies in the marketplace and discourage valuations and transactions among businesses that may otherwise allow for greater investment in new ideas and products.

Consistent with the statutory purposes and policy goals of the program, a firm may be considered a successor-in-interest and receive a subsequent SBIR/STTR award. An entity may be considered a successor-in-interest, if it has secured the transfer of: (1) All the small business concern's assets; or (2) the entire portion of the assets involved in performing the award. Examples of such transactions include, but are not limited to: (1) Sale of these assets with a provision for assuming liabilities; (2) transfer of these assets incident to a merger or corporate consolidation; and (3) incorporation of a proprietorship or partnership, or formation of a partnership. Further, to be considered a successor-in-interest, the firm must meet any applicable eligibility requirements. If performance of the funding agreement is complete prior to the transfer of assets, an entity may be considered a successor-in-interest without a novation. If the transfer of assets occurs during performance of the funding agreement, the awardee should verify with the awarding agency whether a novation is necessary.

Section 6(a)(5) of the Policy Directive provides, only as an example, that a phase III award can be made when the previous SBIR/STTR awardee has received a phase I or phase II award, or been novated one of those awards. This was never intended to be an exclusive list of all scenarios where an SBIR/STTR award could be made to a firm other than the recipient of a prior phase I or phase II award.

SBA amends the second sentence of section 6(a) of the Policy Directive to clarify SBA's long-standing intent regarding the eligibility of successor-in-interest entities to receive phase III awards. Currently, the first two sentences of this paragraph read as follows: "An SBIR/STTR Awardee may include, and SBIR/STTR work may be performed by, those identified via a 'novated' or 'successor in interest' or similarly-revised Funding Agreement. For example, in order to receive a Phase III award, the Awardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant)." SBA changes "must" to "may" in the second sentence and adds "successor-in-interest" to the list of possible eligible entities at the end of the sentence. This would not be a change in policy, but rather, a clarification of existing policy.

This clarification is necessary to provide confidence to Participating Agencies and applicants that entities that acquire access to the relevant SBIR/STTR data developed pursuant to prior SBIR/STTR awards, may be eligible to receive a phase III award as a successor-in-interest without novation if the performance of the prior SBIR/STTR award is complete.

Notice of Clarification of Phase III Eligibility in the Policy Directive for the Small Business Innovation Research (SBIR) and Small Business Technology Transfer Research (STTR) Programs

To: The SBIR and STTR Program Managers

Subject: SBIR/STTR Policy Directive

1. *Purpose.* The Small Business Administration (SBA) is updating its Small Business Innovation Research and Small Business Technology Transfer Research (SBIR/STTR) Policy Directives to clarify SBA's current policy that successor-in-interest entities are eligible to receive phase III SBIR/STTR awards.

2. *Authority.* The Small Business Act (15 U.S.C. 638(j) and (p)) requires the SBA Administrator to issue an SBIR and STTR program Policy Directive for the general conduct of the programs.

3. *Procurement Regulations.* There are no procurement regulations created by this proposed clarification.

4. *Personnel Concerned.* This SBIR/STTR Policy Directive serves as guidance for all Federal Government personnel who are involved in the administration of the SBIR and STTR programs, issuance and management of funding agreements or contracts pursuant to the programs, and/or the establishment of goals for small business concerns in research or research and development acquisition or grants.

5. *Originator.* SBA's Office of Investment and Innovation.

This amendment to the SBIR/STTR Policy Directive will be effective on the date shown in the **DATES** section unless SBA receives any significant adverse comments on or before the deadline for comments set forth in the **DATES** section. Significant adverse comments are comments that provide strong justifications why the clarifying amendment to the PD should not be adopted as written or should be changed further. SBA does not expect to receive any significant adverse comments because the amendment does not change SBA's or Participating Agencies' interpretation of existing policy, and continues to confer the intended incentive for SBIR/STTR awardee successor-in-interest entities. Implementation of this change will benefit the public by ensuring that the plain language interpretation of the SBIR/STTR Policy Directive is consistent with SBA's policy intent. If SBA receives any significant adverse comments, SBA will publish a notice in the **Federal Register** withdrawing this notice before the effective date.

6. *Date.* Public comments on the proposed amendments to the Policy Directive must be submitted within 30 days following publication in the **Federal Register.**

Authorized By:

Jovita Carranza,

Administrator.

SBA revises section 6(a)(5) of the SBIR/STTR Policy Directive as follows:

6. Eligibility and Application (Proposal) Requirements

(a) Eligibility Requirements

(1) * * *

* * * * *

(5) *Novated/Successor in Interested/Revised Funding Agreements.* An SBIR/STTR Awardee may include, and SBIR/STTR work may be performed by, those identified via a "novated" or "successor in interest" or similarly-revised Funding Agreement. For example, a phase III Awardee may have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant) or be a successor-in-interest entity. * * *

* * * * *

[FR Doc. 2020–17815 Filed 8–14–20; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee: Notice of Public Meeting

AGENCY: Federal Aviation Administration, Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the Commercial Space Transportation Advisory Committee for September 14, 2020.

DATES: The September 14, 2020 meeting will be held from 8:45 a.m. to 3:30 p.m. Requests to attend the meeting must be received by September 4, 2020. Requests for accommodations to a disability must be received by September 4, 2020. Requests to speak during the meeting must be submitted by September 4, 2020 to DOT and include a written copy of their remarks. Requests to submit