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PUBLIC CONTRACTS

Annual Review
Small Business
Supplementary Materials

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ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 13: Business Credit and Assistance
PART 121—SMALL BUSINESS SIZE REGULATIONS
Subpart A—Size Eligibility Provisions and Standards

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§121.104 How does SBA calculate annual receipts?

(a) *Receipts* means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered “total income” (or in the case of a sole proprietorship “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's

regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

(b) *Completed fiscal year* means a taxable year including any short year. “Taxable year” and “short year” have the meanings attributed to them by the IRS.

(c) *Period of measurement.* (1) Except for the Business Loan and Disaster Loan Programs, annual receipts of a concern that has been in business for 5 or more completed fiscal years means the total receipts of the concern over its most recently completed 5 fiscal years divided by 5. For certifications submitted on or before January 6, 2022, rather than using the definitions in this paragraph (c), a concern submitting a certification may elect to calculate annual receipts and the receipts of affiliates using either the total receipts of the concern or affiliate over its most recently completed 5 fiscal years divided by 5, or the total receipts of the concern or affiliate over its most recently completed 3 fiscal years divided by 3.

(2) Except for the Business Loan and Disaster Loan Programs, annual receipts of a concern which has been in business for less than 5 complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Except for the Business Loan and Disaster Loan Programs, where a concern has been in business 5 or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the 4 full fiscal years divided by the total number of weeks in the short year and the 4 full fiscal years, multiplied by 52.

(4) For the Business Loan and Disaster Loan Programs, annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three. Annual receipts of a concern which has been in business for less than three complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52. Where a concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52. For the purposes of this section, the Business Loan Programs consist of the 7(a) Loan Program, the Microloan Program, the Intermediary Lending Pilot Program, and the Development Company Loan Program (“504 Loan Program”). The Disaster Loan Programs consist of Physical Disaster Business Loans, Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Immediate Disaster Assistance Program loans.

(d) *Annual receipts of affiliates.* (1) The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.

(2) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a concern has acquired a segregable division of another business concern during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status do not include the receipts of the acquired division prior to the acquisition.

(3) Except for the Business Loan and Disaster Loan Programs, if the business concern or an affiliate has been in business for a period of less than 5 years, the receipts for the fiscal year with less than a 12-month period are annualized in accordance with paragraph (c)(2) of this section. Receipts are determined for the concern and its affiliates in accordance with paragraph (c) of this section even though this may result in using a different period of measurement to calculate an affiliate's annual receipts.

(4) The annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. This exclusion of annual receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a concern has sold a segregable division to another business concern during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status will continue to include the receipts of the division that was sold.

(e) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 48604, Aug. 9, 2000; 69 FR 29203, May 21, 2004; 81 FR 34258, May 31, 2016; 84 FR 66578, Dec. 5, 2019]

Need assistance?

ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 13 → Chapter I → Part 121 → Subpart A → §121.106

Title 13: Business Credit and Assistance
PART 121—SMALL BUSINESS SIZE REGULATIONS
Subpart A—Size Eligibility Provisions and Standards

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§121.106 How does SBA calculate number of employees?

(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

(b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(4)(i) The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(ii) The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a concern has sold a segregable division to another business concern during the applicable period of measurement or before the date on which it self-certified as small, the employees used in determining size status will continue to include the employees of the division that was sold.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29203, May 21, 2004; 84 FR 66579, Dec. 5, 2019]

Need assistance?

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of January 7, 2021

Title 13 → Chapter I → Part 121 → Subpart A → §121.108

Title 13: Business Credit and Assistance
PART 121—SMALL BUSINESS SIZE REGULATIONS
Subpart A—Size Eligibility Provisions and Standards

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§121.108 What are the penalties for misrepresentation of size status?

(a) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.

(b) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of small business size and status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small business concern.

(c) *Signature Requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business

size and status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the size status claimed by the concern.

(d) *Limitation of Liability.* Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' size. Relevant factors to consider in making this determination may include the firm's internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as small without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for Misrepresentation.* (1) *Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's size status pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil Penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812 and any other applicable laws or regulations, including 13 CFR part 142.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct “continuing representations” that are no longer true.

(4) *Limitation on Liability.* An individual or business concern will not be subject to the penalties imposed under 15 U.S.C. 645(a) where it acted in good faith reliance on a small business status advisory opinion accepted by SBA under §121.109.

[78 FR 38816, June 28, 2013, as amended at 80 FR 7536, Feb. 11, 2015; 81 FR 31491, May 19, 2016]

Need assistance?

49 CFR 26.9

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.9 How does the Department issue guidance and interpretations under this part?

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

> The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5128, Feb. 2, 1999; *72 FR 15614*, 15617, Apr. 2, 2007]

Annotations

Notes

[EFFECTIVE DATE NOTE:

72 FR 15614, 15617, Apr. 2, 2007, revised this section, effective May 2, 2007.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

Title 49, Subtit. A, Pt. 26

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

23 U.S.C. 324; *42 U.S.C. 2000d*, et seq.; 49 U.S.C 1615, *47107*, *47113*, *47123*; Sec. 1101(b), *Pub. L. 105-178*, *112 Stat. 107*, 113.

Annotations

Notes

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: Nomenclature changes affecting Part 26 appear at *68 FR 35542*, 35553, June 16, 2003.]

Notes to Decisions

Civil Procedure: Justiciability: Standing: General Overview

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

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Transportation Law: Air Transportation: Airports & Airways Development Act

Transportation Law: Bridges & Roads: General Overview

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Civil Procedure: Justiciability: Standing: General Overview

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- A party may establish standing to challenge the presumption created by 49 C.F.R. pt. 26 by demonstrating that a favorable judicial determination would "likely" improve the terms of competition it faces. To do this, the party would have to show at a bare minimum that the practical effect of eliminating the presumption would be some meaningful reduction in the number of Disadvantaged Business Enterprises against which it would be forced to compete. *Go To Headnote*

Civil Procedure: Pleading & Practice: Pleadings: Supplemental Pleadings

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- 49 C.F.R. pt. 26 directs that, to the extent feasible, state-recipients of federal highway funds attempt to meet their overall goals through the use of race and gender-neutral means, and to the extent they cannot, the state must utilize contract goals to meet its overall goal. On contracts with goals, prime contractors must meet the goal for Disadvantaged Business Enterprise (DBE) participation or otherwise document good faith efforts to meet the DBE goal. "Good faith efforts" require prime contractors to subcontract work to DBEs with higher quotes than non-DBEs. *Go To Headnote*

Civil Rights Law: General Overview

Klaver Constr. Co. v. Kan. DOT, 2001 U.S. Dist. LEXIS 13325 (D. Kan. Aug. 23, 2001), dismissed, *211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002)*.

Overview: *Corporation sought to enjoin letting of federally-funded highway construction contracts. Where interest in pursuing constitutional claims outweighed federal DOT's interest in staying proceedings, motion to stay the proceedings was denied.*

- The use of race-conscious policies under TEA-21 and 49 C.F.R. pt. 26 in the federal highway construction program — as implemented by federal officials — was constitutional. Specifically, the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting markets created by its disbursements; (2) the federal government presented evidence sufficient to support its compelling interest; and (3) the race-conscious programs were narrowly tailored for purposes of strict scrutiny. *Go To Headnote*

Constitutional Law: Equal Protection: Level of Review

Gross Seed Co. v. Neb. Dep't of Rds., 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002).

Overview: *The Transportation Equity Act for the 21st Century and its implementing regulations met the requirements of strict scrutiny and were constitutional. Congress's record did not need to be supported by prior studies and debates as to discrimination.*

- There is a compelling interest for the adoption of the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), and 49 C.F.R. pt. 26. *Go To Headnote*

- The Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), and 49 C.F.R. pt. 26 meet the requirements of strict scrutiny and are, therefore, constitutional. *Go To Headnote*

Criminal Law & Procedure: Interrogation: General Overview

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- The presumption of an individual's disadvantaged status under 49 C.F.R. pt. 26 is rebuttable and may be challenged by any person, including disappointed non-Disadvantaged Business Enterprise (DBE) contractors. In addition, individuals eligible for a presumption of disadvantaged status must substantiate that presumption by attesting to their socially and economically disadvantaged status in a notarized statement, and to their personal net worth in a sworn declaration, and they are subject to a range of potential civil and criminal sanctions if they falsely certify that they are eligible for the program. Certification authorities are required to conduct a detailed inquiry into the basis for a firm's assertion that it qualifies for the DBE program, including an onsite visit; interviews of key officers; and analysis of the firm's ownership documentation, financial capacity, and work history. DBE owners are required to attest annually in a sworn declaration that there have been no material changes in the firm's circumstances relevant to its eligibility to be certified as a DBE. *Go To Headnote*

Governments: Agriculture & Food: Federal Food, Drug & Cosmetic Act

Klaver Constr. Co. v. Kan. DOT, 2001 U.S. Dist. LEXIS 13325 (D. Kan. Aug. 23, 2001), dismissed, *211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002)*.

Overview: *Corporation sought to enjoin letting of federally-funded highway construction contracts. Where interest in pursuing constitutional claims outweighed federal DOT's interest in staying proceedings, motion to stay the proceedings was denied.*

- The use of race-conscious policies under TEA-21 and 49 C.F.R. pt. 26 in the federal highway construction program — as implemented by federal officials — was constitutional. Specifically, the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting markets created by its disbursements; (2) the federal government presented evidence sufficient to support its compelling interest; and (3) the race-conscious programs were narrowly tailored for purposes of strict scrutiny. *Go To Headnote*

Governments: Federal Government: General Overview

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

Former 49 CFR 23 was revised. See now 49 CFR 26.

- In the preface to the Minority Business Enterprise (MBE) regulation, located at 49 C.F.R. part 23, the Secretary of Transportation identifies eight sources of authority for the MBE regulation, which is codified at 49 C.F.R. 23.01 et seq.: Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (*45 U.S.C.S. 803*); Section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C.S. 1730); Section 19 of the Urban Mass Transportation Act 1964, as amended (*Pub. L. 95-599*); Title 23 of the U.S. Code (relating to highways and highway safety); Title 6 of the Civil Rights Act of 1964 (*42 U.S.C.S. 2000d* et seq.); the Federal Property and Administrative Services Act of 1949 (49 U.S.C.S. 471 et seq.); Exec. Order No. 11625; and Exec. Order No. 12138. *Go To Headnote*

Governments: Public Improvements: Bridges & Roads

Gilbert Cent. Corp. v. Kemp, 637 F. Supp. 843, 1986 U.S. Dist. LEXIS 24200 (D. Kan. 1986).

Overview: *The Kansas Secretary of Transportation properly rejected the low bid on a construction contract because the low bidder failed to meet disadvantaged business contract goals and the secretary's interpretation of the federal regulations was reasonable.*

Former 49 CFR Pt. 23 was redesignated. See now 49 CFR Pt. 26.

- The Secretary of the Kansas Department of Transportation (KDOT) is ultimately responsible for the decision to accept or reject bids submitted on contracts let by KDOT. On those projects receiving federal financial assistance, however, KDOT is bound to comply with the regulations promulgated by the Federal Highway Administration and appearing at 49 C.F.R. Pt. 23. *Go To Headnote*

Governments: Public Improvements: Financing

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- Under 49 C.F.R. pt. 26, states receiving federal highway funds are required to adopt and administer Disadvantaged Business Enterprise (DBE) programs. If a state fails to implement and administer a DBE program pursuant to the

federal DBE program guidelines, it forfeits all federal highway funding. Pursuant to the mandates of the Transportation Equity Act for the 21st Century, *Pub L. 105-178, 112 Stat. 107* (1998), the federal DBE program under 49 C.F.R. pt. 26 contains a 10 percent goal for DBE participation on federal-aid highway contracts. It requires that state recipients of federal funds set overall goals for DBE participation on federal-aid highway contracts. It requires states to rebuttably presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found disadvantaged by the Small Business Administration are socially and economically disadvantaged. It requires that applicants for DBE certification who are not presumed disadvantaged on the basis of minority or female status must prove, by a preponderance of the evidence, that they are socially and economically disadvantaged. *Go To Headnote*

Public Contracts Law: Bids & Formation: Subcontracts & Subcontractors: General Overview

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- 49 C.F.R. pt. 26 directs that, to the extent feasible, state-recipients of federal highway funds attempt to meet their overall goals through the use of race and gender-neutral means, and to the extent they cannot, the state must utilize contract goals to meet its overall goal. On contracts with goals, prime contractors must meet the goal for Disadvantaged Business Enterprise (DBE) participation or otherwise document good faith efforts to meet the DBE goal. "Good faith efforts" require prime contractors to subcontract work to DBEs with higher quotes than non-DBEs. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- Pursuant to 49 C.F.R. pt. 26, applicants who are not presumed disadvantaged on the basis of their race or gender must produce evidence of the following: (A) at least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged; (B) personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and (C) negative impact on entry into or advancement in the business world because of the disadvantage. *Go To Headnote*
- The presumption of an individual's disadvantaged status under 49 C.F.R. pt. 26 is rebuttable and may be challenged by any person, including disappointed non-Disadvantaged Business Enterprise (DBE) contractors. In addition, individuals eligible for a presumption of disadvantaged status must substantiate that presumption by attesting to their socially and economically disadvantaged status in a notarized statement, and to their personal net worth in a sworn declaration, and they are subject to a range of potential civil and criminal sanctions if they falsely certify that they are eligible for the program. Certification authorities are required to conduct a detailed inquiry into the basis for a firm's assertion that it qualifies for the DBE program, including an onsite visit; interviews of key officers; and analysis of the firm's ownership documentation, financial capacity, and work history. DBE owners are required to attest annually in a sworn declaration that there have been no material changes in the firm's circumstances relevant to its eligibility to be certified as a DBE. *Go To Headnote*
- 49 C.F.R. pt. 26 does not require proof of social disadvantage on the basis of race or gender; these are merely possible ways to prove social disadvantage. Other means include ethnic origin, disability, long-term residence in an

environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged. Go To Headnote

• A party may establish standing to challenge the presumption created by 49 C.F.R. pt. 26 by demonstrating that a favorable judicial determination would "likely" improve the terms of competition it faces. To do this, the party would have to show at a bare minimum that the practical effect of eliminating the presumption would be some meaningful reduction in the number of Disadvantaged Business Enterprises against which it would be forced to compete. Go To Headnote

Gross Seed Co. v. Neb. Dep't of Rds., 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002).

Overview: *The Transportation Equity Act for the 21st Century and its implementing regulations met the requirements of strict scrutiny and were constitutional. Congress's record did not need to be supported by prior studies and debates as to discrimination.*

• In June of 1998, Congress enacted the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178, 112 Stat. 107* (1998). TEA-21 provides for the participation of disadvantaged business enterprises in federally funded highway programs. Pursuant to the statute, regulations were promulgated by the United States Department of Transportation for its enforcement. 49 C.F.R. pt. 26 (2000). Go To Headnote

• There is a compelling interest for the adoption of the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), and 49 C.F.R. pt. 26. Go To Headnote

• The Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), and 49 C.F.R. pt. 26 meet the requirements of strict scrutiny and are, therefore, constitutional. Go To Headnote

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23 was redesignated. See now 49 CFR 26.

• Pursuant to the Surface Transportation Assistance Act of 1982, *96 Stat. 2097* (1983), and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), *101 Stat. 132* (1987), each federal aid recipient must make reasonable efforts to award at least 10 percent of these funds to businesses owned and controlled by socially and economically disadvantaged persons. The Department of Transportation promulgated regulations, codified at 49 C.F.R. § 23 (1990), to implement these statutes. Congress conditioned the granting of federal transportation funds on the District of Columbia's compliance with federal rules regarding contracting generally and STURAA in particular. A disadvantaged business must be certified as a disadvantaged business enterprise by the District of Columbia pursuant to eligibility standards set forth in 49 C.F.R. § 23.62. Only a small business owned and controlled by socially and economically disadvantaged persons will be certifiable. 49 C.F.R. § 23.62. STURAA incorporated the definitions of social and economic disadvantage that were set forth in § 8 of the Small Business Act, *15 U.S.C.S. § 637(d)*. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Beach Erectors, Inc. v. United States DOT, 2012 U.S. Dist. LEXIS 127632 (E.D.N.Y. Sept. 7, 2012).

Overview: *DOT Departmental Office of Civil Rights' determination that an owner lacked required the managerial and technical competence and experience necessary to maintain control over a corporation, under 49 C.F.R. § 26.71(g), was not arbitrary or capricious, under 5 U.S.C.S. § 706, because, inter alia, the owner lacked technical and field work experience.*

- Recipients of certain federal funds—such as the New York Metropolitan Transit Authority—must apply the regulations set forth in 49 C.F.R. pt. 26 to determine whether an applicant firm is eligible for Disadvantaged Business Enterprise (DBE) certification. *49 C.F.R. § 26.71(a)*. To be eligible for DBE status, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. *49 C.F.R. § 26.69(b)*. There is a rebuttable presumption that, inter alia, women are socially and economically disadvantaged individuals. *49 C.F.R. §§ 26.61(c)* & *26.67(a)(1)*. In addition to determining social and economic disadvantaged status, the recipient of federal funds must determine whether the applicant firm is controlled by the socially and economically disadvantaged owner. *49 C.F.R. § 26.61(e)*. This determination is to be made by considering all the facts in the record, viewed as a whole. *49 C.F.R. § 26.71(a)*. *Go To Headnote*

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. *49 C.F.R. § 26.1*. *49 C.F.R. § 26.3*. It provides that such recipients may certify firms as eligible to participate as DBEs. *49 C.F.R. §§ 26.61(a)*, *26.5*. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an overall goal for DBE participation in USDOT-assisted contracts. *49 C.F.R. §§ 26.41*, *26.45(a)(1)*. A recipient of USDOT contracts must have a DBE program. *49 C.F.R. § 26.21*. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. *Go To Headnote*

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- 49 C.F.R. pt. 26 directs that, to the extent feasible, state-recipients of federal highway funds attempt to meet their overall goals through the use of race and gender-neutral means, and to the extent they cannot, the state must utilize contract goals to meet its overall goal. On contracts with goals, prime contractors must meet the goal for Disadvantaged Business Enterprise (DBE) participation or otherwise document good faith efforts to meet the DBE goal. "Good faith efforts" require prime contractors to subcontract work to DBEs with higher quotes than non-DBEs. *Go To Headnote*

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23 was redesignated. See now 49 CFR 26.

- The federal disadvantaged business enterprise (DBE) statutory scheme sets both overall and contract specific goals for DBE participation. However, the plain language of the implementing regulations (49 C.F.R. § 23 et seq.) makes it clear that both of these goals are applicable only to federally-assisted contracts made by the federal aid recipient. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Gilbert Cent. Corp. v. Kemp, 637 F. Supp. 843, 1986 U.S. Dist. LEXIS 24200 (D. Kan. 1986).

Overview: *The Kansas Secretary of Transportation properly rejected the low bid on a construction contract because the low bidder failed to meet disadvantaged business contract goals and the secretary's interpretation of the federal regulations was reasonable.*

Former 49 CFR Pt. 23 was redesignated. See now 49 CFR Pt. 26.

- The purpose of the federal regulations promulgated by the Federal Highway Administration and appearing at 49 C.F.R. Pt. 23 is to encourage the fullest possible participation in covered contracts by firms owned and controlled by minorities and women. Such minority business enterprises (MBE) consist of both disadvantaged businesses (DB) and women-owned business enterprises (WBE). "Recipients" of federal financial assistance are required to set both overall and contract goals for MBE participation. *49 C.F.R. § 23.45(g)(2)(i)*, (ii). Moreover, such overall and contract goals for MBE participation must be subdivided into participation goals for both DB and WBE. *49 C.F.R. § 23.45(g)(4)*. The regulations further require that recipients inform prospective bidders, in the solicitation for bids, that the apparent successful bidder will be required to submit information concerning MBE participation, including: (1) the names and addresses of MBE firms that will participate in the contract, (2) a description of the work each named MBE firm will perform, and (3) the dollar amount of participation by each named MBE firm. *49 C.F.R. § 23.45(h)(1)(i)*. So long as this information is submitted prior to the signing of the actual contract, the recipient may select the time at which it requires MBE information to be submitted. *49 C.F.R. § 23.45(h)(ii)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Gilbert Cent. Corp. v. Kemp, 637 F. Supp. 843, 1986 U.S. Dist. LEXIS 24200 (D. Kan. 1986).

Overview: *The Kansas Secretary of Transportation properly rejected the low bid on a construction contract because the low bidder failed to meet disadvantaged business contract goals and the secretary's interpretation of the federal regulations was reasonable.*

- The purpose of the federal regulations promulgated by the Federal Highway Administration and appearing at 49 C.F.R. Pt. 23 is to encourage the fullest possible participation in covered contracts by firms owned and controlled by minorities and women. Such minority business enterprises (MBE) consist of both disadvantaged businesses (DB) and women-owned business enterprises (WBE). "Recipients" of federal financial assistance are required to set both overall and contract goals for MBE participation. *49 C.F.R. § 23.45(g)(2)(i)*, (ii). Moreover, such overall and contract goals for MBE participation must be subdivided into participation goals for both DB and WBE. *49 C.F.R. § 23.45(g)(4)*. The regulations further require that recipients inform prospective bidders, in the solicitation for bids, that the apparent successful bidder will be required to submit information concerning MBE participation, including: (1) the names and addresses of MBE firms that will participate in the contract, (2) a description of the work each named MBE firm will perform, and (3) the dollar amount of participation by each named MBE firm. *49 C.F.R. § 23.45(h)(1)(i)*. So long as this information is submitted prior to the signing of the actual contract, the recipient may select the time at which it requires MBE information to be submitted. *49 C.F.R. § 23.45(h)(ii)*. *Go To Headnote*

Tax Law: Federal Income Tax Computation: Deductions for Business Expenses: Business Credits (IRC secs. 38-54, 1396-1397): General Overview

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

- Under 49 C.F.R. pt. 26, states receiving federal highway funds are required to adopt and administer Disadvantaged Business Enterprise (DBE) programs. If a state fails to implement and administer a DBE program pursuant to the federal DBE program guidelines, it forfeits all federal highway funding. Pursuant to the mandates of the Transportation Equity Act for the 21st Century, *Pub L. 105-178, 112 Stat. 107* (1998), the federal DBE program under 49 C.F.R. pt. 26 contains a 10 percent goal for DBE participation on federal-aid highway contracts. It requires that state recipients of federal funds set overall goals for DBE participation on federal-aid highway contracts. It requires states to rebuttably presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found disadvantaged by the Small Business Administration are socially and economically disadvantaged. It requires that applicants for DBE certification who are not presumed disadvantaged on the basis of minority or female status must prove, by a preponderance of the evidence, that they are socially and economically disadvantaged. *Go To Headnote*

Tax Law: Federal Income Tax Computation: Deductions for Losses: At-Risk Limitations (IRC secs. 49, 465)

Klaver Constr. Co., Inc. v. Kan. DOT, 211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002).

Overview: *The contractor lacked standing to challenge the presumptive eligibility of women and racial minorities for the disadvantaged business preference in government contracting, since the ineligibility of the contractor was unrelated to race or gender.*

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Transportation Law: Air Transportation: Airports & Airways Development Act

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

Former 49 CFR 23 was revised. See now 49 CFR 26.

- In the preface to the Minority Business Enterprise (MBE) regulation, located at 49 C.F.R. part 23, the Secretary of Transportation identifies eight sources of authority for the MBE regulation, which is codified at 49 C.F.R. 23.01 et seq.: Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (*45 U.S.C.S. 803*); Section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C.S. 1730); Section 19 of the Urban Mass Transportation Act 1964, as amended (*Pub. L. 95-599*); Title 23 of the U.S. Code (relating to highways and highway safety); Title 6 of the Civil Rights Act of 1964 (*42 U.S.C.S. 2000d* et seq.); the Federal Property and Administrative Services Act of 1949 (49 U.S.C.S. 471 et seq.); Exec. Order No. 11625; and Exec. Order No. 12138. *Go To Headnote*

Transportation Law: Bridges & Roads: General Overview

Gross Seed Co. v. Neb. Dep't of Rds., 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002).

Overview: *The Transportation Equity Act for the 21st Century and its implementing regulations met the requirements of strict scrutiny and were constitutional. Congress's record did not need to be supported by prior studies and debates as to discrimination.*

- In June of 1998, Congress enacted the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178, 112 Stat. 107* (1998). TEA-21 provides for the participation of disadvantaged business enterprises in federally funded highway programs. Pursuant to the statute, regulations were promulgated by the United States Department of Transportation for its enforcement. 49 C.F.R. pt. 26 (2000). *Go To Headnote*
- There is a compelling interest for the adoption of the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), and 49 C.F.R. pt. 26. *Go To Headnote*
- The Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), and 49 C.F.R. pt. 26 meet the requirements of strict scrutiny and are, therefore, constitutional. *Go To Headnote*

Klaver Constr. Co. v. Kan. DOT, 2001 U.S. Dist. LEXIS 13325 (D. Kan. Aug. 23, 2001), dismissed, *211 F. Supp. 2d 1296, 2002 U.S. Dist. LEXIS 13583 (D. Kan. 2002)*.

Overview: *Corporation sought to enjoin letting of federally-funded highway construction contracts. Where interest in pursuing constitutional claims outweighed federal DOT's interest in staying proceedings, motion to stay the proceedings was denied.*

- The use of race-conscious policies under TEA-21 and 49 C.F.R. pt. 26 in the federal highway construction program — as implemented by federal officials — was constitutional. Specifically, the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting markets created by its disbursements; (2) the federal government presented evidence sufficient to support its compelling interest; and (3) the race-conscious programs were narrowly tailored for purposes of strict scrutiny. *Go To Headnote*

Transportation Law: Public Transportation

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23 was redesignated. See now 49 CFR 26.

- Pursuant to the Surface Transportation Assistance Act of 1982, *96 Stat. 2097* (1983), and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), *101 Stat. 132* (1987), each federal aid recipient must make reasonable efforts to award at least 10 percent of these funds to businesses owned and controlled by socially and economically disadvantaged persons. The Department of Transportation promulgated regulations, codified at 49 C.F.R. § 23 (1990), to implement these statutes. Congress conditioned the granting of federal transportation funds on the District of Columbia's compliance with federal rules regarding contracting generally and STURAA in particular. A disadvantaged business must be certified as a disadvantaged business enterprise by the District of Columbia pursuant to eligibility standards set forth in 49 C.F.R. § 23.62. Only a small business owned and controlled by socially and economically disadvantaged persons will be certifiable. 49 C.F.R. § 23.62. STURAA incorporated the definitions of social and economic disadvantage that were set forth in § 8 of the Small Business Act, *15 U.S.C.S. § 637(d)*. *Go To Headnote*

- The federal disadvantaged business enterprise (DBE) statutory scheme sets both overall and contract specific goals for DBE participation. However, the plain language of the implementing regulations (49 C.F.R. § 23 et seq.) makes it clear that both of these goals are applicable only to federally-assisted contracts made by the federal aid recipient. *Go To Headnote*

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

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End of Document

49 CFR 26.5

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.5 What do the terms used in this part mean?

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii)A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (*43 U.S.C. 1601*, et seq.).

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Compliance means that a recipient has correctly implemented the requirements of this part.

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged business enterprise or DBE means a for-profit small business concern —

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

"Home state" means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an

applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual — United States, which is available on the Internet at the U.S. Census Bureau Web site: http://www.census.gov/eos/wwwaics/.

Primary recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i)"Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii)"Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii)"Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv)"Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v)"Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

(3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse means a married person, including a person in a domestic partnership or a civil union recognized under State law.

Transit vehicle manufacturer means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale "off the lot" are not considered transit vehicle manufacturers.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., You must do XYZ' means that recipients must do XYZ).

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5127, Feb. 2, 1999; *64 FR 34569*, 34570, June 28, 1999; *68 FR 35542*, 35553, June 16, 2003; *76 FR 5083*, 5096, Jan. 28, 2011; *79 FR 59566*, 59592, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59592, Oct. 2, 2014, amended this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

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Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

A. Esteban & Co. v. Metro. Transp. Auth., 2002 U.S. Dist. LEXIS 9353 (S.D.N.Y. May 24, 2002), dismissed without prejudice, *2003 U.S. Dist. LEXIS 407 (S.D.N.Y. Jan. 3, 2003)*.

Overview: *Company, which had lost disadvantaged business enterprise status (DBE), submitted a number of prices to the contractors. The contractors were only entitled to get DBE credit for contracts formed prior to the company's loss of status.*

- The term "contract" is defined as a legally binding relationship obligating a seller to furnish supplies or services and the buyer to pay for them. *49 C.F.R. § 26.5*. The meaning of the term "executed" as used in the regulation can be discerned from a reading of the language and, in particular, from a comparison of the two subparts of *49 C.F.R. § 26.87*. From the examination of the language of the regulation itself it is clear that an executed subcontract refers to a binding written agreement. *Go To Headnote*

Administrative Law: Judicial Review: Standards of Review: General Overview

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- The term "contract" is defined as a legally binding relationship obligating a seller to furnish supplies or services and the buyer to pay for them. *49 C.F.R. § 26.5*. The meaning of the term "executed" as used in the regulation can be discerned from a reading of the language and, in particular, from a comparison of the two subparts of *49 C.F.R. § 26.87*. From the examination of the language of the regulation itself it is clear that an executed subcontract refers to a binding written agreement. *Go To Headnote*

Contracts Law: Types of Contracts: Construction Contracts

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.5 was redesignated. See now 49 CFR 26.5.

- Under the disadvantaged business enterprise (DBE) program a minimum percentage of the dollar amount of federal highway construction contracts is set aside for bidding by certified DBEs. It is a part of the federal program to support the fullest possible participation of firms owned and controlled by minority and women in Department programs. *49 C.F.R. § 23.1*. The definition of a minority business enterprise (MBE) means a small business concern which is owned and controlled by one or more minorities or women. *49 C.F.R. § 23.5*. The definition of a DBE is almost the same as that of a MBE. Under the regulations, applicants and recipients who let Department of Transportation-assisted contracts are required to implement MBE programs and to secure Department approval of the program. *49 C.F.R. § 23.41*. *Go To Headnote*

Evidence: Inferences & Presumptions: General Overview

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

• States may certify as disadvantaged business enterprises only those businesses that meet the eligibility standards in 49 C.F.R. § 23.62. Under 49 C.F.R. § 23.62, a firm is disadvantaged if it is a small business concern and is owned and controlled by individuals who are socially and economically disadvantaged. The regulation adopts the definition of small business in the Small Business Act and imposes the additional requirement that the business concern may not have annual average gross receipts in excess of $ 14 million. States are directed to make a rebuttable presumption that women and members of specified racial and ethnic minority groups are socially and economically disadvantaged and to determine on a case-by-case basis whether individuals who are not members of those groups are socially and economically disadvantaged. Also, as part of its certification procedure, the State must provide a procedure through which third parties may challenge the certification of individuals presumed to be socially and economically disadvantaged under 49 C.F.R. § 23.69. *Go To Headnote*

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

• To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

• United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

Governments: Public Improvements: Bridges & Roads

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir.), cert. denied, *500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714, 1991 U.S. LEXIS 3264 (1991)*.

Overview: *Decision to enjoin state law based set aside program and not federal program was affirmed where reverse discrimination was unconstitutional but federal program was not pursuant to constitutional enforcement authority.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- The receipt of funds under the Surface Transportation and Uniform Relocation Assistance Act of 1987 is voluntary, but a state that decides to receive such funds is bound by the regulations. 49 C.F.R. § 23.63. Oddly, the regulations fail to mention women as one of the groups eligible for the presumption of disadvantage. 49 C.F.R. § 23.62. That is because the regulations date from a 1983 highway construction law and women were first made beneficiaries in the 1987 version. The regulations have been amended to include women, 49 C.F.R. pt. 23, subpt. D, app. A, Section-by-Section Analysis: Section 23.62 Definitions, but amended clumsily, so that the intention to entitle women to the presumption remains obscure as a matter of semantics. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- The Florida department of transportation has adopted rules pertaining to Fla. Stat. Ann. § 339.0805(1)(a). Fla. Stat. Ann. ch. 14-78.002(1) defines "socially and economically disadvantaged individuals" in the same way as defined by the Surface Transportation Assistance Act, Surface Transportation and Uniform Relocation Assistance Act, and using language identical in all relevant parts as that used by the United States department of transportation in 49 C.F.R. § 23.62. Like those definitions, the Florida rule provides that the presumption based upon race or ethnicity is rebuttable. Fla. Stat. Ann. ch. 14-78.005(7)(b)2 also provides that individuals certified by the small business administration, pursuant to § 8(a) of the Small Business Act, *15 U.S.C.S. § 637*, as socially and economically disadvantaged, shall be accepted as socially and economically disadvantaged individuals for purposes of this rule chapter. A procedure is provided by Fla. Stat. Ann. ch. 14-78.007(7) for third persons to challenge the socially and economically disadvantaged status of any individual except those who hold a current § 8(a), *15 U.S.C.S. § 637* certification from the federal small business administration. *Go To Headnote*

Governments: Public Improvements: Financing

In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026, 42 Cont. Cas. Fed. (CCH) ¶ 77383, 1998 U.S. Dist. LEXIS 13690 (D. Minn. 1998).

Overview: *State's Disadvantaged Business Enterprises program, which required federal highway fund recipients to award a certain percentage of state highway projects to women and to certain ethnic minority contractors and subcontractors, was unconstitutional.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) defines a "small business" as one with average annual gross receipts of less than $ 15,370,000 for the preceding three fiscal years, adjusted for inflation. 1003(b)(2)(A) and (B). The amount was increased to $ 16,600,000 in 1994. 49 C.F.R. § 23.62 (1996).

Section 1003(b) of ISTEA incorporates the section 8(d) of the Small Business Act's definition of small business concerns owned and controlled by socially and economically disadvantaged individuals. Go To Headnote

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- Under federal law at least 10 percent of funds authorized for certain Department of Transportation programs, including federal-aid highway construction funds, are to be expended with disadvantaged business enterprises (DBE). Surface Transportation Assistance Act of 1982, *Pub. L. No. 97-424*, *96 Stat. 2097*. To qualify as a DBE the ownership, management, and daily business operations must be owned and controlled by one or more socially and economically disadvantaged individuals. 49 C.F.R. § 23.62. Women are included in this definition. Go To Headnote

Labor & Employment Law: Affirmative Action: Enforcement

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

*Former 49 CFR 23.5 was revised. See now 49 CFR 26.5. *HISTORY*Former 48 CFR 15.1001 was revised. See now 48 CFR 6.203.*

- The Department of Transportation's (DOT) regulation entitled "Participation by Minority Business Enterprise in Department of Transportation Programs" is found at 49 C.F.R. § 23.01 et seq. The regulation defines minority as follows: "Minority" means a person who is a citizen or lawful permanent resident of the United States and who is: (a) Black (a person having origins in any of the black racial groups of Africa); (b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race); (c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race); (d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or (e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America.) (f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended, *15 U.S.C.S. § 637(a)*. *49 C.F.R. § 23.5*. "Minority business enterprise" or "MBE" is defined as a small business concern that is owned and controlled by one or more minorities or women. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006)*.

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

- The regulations implementing the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), seek to create a level playing field on which disadvantaged business enterprises can compete fairly for contracts assisted by the U.S. Department of Transportation. *49 C.F.R. § 26.1(b)*. A disadvantaged business enterprise (DBE) is defined as a small business owned and controlled by one or more individuals who are socially and

economically disadvantaged. 49 C.F.R. § 26.5. Although the term "socially and economically disadvantaged" is race- and sex-neutral on its face, the regulations presume that Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women are socially and economically disadvantaged. 49 C.F.R. § 26.67(a). This presumption of disadvantage is rebutted where the individual has a personal net worth of more than $ 750,000 or a preponderance of the evidence demonstrates that the individual is not in fact socially and economically disadvantaged. § 26.67(b). Firms owned and controlled by someone who is not presumed to be disadvantaged (i.e., a white male) can qualify for DBE status if the individual can demonstrate that he is in fact socially and economically disadvantaged. § 26.67(d). Go To Headnote

A. Esteban & Co. v. Metro. Transp. Auth., 2002 U.S. Dist. LEXIS 9353 (S.D.N.Y. May 24, 2002), dismissed without prejudice, 2003 U.S. Dist. LEXIS 407 (S.D.N.Y. Jan. 3, 2003).

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- The term "contract" is defined as a legally binding relationship obligating a seller to furnish supplies or services and the buyer to pay for them. 49 C.F.R. § 26.5. The meaning of the term "executed" as used in the regulation can be discerned from a reading of the language and, in particular, from a comparison of the two subparts of 49 C.F.R. § 26.87. From the examination of the language of the regulation itself it is clear that an executed subcontract refers to a binding written agreement. Go To Headnote

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Overview: *State's Disadvantaged Business Enterprises program, which required federal highway fund recipients to award a certain percentage of state highway projects to women and to certain ethnic minority contractors and subcontractors, was unconstitutional.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- The regulations promulgated by the United States Department of Transportation define groups which are presumptively "disadvantaged," including (a) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa; (b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race; (c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; (d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and (e) "Asian-Indian Americans," which includes persons whose origins are from India, Pakistan, and Bangladesh. 49 C.F.R. § 23.62 (1996). White males are not presumed to be disadvantaged. Go To Headnote

- The regulations promulgated by the United States Department of Transportation (USDOT) to implement its Disadvantaged Business Enterprise (DBE) programs further provide that individuals who are not members of any of the listed groups may apply for DBE status on a case-by-case basis. Such DBE status-seekers must actually demonstrate both social and economic disadvantage. 49 C.F.R. § 23.62 (1996); 49 C.F.R. pt. 23, subpt. D, app. C (1996). USDOT also recognizes, for purposes of USDOT-assisted programs, anyone found to be socially and economically disadvantaged by the Small Business Administration (SBA), under Section 8(a) of the SBA. 49 C.F.R. § 23.62 (1996). Go To Headnote

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23.5 was redesignated. See now 49 CFR 26.5.

• Subpart D of the regulations applies to all Department of Transportation (DOT) financial assistance that recipients expend in DOT-assisted contracts. 49 C.F.R. § 23.63. DOT financial assistance is defined as financial aid provided directly in the form of actual money or indirectly in the form of guarantees authorized by statute or any other arrangement through which the recipient benefits financially. *49 C.F.R. § 23.5*. DOT-assisted contract means any contract which is paid for in whole or in part with DOT financial assistance. *Go To Headnote*

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

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• Under federal law at least 10 percent of funds authorized for certain Department of Transportation programs, including federal-aid highway construction funds, are to be expended with disadvantaged business enterprises (DBE). Surface Transportation Assistance Act of 1982, *Pub. L. No. 97-424*, *96 Stat. 2097*. To qualify as a DBE the ownership, management, and daily business operations must be owned and controlled by one or more socially and economically disadvantaged individuals. 49 C.F.R. § 23.62. Women are included in this definition. *Go To Headnote*

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Overview: *Decision to enjoin state law based set aside program and not federal program was affirmed where reverse discrimination was unconstitutional but federal program was not pursuant to constitutional enforcement authority.*

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• The receipt of funds under the Surface Transportation and Uniform Relocation Assistance Act of 1987 is voluntary, but a state that decides to receive such funds is bound by the regulations. 49 C.F.R. § 23.63. Oddly, the regulations fail to mention women as one of the groups eligible for the presumption of disadvantage. 49 C.F.R. § 23.62. That is because the regulations date from a 1983 highway construction law and women were first made beneficiaries in the 1987 version. The regulations have been amended to include women, 49 C.F.R. pt. 23, subpt. D, app. A, Section-by-Section Analysis: Section 23.62 Definitions, but amended clumsily, so that the intention to entitle women to the presumption remains obscure as a matter of semantics. *Go To Headnote*

Ellis v. Skinner, 753 F. Supp. 329, 36 Cont. Cas. Fed. (CCH) ¶ 76010, 1990 U.S. Dist. LEXIS 17002 (D. Utah 1990), aff'd, *961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir. 1992)*.

Overview: *A Utah minority set-aside program for public contracts, enacted pursuant to federal statutes, was held to be constitutional because the judiciary deferred to Congress' role to legislate Fourteenth Amendment equal protection guarantees.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

• Federal Disadvantaged Business Enterprise (DBE) regulations establish a rebuttable presumption that small businesses owned and controlled by women and minorities, including Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and others, are DBEs. 49 C.F.R. § 23.62 (1989). Businesses that are presumed to be disadvantaged are subject to decertification of their DBE status if the participating state determines that they are not in fact disadvantaged. On the other hand, businesses that are not presumed to be disadvantaged may be certified as a DBE by the U.S. Small Business Administration or by the state upon a sufficient showing. *Go To Headnote*

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- States may certify as disadvantaged business enterprises only those businesses that meet the eligibility standards in 49 C.F.R. § 23.62. Under 49 C.F.R. § 23.62, a firm is disadvantaged if it is a small business concern and is owned and controlled by individuals who are socially and economically disadvantaged. The regulation adopts the definition of small business in the Small Business Act and imposes the additional requirement that the business concern may not have annual average gross receipts in excess of $ 14 million. States are directed to make a rebuttable presumption that women and members of specified racial and ethnic minority groups are socially and economically disadvantaged and to determine on a case-by-case basis whether individuals who are not members of those groups are socially and economically disadvantaged. Also, as part of its certification procedure, the State must provide a procedure through which third parties may challenge the certification of individuals presumed to be socially and economically disadvantaged under 49 C.F.R. § 23.69. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- The United States Department of Transportation promulgated detailed regulations implementing the Surface Transportation Assistance Act of 1982. 49 C.F.R. § 23(D). 49 C.F.R. § 23.62 defines "socially and economically disadvantaged individuals" in essentially the same way as the Small Business Act. The definition is described as a rebuttable presumption. 49 C.F.R. § 23.62 defines "socially and economically disadvantaged individuals" to mean those individuals who are citizens of the United States, or lawfully admitted permanent residents, and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantages by the Small Business Administration pursuant to § 8(a) of the Small Business Act, *15 U.S.C.S. § 637(a)*. *Go To Headnote*

- The Florida department of transportation has adopted rules pertaining to Fla. Stat. Ann. § 339.0805(1)(a). Fla. Stat. Ann. ch. 14-78.002(1) defines "socially and economically disadvantaged individuals" in the same way as defined by the Surface Transportation Assistance Act, Surface Transportation and Uniform Relocation Assistance Act, and using language identical in all relevant parts as that used by the United States department of transportation in 49 C.F.R. § 23.62. Like those definitions, the Florida rule provides that the presumption based upon race or ethnicity is rebuttable. Fla. Stat. Ann. ch. 14-78.005(7)(b)2 also provides that individuals certified by the small business administration, pursuant to § 8(a) of the Small Business Act, *15 U.S.C.S. § 637*, as socially and economically disadvantaged, shall be accepted as socially and economically disadvantaged individuals for purposes of this rule chapter. A procedure is provided by Fla. Stat. Ann. ch. 14-78.007(7) for third persons to challenge the socially and economically disadvantaged status of any individual except those who hold a current § 8(a), *15 U.S.C.S. § 637* certification from the federal small business administration. *Go To Headnote*

Baja Contractors, Inc. v. Chicago, 830 F.2d 667, 1987 U.S. App. LEXIS 14016 (7th Cir. 1987), cert. denied, *485 U.S. 993, 108 S. Ct. 1301, 99 L. Ed. 2d 511, 1988 U.S. LEXIS 1577 (1988).*

Overview: *Contractor was not deprived of due process of law because city's procedure to receive certification as concrete supplier provided adequate protection against the risk of an erroneous deprivation of property interest.*

Former 49 CFR 23.5 was redesignated. See now 49 CFR 26.5.

- The USDOT regulations define a minority business enterprise as a small business concern which is owned and controlled by one or more minorities or women. Under the regulations, ownership and control means that a business must be at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and its management and daily business operations are controlled by one or more such individuals. *49 C.F.R. § 23.5(f) (1986)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

Overview: *Defendant could not bring a Fourth Amendment challenge to a search of corporate offices because he did not have a reasonable expectation of privacy; under USSG § 2B1.1, in a disadvantaged business enterprise fraud case, the amount of loss was the face value of the contracts less the fair market value of the services provided.*

- Federal regulations require states that receive federal transportation funds to set annual goals for participation in transportation construction projects by disadvantaged business enterprises (DBEs). *49 C.F.R. § 26.21*. A DBE is a for-profit small business that is at least 51% owned by an individual or individuals who are both socially and economically disadvantaged and whose management and daily operations are controlled by one or more of the disadvantaged individuals who own it. *49 C.F.R. § 26.5*. *Go To Headnote*

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. *49 C.F.R. § 26.1*. *49 C.F.R. § 26.3*. It provides that such recipients may certify firms as eligible to participate as DBEs. *49 C.F.R. §§ 26.61(a)*, *26.5*. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an

overall goal for DBE participation in USDOT-assisted contracts. *49 C.F.R. §§ 26.41*, *26.45(a)(1)*. A recipient of USDOT contracts must have a DBE program. *49 C.F.R. § 26.21*. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. *Go To Headnote*

Corey Airport Servs. v. City of Atlanta, 632 F. Supp. 2d 1246, 2008-2 Trade Cas. (CCH) ¶76351, 77 Fed. R. Evid. Serv. (CBC) 882, 2008 U.S. Dist. LEXIS 75508 (N.D. Ga. 2008), rev'd, remanded, *587 F.3d 1280, 22 Fla. L. Weekly Fed. C 274, 2009 U.S. App. LEXIS 25048 (11th Cir. 2009)*.

Overview: *Testimony of public bidder's expert on definition of relevant market did not meet reliability standard of Fed. R. Evid. 702 where expert impermissibly based analysis on initial assumption that antitrust violation occurred. Bidder's 15 U.S.C.S. § 1 claim failed due to lack of proof as to relevant market or actual detrimental effects to competition.*

• The City of Atlanta, Georgia administers a Disadvantaged Business Enterprise (DBE) program in connection with its public contracts. Because the City accepts federal funding for its airport, the DBE program is subject to the federal DBE rules promulgated by the U.S. Department of Transportation, which are codified at 49 C.F.R. §§ 23, 26 (2005). Under those rules, a DBE firm is one that is at least 51% owned by one or more individuals who are both socially and economically disadvantaged and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. *49 C.F.R. § 26.5 (2005)*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within society because of their identities as members of certain groups and without regard to their individual qualities. 49 C.F.R. § 26, app. E (2005). Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. 49 C.F.R. § 26, app. E (2005). *Go To Headnote*

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

• To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

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Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.5 was redesignated. See now 49 CFR 26.5.

- Under the disadvantaged business enterprise (DBE) program a minimum percentage of the dollar amount of federal highway construction contracts is set aside for bidding by certified DBEs. It is a part of the federal program to support the fullest possible participation of firms owned and controlled by minority and women in Department programs. *49 C.F.R. § 23.1*. The definition of a minority business enterprise (MBE) means a small business concern which is owned and controlled by one or more minorities or women. *49 C.F.R. § 23.5*. The definition of a DBE is almost the same as that of a MBE. Under the regulations, applicants and recipients who let Department of Transportation-assisted contracts are required to implement MBE programs and to secure Department approval of the program. *49 C.F.R. § 23.41*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

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Public Contracts Law: Business Aids & Assistance: Small Businesses

In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026, 42 Cont. Cas. Fed. (CCH) ¶ 77383, 1998 U.S. Dist. LEXIS 13690 (D. Minn. 1998).

Overview: *State's Disadvantaged Business Enterprises program, which required federal highway fund recipients to award a certain percentage of state highway projects to women and to certain ethnic minority contractors and subcontractors, was unconstitutional.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) defines a "small business" as one with average annual gross receipts of less than $ 15,370,000 for the preceding three fiscal years, adjusted for inflation. 1003(b)(2)(A) and (B). The amount was increased to $ 16,600,000 in 1994. 49 C.F.R. § 23.62 (1996). Section 1003(b) of ISTEA incorporates the section 8(d) of the Small Business Act's definition of small business concerns owned and controlled by socially and economically disadvantaged individuals. *Go To Headnote*

- The regulations promulgated by the United States Department of Transportation (USDOT) to implement its Disadvantaged Business Enterprise (DBE) programs further provide that individuals who are not members of any of the listed groups may apply for DBE status on a case-by-case basis. Such DBE status-seekers must actually demonstrate both social and economic disadvantage. 49 C.F.R. § 23.62 (1996); 49 C.F.R. pt. 23, subpt. D, app. C (1996). USDOT also recognizes, for purposes of USDOT-assisted programs, anyone found to be socially and economically disadvantaged by the Small Business Administration (SBA), under Section 8(a) of the SBA. 49 C.F.R. § 23.62 (1996). *Go To Headnote*

Public Contracts Law: Types of Contracts: Construction Contracts

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

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Transportation Law: General Overview

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

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Transportation Law: Air Transportation: Airports: Concessionaires

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

- A firm is eligible for the Federal Airport Concessions Disadvantaged Business Enterprise Program as long as (1) it is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) its management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. *49 C.F.R. § 26.5*. Critical to this court's review, the firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control. *49 C.F.R. § 26.61(b)*. *Go To Headnote*

Transportation Law: Air Transportation: Airports: Funding

Corey Airport Servs. v. City of Atlanta, 632 F. Supp. 2d 1246, 2008-2 Trade Cas. (CCH) ¶76351, 77 Fed. R. Evid. Serv. (CBC) 882, 2008 U.S. Dist. LEXIS 75508 (N.D. Ga. 2008), rev'd, remanded, *587 F.3d 1280, 22 Fla. L. Weekly Fed. C 274, 2009 U.S. App. LEXIS 25048 (11th Cir. 2009)*.

Overview: *Testimony of public bidder's expert on definition of relevant market did not meet reliability standard of Fed. R. Evid. 702 where expert impermissibly based analysis on initial assumption that antitrust violation occurred. Bidder's 15 U.S.C.S. § 1 claim failed due to lack of proof as to relevant market or actual detrimental effects to competition.*

- The City of Atlanta, Georgia administers a Disadvantaged Business Enterprise (DBE) program in connection with its public contracts. Because the City accepts federal funding for its airport, the DBE program is subject to the federal DBE rules promulgated by the U.S. Department of Transportation, which are codified at 49 C.F.R. §§ 23, 26 (2005). Under those rules, a DBE firm is one that is at least 51% owned by one or more individuals who are both socially and economically disadvantaged and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. *49 C.F.R. § 26.5 (2005)*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within society because of their identities as members of certain groups and without regard to their individual qualities. 49 C.F.R. § 26, app. E (2005). Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. 49 C.F.R. § 26, app. E (2005). *Go To Headnote*

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Transportation Law: Bridges & Roads: Funding

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- Under federal law at least 10 percent of funds authorized for certain Department of Transportation programs, including federal-aid highway construction funds, are to be expended with disadvantaged business enterprises (DBE). Surface Transportation Assistance Act of 1982, *Pub. L. No. 97-424*, *96 Stat. 2097*. To qualify as a DBE the ownership, management, and daily business operations must be owned and controlled by one or more socially and economically disadvantaged individuals. 49 C.F.R. § 23.62. Women are included in this definition. *Go To Headnote*

Transportation Law: Bridges & Roads: U.S. Federal Highway Administration

In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026, 42 Cont. Cas. Fed. (CCH) ¶ 77383, 1998 U.S. Dist. LEXIS 13690 (D. Minn. 1998).

Overview: *State's Disadvantaged Business Enterprises program, which required federal highway fund recipients to award a certain percentage of state highway projects to women and to certain ethnic minority contractors and subcontractors, was unconstitutional.*

Former 49 CFR 23.62 was redesignated. See now 49 CFR 26.5.

- The regulations promulgated by the United States Department of Transportation (USDOT) to implement its Disadvantaged Business Enterprise (DBE) programs further provide that individuals who are not members of any of the listed groups may apply for DBE status on a case-by-case basis. Such DBE status-seekers must actually demonstrate both social and economic disadvantage. 49 C.F.R. § 23.62 (1996); 49 C.F.R. pt. 23, subpt. D, app. C (1996). USDOT also recognizes, for purposes of USDOT-assisted programs, anyone found to be socially and economically disadvantaged by the Small Business Administration (SBA), under Section 8(a) of the SBA. 49 C.F.R. § 23.62 (1996). *Go To Headnote*

Transportation Law: Public Transportation

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23.5 was redesignated. See now 49 CFR 26.5.

- Subpart D of the regulations applies to all Department of Transportation (DOT) financial assistance that recipients expend in DOT-assisted contracts. 49 C.F.R. § 23.63. DOT financial assistance is defined as financial aid provided directly in the form of actual money or indirectly in the form of guarantees authorized by statute or any other arrangement through which the recipient benefits financially. *49 C.F.R. § 23.5*. DOT-assisted contract means any contract which is paid for in whole or in part with DOT financial assistance. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.1

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

(a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;

(b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;

(c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;

(e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;

(f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.

(g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and

(h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5127, Feb. 2, 1999; *79 FR 59566*, 59592, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59592, Oct. 2, 2014, amended this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Contracts Law: Types of Contracts: Construction Contracts

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

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Contracts Law: Types of Contracts: Construction Contracts

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.1 was redesignated. See now 49 CFR 26.1.

- Under the disadvantaged business enterprise (DBE) program a minimum percentage of the dollar amount of federal highway construction contracts is set aside for bidding by certified DBEs. It is a part of the federal program to support the fullest possible participation of firms owned and controlled by minority and women in Department programs. *49 C.F.R. § 23.1*. The definition of a minority business enterprise (MBE) means a small business concern which is owned and controlled by one or more minorities or women. *49 C.F.R. § 23.5*. The definition of a DBE is almost the same as that of a MBE. Under the regulations, applicants and recipients who let Department of Transportation-assisted contracts are required to implement MBE programs and to secure Department approval of the program. *49 C.F.R. § 23.41*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006).*

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

- The regulations implementing the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), seek to create a level playing field on which disadvantaged business enterprises can compete fairly for contracts assisted by the U.S. Department of Transportation. *49 C.F.R. § 26.1(b)*. A disadvantaged business enterprise (DBE) is defined as a small business owned and controlled by one or more individuals who are socially and

economically disadvantaged. 49 C.F.R. § 26.5. Although the term "socially and economically disadvantaged" is race- and sex-neutral on its face, the regulations presume that Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women are socially and economically disadvantaged. 49 C.F.R. § 26.67(a). This presumption of disadvantage is rebutted where the individual has a personal net worth of more than $ 750,000 or a preponderance of the evidence demonstrates that the individual is not in fact socially and economically disadvantaged. § 26.67(b). Firms owned and controlled by someone who is not presumed to be disadvantaged (i.e., a white male) can qualify for DBE status if the individual can demonstrate that he is in fact socially and economically disadvantaged. § 26.67(d). Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. 49 C.F.R. § 26.1. 49 C.F.R. § 26.3. It provides that such recipients may certify firms as eligible to participate as DBEs. 49 C.F.R. §§ 26.61(a), 26.5. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an overall goal for DBE participation in USDOT-assisted contracts. 49 C.F.R. §§ 26.41, 26.45(a)(1). A recipient of USDOT contracts must have a DBE program. 49 C.F.R. § 26.21. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.1 was redesignated. See now 49 CFR 26.1.

- Under the disadvantaged business enterprise (DBE) program a minimum percentage of the dollar amount of federal highway construction contracts is set aside for bidding by certified DBEs. It is a part of the federal program to support the fullest possible participation of firms owned and controlled by minority and women in Department programs. 49 C.F.R. § 23.1. The definition of a minority business enterprise (MBE) means a small business concern which is owned and controlled by one or more minorities or women. 49 C.F.R. § 23.5. The definition of a DBE is almost the same as that of a MBE. Under the regulations, applicants and recipients who let Department of Transportation-assisted contracts are required to implement MBE programs and to secure Department approval of the program. 49 C.F.R. § 23.41. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.1 was redesignated. See now 49 CFR 26.1.

- Under the disadvantaged business enterprise (DBE) program a minimum percentage of the dollar amount of federal highway construction contracts is set aside for bidding by certified DBEs. It is a part of the federal program to support the fullest possible participation of firms owned and controlled by minority and women in Department programs. *49 C.F.R. § 23.1*. The definition of a minority business enterprise (MBE) means a small business concern which is owned and controlled by one or more minorities or women. *49 C.F.R. § 23.5*. The definition of a DBE is almost the same as that of a MBE. Under the regulations, applicants and recipients who let Department of Transportation-assisted contracts are required to implement MBE programs and to secure Department approval of the program. *49 C.F.R. § 23.41*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.7

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.7 What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5128, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5128, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Department of Transportation regulations forbid a recipient from discriminating against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin. *49 C.F.R. § 26.7(a)*. In administering its disadvantaged business enterprises program, a recipient must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin. *49 C.F.R. § 26.7(b)*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.3

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), *Pub. L. 102-240, 105 Stat. 1914*, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. 105-178, 112 Stat. 107*. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), *Pub. L. 109-59, 119 Stat. 1144*; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), *Pub. L. 112-141, 126 Stat. 405*.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, *Pub. L. 102-240* or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, *Pub. L. 105-178*. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), *Pub. L. 109-59, 119 Stat. 1144*; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), *Pub. L. 112-141, 126 Stat. 405*.

(3) Airport funds authorized by *49 U.S.C. 47101*, et seq.

(b)[Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5127, Feb. 2, 1999; *79 FR 59566*, 59592, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59592, Oct. 2, 2014, amended paragraphs (a)(1) and (a)(2), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Governments: Public Improvements: Bridges & Roads

Governments: Public Improvements: Financing

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Transportation Law: Bridges & Roads: Funding

Governments: Public Improvements: Bridges & Roads

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir.), cert. denied, *500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714, 1991 U.S. LEXIS 3264 (1991)*.

Overview: *Decision to enjoin state law based set aside program and not federal program was affirmed where reverse discrimination was unconstitutional but federal program was not pursuant to constitutional enforcement authority.*

Former 49 CFR 23.63 was redesignated. See now 49 CFR 26.3.

- The receipt of funds under the Surface Transportation and Uniform Relocation Assistance Act of 1987 is voluntary, but a state that decides to receive such funds is bound by the regulations. 49 C.F.R. § 23.63. Oddly, the regulations fail to mention women as one of the groups eligible for the presumption of disadvantage. 49 C.F.R. § 23.62. That is because the regulations date from a 1983 highway construction law and women were first made beneficiaries in the 1987 version. The regulations have been amended to include women, 49 C.F.R. pt. 23, subpt. D, app. A, Section-by-Section Analysis: Section 23.62 Definitions, but amended clumsily, so that the intention to entitle women to the presumption remains obscure as a matter of semantics. *Go To Headnote*

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.68 was redesignated. See now 49 CFR 26.3.

- The Federal Highway Administration is the federal agency primarily responsible for administering federal highway aid programs in Wisconsin. The Wisconsin Department of Transportation and the Federal Highway Administration are parties to contracts for the receipt of federal highway funds. As a condition of receiving federal funding of state

highway construction projects, Wisconsin must comply with federal rules regarding contracting generally, and regarding the 1987 federal Surface Transportation Act disadvantaged business program in particular. 49 C.F.R. § 23.68. Go To Headnote

Governments: Public Improvements: Financing

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.68 was redesignated. See now 49 CFR 26.3.

- The Federal Highway Administration is the federal agency primarily responsible for administering federal highway aid programs in Wisconsin. The Wisconsin Department of Transportation and the Federal Highway Administration are parties to contracts for the receipt of federal highway funds. As a condition of receiving federal funding of state highway construction projects, Wisconsin must comply with federal rules regarding contracting generally, and regarding the 1987 federal Surface Transportation Act disadvantaged business program in particular. 49 C.F.R. § 23.68. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir.), cert. denied, *500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714, 1991 U.S. LEXIS 3264 (1991)*.

Overview: *Decision to enjoin state law based set aside program and not federal program was affirmed where reverse discrimination was unconstitutional but federal program was not pursuant to constitutional enforcement authority.*

Former 49 CFR 23.63 was redesignated. See now 49 CFR 26.3.

- The receipt of funds under the Surface Transportation and Uniform Relocation Assistance Act of 1987 is voluntary, but a state that decides to receive such funds is bound by the regulations. 49 C.F.R. § 23.63. Oddly, the regulations fail to mention women as one of the groups eligible for the presumption of disadvantage. 49 C.F.R. § 23.62. That is because the regulations date from a 1983 highway construction law and women were first made beneficiaries in the 1987 version. The regulations have been amended to include women, 49 C.F.R. pt. 23, subpt. D, app. A, Section-by-Section Analysis: Section 23.62 Definitions, but amended clumsily, so that the intention to entitle women to the presumption remains obscure as a matter of semantics. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

• Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. *49 C.F.R. § 26.1*. *49 C.F.R. § 26.3*. It provides that such recipients may certify firms as eligible to participate as DBEs. *49 C.F.R. §§ 26.61(a)*, *26.5*. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an overall goal for DBE participation in USDOT-assisted contracts. *49 C.F.R. §§ 26.41*, *26.45(a)(1)*. A recipient of USDOT contracts must have a DBE program. *49 C.F.R. § 26.21*. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. *Go To Headnote*

Transportation Law: Bridges & Roads: Funding

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.68 was redesignated. See now 49 CFR 26.3.

• The Federal Highway Administration is the federal agency primarily responsible for administering federal highway aid programs in Wisconsin. The Wisconsin Department of Transportation and the Federal Highway Administration are parties to contracts for the receipt of federal highway funds. As a condition of receiving federal funding of state highway construction projects, Wisconsin must comply with federal rules regarding contracting generally, and regarding the 1987 federal Surface Transportation Act disadvantaged business program in particular. 49 C.F.R. § 23.68. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.25

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.25 What is the requirement for a liaison officer?

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5130, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.23

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5130, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.21

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA primary recipients receiving funds authorized by a statute to which this part applies;

(2)FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds $ 250,000 in FTA funds in a Federal fiscal year;

(3)FAA recipients receiving grants for airport planning or development who will award prime contracts the cumulative total value of which exceeds $ 250,000 in FAA funds in a Federal fiscal year.

(b)

(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5129, Feb. 2, 1999; *64 FR 34569*, 34570, June 28, 1999; *65 FR 68949*, 68951, Nov. 15, 2000; *79 FR 59566*, 59593, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59593, Oct. 2, 2014, amended paragraphs (a)(1), (a)(2), and (a)(3), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Constitutional Law: Congressional Duties & Powers: Spending & Taxation

Contracts Law: Types of Contracts: Construction Contracts

Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

Governments: Public Improvements: Bridges & Roads

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Public Contracts Law: Business Aids & Assistance: Small Businesses

Public Contracts Law: Types of Contracts: Construction Contracts

Transportation Law: General Overview

Transportation Law: Bridges & Roads: General Overview

Constitutional Law: Congressional Duties & Powers: Spending & Taxation

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- As a condition of receiving federal highway funds, a recipient must have a disadvantaged business enterprises (DBE) program, *49 C.F.R. § 26.21*, must set an overall goal for DBE participation in United States Department of Transportation (USDOT) -assisted contracts, *49 C.F.R. § 26.45(a)*, and, if it sets overall goals on a fiscal year basis, must submit them to USDOT for review and approval. *49 C.F.R. § 26.45(f)(1)*. If a recipient determines that DBE firms are so "overconcentrated" in a particular occupational area as to "unduly burden" the opportunity of non-DBE

firms to participate in that type of work, it must devise appropriate measures to address this overconcentration. 49 C.F.R. § 26.33. Go To Headnote

Contracts Law: Types of Contracts: Construction Contracts

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.41 was redesignated. See now 49 CFR 26.21.

- Under the disadvantaged business enterprise (DBE) program a minimum percentage of the dollar amount of federal highway construction contracts is set aside for bidding by certified DBEs. It is a part of the federal program to support the fullest possible participation of firms owned and controlled by minority and women in Department programs. 49 C.F.R. § 23.1. The definition of a minority business enterprise (MBE) means a small business concern which is owned and controlled by one or more minorities or women. 49 C.F.R. § 23.5. The definition of a DBE is almost the same as that of a MBE. Under the regulations, applicants and recipients who let Department of Transportation-assisted contracts are required to implement MBE programs and to secure Department approval of the program. 49 C.F.R. § 23.41. Go To Headnote

Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. 49 C.F.R. § 26.21. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. 49 C.F.R. § 26.5. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. 49 C.F.R. § 26.67(a)(1). The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. 49 C.F.R. § 26.67(b)(1). Go To Headnote

Governments: Public Improvements: Bridges & Roads

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, 2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007).

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- The Illinois Department of Transportation's (IDOT) disadvantaged business enterprise (DBE) program is an outgrowth of federal policy. Federal law establishes a national goal that 10 % of federal highway funds are to be spent with DBEs. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1983). The U.S. Department of Transportation's implementing regulations for the Transportation Equity Act for the 21st Century,

Pub. L. No. 105-178, § 1101(b)(1), *112 Stat. 107*, 113 (1998), require all recipients of federal highway funds (such as the IDOT) to have an approved DBE program. *49 C.F.R. § 26.21(a)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Gross Seed Co. v. Neb. Dep't of Rds., 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002).

Overview: *The Transportation Equity Act for the 21st Century and its implementing regulations met the requirements of strict scrutiny and were constitutional. Congress's record did not need to be supported by prior studies and debates as to discrimination.*

- The regulations promulgated under the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), require states to implement a Disadvantaged Business Enterprise (DBE) program to obtain federal financial assistance for state highway projects. *49 C.F.R. § 26.21*. The state must then submit the plan to the United States Department of Transportation for approval. A state may obtain a waiver of the requirement if the state demonstrates it can reach a level playing field for DBEs without the implementation of the program. *49 C.F.R. § 26.15*. *Go To Headnote*

Milwaukee County Pavers Ass'n v. Fielder, 710 F. Supp. 1532, 1989 U.S. Dist. LEXIS 4914 (W.D. Wis. 1989).

Overview: *When a constitutionally contested state program was proved to be a subsidiary of a federal program, state could rely on Congressional findings of past discrimination as the requisite findings of discrimination for racial and ethnic classification.*

Former 49 CFR 23.68 was removed. See now 49 CFR 26.21.

- Receipt of federal highway funds is contingent upon compliance with the statutory and regulatory requirements concerning disadvantaged businesses. 49 C.F.R. § 23.68. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016)*.

Overview: *Defendant could not bring a Fourth Amendment challenge to a search of corporate offices because he did not have a reasonable expectation of privacy; under USSG § 2B1.1, in a disadvantaged business enterprise fraud case, the amount of loss was the face value of the contracts less the fair market value of the services provided.*

- Federal regulations require states that receive federal transportation funds to set annual goals for participation in transportation construction projects by disadvantaged business enterprises (DBEs). *49 C.F.R. § 26.21*. A DBE is a for-profit small business that is at least 51% owned by an individual or individuals who are both socially and economically disadvantaged and whose management and daily operations are controlled by one or more of the disadvantaged individuals who own it. *49 C.F.R. § 26.5*. *Go To Headnote*

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

• United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. 49 C.F.R. § 26.21. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. 49 C.F.R. § 26.5. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. 49 C.F.R. § 26.67(a)(1). The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. 49 C.F.R. § 26.67(b)(1). Go To Headnote

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

• Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. 49 C.F.R. § 26.1. 49 C.F.R. § 26.3. It provides that such recipients may certify firms as eligible to participate as DBEs. 49 C.F.R. §§ 26.61(a), 26.5. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an overall goal for DBE participation in USDOT-assisted contracts. 49 C.F.R. §§ 26.41, 26.45(a)(1). A recipient of USDOT contracts must have a DBE program. 49 C.F.R. § 26.21. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. Go To Headnote

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

• The Illinois Department of Transportation's (IDOT) disadvantaged business enterprise (DBE) program is an outgrowth of federal policy. Federal law establishes a national goal that 10 % of federal highway funds are to be spent with DBEs. Surface Transportation Assistance Act of 1982, *Pub. L. No. 97-424*, § 105(f), *96 Stat. 2097*, 2100 (1983). The U.S. Department of Transportation's implementing regulations for the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113 (1998), require all recipients of federal highway funds (such as the IDOT) to have an approved DBE program. 49 C.F.R. § 26.21(a). Go To Headnote

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

• As a condition of receiving federal highway funds, a recipient must have a disadvantaged business enterprises (DBE) program, 49 C.F.R. § 26.21, must set an overall goal for DBE participation in United States Department of Transportation (USDOT) -assisted contracts, 49 C.F.R. § 26.45(a), and, if it sets overall goals on a fiscal year basis, must submit them to USDOT for review and approval. 49 C.F.R. § 26.45(f)(1). If a recipient determines that DBE firms are so "overconcentrated" in a particular occupational area as to "unduly burden" the opportunity of non-DBE firms to participate in that type of work, it must devise appropriate measures to address this overconcentration. 49 C.F.R. § 26.33. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.41 was redesignated. See now 49 CFR 26.21.

- Under the disadvantaged business enterprise (DBE) program a minimum percentage of the dollar amount of federal highway construction contracts is set aside for bidding by certified DBEs. It is a part of the federal program to support the fullest possible participation of firms owned and controlled by minority and women in Department programs. *49 C.F.R. § 23.1*. The definition of a minority business enterprise (MBE) means a small business concern which is owned and controlled by one or more minorities or women. *49 C.F.R. § 23.5*. The definition of a DBE is almost the same as that of a MBE. Under the regulations, applicants and recipients who let Department of Transportation-assisted contracts are required to implement MBE programs and to secure Department approval of the program. *49 C.F.R. § 23.41*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

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Public Contracts Law: Business Aids & Assistance: Small Businesses

Dobson Bros. Constr. v. Ratliff, Inc., 2008 U.S. Dist. LEXIS 97283 (D. Neb. Nov. 6, 2008), adopted, *2008 U.S. Dist. LEXIS 100816 (D. Neb. Dec. 12, 2008)*.

Overview: *In this breach of contract action, the magistrate recommended that defendants' motion to compel arbitration be granted because, read as a whole, a special provision of the contract mandated ADR, and stated that the parties must submit their dispute to a neutral mediator or arbitrator for a hearing and decision.*

- Pursuant to the revised Disadvantaged Business Enterprise (DBE) program, any entity, including the ODOT, which accepts bids for federally funded highway construction must have its own DBE program. *49 C.F.R. § 26.21*. *Go To Headnote*

Public Contracts Law: Types of Contracts: Construction Contracts

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

Overview: *Defendant could not bring a Fourth Amendment challenge to a search of corporate offices because he did not have a reasonable expectation of privacy; under USSG § 2B1.1, in a disadvantaged business enterprise fraud case, the amount of loss was the face value of the contracts less the fair market value of the services provided.*

- Federal regulations require states that receive federal transportation funds to set annual goals for participation in transportation construction projects by disadvantaged business enterprises (DBEs). *49 C.F.R. § 26.21*. A DBE is a for-profit small business that is at least 51% owned by an individual or individuals who are both socially and economically disadvantaged and whose management and daily operations are controlled by one or more of the disadvantaged individuals who own it. *49 C.F.R. § 26.5*. *Go To Headnote*

Transportation Law: General Overview

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

Overview: *Defendant could not bring a Fourth Amendment challenge to a search of corporate offices because he did not have a reasonable expectation of privacy; under USSG § 2B1.1, in a disadvantaged business enterprise fraud case, the amount of loss was the face value of the contracts less the fair market value of the services provided.*

- Federal regulations require states that receive federal transportation funds to set annual goals for participation in transportation construction projects by disadvantaged business enterprises (DBEs). *49 C.F.R. § 26.21*. A DBE is a for-profit small business that is at least 51% owned by an individual or individuals who are both socially and economically disadvantaged and whose management and daily operations are controlled by one or more of the disadvantaged individuals who own it. *49 C.F.R. § 26.5*. *Go To Headnote*

Transportation Law: Bridges & Roads: General Overview

Gross Seed Co. v. Neb. Dep't of Rds., 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002).

Overview: *The Transportation Equity Act for the 21st Century and its implementing regulations met the requirements of strict scrutiny and were constitutional. Congress's record did not need to be supported by prior studies and debates as to discrimination.*

- The regulations promulgated under the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), require states to implement a Disadvantaged Business Enterprise (DBE) program to obtain federal financial assistance for state highway projects. *49 C.F.R. § 26.21*. The state must then submit the plan to the United States Department of Transportation for approval. A state may obtain a waiver of the requirement if the state demonstrates it can reach a level playing field for DBEs without the implementation of the program. *49 C.F.R. § 26.15*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.15

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.15 How can recipients apply for exemptions or waivers?

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that —

(i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

(i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;

(ii) Your level of DBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of your modified program; and

(iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5129, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5129, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Civil Rights Law: General Overview

Governments: Public Improvements: Financing

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Small Businesses

Transportation Law: Bridges & Roads: General Overview

Civil Rights Law: General Overview

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

- Neither the Minnesota Department of Transportation's implementing regulations nor the Transportation Equity Act for the 21st Century (TEA-21) includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. *49 C.F.R. § 26.43*. Although each state is required to set overall goals based on its local situation, *49 C.F.R. § 26.45*, it is not bound to TEA-21's 10 percent goal. Under the regulations, a state which tries but does not meet its Disadvantaged Business Enterprise goals is not penalized. *49 C.F.R. § 26.47*. The regulations go further, permitting a state to apply for an exemption from any provision of that part of the regulations. *49 C.F.R. § 26.15*. *Go To Headnote*

Governments: Public Improvements: Financing

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- The provision in the Transportation Equity Act for the 21st Century, *Pub. L. 105-178, 112 Stat. 107* (1998), requiring that at least ten percent of federal highway construction funds be paid to disadvantaged business enterprises is an aspirational goal at the national level. *49 C.F.R. § 26.41(b)*. This national goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent. *49 C.F.R. § 26.41(c)*. The United States Department of Transportation may grant an exemption or waiver from nearly all aspects of the program, including any provision relating to administrative requirements, overall goals, contract goals, and good faith efforts. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, the presumption that women and minorities are socially disadvantaged is deemed rebutted if such individual's personal net worth exceeds $ 750,000, *49 C.F.R. § 26.67(b)(1)*, and a firm owned by an individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. *49 C.F.R. § 26.67(d)*. Other aspects of the regulations, as well, provide recipients and prime contractors with ample flexibility: recipients may obtain waivers or exemptions from any requirement, *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

• Regarding the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the regulations expressly declare that the statutory 10 percent provision is an aspirational goal at the national level, not a mandatory requirement for grantee states. *49 C.F.R. § 26.41(b)*. Thus, absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *49 C.F.R. § 26.47*. If the state meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *49 C.F.R. § 26.51(f)(3)*. In addition, U.S. Department of Transportation may grant an exemption or waiver from any or all requirements of the program. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Gross Seed Co. v. Neb. Dep't of Rds., 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002).

Overview: *The Transportation Equity Act for the 21st Century and its implementing regulations met the requirements of strict scrutiny and were constitutional. Congress's record did not need to be supported by prior studies and debates as to discrimination.*

• The regulations promulgated under the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), require states to implement a Disadvantaged Business Enterprise (DBE) program to obtain federal financial assistance for state highway projects. *49 C.F.R. § 26.21*. The state must then submit the plan to the United States Department of Transportation for approval. A state may obtain a waiver of the requirement if the state demonstrates it can reach a level playing field for DBEs without the implementation of the program. *49 C.F.R. § 26.15*. *Go To Headnote*

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Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

• Neither the Minnesota Department of Transportation's implementing regulations nor the Transportation Equity Act for the 21st Century (TEA-21) includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. *49 C.F.R. § 26.43*. Although each state is required to set overall goals based on its local situation, *49 C.F.R. § 26.45*, it is not bound to TEA-21's 10 percent goal. Under the regulations, a state which tries but does not meet its Disadvantaged Business Enterprise goals is not penalized. *49 C.F.R. § 26.47*. The regulations go further, permitting a state to apply for an exemption from any provision of that part of the regulations. *49 C.F.R. § 26.15*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

• The provision in the Transportation Equity Act for the 21st Century, *Pub. L. 105-178, 112 Stat. 107* (1998), requiring that at least ten percent of federal highway construction funds be paid to disadvantaged business enterprises is an aspirational goal at the national level. *49 C.F.R. § 26.41(b)*. This national goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent. *49 C.F.R. § 26.41(c)*. The United States Department of Transportation may grant an exemption or waiver from nearly all aspects of the program, including any provision relating to administrative requirements, overall goals, contract goals, and good faith efforts. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Regarding the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the regulations expressly declare that the statutory 10 percent provision is an aspirational goal at the national level, not a mandatory requirement for grantee states. *49 C.F.R. § 26.41(b)*. Thus, absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *49 C.F.R. § 26.47*. If the state meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *49 C.F.R. § 26.51(f)(3)*. In addition, U.S. Department of Transportation may grant an exemption or waiver from any or all requirements of the program. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Transportation Law: Bridges & Roads: General Overview

Gross Seed Co. v. Neb. Dep't of Rds., 2002 U.S. Dist. LEXIS 27125 (D. Neb. May 6, 2002).

Overview: *The Transportation Equity Act for the 21st Century and its implementing regulations met the requirements of strict scrutiny and were constitutional. Congress's record did not need to be supported by prior studies and debates as to discrimination.*

- The regulations promulgated under the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178*, *112 Stat. 107* (1998), require states to implement a Disadvantaged Business Enterprise (DBE) program to obtain federal financial assistance for state highway projects. *49 C.F.R. § 26.21*. The state must then submit the plan to the United States Department of Transportation for approval. A state may obtain a waiver of the requirement if the state demonstrates it can reach a level playing field for DBEs without the implementation of the program. *49 C.F.R. § 26.15*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.13

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under *18 U.S.C. 1001* and/or the Program Fraud Civil Remedies Act of 1986 (*31 U.S.C. 3801* et seq.).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

(1) Withholding monthly progress payments;

(2) Assessing sanctions;

(3) Liquidated damages; and/or

(4) Disqualifying the contractor from future bidding as non-responsible.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5129, Feb. 2, 1999; *79 FR 59566*, 59593, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59593, Oct. 2, 2014, revised this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.11

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart A — General

§ 26.11 What records do recipients keep and report?

(a) You must transmit the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to this part, at the intervals stated on the form.

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must create and maintain a bidders list.

(1) The purpose of this list is to provide you as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts for use in helping you set your overall goals.

(2) You must obtain the following information about DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts:

(i) Firm name;

(ii) Firm address;

(iii) Firm's status as a DBE or non-DBE;

(iv) Age of the firm; and

(v) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than $ 500,000; $ 500,000-$ 1 million; $ 1-2 million; $ 2-5 million; etc.) rather than requesting an exact figure from the firm.

(3) You may acquire the information for your bidders list in a variety of ways. For example, you can collect the data from all bidders, before or after the bid due date. You can conduct a survey that will result in statistically sound estimate of the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts. You may combine different data collection approaches (e.g., collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information).

(d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

(e) The State department of transportation in each UCP established pursuant to § 26.81 of this part must report to the Department of Transportation's Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location in the State of certified DBE firms in the UCP Directory controlled by the following:

(1) Women;

(2) Socially and economically disadvantaged individuals (other than women); and

(3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5129, Feb. 2, 1999; *65 FR 68949*, 68951, Nov. 15, 2000; *76 FR 5083*, 5096, Jan. 28, 2011; *79 FR 59566*, 59593, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59593, Oct. 2, 2014, added paragraphs (d) and (e), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.27

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.27 What efforts must recipients make concerning DBE financial institutions?

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5130, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.31

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.31 What information must you include in your DBE directory?

(a) In the directory required under § 26.81(g) of this Part, you must list all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE.

(b) You must list each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work. You must make any changes to your current directory entries necessary to meet the requirement of this paragraph (a) by August 26, 2011.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999; *76 FR 5083*, 5096, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5096, Jan. 28, 2011, revised this section, effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.29

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

(c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

(d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(e) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

(1)A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2)A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999; *68 FR 35542*, 35553, June 16, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

68 FR 35542, 35553, June 16, 2003, revised this section, effective July 16, 2003.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Civil Procedure: Alternative Dispute Resolution: General Overview

Public Contracts Law: Business Aids & Assistance: Small Businesses

Public Contracts Law: Contract Provisions: Payment Schedules

Public Contracts Law: Dispute Resolution: Subcontractors: General Overview

Public Contracts Law: Performance: Subcontracts & Subcontractors

Civil Procedure: Alternative Dispute Resolution: General Overview

Dobson Bros. Constr. v. Ratliff, Inc., 2008 U.S. Dist. LEXIS 97283 (D. Neb. Nov. 6, 2008), adopted, *2008 U.S. Dist. LEXIS 100816 (D. Neb. Dec. 12, 2008)*.

Overview: *In this breach of contract action, the magistrate recommended that defendants' motion to compel arbitration be granted because, read as a whole, a special provision of the contract mandated ADR, and stated that the parties must submit their dispute to a neutral mediator or arbitrator for a hearing and decision.*

- *49 C.F.R. § 26.29*afforded states the authority to require ADR for "resolution" of contractor/subcontractor payment disputes, and to delineate the acceptable ADR mechanisms. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Dobson Bros. Constr. v. Ratliff, Inc., 2008 U.S. Dist. LEXIS 97283 (D. Neb. Nov. 6, 2008), adopted, *2008 U.S. Dist. LEXIS 100816 (D. Neb. Dec. 12, 2008)*.

Overview: *In this breach of contract action, the magistrate recommended that defendants' motion to compel arbitration be granted because, read as a whole, a special provision of the contract mandated ADR, and stated that the parties must submit their dispute to a neutral mediator or arbitrator for a hearing and decision.*

- *49 C.F.R. § 26.29*afforded states the authority to require ADR for "resolution" of contractor/subcontractor payment disputes, and to delineate the acceptable ADR mechanisms. *Go To Headnote*

Public Contracts Law: Contract Provisions: Payment Schedules

Rasins Landscape & Assocs., Inc. v. Mich. DOT, 528 Fed. Appx. 441, 2013 FED App. 0529N, 118 Fair Empl. Prac. Cas. (BNA) 1117, 2013 U.S. App. LEXIS 11121 (6th Cir. 2013).

Overview: *Subcontractor (SC) lacked standing in 23 U.S.C.S. § 324 discrimination claim against Michigan DOT, alleging DOT failed to sanction prime contractors who did not pay SC, because SC's allegations did not show DOT caused SC's injury; rather, the prime contractors caused SC's injury when they refused to pay and, as such, SC sued wrong party.*

- Pursuant to *49 C.F.R. § 26.29(a)*, the "prompt payment" provision, the Michigan Department of Transportation requires that prime contractors pay subcontractors for satisfactory performance within ten days from the date that the prime contractor receives payment from the Department. In compliance with § 26.29(d), the Department provides means to enforce the prompt-payment requirement. The Department may sanction prime contractors for noncompliance through the withholding of estimates on projects where prompt-payment violations are confirmed, reduce prequalification ratings; and/or withdraw bidding privileges. In addition, a subcontractor may submit a lien claim to the Department's Contract Services Division to notify the project surety of a nonpayment issue. *Go To Headnote*

Public Contracts Law: Dispute Resolution: Subcontractors: General Overview

Rasins Landscape & Assocs., Inc. v. Mich. DOT, 528 Fed. Appx. 441, 2013 FED App. 0529N, 118 Fair Empl. Prac. Cas. (BNA) 1117, 2013 U.S. App. LEXIS 11121 (6th Cir. 2013).

Overview: *Subcontractor (SC) lacked standing in 23 U.S.C.S. § 324 discrimination claim against Michigan DOT, alleging DOT failed to sanction prime contractors who did not pay SC, because SC's allegations did not show DOT caused SC's injury; rather, the prime contractors caused SC's injury when they refused to pay and, as such, SC sued wrong party.*

- Pursuant to *49 C.F.R. § 26.29(a)*, the "prompt payment" provision, the Michigan Department of Transportation requires that prime contractors pay subcontractors for satisfactory performance within ten days from the date that the prime contractor receives payment from the Department. In compliance with § 26.29(d), the Department provides means to enforce the prompt-payment requirement. The Department may sanction prime contractors for noncompliance through the withholding of estimates on projects where prompt-payment violations are confirmed, reduce prequalification ratings; and/or withdraw bidding privileges. In addition, a subcontractor may submit a lien claim to the Department's Contract Services Division to notify the project surety of a nonpayment issue. *Go To Headnote*

Public Contracts Law: Performance: Subcontracts & Subcontractors

Rasins Landscape & Assocs., Inc. v. Mich. DOT, 528 Fed. Appx. 441, 2013 FED App. 0529N, 118 Fair Empl. Prac. Cas. (BNA) 1117, 2013 U.S. App. LEXIS 11121 (6th Cir. 2013).

Overview: *Subcontractor (SC) lacked standing in 23 U.S.C.S. § 324 discrimination claim against Michigan DOT, alleging DOT failed to sanction prime contractors who did not pay SC, because SC's allegations did not show DOT caused SC's injury; rather, the prime contractors caused SC's injury when they refused to pay and, as such, SC sued wrong party.*

- Pursuant to *49 C.F.R. § 26.29(a)*, the "prompt payment" provision, the Michigan Department of Transportation requires that prime contractors pay subcontractors for satisfactory performance within ten days from the date that the prime contractor receives payment from the Department. In compliance with § 26.29(d), the Department provides means to enforce the prompt-payment requirement. The Department may sanction prime contractors for noncompliance through the withholding of estimates on projects where prompt-payment violations are confirmed, reduce prequalification ratings; and/or withdraw bidding privileges. In addition, a subcontractor may submit a lien claim to the Department's Contract Services Division to notify the project surety of a nonpayment issue. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.33

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

(a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protege programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to unsure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5130, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Constitutional Law: Congressional Duties & Powers: Spending & Taxation

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Constitutional Law: Congressional Duties & Powers: Spending & Taxation

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- As a condition of receiving federal highway funds, a recipient must have a disadvantaged business enterprises (DBE) program, *49 C.F.R. § 26.21*, must set an overall goal for DBE participation in United States Department of Transportation (USDOT) -assisted contracts, *49 C.F.R. § 26.45(a)*, and, if it sets overall goals on a fiscal year basis, must submit them to USDOT for review and approval. *49 C.F.R. § 26.45(f)(1)*. If a recipient determines that DBE firms are so "overconcentrated" in a particular occupational area as to "unduly burden" the opportunity of non-DBE firms to participate in that type of work, it must devise appropriate measures to address this overconcentration. *49 C.F.R. § 26.33*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- As a condition of receiving federal highway funds, a recipient must have a disadvantaged business enterprises (DBE) program, *49 C.F.R. § 26.21*, must set an overall goal for DBE participation in United States Department of Transportation (USDOT) -assisted contracts, *49 C.F.R. § 26.45(a)*, and, if it sets overall goals on a fiscal year basis, must submit them to USDOT for review and approval. *49 C.F.R. § 26.45(f)(1)*. If a recipient determines that DBE firms are so "overconcentrated" in a particular occupational area as to "unduly burden" the opportunity of non-DBE firms to participate in that type of work, it must devise appropriate measures to address this overconcentration. *49 C.F.R. § 26.33*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.41

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.41 What is the role of the statutory 10 percent goal in this program?

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5131, Feb. 2, 1999]

Annotations

Notes

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64 FR 5096, 5131, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

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Governments: Public Improvements: Bridges & Roads

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

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Transportation Law: Public Transportation

Governments: Public Improvements: Bridges & Roads

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.66 was redesignated. See now 49 CFR 26.41.

- The administrator of the United States Department of Transportation (USDOT) has authority to approve a goal less than 10 percent if a finding is made that the recipient is making all appropriate efforts to increase disadvantaged business participation to 10%, and that despite such efforts, the lower goal is a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66. Pursuant to 49 C.F.R. § 23.68, the failure of a state that receives federal highway construction funds to have an approved minority business enterprise program and an approved overall goal can result in the suspension or termination of federal funds. The same section provides that the state has the opportunity to explain to the federal administrator why the goal could not be achieved and why meeting the goal was beyond the state's control, and the administrator has authority to grant exceptions. 49 C.F.R. § 23.69 provides that a recipient state must establish a procedure whereby the individual status of those persons presumed due to race or ethnicity to be "socially and economically disadvantaged" can be challenged by a third party. The recipient must ultimately resolve the challenge, determining that the person is or is not socially and economically disadvantaged. The state's decision is then appealable to the USDOT pursuant to *49 C.F.R. § 23.55*. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.61 was redesignated. See now 49 CFR 26.41.

- Pursuant to *49 C.F.R. § 23.61*, unless the secretary of the United States Department of Transportation (USDOT) determines otherwise, not less than 10 percent of the funds authorized by the Surface Transportation and Uniform Relocation Assistance Act must be expended by recipient states for small business concerns owned and controlled by "socially and economically disadvantaged individuals." The regulation further provides that the 10 percent level of participation will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least 10 percent. If the goal submitted is less than 10 percent, there is a procedure for seeking USDOT approval of a lesser goal. A state must show its efforts to locate disadvantaged businesses, to make such businesses aware of contracting opportunities, to encourage disadvantaged businesses, and must provide information concerning legal or other barriers impeding participation of disadvantaged businesses, the availability of such businesses to work on the recipient's contracts, the size and other characteristics of the minority population in

the recipient's jurisdiction and the relevance of such statistics to the potential availability of such businesses. 49 C.F.R. § 23.64. Go To Headnote

• United States Department of Transportation (USDOT) regulations state that recipient states must meet the 10 percent goal, absent USDOT secretary waiver. USDOT regulations further provide that each state recipient of federal funds must submit its goal to the secretary of the USDOT, and a state must justify any goal less than 10 percent. USDOT regulations explicitly state that the national goal of 10 percent will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least ten percent. 49 C.F.R. § 23.61. Florida has established an overall goal of 10 percent, subject to waiver by the state department of transportation. Absent exception, the USDOT can terminate federal highway funds if a recipient state fails to have an approved minority business enterprise program, fails to have an approved overall goal, or fails to meet such goal annually. By USDOT regulation, a state must establish a procedure whereby third persons can challenge the "socially and economically disadvantaged" status of a person. Florida has provide that procedure by rule. Florida has also provided that any person adversely affected by Florida's decision may appeal to the USDOT, and the USDOT regulations provide for such an appeal. Go To Headnote

Governments: Public Improvements: Financing

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

• The provision in the Transportation Equity Act for the 21st Century, *Pub. L. 105-178, 112 Stat. 107* (1998), requiring that at least ten percent of federal highway construction funds be paid to disadvantaged business enterprises is an aspirational goal at the national level. 49 C.F.R. § 26.41(b). This national goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent. 49 C.F.R. § 26.41(c). The United States Department of Transportation may grant an exemption or waiver from nearly all aspects of the program, including any provision relating to administrative requirements, overall goals, contract goals, and good faith efforts. 49 C.F.R. § 26.15(b). Go To Headnote

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.66 was redesignated. See now 49 CFR 26.41.

• The administrator of the United States Department of Transportation (USDOT) has authority to approve a goal less than 10 percent if a finding is made that the recipient is making all appropriate efforts to increase disadvantaged business participation to 10%, and that despite such efforts, the lower goal is a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66. Pursuant to 49 C.F.R. § 23.68, the failure of a state that receives federal highway construction funds to have an approved minority business enterprise program and an approved overall goal can result in the suspension or termination of federal funds. The same section provides that the state has the opportunity to explain to the federal administrator why the goal could not be achieved and why meeting the goal was beyond the state's control, and the administrator has authority to grant exceptions. 49 C.F.R. § 23.69 provides that a recipient state must establish a procedure whereby the individual status of those persons presumed due to race or ethnicity to be "socially and economically disadvantaged" can be challenged by a third party. The recipient must

ultimately resolve the challenge, determining that the person is or is not socially and economically disadvantaged. The state's decision is then appealable to the USDOT pursuant to *49 C.F.R. § 23.55*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006)*.

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

- The regulations implementing the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178, 112 Stat. 107* (1998), do not establish a nationwide disadvantaged business enterprise (DBE) program centrally administered by the U.S. Department of Transportation. Rather, the regulations delegate to each state that accepts federal transportation funds the responsibility for implementing a DBE program that comports with TEA-21. The regulations accordingly explain that the 10 percent DBE utilization requirement established by the TEA-21 statute is merely aspirational in nature. *49 C.F.R. § 26.41(b)*. The statutory goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent. § 26.41(c). *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Regarding the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the regulations expressly declare that the statutory 10 percent provision is an aspirational goal at the national level, not a mandatory requirement for grantee states. *49 C.F.R. § 26.41(b)*. Thus, absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *49 C.F.R. § 26.47*. If the state meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *49 C.F.R. § 26.51(f)(3)*. In addition, U.S. Department of Transportation may grant an exemption or waiver from any or all requirements of the program. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23.64 was redesignated. See now 49 CFR 26.41.

- Recipients of federal funds must develop and use affirmative action techniques to facilitate minority business enterprise participation in contracting activities. *49 C.F.R. § 23.45(c)*. The statute sets forth a target: not less than 10 percent of the amounts authorized will go to certified disadvantaged business enterprises (DBE). The Surface Transportation and Uniform Relocation Assistance Act of 1987, *101 Stat. 132* (1987), § 106(c), *101 Stat. 145*. An overall goal of less than 10 percent may be accepted but must be supported by specific factual findings justifying a lesser percentage. A state must petition the Secretary of Transportation to obtain a waiver of the 10 percent minimum overall goal. 49 C.F.R. §§ 23.64(e), 23.65. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.61 was redesignated. See now 49 CFR 26.41.

- United States Department of Transportation (USDOT) regulations state that recipient states must meet the 10 percent goal, absent USDOT secretary waiver. USDOT regulations further provide that each state recipient of federal funds must submit its goal to the secretary of the USDOT, and a state must justify any goal less than 10 percent. USDOT regulations explicitly state that the national goal of 10 percent will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least ten percent. *49 C.F.R. § 23.61*. Florida has established an overall goal of 10 percent, subject to waiver by the state department of transportation. Absent exception, the USDOT can terminate federal highway funds if a recipient state fails to have an approved minority business enterprise program, fails to have an approved overall goal, or fails to meet such goal annually. By USDOT regulation, a state must establish a procedure whereby third persons can challenge the "socially and economically disadvantaged" status of a person. Florida has provide that procedure by rule. Florida has also provided that any person adversely affected by Florida's decision may appeal to the USDOT, and the USDOT regulations provide for such an appeal. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

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Gauvin v. Trombatore, 682 F. Supp. 1067, 1988 U.S. Dist. LEXIS 2624 (N.D. Cal. 1988).

Overview: *Black businessman's claims against state transportation department and employees in official capacities violated 11th Amendment; other claims failed for lack of specificity; leave to amend was granted. Remaining "claims" failed to state a claim.*

Former 49 CFR 23.61 was redesignated. See now 49 CFR 26.41.

- The Disadvantaged Business Enterprises (DBE) program does not provide for specific quotas or goals for participation by each identifiable group of socially or economically disadvantaged individuals. *49 C.F.R. § 23.61*, 62. Rather, the

statute establishes an overall goal of DBE participation of 10 percent for all groups, including black Americans, Hispanics, Native Americans, and Asian Americans. The DBE goal does not specify figures for each identifiable racial group, but is an aggregate for all groups. Local ethnic composition is not taken into consideration in setting individual contract goals. The ethnic makeup of the pool of available contractors, not a city's overall ethnic makeup, would be the relevant factor, among others, in determining the validity of any charge of discrimination in subcontracting to a particular ethnic group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. *49 C.F.R. § 26.1*. *49 C.F.R. § 26.3*. It provides that such recipients may certify firms as eligible to participate as DBEs. *49 C.F.R. §§ 26.61(a)*, *26.5*. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an overall goal for DBE participation in USDOT-assisted contracts. *49 C.F.R. §§ 26.41*, *26.45(a)(1)*. A recipient of USDOT contracts must have a DBE program. *49 C.F.R. § 26.21*. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. *Go To Headnote*

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- The provision in the Transportation Equity Act for the 21st Century, *Pub. L. 105-178, 112 Stat. 107* (1998), requiring that at least ten percent of federal highway construction funds be paid to disadvantaged business enterprises is an aspirational goal at the national level. *49 C.F.R. § 26.41(b)*. This national goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent. *49 C.F.R. § 26.41(c)*. The United States Department of Transportation may grant an exemption or waiver from nearly all aspects of the program, including any provision relating to administrative requirements, overall goals, contract goals, and good faith efforts. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

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• Pursuant to *49 C.F.R. § 23.61*, unless the secretary of the United States Department of Transportation (USDOT) determines otherwise, not less than 10 percent of the funds authorized by the Surface Transportation and Uniform Relocation Assistance Act must be expended by recipient states for small business concerns owned and controlled by "socially and economically disadvantaged individuals." The regulation further provides that the 10 percent level of participation will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least 10 percent. If the goal submitted is less than 10 percent, there is a procedure for seeking USDOT approval of a lesser goal. A state must show its efforts to locate disadvantaged businesses, to make such businesses aware of contracting opportunities, to encourage disadvantaged businesses, and must provide information concerning legal or other barriers impeding participation of disadvantaged businesses, the availability of such businesses to work on the recipient's contracts, the size and other characteristics of the minority population in the recipient's jurisdiction and the relevance of such statistics to the potential availability of such businesses. 49 C.F.R. § 23.64. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

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Transportation Law: Public Transportation

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

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• Recipients of federal funds must develop and use affirmative action techniques to facilitate minority business enterprise participation in contracting activities. *49 C.F.R. § 23.45(c)*. The statute sets forth a target: not less than 10 percent of the amounts authorized will go to certified disadvantaged business enterprises (DBE). The Surface Transportation and Uniform Relocation Assistance Act of 1987, *101 Stat. 132* (1987), § 106(c), *101 Stat. 145*. An overall goal of less than 10 percent may be accepted but must be supported by specific factual findings justifying a lesser percentage. A state must petition the Secretary of Transportation to obtain a waiver of the 10 percent minimum overall goal. 49 C.F.R. §§ 23.64(e), 23.65. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.35

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.35 What role do business development and mentor-protege programs have in the DBE program?

(a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.

(b) As part of a BDP or separately, you may establish a "mentor-protege" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.

(1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protege program are eligible to participate in the mentor-protege program.

(2) During the course of the mentor-protege relationship, you must:

(i) Not award DBE credit to a non-DBE mentor firm for using its own protege firm for more than one half of its goal on any contract let by the recipient; and

(ii) Not award DBE credit to a non-DBE mentor firm for using its own protege firm for more than every other contract performed by the protege firm.

(3) For purposes of making determinations of business size under this part, you must not treat protege firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protege program. See Appendix D of this part for guidance concerning the operation of mentor-protege programs.

(c) Your BDPs and mentor-protege programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5130, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.37

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

(a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set forth these mechanisms in your DBE program.

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).

(c) This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In your reports of DBE participation to the Department, you must display both commitments and attainments.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5130, Feb. 2, 1999; *65 FR 68949*, 68951, Nov. 15, 2000; *68 FR 35542*, 35554, June 16, 2003; *76 FR 5083*, 5097, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5097, Jan. 28, 2011, revised paragraph (b), effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.39

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart B — Administrative Requirements for Dbe Programs for Federally-Assisted Contracting

§ 26.39 Fostering small business participation.

(a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

(b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program by February 28, 2012. As part of this program element you may include, but are not limited to, the following strategies:

(1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., $ 1 million).

(2) In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.

(3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.

(4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

(5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

(c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*76 FR 5083*, 5097, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5097, Jan. 28, 2011, added this section, effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.55

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.55 How is DBE participation counted toward goals?

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1)A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2)A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

Example to paragraph (d)(5):

DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

(6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (d)(6):

DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

(7) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)

(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)

(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B)A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(i)).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5134, Feb. 2, 1999; *65 FR 68949*, 68951, Nov. 15, 2000; *68 FR 35542*, 35554, June 16, 2003; *79 FR 59566*, 59595, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59595, Oct. 2, 2014, amended this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Types of Contracts: Construction Contracts

Transportation Law: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.47 was redesignated. See now 49 CFR 26.55.

- Under the 1987 Surface Transportation Act, federal money spent on projects let to disadvantaged prime contractors will count toward the 10 percent goal whether or not the subcontractors are disadvantaged businesses pursuant to *49 C.F.R. § 23.47(a)*. It is only when the prime contractor is not a disadvantaged business that the status of the subcontractors becomes relevant under the federal regulations. Ultimately, the federal approach may undermine the purpose of developing a pool of competitive disadvantaged businesses in the state, because it permits a state to meet its overall goal by using disadvantaged prime contractors who then subcontract to non-disadvantaged businesses. However, the federal regulations provide a safeguard against using disadvantaged prime contractors as a front for work that is being disproportionately performed by subcontractors. A state receiving federal funds may count toward its goals only expenditures to disadvantaged businesses that perform a commercially useful function under *49 C.F.R. § 23.47(d)(1)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

Overview: *Defendant could not bring a Fourth Amendment challenge to a search of corporate offices because he did not have a reasonable expectation of privacy; under USSG § 2B1.1, in a disadvantaged business enterprise fraud case, the amount of loss was the face value of the contracts less the fair market value of the services provided.*

- A state agency will announce a disadvantaged business enterprise (DBE)-participation goal when soliciting bids for a transportation construction contract, and bids for the contract must show how the contractor will meet the goal. If the prime contractor is not a DBE, this is usually demonstrated by showing that certain subcontractors that will work on a contract are DBEs. States themselves certify businesses as DBEs. *49 C.F.R. § 26.81*. A business must be certified as a DBE before it or a prime contractor can rely on its DBE status in bidding for a contract. § 26.81(c). In order to count towards a contract's DBE participation, a DBE must perform a commercially useful function on the contract. *49 C.F.R. § 26.55(c)*. Therefore, a certified DBE whose role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation cannot be counted towards DBE participation. § 26.55(c)(2). *Go To Headnote*

Public Contracts Law: Types of Contracts: Construction Contracts

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

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- A state agency will announce a disadvantaged business enterprise (DBE)-participation goal when soliciting bids for a transportation construction contract, and bids for the contract must show how the contractor will meet the goal. If the prime contractor is not a DBE, this is usually demonstrated by showing that certain subcontractors that will work on a contract are DBEs. States themselves certify businesses as DBEs. *49 C.F.R. § 26.81*. A business must be certified as a DBE before it or a prime contractor can rely on its DBE status in bidding for a contract. § 26.81(c). In order to count towards a contract's DBE participation, a DBE must perform a commercially useful function on the contract. *49 C.F.R. § 26.55(c)*. Therefore, a certified DBE whose role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation cannot be counted towards DBE participation. § 26.55(c)(2). *Go To Headnote*

Transportation Law: General Overview

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

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- A state agency will announce a disadvantaged business enterprise (DBE)-participation goal when soliciting bids for a transportation construction contract, and bids for the contract must show how the contractor will meet the goal. If the prime contractor is not a DBE, this is usually demonstrated by showing that certain subcontractors that will work on a contract are DBEs. States themselves certify businesses as DBEs. *49 C.F.R. § 26.81*. A business must be certified as a

DBE before it or a prime contractor can rely on its DBE status in bidding for a contract. § 26.81(c). In order to count towards a contract's DBE participation, a DBE must perform a commercially useful function on the contract. *49 C.F.R. § 26.55(c)*. Therefore, a certified DBE whose role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation cannot be counted towards DBE participation. § 26.55(c)(2). *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.51

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order meet your overall goal.

Example to paragraph (f)(1): Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to Paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to Paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to Paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5132, Feb. 2, 1999; *76 FR 5083*, 5098, Jan. 28, 2011; *79 FR 59566*, 59595, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59595, Oct. 2, 2014, revised paragraph (a), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Civil Rights Law: General Overview

Constitutional Law: Equal Protection: Gender & Sex

Constitutional Law: Equal Protection: Race

Constitutional Law: Equal Protection: Scope of Protection

Governments: Public Improvements: Bridges & Roads

Governments: State & Territorial Governments: Employees & Officials

Labor & Employment Law: Affirmative Action: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Small Businesses

Real Property Law: Construction Law: General Overview

Tax Law: Federal Income Tax Computation: Deductions for Business Expenses: Business Credits (IRC secs. 38-54, 1396-1397): General Overview

Civil Rights Law: General Overview

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

- *49 C.F.R. § 26.51*requires states to meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating Disadvantaged Business Enterprise participation. *49 C.F.R. § 26.51(a)*. *Go To Headnote*

- The Transportation Equity Act for the 21st Century's (TEA-21) implementing regulations list a number of race-neutral measures to be used when awarding subcontracts. *49 C.F.R. § 26.51(b)*. TEA-21's emphasis on alternatives to race-conscious subcontracting — as emphasized in the regulations — demonstrate that both Congress and United States Department of Transportation considered race-neutral alternatives in a fashion which compels a finding that this a narrowly tailored program. *Go To Headnote*

Constitutional Law: Equal Protection: Gender & Sex

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- The Illinois Department of Transportation (IDOT) uses nearly all of the methods described in *49 C.F.R. § 26.51(b)* to maximize the portion of the local disadvantaged business enterprises (DBE) program goal that will be achieved through race-neutral means. Among other methods, the IDOT sponsors different types of informational sessions, provides technical and financial training to DBEs and other small businesses, and has initiated a bonding and financing assistance program. A litigant's failure to demonstrate that the IDOT has not maximized the portion of its goal that will be met through race-neutral means reflects a broader inability to demonstrate that the IDOT's DBE program is in violation of the equal protection provisions of the Federal Constitution. *Go To Headnote*

Constitutional Law: Equal Protection: Race

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- The Illinois Department of Transportation (IDOT) uses nearly all of the methods described in *49 C.F.R. § 26.51(b)* to maximize the portion of the local disadvantaged business enterprises (DBE) program goal that will be achieved through race-neutral means. Among other methods, the IDOT sponsors different types of informational sessions, provides technical and financial training to DBEs and other small businesses, and has initiated a bonding and financing assistance program. A litigant's failure to demonstrate that the IDOT has not maximized the portion of its goal that will be met through race-neutral means reflects a broader inability to demonstrate that the IDOT's DBE program is in violation of the equal protection provisions of the Federal Constitution. *Go To Headnote*

Constitutional Law: Equal Protection: Scope of Protection

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, recipients must submit their fiscal year goals to USDOT for review and approval, *49 C.F.R. § 26.45(f)(1)*, and that a recipient that has met its DBE participation by race-neutral means alone for two consecutive years is not required to project the amount of its goal it can meet using such means in the next year. *49 C.F.R. § 26.51(f)(3)*. Because the program is subject to periodic reauthorization and requires recipients to review their programs annually, the federal DBE scheme is appropriately limited to last no longer than necessary. *Go To Headnote*

Governments: Public Improvements: Bridges & Roads

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- At the implementation stage, a recipient of U.S. Department of Transportation funds is required to maximize the portion of its local disadvantaged business enterprise (DBE) program goal that can feasibly be achieved through race-neutral means. *49 C.F.R. § 26.51(a)*. *49 C.F.R. § 26.51(b)* provides a non-exhaustive list of race-neutral means through which a recipient can maximize DBE participation, including such steps as providing bonding assistance to all subcontractors, sponsoring informational programs, and ensuring the widest possible distribution of the recipient's DBE directory. *Go To Headnote*
- Under *49 C.F.R. § 26.51*, race-neutral disadvantaged business enterprises (DBE) participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts). *Go To Headnote*
- Though U.S. Department of Transportation regulations indicate that where a disadvantaged business enterprise (DBE) wins a subcontract on goal projects strictly through a low bid, this can be counted as race-neutral participation, no aspect of the regulations require the Illinois Department of Transportation (IDOT) to engage in a search for this information for the purpose of calculating past levels of race-neutral DBE participation. Under *49 C.F.R. §*

26.51(f)(1), the IDOT is required to implement its program without setting contract goals if, under the IDOT's approved projection, it estimates that it is able to meet its goal strictly through race-neutral means. Go To Headnote

• The Illinois Department of Transportation (IDOT) uses nearly all of the methods described in 49 C.F.R. § 26.51(b) to maximize the portion of the local disadvantaged business enterprises (DBE) program goal that will be achieved through race-neutral means. Among other methods, the IDOT sponsors different types of informational sessions, provides technical and financial training to DBEs and other small businesses, and has initiated a bonding and financing assistance program. A litigant's failure to demonstrate that the IDOT has not maximized the portion of its goal that will be met through race-neutral means reflects a broader inability to demonstrate that the IDOT's DBE program is in violation of the equal protection provisions of the Federal Constitution. Go To Headnote

Governments: State & Territorial Governments: Employees & Officials

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, 2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007).

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

• Though U.S. Department of Transportation regulations indicate that where a disadvantaged business enterprise (DBE) wins a subcontract on goal projects strictly through a low bid, this can be counted as race-neutral participation, no aspect of the regulations require the Illinois Department of Transportation (IDOT) to engage in a search for this information for the purpose of calculating past levels of race-neutral DBE participation. Under 49 C.F.R. § 26.51(f)(1), the IDOT is required to implement its program without setting contract goals if, under the IDOT's approved projection, it estimates that it is able to meet its goal strictly through race-neutral means. Go To Headnote

• The Illinois Department of Transportation (IDOT) uses nearly all of the methods described in 49 C.F.R. § 26.51(b) to maximize the portion of the local disadvantaged business enterprises (DBE) program goal that will be achieved through race-neutral means. Among other methods, the IDOT sponsors different types of informational sessions, provides technical and financial training to DBEs and other small businesses, and has initiated a bonding and financing assistance program. A litigant's failure to demonstrate that the IDOT has not maximized the portion of its goal that will be met through race-neutral means reflects a broader inability to demonstrate that the IDOT's DBE program is in violation of the equal protection provisions of the Federal Constitution. Go To Headnote

Labor & Employment Law: Affirmative Action: General Overview

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003).

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

• The Transportation Equity Act for the 21st Century's (TEA-21) implementing regulations list a number of race-neutral measures to be used when awarding subcontracts. 49 C.F.R. § 26.51(b). TEA-21's emphasis on alternatives to race-conscious subcontracting — as emphasized in the regulations — demonstrate that both Congress and United States Department of Transportation considered race-neutral alternatives in a fashion which compels a finding that this a narrowly tailored program. Go To Headnote

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, when submitting its DBE goal to USDOT, a recipient must include a description of the methodology used to establish the goal, including the base figure and the evidence with which it was calculated, as well as the adjustments made to the base figure and the evidence relied on for such adjustments. *49 C.F.R. § 26.45(f)(3)*. The recipient should also include a summary listing of the relevant available evidence in the jurisdiction and, where applicable, an explanation of why the recipient did not use that evidence to adjust the base figure. Further, the recipient must include its projection of the portions of the overall goal it expects to meet through race-neutral and race-conscious measures, respectively. *49 C.F.R. § 26.51(c)*. *Go To Headnote*

- United States Department of Transportation disadvantaged business enterprise (DBE) regulations direct a recipient to meet the "maximum feasible portion" of its overall goal through race-neutral means. *49 C.F.R. § 26.51(a)*. Race-neutral DBE participation includes a DBE's being awarded (1) a prime contract through customary competitive procurement procedures, (2) a subcontract on a prime contract that does not carry a DBE goal, and (3) a subcontract on a prime contract that does carry a DBE goal but where the prime contractor did not consider its DBE status in making the award (e.g., where a prime contractor uses a strict low bid system to award subcontracts). Race-neutral means include providing assistance in overcoming limitations such as inability to obtain bonding or financing by simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing. *49 C.F.R. § 26.51(b)*. Contract goals are considered race-conscious measures. 64 Fed. Reg. at 5112. *Go To Headnote*

- The terms "race-neutral" and "race-conscious" include gender-neutrality and gender-consciousness for purposes of *49 C.F.R. § 26.51*. 64 Fed. Reg. at 5112. *Go To Headnote*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, a Recipient projects it will not be able to meet its overall goal using only race-neutral means, it must establish contract goals to the extent that such goals will achieve the overall goal. *49 C.F.R. §§ 26.51(d)*, (f)(1). A recipient may use contract goals only on those USDOT-assisted contracts that have subcontracting possibilities. *49 C.F.R. § 26.51(e)(1)*. Further, a recipient must adjust its use of race-neutral and/or race-conscious measures if it determines during the course of the year that it will exceed or fall short of its overall goal. *49 C.F.R. § 26.51(f)(2)*. *Go To Headnote*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, if the recipient has succeeded in meeting or exceeding its overall goals through race-neutral means alone for two consecutive years, it need not make a projection of the amount of its goal it can meet using race-neutral means in the next year. *49 C.F.R. § 26.51(f)(3)*. If the recipient obtains DBE participation that exceeds its overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), it must reduce its use of contract goals proportionately in the following year. *49 C.F.R. § 26.51(f)(4)*. *Go To Headnote*

- Race-neutral disadvantaged business enterprises (DBEs) participation includes a DBE's being awarded a prime contract through customary competitive procurement procedures. *49 C.F.R. § 26.51(a)*. *Go To Headnote*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, recipients must submit their fiscal year goals to USDOT for review and approval, *49 C.F.R. § 26.45(f)(1)*, and that a recipient that has met its DBE participation by race-neutral means alone for two consecutive years is not required to project the amount of its goal it can meet using such means in the next year. *49 C.F.R. § 26.51(f)(3)*. Because the program is subject to periodic reauthorization and requires recipients to review their programs annually, the federal DBE scheme is appropriately limited to last no longer than necessary. *Go To Headnote*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, recipients are not required to set a contract goal on every USDOT-assisted contract. *49 C.F.R. § 26.51(e)(2)*. If a recipient estimates that it can meet its entire overall goal for a given year through race-neutral means, it must implement the program without setting contract goals during that year. *49 C.F.R. § 26.51(f)(1)*. If, during the course

of any year in which it is using contract goals, a recipient determines that it will exceed its overall goal, it must adjust the use of race-conscious contract goals accordingly. *49 C.F.R. § 26.51(f)(2)*. Recipients administering a DBE program in good faith cannot be penalized for failing to meet their DBE goals. *49 C.F.R. § 26.47 (a)*. *Go To Headnote*

• Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, a recipient may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years. *49 C.F.R. § 26.51(f)(3)*. Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE participation goal so long as the bidder has made adequate good faith efforts to meet the goal. *49 C.F.R. § 26.53(a)(2)*. The regulations also prohibit the use of quotas. *49 C.F.R. § 26.43*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

• Regarding the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the regulations expressly declare that the statutory 10 percent provision is an aspirational goal at the national level, not a mandatory requirement for grantee states. *49 C.F.R. § 26.41(b)*. Thus, absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *49 C.F.R. § 26.47*. If the state meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *49 C.F.R. § 26.51(f)(3)*. In addition, U.S. Department of Transportation may grant an exemption or waiver from any or all requirements of the program. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

• *49 C.F.R. § 26.51*requires states to meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating Disadvantaged Business Enterprise participation. *49 C.F.R. § 26.51(a)*. *Go To Headnote*

• The Transportation Equity Act for the 21st Century's (TEA-21) implementing regulations list a number of race-neutral measures to be used when awarding subcontracts. *49 C.F.R. § 26.51(b)*. TEA-21's emphasis on alternatives to race-conscious subcontracting — as emphasized in the regulations — demonstrate that both Congress and United States Department of Transportation considered race-neutral alternatives in a fashion which compels a finding that this a narrowly tailored program. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

• At the implementation stage, a recipient of U.S. Department of Transportation funds is required to maximize the portion of its local disadvantaged business enterprise (DBE) program goal that can feasibly be achieved through race-neutral means. *49 C.F.R. § 26.51(a)*. *49 C.F.R. § 26.51(b)* provides a non-exhaustive list of race-neutral means through which

a recipient can maximize DBE participation, including such steps as providing bonding assistance to all subcontractors, sponsoring informational programs, and ensuring the widest possible distribution of the recipient's DBE directory. Go To Headnote

• Under 49 C.F.R. § 26.51, race-neutral disadvantaged business enterprises (DBE) participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts). Go To Headnote

• Though U.S. Department of Transportation regulations indicate that where a disadvantaged business enterprise (DBE) wins a subcontract on goal projects strictly through a low bid, this can be counted as race-neutral participation, no aspect of the regulations require the Illinois Department of Transportation (IDOT) to engage in a search for this information for the purpose of calculating past levels of race-neutral DBE participation. Under 49 C.F.R. § 26.51(f)(1), the IDOT is required to implement its program without setting contract goals if, under the IDOT's approved projection, it estimates that it is able to meet its goal strictly through race-neutral means. Go To Headnote

• The Illinois Department of Transportation (IDOT) uses nearly all of the methods described in 49 C.F.R. § 26.51(b) to maximize the portion of the local disadvantaged business enterprises (DBE) program goal that will be achieved through race-neutral means. Among other methods, the IDOT sponsors different types of informational sessions, provides technical and financial training to DBEs and other small businesses, and has initiated a bonding and financing assistance program. A litigant's failure to demonstrate that the IDOT has not maximized the portion of its goal that will be met through race-neutral means reflects a broader inability to demonstrate that the IDOT's DBE program is in violation of the equal protection provisions of the Federal Constitution. Go To Headnote

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006).*

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

• The regulations implementing the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), expressly prohibit states from apportioning their disadvantaged business enterprise (DBE) utilization goal among different minority groups (e.g., allocating 5 percent to Black Americans, 3 percent to Hispanic Americans, 0 percent to Asian Americans, etc.); rather, an undifferentiated goal that encompasses all minority groups is required. 49 C.F.R. § 26.45(h). A state must meet the maximum feasible portion of this goal through race-neutral means, including informational and instructional programs targeted toward all small businesses. 49 C.F.R. § 26.51(a)-(b). A state must use race-conscious contract goals to achieve any portion of its DBE utilization requirement that cannot be attained through these race-neutral means. § 26.51(d). Even when race-conscious measures are necessary, however, the regulations do not require that DBE utilization goals be included in every contract—or that they be set at the same level in every contract in which they are used—as long as the overall effect is to obtain that portion of the requisite DBE participation that cannot be achieved through race-neutral means. § 26.51(e)(2). Go To Headnote

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

• In determining whether a disadvantaged business enterprises (DBE) bidder/offeror for a prime contract has met a contract goal, a recipient is directed to count the work the DBE has committed to performing with its own forces. 49 C.F.R. § 26.53(g). Although United States Department of Transportation (USDOT) DBE regulations do not explicitly bar consideration of DBE status in the award of prime contracts, the regulations do state that a recipient may use contract

goals only on those USDOT-assisted contracts that have subcontracting possibilities. *49 C.F.R. § 26.51 (e)(1)*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, a state receiving federal highway funds must annually submit to the U.S. Department of Transportation (DOT) an overall goal for DBE participation in its federally funded highway contracts. *49 C.F.R. § 26.45(f)(1)*. The overall goal must be based on demonstrable evidence as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. *49 C.F.R. § 26.45(b)*. The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *49 C.F.R. § 26.45(d)*. The state must meet the maximum feasible portion of its overall goal through raceneutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *49 C.F.R. § 26.51(a)*, (c). *Go To Headnote*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, if race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas, and set-aside contracts are limited to those instances when no other method could be reasonably expected to redress egregious instances of discrimination. *49 C.F.R. § 26.43(b)*. During the course of a year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods to ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination. *49 C.F.R. § 26.51(f)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, a state receiving federal highway funds must annually submit to the U.S. Department of Transportation (DOT) an overall goal for DBE participation in its federally funded highway contracts. *49 C.F.R. § 26.45(f)(1)*. The overall goal must be based on demonstrable evidence as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. *49 C.F.R. § 26.45(b)*. The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *49 C.F.R. § 26.45(d)*. The state must meet the maximum feasible portion of its overall goal through raceneutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *49 C.F.R. § 26.51(a)*, (c). *Go To Headnote*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, if race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas, and set-aside contracts are limited to those instances when no other method could be reasonably

expected to redress egregious instances of discrimination. *49 C.F.R. § 26.43(b)*. During the course of a year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods to ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination. *49 C.F.R. § 26.51(f)*. *Go To Headnote*

- Regarding the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the regulations expressly declare that the statutory 10 percent provision is an aspirational goal at the national level, not a mandatory requirement for grantee states. *49 C.F.R. § 26.41(b)*. Thus, absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *49 C.F.R. § 26.47*. If the state meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *49 C.F.R. § 26.51(f)(3)*. In addition, U.S. Department of Transportation may grant an exemption or waiver from any or all requirements of the program. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Real Property Law: Construction Law: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- United States Department of Transportation disadvantaged business enterprise (DBE) regulations direct a recipient to meet the "maximum feasible portion" of its overall goal through race-neutral means. *49 C.F.R. § 26.51(a)*. Race-neutral DBE participation includes a DBE's being awarded (1) a prime contract through customary competitive procurement procedures, (2) a subcontract on a prime contract that does not carry a DBE goal, and (3) a subcontract on a prime contract that does carry a DBE goal but where the prime contractor did not consider its DBE status in making the award (e.g., where a prime contractor uses a strict low bid system to award subcontracts). Race-neutral means include providing assistance in overcoming limitations such as inability to obtain bonding or financing by simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing. *49 C.F.R. § 26.51(b)*. Contract goals are considered race-conscious measures. 64 Fed. Reg. at 5112. *Go To Headnote*

Tax Law: Federal Income Tax Computation: Deductions for Business Expenses: Business Credits (IRC secs. 38-54, 1396-1397): General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- The terms "race-neutral" and "race-conscious" include gender-neutrality and gender-consciousness for purposes of *49 C.F.R. § 26.51*. 64 Fed. Reg. at 5112. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.47

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

(c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:

(1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

(2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;

(3)

(i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.

(4)FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in § 26.103 or § 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;

(ii)FHWA, FTA, or FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.

(d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5132, Feb. 2, 1999; *76 FR 5083*, 5098, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5098, Jan. 28, 2011, added paragraphs (c) and (d), effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Supplemental Jurisdiction: Pendent Claims

Civil Rights Law: General Overview

Environmental Law: Hazardous Wastes & Toxic Substances: Hazardous Materials Transportation Safety & Security Reauthorization Act: Handling Requirements

Governments: Public Improvements: Bridges & Roads

Public Contracts Law: Bids & Formation: Subcontracts & Subcontractors: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Small Businesses

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Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.65 was redesignated. See now 49 CFR 26.47.

- Federal regulations permit recipients to seek waivers from the 10 percent goal set under the 1987 federal Surface Transportation Act based on legal barriers impeding the participation of disadvantaged businesses at at least a 10 percent level, 49 C.F.R. § 23.65(d), and permit set-aside programs where not prohibited by state or local law under *49 C.F.R. § 23.45(k)*. *Go To Headnote*

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Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

- Neither the Minnesota Department of Transportation's implementing regulations nor the Transportation Equity Act for the 21st Century (TEA-21) includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. *49 C.F.R. § 26.43*. Although each state is required to set overall goals based on its local situation, *49 C.F.R. § 26.45*, it is not bound to TEA-21's 10 percent goal. Under the regulations, a state which tries but does not meet its Disadvantaged Business Enterprise goals is not penalized. *49 C.F.R. § 26.47*. The regulations go further, permitting a state to apply for an exemption from any provision of that part of the regulations. *49 C.F.R. § 26.15*. *Go To Headnote*

Environmental Law: Hazardous Wastes & Toxic Substances: Hazardous Materials Transportation Safety & Security Reauthorization Act: Handling Requirements

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.47.

- For all contracts on which disadvantaged business subcontractor participation goals have been established, the apparently successful prime contractor must submit information about the participation of disadvantaged firms before the State commits itself to the performance by the prime contractor under *49 C.F.R. § 23.45(h)(1)*. If the level of disadvantaged business participation does not meet the contract goals, the State may grant a waiver of the goals to the prime contractor if the State is satisfied that the prime contractor has made good faith efforts to meet the goals under *49 C.F.R. § 23.45(h)(2)*. Each state has discretion to consider whether, under all relevant circumstances, the contractor has actively and aggressively attempted to meet the goal under *49 C.F.R. 23.45*, Appendix A. The federal government has provided a non-exclusive, non-exhaustive list of the kinds of efforts that states may consider. It is not intended to be a mandatory checklist. *Go To Headnote*

Governments: Public Improvements: Bridges & Roads

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- A recipient of U.S. Department of Transportation (USDOT) funds must take several steps in order to assure compliance with federal law pertaining to its required disadvantaged business enterprise (DBE) program. First, the recipient must determine at the local level the figure that would constitute an appropriate DBE involvement goal, based on the relative availability of DBEs. *49 C.F.R. § 26.45(b)*. *49 C.F.R. § 26.45(c)*, *26.45(d)*, detail the various methods a recipient may use to calculate DBE availability, but under any method selected, a recipient must begin by calculating a "base figure" for the relative availability of DBEs and then must examine evidence in the local area to determine whether any adjustments to the base figure are needed. These adjustments lead to the final local goal. After a local goal is established, the recipient must submit its DBE plan to USDOT for approval, with explanations as to how it arrived at the goal. *49 C.F.R. § 26.45(f)*. The USDOT is not allowed to withhold funds if a recipient later fails to meet its goal unless there is a demonstration of bad faith on the part of the recipient. *49 C.F.R. § 26.47(a)*. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.68 was redesignated. See now 49 CFR 26.47.

- The administrator of the United States Department of Transportation (USDOT) has authority to approve a goal less than 10 percent if a finding is made that the recipient is making all appropriate efforts to increase disadvantaged business participation to 10%, and that despite such efforts, the lower goal is a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66. Pursuant to 49 C.F.R. § 23.68, the failure of a state that receives federal highway construction funds to have an approved minority business enterprise program and an approved overall goal can result in the suspension or termination of federal funds. The same section provides that the state has the opportunity to explain to the federal administrator why the goal could not be achieved and why meeting the goal was beyond the state's control, and the administrator has authority to grant exceptions. 49 C.F.R. § 23.69 provides that a recipient state must establish a procedure whereby the individual status of those persons presumed due to race or ethnicity to be "socially and economically disadvantaged" can be challenged by a third party. The recipient must ultimately resolve the challenge, determining that the person is or is not socially and economically disadvantaged. The state's decision is then appealable to the USDOT pursuant to *49 C.F.R. § 23.55*. *Go To Headnote*

Public Contracts Law: Bids & Formation: Subcontracts & Subcontractors: General Overview

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.47.

- For all contracts on which disadvantaged business subcontractor participation goals have been established, the apparently successful prime contractor must submit information about the participation of disadvantaged firms before the State commits itself to the performance by the prime contractor under *49 C.F.R. § 23.45(h)(1)*. If the level of disadvantaged business participation does not meet the contract goals, the State may grant a waiver of the goals to the prime contractor if the State is satisfied that the prime contractor has made good faith efforts to meet the goals under *49 C.F.R. § 23.45(h)(2)*. Each state has discretion to consider whether, under all relevant circumstances, the contractor has actively and aggressively attempted to meet the goal under *49 C.F.R. 23.45*, Appendix A. The federal government has provided a non-exclusive, non-exhaustive list of the kinds of efforts that states may consider. It is not intended to be a mandatory checklist. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, if a recipient does not have an approved DBE program or overall goal, or if it fails to implement its program in good faith, it is in noncompliance with the regulations. *49 C.F.R. § 26.47(b)*. A recipient cannot, however, be penalized, or treated by the USDOT as being in noncompliance with the regulations, because its DBE participation falls short of its overall goal, unless it has failed to administer its program in good faith. *49 C.F.R. § 26.47(a)*. *Go To Headnote*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, recipients are not required to set a contract goal on every USDOT-assisted contract. *49 C.F.R. § 26.51(e)(2)*. If a recipient estimates that it can meet its entire overall goal for a given year through race-neutral means, it must implement the program without setting contract goals during that year. *49 C.F.R. § 26.51(f)(1)*. If, during the course of any year in which it is using contract goals, a recipient determines that it will exceed its overall goal, it must adjust the use of race-conscious contract goals accordingly. *49 C.F.R. § 26.51(f)(2)*. Recipients administering a DBE program in good faith cannot be penalized for failing to meet their DBE goals. *49 C.F.R. § 26.47 (a)*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Regarding the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the regulations expressly declare that the statutory 10 percent provision is an aspirational goal at the national level, not a mandatory requirement for grantee states. *49 C.F.R. § 26.41(b)*. Thus, absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *49 C.F.R. § 26.47*. If the state meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *49 C.F.R. § 26.51(f)(3)*. In addition, U.S. Department of Transportation may grant an exemption or waiver from any or all requirements of the program. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

- Neither the Minnesota Department of Transportation's implementing regulations nor the Transportation Equity Act for the 21st Century (TEA-21) includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. *49 C.F.R. § 26.43*. Although each state is required to set overall goals based on its local situation, *49 C.F.R. § 26.45*, it is not bound to TEA-21's 10 percent goal. Under the regulations, a state which tries but does not meet its Disadvantaged Business Enterprise goals is not penalized. *49 C.F.R. § 26.47*. The regulations go further, permitting a state to apply for an exemption from any provision of that part of the regulations. *49 C.F.R. § 26.15*. *Go To Headnote*

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Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.65 was redesignated. See now 49 CFR 26.47.

- 49 C.F.R. § 23.65(d) permit states to set goals of less than 10 percent based on legal or other barriers impeding the participation of disadvantaged businesses at at least a 10 percent level. *Go To Headnote*

- Recipients of federal highway assistance must set overall goals for participation by disadvantaged businesses that are practical and related to the availability of disadvantaged businesses in desired areas of expertise under *49 C.F.R. § 23.45(g)*. Any overall goal of less than 10 percent must be justified with information concerning, among other things, the recipient's efforts to locate disadvantaged businesses, the recipient's efforts to make disadvantaged businesses aware of contracting opportunities, the availability of disadvantaged businesses, the size and other characteristics of the minority population in the recipient's jurisdiction, and legal or other barriers impeding the participation of disadvantaged businesses at a 10 percent level and the recipient's efforts to overcome or mitigate the effects of these barriers under 49 C.F.R. § 23.65. *Go To Headnote*

- Federal regulations permit recipients to seek waivers from the 10 percent goal set under the 1987 federal Surface Transportation Act based on legal barriers impeding the participation of disadvantaged businesses at at least a 10 percent level, 49 C.F.R. § 23.65(d), and permit set-aside programs where not prohibited by state or local law under *49 C.F.R. § 23.45(k)*. *Go To Headnote*

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Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.68 was redesignated. See now 49 CFR 26.47.

- The administrator of the United States Department of Transportation (USDOT) has authority to approve a goal less than 10 percent if a finding is made that the recipient is making all appropriate efforts to increase disadvantaged business participation to 10%, and that despite such efforts, the lower goal is a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66. Pursuant to 49 C.F.R. § 23.68, the failure of a state that receives federal highway construction funds to have an approved minority business enterprise program and an approved overall goal can result in the suspension or termination of federal funds. The same section provides that the state has the opportunity to explain to the federal administrator why the goal could not be achieved and why meeting the goal was beyond the state's control, and the administrator has authority to grant exceptions. 49 C.F.R. § 23.69 provides that a recipient state must establish a procedure whereby the individual status of those persons presumed due to race or

ethnicity to be "socially and economically disadvantaged" can be challenged by a third party. The recipient must ultimately resolve the challenge, determining that the person is or is not socially and economically disadvantaged. The state's decision is then appealable to the USDOT pursuant to *49 C.F.R. § 23.55*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

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Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- A recipient of U.S. Department of Transportation (USDOT) funds must take several steps in order to assure compliance with federal law pertaining to its required disadvantaged business enterprise (DBE) program. First, the recipient must determine at the local level the figure that would constitute an appropriate DBE involvement goal, based on the relative availability of DBEs. *49 C.F.R. § 26.45(b)*. *49 C.F.R. § 26.45(c)*, *26.45(d)*, detail the various methods a recipient may use to calculate DBE availability, but under any method selected, a recipient must begin by calculating a "base figure" for the relative availability of DBEs and then must examine evidence in the local area to determine whether any adjustments to the base figure are needed. These adjustments lead to the final local goal. After a local goal is established, the recipient must submit its DBE plan to USDOT for approval, with explanations as to how it arrived at the goal. *49 C.F.R. § 26.45(f)*. The USDOT is not allowed to withhold funds if a recipient later fails to meet its goal unless there is a demonstration of bad faith on the part of the recipient. *49 C.F.R. § 26.47(a)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Regarding the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the regulations expressly declare that the statutory 10 percent provision is an aspirational goal at the national level, not a mandatory requirement for grantee states. *49 C.F.R. § 26.41(b)*. Thus, absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *49 C.F.R. § 26.47*. If the state meets its overall goal for two consecutive years through raceneutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *49 C.F.R. § 26.51(f)(3)*. In addition, U.S. Department of Transportation may grant an exemption or waiver from any or all requirements of the program. *49 C.F.R. § 26.15(b)*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.43

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.43 Can recipients use set-asides or quotas as part of this program?

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5131, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5131, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Small Businesses

Transportation Law: Bridges & Roads: Funding

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Supplemental Jurisdiction: Pendent Claims

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.43.

- Federal regulations permit recipients to seek waivers from the 10 percent goal set under the 1987 federal Surface Transportation Act based on legal barriers impeding the participation of disadvantaged businesses at at least a 10 percent level, 49 C.F.R. § 23.65(d), and permit set-aside programs where not prohibited by state or local law under *49 C.F.R. § 23.45(k)*. *Go To Headnote*

Civil Rights Law: General Overview

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Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

- Neither the Minnesota Department of Transportation's implementing regulations nor the Transportation Equity Act for the 21st Century (TEA-21) includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. *49 C.F.R. § 26.43*. Although each state is required to set overall goals based on its local situation, *49 C.F.R. § 26.45*, it is not bound to TEA-21's 10 percent goal. Under the regulations, a state which tries but does not meet its Disadvantaged Business Enterprise goals is not penalized. *49 C.F.R. § 26.47*. The regulations go further, permitting a state to apply for an exemption from any provision of that part of the regulations. *49 C.F.R. § 26.15*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- United States Department of Transportation (DOT) disadvantaged business enterprises (DBE) regulations provide that a recipient may not use quotas for DBEs on USDOT-assisted contracts and may not set aside contracts for DBEs on

USDOT-assisted contracts except in limited circumstances when no other method could be reasonably expected to redress egregious instances of discrimination. *49 C.F.R. § 26.43*. *Go To Headnote*

• Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, a recipient may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years. *49 C.F.R. § 26.51(f)(3)*. Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE participation goal so long as the bidder has made adequate good faith efforts to meet the goal. *49 C.F.R. § 26.53(a)(2)*. The regulations also prohibit the use of quotas. *49 C.F.R. § 26.43*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

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Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.43.

• *49 C.F.R. § 23.45(k)*provide that states shall establish set-asides where not prohibited by state or local law and determined to be necessary to meet federal goals. *Go To Headnote*

• Recipients of federal highway assistance must set overall goals for participation by disadvantaged businesses that are practical and related to the availability of disadvantaged businesses in desired areas of expertise under *49 C.F.R. § 23.45(g)*. Any overall goal of less than 10 percent must be justified with information concerning, among other things, the recipient's efforts to locate disadvantaged businesses, the recipient's efforts to make disadvantaged businesses aware of contracting opportunities, the availability of disadvantaged businesses, the size and other characteristics of the minority population in the recipient's jurisdiction, and legal or other barriers impeding the participation of disadvantaged businesses at a 10 percent level and the recipient's efforts to overcome or mitigate the effects of these barriers under 49 C.F.R. § 23.65. *Go To Headnote*

• *49 C.F.R. § 23.45(k)*requires only that qualified disadvantaged business enterprises exist, not that they actually submit bids. Furthermore, a requirement that three disadvantaged firms bid on each project in order to permit states to enact set-aside programs would be administratively unworkable. The State cannot control the number of qualified disadvantaged contractors that come forward to bid on set-aside projects. *Go To Headnote*

• Federal regulations permit recipients to seek waivers from the 10 percent goal set under the 1987 federal Surface Transportation Act based on legal barriers impeding the participation of disadvantaged businesses at at least a 10 percent level, 49 C.F.R. § 23.65(d), and permit set-aside programs where not prohibited by state or local law under *49 C.F.R. § 23.45(k)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 2013 U.S. Dist. LEXIS 74236 (D. Minn. 2013).

Overview: *Because a bidder that lacked good-faith efforts to meet disadvantaged business enterprise subcontractor requirements for a highway project did not show irreparable harm from rejection of its bid and did not show likelihood of success because agency procedures were proper, it could not obtain preliminary injunctive relief under Fed. R. Civ. P. 65.*

- *49 C.F.R. § 26.45(a)(1)*requires recipients of federal highway funds to set an overall goal for disadvantaged business enterprise (DBE) subcontractor participation in United States Department of Transportation (DOT) assisted contracts. Such a contract goal may not be a rigid quota. *49 C.F.R. § 26.43(a)*. Instead, the recipient must ensure that the primary (main) contractor awarded a DOT-assisted contract has either (1) met the goal for DBE subcontractor participation or (2) if unsuccessful in doing so, has made a good-faith effort to achieve it. *49 C.F.R. § 26.53(a)*. Determining whether a contractor has made a good-faith effort turns on several factors listed by the DOT in an appendix to the regulations entitled "Guidance Concerning Good Faith Efforts." 49 C.F.R. pt. 26, app. A. The inquiry is a flexible one, based on (among other things) the means used by the contractor to obtain DBE participation, the scope of its negotiations with DBE subcontractors, and whether it undertook efforts to divide subcontracted work into smaller units (if feasible) to facilitate participation. 49 C.F.R. pt. 26, app. A, § IV. A contracting authority must consider these factors when assessing good-faith efforts. 49 C.F.R. pt. 26, app. A, § II. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, if race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas, and set-aside contracts are limited to those instances when no other method could be reasonably expected to redress egregious instances of discrimination. *49 C.F.R. § 26.43(b)*. During the course of a year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods to ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination. *49 C.F.R. § 26.51(f)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, if race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas, and set-aside contracts are limited to those instances when no other method could be reasonably expected to redress egregious instances of discrimination. *49 C.F.R. § 26.43(b)*. During the course of a year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral

methods to ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination. *49 C.F.R. § 26.51(f)*. *Go To Headnote*

Transportation Law: Bridges & Roads: Funding

C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 2013 U.S. Dist. LEXIS 74236 (D. Minn. 2013).

Overview: *Because a bidder that lacked good-faith efforts to meet disadvantaged business enterprise subcontractor requirements for a highway project did not show irreparable harm from rejection of its bid and did not show likelihood of success because agency procedures were proper, it could not obtain preliminary injunctive relief under Fed. R. Civ. P. 65.*

- *49 C.F.R. § 26.45(a)(1)*requires recipients of federal highway funds to set an overall goal for disadvantaged business enterprise (DBE) subcontractor participation in United States Department of Transportation (DOT) assisted contracts. Such a contract goal may not be a rigid quota. *49 C.F.R. § 26.43(a)*. Instead, the recipient must ensure that the primary (main) contractor awarded a DOT-assisted contract has either (1) met the goal for DBE subcontractor participation or (2) if unsuccessful in doing so, has made a good-faith effort to achieve it. *49 C.F.R. § 26.53(a)*. Determining whether a contractor has made a good-faith effort turns on several factors listed by the DOT in an appendix to the regulations entitled "Guidance Concerning Good Faith Efforts." 49 C.F.R. pt. 26, app. A. The inquiry is a flexible one, based on (among other things) the means used by the contractor to obtain DBE participation, the scope of its negotiations with DBE subcontractors, and whether it undertook efforts to divide subcontracted work into smaller units (if feasible) to facilitate participation. 49 C.F.R. pt. 26, app. A, § IV. A contracting authority must consider these factors when assessing good-faith efforts. 49 C.F.R. pt. 26, app. A, § II. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.49

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.49 How are overall goals established for transit vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(1) Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.

(2)A TVM's failure to implement the DBE Program in the manner as prescribed in this section and throughout 49 CFR part 26 will be deemed as non-compliance, which will result in removal from FTA's certified TVMs list, resulting in that manufacturer becoming ineligible to bid.

(3)FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).

(4)FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal.

(1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by the transit vehicle manufacturer's own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBE firms; and

(ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

(iii) In establishing an overall goal, the transit vehicle manufacturer must provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) Transit vehicle manufacturers awarded must comply with the reporting requirements of § 26.11 of this part including the requirement to submit the Uniform Report of Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.

(d) Transit vehicle manufacturers must implement all other applicable requirements of this part, except those relating to UCPs and DBE certification procedures.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

(f) As a recipient you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5132, Feb. 2, 1999; *79 FR 59566*, 59594, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59594, Oct. 2, 2014, revised this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.45

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.45 How do recipients set overall goals?

(a)

(1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(2) If you are a FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) $ 250,000 or less in FTA or FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year. However, if you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in § 26.1.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) Step 1. You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) Use DBE Directories and Census Bureau Data. Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, *www.census.gov/epcd/cbp/view/cbpview.html*.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) Use a bidders list. Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and subcontractors that submitted bids or quotes on your DOT-assisted contracts.

(3) Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study.

(4) Use the goal of another DOT recipient. If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) Alternative methods. Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.

(d) Step 2. Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the “but for” factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.

(2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i)A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii)A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)

(1)

(i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site.

(ii) You may adjust your three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.

(iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.

(v) You may make, for informational purposes, projections of your expected DBE achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.

(2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, incuding your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-consioous measures, respectively (See 26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

(6) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(7) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

(g)

(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of

disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii)A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

(2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5132, Feb. 2, 1999; *64 FR 34569*, 34570, June 28, 1999; *65 FR 68949*, 68951, Nov. 15, 2000; *68 FR 35542*, 35553, June 16, 2003; *75 FR 5535*, 5536, Feb. 3, 2010; *76 FR 5083*, 5097, Jan. 28, 2011; *79 FR 59566*, 59593, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59593, Oct. 2, 2014, amended this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

Civil Procedure: Discovery: Methods: Stipulations

Civil Procedure: Appeals: Briefs

Civil Rights Law: General Overview

Communications Law: Ownership: Diversification

Constitutional Law: Congressional Duties & Powers: Spending & Taxation

Constitutional Law: Equal Protection: Scope of Protection

Governments: Public Improvements: Bridges & Roads

Labor & Employment Law: Affirmative Action: Compliance

Labor & Employment Law: Affirmative Action: Enforcement

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

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Transportation Law: Bridges & Roads: Funding

Transportation Law: Bridges & Roads: U.S. Federal Highway Administration

Transportation Law: Public Transportation

Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

Former 49 CFR 23.45 was revised. See now 49 CFR 26.45.

- The Department of Transportation's (DOT) minority business enterprise (MBE) regulation, *49 C.F.R. § 23.45*,requires recipients of DOT funds (state and local governments) to implement an MBE program incorporating certain specific features. The regulation does not set a uniform percentage goal but leaves it to the recipients to do so. *Go To Headnote*

- The "showing" or "findings" of prior discrimination relied on by the Department of Transportation (DOT) in its decision to formulate the minority business enterprise (MBE) regulations consist of the following: (1) Comments received by DOT in response to the May 17, 1979 Notice of Proposed Rule Making (NPRM) for the MBE regulation, the March

31, 1980 final rule, and the March 12, 1981 proposed amendment to section 23.45 of the MBE regulation; (2) "Appendix II," a narrative description of the evidence supporting the regulation prepared as an appendix to a DOT brief filed in another federal district court case, and various agency and commission reports referenced in "Appendix II;" (3) Data referenced in the preambles to the May 17, 1979 NPRM, the March 31, 1980 final rule, and the regulatory evaluations attached thereto. Go To Headnote

Civil Procedure: Discovery: Methods: Stipulations

Ellis v. Skinner, 961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir.), cert. denied, *506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286, 1992 U.S. LEXIS 6630 (1992).*

Overview: *Where Utah had been able to meet the 10-percent set-aside requirement of the federal disadvantaged business enterprise program, it was not required to justify its factual findings because it was not able to obtain a waiver of the requirement.*

49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- The disadvantaged business enterprise (DBE) program established by the Surface Transportation Assistance Act of 1982, 96 Stat. 2097, 2100, and renewed by the Surface Transportation and Uniform Relocation Assistance Act of 1987, 101 Stat. 132, 145, requires states — as a prerequisite to the receipt of federal funds — to set aside at least 10 percent of all federally aided highway contracts to DBEs. Each participating state must set annual goals for DBE participation. 49 C.F.R. § 23.64. A state may set its annual goal at less than 10 percent DBE participation if the state can document its efforts to meet the statutory 10 percent requirement and can provide information justifying a lesser goal. 49 C.F.R. §§ 23.64, 23.65. Once the state has set an annual goal, it must set levels of DBE participation for each project. *49 C.F.R. § 23.45(g)*. The state may award a project to bidders that fail to meet the project's DBE goal if the bidder can demonstrate its good faith efforts to obtain DBE participation. *49 C.F.R. § 23.45(h)*. Go To Headnote

Ellis v. Skinner, 961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir.), cert. denied, *506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286, 1992 U.S. LEXIS 6630 (1992).*

Overview: *Where Utah had been able to meet the 10-percent set-aside requirement of the federal disadvantaged business enterprise program, it was not required to justify its factual findings because it was not able to obtain a waiver of the requirement.*

49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- The disadvantaged business enterprise (DBE) program established by the Surface Transportation Assistance Act of 1982, 96 Stat. 2097, 2100, and renewed by the Surface Transportation and Uniform Relocation Assistance Act of 1987, 101 Stat. 132, 145, requires states — as a prerequisite to the receipt of federal funds — to set aside at least 10 percent of all federally aided highway contracts to DBEs. Each participating state must set annual goals for DBE participation. 49 C.F.R. § 23.64. A state may set its annual goal at less than 10 percent DBE participation if the state can document its efforts to meet the statutory 10 percent requirement and can provide information justifying a lesser goal. 49 C.F.R. §§ 23.64, 23.65. Once the state has set an annual goal, it must set levels of DBE participation for each project. *49 C.F.R. § 23.45(g)*. The state may award a project to bidders that fail to meet the project's DBE goal if the bidder can demonstrate its good faith efforts to obtain DBE participation. *49 C.F.R. § 23.45(h)*. Go To Headnote

Civil Procedure: Appeals: Briefs

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

Former 49 CFR 23.45 was revised. See now 49 CFR 26.45.

- The "showing" or "findings" of prior discrimination relied on by the Department of Transportation (DOT) in its decision to formulate the minority business enterprise (MBE) regulations consist of the following: (1) Comments received by DOT in response to the May 17, 1979 Notice of Proposed Rule Making (NPRM) for the MBE regulation, the March 31, 1980 final rule, and the March 12, 1981 proposed amendment to section 23.45 of the MBE regulation; (2) "Appendix II," a narrative description of the evidence supporting the regulation prepared as an appendix to a DOT brief filed in another federal district court case, and various agency and commission reports referenced in "Appendix II;" (3) Data referenced in the preambles to the May 17, 1979 NPRM, the March 31, 1980 final rule, and the regulatory evaluations attached thereto. *Go To Headnote*

Civil Rights Law: General Overview

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

- Under the Transportation Equity Act for the 21st Century, each Disadvantaged Business Enterprise (DBE) is limited by regulation to approximately 10 ½ years in the program. The program requires annual certification of each DBE's financial and contracting records to prove continuing eligibility. Because each state sets its particular overall goal based in part on the availability and needs of local DBEs, *49 C.F.R. § 26.45*, the certification limits tailor the program's duration to local needs. *Go To Headnote*

- Neither the Minnesota Department of Transportation's implementing regulations nor the Transportation Equity Act for the 21st Century (TEA-21) includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. *49 C.F.R. § 26.43*. Although each state is required to set overall goals based on its local situation, *49 C.F.R. § 26.45*, it is not bound to TEA-21's 10 percent goal. Under the regulations, a state which tries but does not meet its Disadvantaged Business Enterprise goals is not penalized. *49 C.F.R. § 26.47*. The regulations go further, permitting a state to apply for an exemption from any provision of that part of the regulations. *49 C.F.R. § 26.15*. *Go To Headnote*

Communications Law: Ownership: Diversification

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

Former 49 CFR 23.45 was revised. See now 49 CFR 26.45.

- Among the required components of the Department of Transportation's (DOT) minority business enterprise (MBE) programs are the following: (a) A policy statement expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible; (c) Affirmative action techniques to facilitate MBE participation in contracting, including the following: (1) arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of MBEs; (e) Making an MBE directory available to bidders; (f) Certification of the eligibility of MBEs by the recipient, to ensure that the MBE program benefits only firms owned and controlled by minorities; (g) Establishing percentage goals for the dollar value of work to be awarded to MBEs, including overall goals and goals on each specific prime contract with subcontracting possibilities; overall goals are to be based on a projection of the number and types of MBEs likely to be available to compete for contracts; goals for specific contracts are to be based on the known availability of qualified MBEs; and

(h) A requirement that bidders who do not meet the MBE contract goals satisfy the recipient that the bidder has made "good faith efforts" to meet the goals. *49 C.F.R. § 23.45*. *Go To Headnote*

Constitutional Law: Congressional Duties & Powers: Spending & Taxation

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- As a condition of receiving federal highway funds, a recipient must have a disadvantaged business enterprises (DBE) program, *49 C.F.R. § 26.21*, must set an overall goal for DBE participation in United States Department of Transportation (USDOT) -assisted contracts, *49 C.F.R. § 26.45(a)*, and, if it sets overall goals on a fiscal year basis, must submit them to USDOT for review and approval. *49 C.F.R. § 26.45(f)(1)*. If a recipient determines that DBE firms are so "overconcentrated" in a particular occupational area as to "unduly burden" the opportunity of non-DBE firms to participate in that type of work, it must devise appropriate measures to address this overconcentration. *49 C.F.R. § 26.33*. *Go To Headnote*

Ellis v. Skinner, 961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir.), cert. denied, *506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286, 1992 U.S. LEXIS 6630 (1992)*.

Overview: *Where Utah had been able to meet the 10-percent set-aside requirement of the federal disadvantaged business enterprise program, it was not required to justify its factual findings because it was not able to obtain a waiver of the requirement.*

49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- The disadvantaged business enterprise (DBE) program established by the Surface Transportation Assistance Act of 1982, *96 Stat. 2097*, 2100, and renewed by the Surface Transportation and Uniform Relocation Assistance Act of 1987, *101 Stat. 132*, 145, requires states — as a prerequisite to the receipt of federal funds — to set aside at least 10 percent of all federally aided highway contracts to DBEs. Each participating state must set annual goals for DBE participation. 49 C.F.R. § 23.64. A state may set its annual goal at less than 10 percent DBE participation if the state can document its efforts to meet the statutory 10 percent requirement and can provide information justifying a lesser goal. 49 C.F.R. §§ 23.64, 23.65. Once the state has set an annual goal, it must set levels of DBE participation for each project. *49 C.F.R. § 23.45(g)*. The state may award a project to bidders that fail to meet the project's DBE goal if the bidder can demonstrate its good faith efforts to obtain DBE participation. *49 C.F.R. § 23.45(h)*. *Go To Headnote*

Ellis v. Skinner, 961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir.), cert. denied, *506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286, 1992 U.S. LEXIS 6630 (1992)*.

Overview: *Where Utah had been able to meet the 10-percent set-aside requirement of the federal disadvantaged business enterprise program, it was not required to justify its factual findings because it was not able to obtain a waiver of the requirement.*

49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- The disadvantaged business enterprise (DBE) program established by the Surface Transportation Assistance Act of 1982, *96 Stat. 2097*, 2100, and renewed by the Surface Transportation and Uniform Relocation Assistance Act of 1987, *101 Stat. 132*, 145, requires states — as a prerequisite to the receipt of federal funds — to set aside at least 10 percent of all federally aided highway contracts to DBEs. Each participating state must set annual goals for DBE participation. 49 C.F.R. § 23.64. A state may set its annual goal at less than 10 percent DBE participation if the state can document its efforts to meet the statutory 10 percent requirement and can provide information justifying a lesser goal. 49 C.F.R. §§ 23.64, 23.65. Once the state has set an annual goal, it must set levels of DBE participation for each project. *49*

C.F.R. § 23.45(g). The state may award a project to bidders that fail to meet the project's DBE goal if the bidder can demonstrate its good faith efforts to obtain DBE participation. 49 C.F.R. § 23.45(h). Go To Headnote

• The Surface Transportation Assistance Act of 1982, 96 Stat. 2097, 2100, and the Surface Transportation and Uniform Relocation Assistance Act of 1987, 101 Stat. 132, 145, both contain a waiver provision whereby a state can petition the Secretary of Transportation for an annual disadvantaged business enterprise program set-aside figure other than the standard 10 percent goal. The regulations governing the procedure for obtaining an administrative waiver can be found in 49 C.F.R. §§ 23.64(e), 23.65, and 49 C.F.R. § 23(D), App. D. 49 C.F.R. § 23.64(e) requires that a state take several steps to seek a waiver, including compliance with the requirements of 49 C.F.R. § 23.65. Section 23.65 requires a state to include with its waiver request information justifying the state's entitlement to a set-aside goal of less than 10 percent. Go To Headnote

Constitutional Law: Equal Protection: Scope of Protection

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

• Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, recipients must submit their fiscal year goals to USDOT for review and approval, 49 C.F.R. § 26.45(f)(1), and that a recipient that has met its DBE participation by race-neutral means alone for two consecutive years is not required to project the amount of its goal it can meet using such means in the next year. 49 C.F.R. § 26.51(f)(3). Because the program is subject to periodic reauthorization and requires recipients to review their programs annually, the federal DBE scheme is appropriately limited to last no longer than necessary. Go To Headnote

Governments: Public Improvements: Bridges & Roads

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, 2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007).

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

• A recipient of U.S. Department of Transportation (USDOT) funds must take several steps in order to assure compliance with federal law pertaining to its required disadvantaged business enterprise (DBE) program. First, the recipient must determine at the local level the figure that would constitute an appropriate DBE involvement goal, based on the relative availability of DBEs. 49 C.F.R. § 26.45(b). 49 C.F.R. § 26.45(c), 26.45(d), detail the various methods a recipient may use to calculate DBE availability, but under any method selected, a recipient must begin by calculating a "base figure" for the relative availability of DBEs and then must examine evidence in the local area to determine whether any adjustments to the base figure are needed. These adjustments lead to the final local goal. After a local goal is established, the recipient must submit its DBE plan to USDOT for approval, with explanations as to how it arrived at the goal. 49 C.F.R. § 26.45(f). The USDOT is not allowed to withhold funds if a recipient later fails to meet its goal unless there is a demonstration of bad faith on the part of the recipient. 49 C.F.R. § 26.47(a). Go To Headnote

• 49 C.F.R. § 26.45(c)describes the appropriate method for calculation, by a recipient of U.S. Department of Transportation funds, of the local base figure for a disadvantaged business enterprise (DBE) program——the first step in the goal-setting process. The regulation gives several examples of appropriate methodology, but states explicitly that the examples are not intended as an exhaustive list and that other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration. The fifth item in the list, entitled "Alternative Methods," states that a recipient may use other methods to determine a base figure for its overall

goal and that any methodology chosen must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in the recipient's market. *49 C.F.R. § 26.45(c)(5)*. The other four methods in the list are: (1) use DBE directories and U.S. Census Bureau Data; (2) use a bidders list; (3) use data from a disparity study; and (4) use the goal of another recipient. *49 C.F.R. § 26.45(c)(1)*-(4). The regulations provide detailed descriptions of each of these four examples. *Go To Headnote*

- *49 C.F.R. § 26.45(b)*makes clear that "relative availability" of disadvantaged business enterprises (DBE) means the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate in U.S. Department of Transportation (USDOT) assisted contracts. There is nothing in the federal regulations indicating that a recipient of USDOT funds must narrowly define the scope of ready, willing, and available firms by simply counting the number of registered and pre-qualified DBEs under state law. The use of a custom census from the National Economic Research Associate's, Inc., reflects an attempt to arrive at more accurate numbers than would be possible through use of just a DBE list. The remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. This conclusion is bolstered by guidance offered by USDOT on its website, which suggests that recipients might supplement their DBE directories, for goal-setting purposes, with list of parties attending DBE certification/outreach sessions. It seems illogical that the regulations would refer to five different methods of calculating the relative availability of DBEs, if any method other than strict reference to a list of registered and pre-qualified DBEs was inappropriate. *Go To Headnote*

- *49 C.F.R. § 26.45(d)*does not require any adjustments to the base figure of available disadvantaged business enterprises (DBE) after the initial calculation, but simply provides recipients of U.S. Department of Transportation (USDOT) funds with authority to make such adjustments if necessary. There is no aspect of the regulations that requires a recipient to separate prime contractor availability from subcontractor availability. The regulations require the local goal to be focused on overall DBE participation in the recipient's USDOT-assisted contracts. *49 C.F.R. § 26.45(a)(1)*. It would make little sense to separate prime contractor and subcontractor availability when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- Pursuant to *49 C.F.R. § 23.61*, unless the secretary of the United States Department of Transportation (USDOT) determines otherwise, not less than 10 percent of the funds authorized by the Surface Transportation and Uniform Relocation Assistance Act must be expended by recipient states for small business concerns owned and controlled by "socially and economically disadvantaged individuals." The regulation further provides that the 10 percent level of participation will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least 10 percent. If the goal submitted is less than 10 percent, there is a procedure for seeking USDOT approval of a lesser goal. A state must show its efforts to locate disadvantaged businesses, to make such businesses aware of contracting opportunities, to encourage disadvantaged businesses, and must provide information concerning legal or other barriers impeding participation of disadvantaged businesses, the availability of such businesses to work on the recipient's contracts, the size and other characteristics of the minority population in the recipient's jurisdiction and the relevance of such statistics to the potential availability of such businesses. 49 C.F.R. § 23.64. *Go To Headnote*

Labor & Employment Law: Affirmative Action: Compliance

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

Former 49 CFR 23.45 was revised. See now 49 CFR 26.45.

- Among the required components of the Department of Transportation's (DOT) minority business enterprise (MBE) programs are the following: (a) A policy statement expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible; (c) Affirmative action techniques to facilitate MBE participation in contracting, including the following: (1) arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of MBEs; (e) Making an MBE directory available to bidders; (f) Certification of the eligibility of MBEs by the recipient, to ensure that the MBE program benefits only firms owned and controlled by minorities; (g) Establishing percentage goals for the dollar value of work to be awarded to MBEs, including overall goals and goals on each specific prime contract with subcontracting possibilities; overall goals are to be based on a projection of the number and types of MBEs likely to be available to compete for contracts; goals for specific contracts are to be based on the known availability of qualified MBEs; and (h) A requirement that bidders who do not meet the MBE contract goals satisfy the recipient that the bidder has made "good faith efforts" to meet the goals. *49 C.F.R. § 23.45*. *Go To Headnote*

Labor & Employment Law: Affirmative Action: Enforcement

S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1987 U.S. Dist. LEXIS 15294 (N.D. Ga. 1987).

Overview: *The Department of Transportation's minority business enterprise regulation violated the Fifth Amendment's equal protection clause, entitling two corporations that challenged the regulation's constitutionality to summary judgment.*

Former 49 CFR 23.45 was revised. See now 49 CFR 26.45.

- The Department of Transportation's (DOT) minority business enterprise (MBE) regulation, *49 C.F.R. § 23.45*,requires recipients of DOT funds (state and local governments) to implement an MBE program incorporating certain specific features. The regulation does not set a uniform percentage goal but leaves it to the recipients to do so. *Go To Headnote*

- Among the required components of the Department of Transportation's (DOT) minority business enterprise (MBE) programs are the following: (a) A policy statement expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible; (c) Affirmative action techniques to facilitate MBE participation in contracting, including the following: (1) arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of MBEs; (e) Making an MBE directory available to bidders; (f) Certification of the eligibility of MBEs by the recipient, to ensure that the MBE program benefits only firms owned and controlled by minorities; (g) Establishing percentage goals for the dollar value of work to be awarded to MBEs, including overall goals and goals on each specific prime contract with subcontracting possibilities; overall goals are to be based on a projection of the number and types of MBEs likely to be available to compete for contracts; goals for specific contracts are to be based on the known availability of qualified MBEs; and (h) A requirement that bidders who do not meet the MBE contract goals satisfy the recipient that the bidder has made "good faith efforts" to meet the goals. *49 C.F.R. § 23.45*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005), aff'd, *473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007)*.

Overview: *Illinois Department of Transportation's (IDOT) program for disadvantaged business enterprises (DBE) was narrowly tailored under the Equal Protection Clause to achieve the federal government's compelling interest because, inter alia, IDOT's goal represented a "plausible lower-bound estimate" of DBE participation in the absence of discrimination.*

- Under *49 C.F.R. § 26.45(c)*, a recipient may calculate its base estimate of disadvantaged business enterprises (DBE) availability under one of five methods: (1) use of DBE directories and Census Bureau data; (2) use of a previous year's bidders list; (3) use of data from a disparity study; (4) use of a goal of another Department of Transportation recipient in the same, or substantially similar, market; or (5) use of alternative methods based on demonstrable evidence of local market conditions. *49 C.F.R. § 26.45(c)(1)*-(5). *Go To Headnote*

- *49 C.F.R. § 26.45(b)*requires that a recipient's overall goal to be based on demonstrable evidence of the availability of ready, willing and able disadvantaged business enterprises relative to all business ready, willing and able to participate on the Recipient's Department of Transportation-assisted contracts. *Go To Headnote*

- Under *49 C.F.R. § 26.45(a)(1)*, a recipient must set an overall goal for disadvantaged business enterprises (DBE) participation in its Department of Transportation-assisted contracts. At no point do the Regulations limit the application of DBE goals to the subcontracted portion of contracts. To the contrary, the Regulations expressly provide that the goals requirements are imposed on prime contractors. *49 C.F.R. § 26.53(g)*. *Go To Headnote*

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006).*

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

- The regulations implementing the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), delineate a two-step process that a state must follow to set a disadvantaged business enterprise (DBE) utilization goal that reflects its determination of the level of DBE participation that would be expected absent the effects of discrimination. *49 C.F.R. § 26.45(b)*. In establishing this goal, a state must first calculate the relative availability of DBEs in its local transportation contracting industry. § 26.45(c). One acceptable means of making this determination is by dividing the number of ready, willing, and able DBEs in a state by the total number of ready, willing, and able firms. § 26.45(c)(1). *Go To Headnote*

- The regulations implementing the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), delineate a two-step process that a state must follow to set a disadvantaged business enterprise (DBE) utilization goal that reflects its determination of the level of DBE participation that would be expected absent the effects of discrimination. *49 C.F.R. § 26.45(b)*. Under step two, a state is required to adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies. § 26.45(d)(1). A state may also consider discrimination against DBEs in the bonding and financing industries, as well as the present effects of past discrimination. § 26.45(d)(2)-(3). The final, adjusted figure represents the proportion of federal transportation funding that a state must allocate to DBEs during a forthcoming fiscal year. § 26.45(e)(1). A state must submit its DBE program to the U.S. Department of Transportation for review by August 1 of each year. § 26.45(f)(1). *Go To Headnote*

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- United States Department of Transportation (USDOT) regulations outline the process for setting a recipient's overall disadvantaged business enterprises (DBEs) participation goal. As the regulations explain, that goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and

able to participate on its USDOT-assisted contracts. *49 C.F.R. § 26.45(b)*. The goal must also reflect the recipient's determination of the level of DBE participation it would expect absent the effects of discrimination. *Go To Headnote*

• Under the first of two steps mandated by the United States Department of Transportation disadvantaged business enterprise regulations (DBEs), a recipient is directed to determine a base figure for the relative availability of DBEs. *49 C.F.R. § 26.45(c)*. Examples of approaches that the recipient may employ in determining a base figure include: (1) use of DBE directories and Census Bureau data; (2) use of a bidders list; (3) use of data from a disparity study; (4) use of the goal of another Recipient in the same, or a substantially similar, market, adjusted for differences in the recipient's local market and contracting program, as a base figure for the recipient's goal; or (5) other methods to determine a base figure, as long as such methods are based on demonstrable evidence of local market conditions and are designed ultimately to attain a goal that is rationally related to the relative availability of DBEs in the relevant market. *Go To Headnote*

• Under United States Department of Transportation (DOT) disadvantaged business enterprise (DBE) regulations, once a recipient has calculated its base figure, step two of the goal-setting process requires the recipient to examine all evidence available in the jurisdiction and adjust the base figure accordingly to arrive at the overall goal. *49 C.F.R. § 26.45(d)*. The many types of evidence that must be considered when adjusting the base figure include (i) the current capacity of DBEs to perform work in the DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, and (ii) evidence from "disparity studies" conducted anywhere within the jurisdiction, to the extent such evidence is not already accounted for in the base figure. *Go To Headnote*

• Under United States Department of Transportation (DOT) disadvantaged business enterprise (DBE) regulations, if a recipient attempts to make an adjustment to the base figure to account for the continuing effects of past discrimination (often called the "but for factor") or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. In setting the overall goal, the recipient must provide for public participation, including consultation with minority, women's, and general contractor groups and community organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the recipient's efforts to establish a level playing field for the participation of DBEs. *49 C.F.R. § 26.45(g)(1)*. *Go To Headnote*

• Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, when submitting its DBE goal to USDOT, a recipient must include a description of the methodology used to establish the goal, including the base figure and the evidence with which it was calculated, as well as the adjustments made to the base figure and the evidence relied on for such adjustments. *49 C.F.R. § 26.45(f)(3)*. The recipient should also include a summary listing of the relevant available evidence in the jurisdiction and, where applicable, an explanation of why the recipient did not use that evidence to adjust the base figure. Further, the recipient must include its projection of the portions of the overall goal it expects to meet through race-neutral and race-conscious measures, respectively. *49 C.F.R. § 26.51(c)*. *Go To Headnote*

• Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, recipients must submit their fiscal year goals to USDOT for review and approval, *49 C.F.R. § 26.45(f)(1)*, and that a recipient that has met its DBE participation by race-neutral means alone for two consecutive years is not required to project the amount of its goal it can meet using such means in the next year. *49 C.F.R. § 26.51(f)(3)*. Because the program is subject to periodic reauthorization and requires recipients to review their programs annually, the federal DBE scheme is appropriately limited to last no longer than necessary. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001), aff'd, *345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003)*.

Overview: *In subcontractor's challenge to the Transportation Equity Act for the 21st Century affirmative action program and Minnesota's participation in it, the compelling interest test was satisfied; the program was constitutional.*

• Under the Transportation Equity Act for the 21st Century, each Disadvantaged Business Enterprise (DBE) is limited by regulation to approximately 10 ½ years in the program. The program requires annual certification of each DBE's financial and contracting records to prove continuing eligibility. Because each state sets its particular overall goal

based in part on the availability and needs of local DBEs, *49 C.F.R. § 26.45*, the certification limits tailor the program's duration to local needs. *Go To Headnote*

- Neither the Minnesota Department of Transportation's implementing regulations nor the Transportation Equity Act for the 21st Century (TEA-21) includes rigid quotas. Instead, under the new program language, quotas are explicitly forbidden. *49 C.F.R. § 26.43*. Although each state is required to set overall goals based on its local situation, *49 C.F.R. § 26.45*, it is not bound to TEA-21's 10 percent goal. Under the regulations, a state which tries but does not meet its Disadvantaged Business Enterprise goals is not penalized. *49 C.F.R. § 26.47*. The regulations go further, permitting a state to apply for an exemption from any provision of that part of the regulations. *49 C.F.R. § 26.15*. *Go To Headnote*

Gauvin v. Trombatore, 682 F. Supp. 1067, 1988 U.S. Dist. LEXIS 2624 (N.D. Cal. 1988).

Overview: *Black businessman's claims against state transportation department and employees in official capacities violated 11th Amendment; other claims failed for lack of specificity; leave to amend was granted. Remaining "claims" failed to state a claim.*

Former 49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- The Disadvantaged Business Enterprises (DBE) program, authorized by the Surface Transportation Assistance Act of 1982, *Pub. L. No. 97-424*, provides that at least 10 percent of federal highway assistance funds are to be expended for small business concerns owned and controlled by socially and economically disadvantaged individuals. 49 C.F.R. § 23(D) (1987). Under the program, state departments of transportation are required to establish a statewide goal for attainment of DBE participation and submit that goal to the U.S. Department of Transportation. 49 C.F.R. § 23.64. The department also establishes individual contract goals, which contractors must meet or establish good faith efforts at compliance. *49 C.F.R. § 23.45(g)(2)(ii)*.With the enactment of the Surface Transportation and Uniform Relocation Assistance Act of 1987, the DBE program was combined with the Women Business Enterprise program, and a single aggregate goal established for both. *52 Fed. Reg. 39225* (October 21, 1987). *Go To Headnote*

Gauvin v. Trombatore, 682 F. Supp. 1067, 1988 U.S. Dist. LEXIS 2624 (N.D. Cal. 1988).

Overview: *Black businessman's claims against state transportation department and employees in official capacities violated 11th Amendment; other claims failed for lack of specificity; leave to amend was granted. Remaining "claims" failed to state a claim.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- The Disadvantaged Business Enterprises (DBE) program, authorized by the Surface Transportation Assistance Act of 1982, *Pub. L. No. 97-424*, provides that at least 10 percent of federal highway assistance funds are to be expended for small business concerns owned and controlled by socially and economically disadvantaged individuals. 49 C.F.R. § 23(D) (1987). Under the program, state departments of transportation are required to establish a statewide goal for attainment of DBE participation and submit that goal to the U.S. Department of Transportation. 49 C.F.R. § 23.64. The department also establishes individual contract goals, which contractors must meet or establish good faith efforts at compliance. *49 C.F.R. § 23.45(g)(2)(ii)*.With the enactment of the Surface Transportation and Uniform Relocation Assistance Act of 1987, the DBE program was combined with the Women Business Enterprise program, and a single aggregate goal established for both. *52 Fed. Reg. 39225* (October 21, 1987). *Go To Headnote*

Gilbert Cent. Corp. v. Kemp, 637 F. Supp. 843, 1986 U.S. Dist. LEXIS 24200 (D. Kan. 1986).

Overview: *The Kansas Secretary of Transportation properly rejected the low bid on a construction contract because the low bidder failed to meet disadvantaged business contract goals and the secretary's interpretation of the federal regulations was reasonable.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- *49 C.F.R. § 23.45(h)(2)*provides: If the minority business enterprise (MBE) participation submitted in response to *49 C.F.R. § 23.45(h)(1)* does not meet the MBE contract goals, the apparent successful competitor shall satisfy the recipient that the competitor has made good faith efforts to meet the goals. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 2013 U.S. Dist. LEXIS 74236 (D. Minn. 2013).

Overview: *Because a bidder that lacked good-faith efforts to meet disadvantaged business enterprise subcontractor requirements for a highway project did not show irreparable harm from rejection of its bid and did not show likelihood of success because agency procedures were proper, it could not obtain preliminary injunctive relief under Fed. R. Civ. P. 65.*

- *49 C.F.R. § 26.45(a)(1)*requires recipients of federal highway funds to set an overall goal for disadvantaged business enterprise (DBE) subcontractor participation in United States Department of Transportation (DOT) assisted contracts. Such a contract goal may not be a rigid quota. *49 C.F.R. § 26.43(a)*. Instead, the recipient must ensure that the primary (main) contractor awarded a DOT-assisted contract has either (1) met the goal for DBE subcontractor participation or (2) if unsuccessful in doing so, has made a good-faith effort to achieve it. *49 C.F.R. § 26.53(a)*. Determining whether a contractor has made a good-faith effort turns on several factors listed by the DOT in an appendix to the regulations entitled "Guidance Concerning Good Faith Efforts." 49 C.F.R. pt. 26, app. A. The inquiry is a flexible one, based on (among other things) the means used by the contractor to obtain DBE participation, the scope of its negotiations with DBE subcontractors, and whether it undertook efforts to divide subcontracted work into smaller units (if feasible) to facilitate participation. 49 C.F.R. pt. 26, app. A, § IV. A contracting authority must consider these factors when assessing good-faith efforts. 49 C.F.R. pt. 26, app. A, § II. *Go To Headnote*

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. *49 C.F.R. § 26.1*. *49 C.F.R. § 26.3*. It provides that such recipients may certify firms as eligible to participate as DBEs. *49 C.F.R. §§ 26.61(a)*, *26.5*. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an overall goal for DBE participation in USDOT-assisted contracts. *49 C.F.R. §§ 26.41*, *26.45(a)(1)*. A recipient of USDOT contracts must have a DBE program. *49 C.F.R. § 26.21*. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. *Go To Headnote*

S. Fla. Chapter of the Associated Gen. Contrs. v. Broward County, 544 F. Supp. 2d 1336, 2008 U.S. Dist. LEXIS 8630 (S.D. Fla. 2008).

Overview: *County officials were required only to establish that they had fully complied with federal regulations under 49 C.F.R. pt. 26 in implementing Disadvantaged Business Enterprise program established pursuant to the Transportation Equity Act for the 21st Century. Additional steps were not required to ensure constitutionality under the 14th Amendment.*

- The regulations of the United States Department of Transportation promulgated pursuant to the Transportation Equity Act for the 21st Century provide a detailed, step-by-step process through which recipients of the federal funds are

required to set and reach goals for Disadvantaged Business Enterprise participation in funded projects. *49 C.F.R. § 26.45*. *Go To Headnote*

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- A recipient of U.S. Department of Transportation (USDOT) funds must take several steps in order to assure compliance with federal law pertaining to its required disadvantaged business enterprise (DBE) program. First, the recipient must determine at the local level the figure that would constitute an appropriate DBE involvement goal, based on the relative availability of DBEs. *49 C.F.R. § 26.45(b)*. *49 C.F.R. § 26.45(c)*, *26.45(d)*, detail the various methods a recipient may use to calculate DBE availability, but under any method selected, a recipient must begin by calculating a "base figure" for the relative availability of DBEs and then must examine evidence in the local area to determine whether any adjustments to the base figure are needed. These adjustments lead to the final local goal. After a local goal is established, the recipient must submit its DBE plan to USDOT for approval, with explanations as to how it arrived at the goal. *49 C.F.R. § 26.45(f)*. The USDOT is not allowed to withhold funds if a recipient later fails to meet its goal unless there is a demonstration of bad faith on the part of the recipient. *49 C.F.R. § 26.47(a)*. *Go To Headnote*

- *49 C.F.R. § 26.45(c)*describes the appropriate method for calculation, by a recipient of U.S. Department of Transportation funds, of the local base figure for a disadvantaged business enterprise (DBE) program——the first step in the goal-setting process. The regulation gives several examples of appropriate methodology, but states explicitly that the examples are not intended as an exhaustive list and that other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration. The fifth item in the list, entitled "Alternative Methods," states that a recipient may use other methods to determine a base figure for its overall goal and that any methodology chosen must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in the recipient's market. *49 C.F.R. § 26.45(c)(5)*. The other four methods in the list are: (1) use DBE directories and U.S. Census Bureau Data; (2) use a bidders list; (3) use data from a disparity study; and (4) use the goal of another recipient. *49 C.F.R. § 26.45(c)(1)*-(4). The regulations provide detailed descriptions of each of these four examples. *Go To Headnote*

- *49 C.F.R. § 26.45(b)*makes clear that "relative availability" of disadvantaged business enterprises (DBE) means the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate in U.S. Department of Transportation (USDOT) assisted contracts. There is nothing in the federal regulations indicating that a recipient of USDOT funds must narrowly define the scope of ready, willing, and available firms by simply counting the number of registered and pre-qualified DBEs under state law. The use of a custom census from the National Economic Research Associate's, Inc., reflects an attempt to arrive at more accurate numbers than would be possible through use of just a DBE list. The remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. This conclusion is bolstered by guidance offered by USDOT on its website, which suggests that recipients might supplement their DBE directories, for goal-setting purposes, with list of parties attending DBE certification/outreach sessions. It seems illogical that the regulations would refer to five different methods of calculating the relative availability of DBEs, if any method other than strict reference to a list of registered and pre-qualified DBEs was inappropriate. *Go To Headnote*

- *49 C.F.R. § 26.45(d)*does not require any adjustments to the base figure of available disadvantaged business enterprises (DBE) after the initial calculation, but simply provides recipients of U.S. Department of Transportation (USDOT) funds with authority to make such adjustments if necessary. There is no aspect of the regulations that requires a recipient to separate prime contractor availability from subcontractor availability. The regulations require the local goal to be focused on overall DBE participation in the recipient's USDOT-assisted contracts. *49 C.F.R. § 26.45(a)(1)*. It would make little sense to separate prime contractor and subcontractor availability when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Go To Headnote*

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006).*

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

- The regulations implementing the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), expressly prohibit states from apportioning their disadvantaged business enterprise (DBE) utilization goal among different minority groups (e.g., allocating 5 percent to Black Americans, 3 percent to Hispanic Americans, 0 percent to Asian Americans, etc.); rather, an undifferentiated goal that encompasses all minority groups is required. *49 C.F.R. § 26.45(h)*. A state must meet the maximum feasible portion of this goal through race-neutral means, including informational and instructional programs targeted toward all small businesses. *49 C.F.R. § 26.51(a)*-(b). A state must use race-conscious contract goals to achieve any portion of its DBE utilization requirement that cannot be attained through these race-neutral means. § 26.51(d). Even when race-conscious measures are necessary, however, the regulations do not require that DBE utilization goals be included in every contract—or that they be set at the same level in every contract in which they are used—as long as the overall effect is to obtain that portion of the requisite DBE participation that cannot be achieved through race-neutral means. § 26.51(e)(2). *Go To Headnote*

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- As a condition of receiving federal highway funds, a recipient must have a disadvantaged business enterprises (DBE) program, *49 C.F.R. § 26.21*, must set an overall goal for DBE participation in United States Department of Transportation (USDOT) -assisted contracts, *49 C.F.R. § 26.45(a)*, and, if it sets overall goals on a fiscal year basis, must submit them to USDOT for review and approval. *49 C.F.R. § 26.45(f)(1)*. If a recipient determines that DBE firms are so "overconcentrated" in a particular occupational area as to "unduly burden" the opportunity of non-DBE firms to participate in that type of work, it must devise appropriate measures to address this overconcentration. *49 C.F.R. § 26.33*. *Go To Headnote*

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004).*

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, a state receiving federal highway funds must annually submit to the U.S. Department of Transportation (DOT) an overall goal for DBE participation in its federally funded highway contracts. *49 C.F.R. § 26.45(f)(1)*. The overall goal must be based on demonstrable evidence as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. *49 C.F.R. § 26.45(b)*. The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *49 C.F.R. § 26.45(d)*. The state must meet the maximum feasible portion of its overall goal through raceneutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *49 C.F.R. § 26.51(a)*, (c). *Go To Headnote*

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23.45 was redesignated. See now 49 CFR 26.45

- Upon receiving a grant, the federal aid recipient must execute an agreement promising to submit, for Department of Transportation review, a disadvantaged business enterprise affirmative action program. *49 C.F.R. § 23.43(b)*. Grant recipients are required to establish overall goals for minority contracting for a specified period of time and goals on each specific prime contract with subcontracting possibilities. *49 C.F.R. § 23.45(g)*. One way for an aid recipient to meet the overall goal is to set individual goals for disadvantaged business enterprise (DBE) subcontracts. *49 C.F.R. § 23.45(g)(2)(ii)*. The recipient is required to set a minimum level of DBE participation on each contract that will count towards the overall goal. *49 C.F.R. § 23.45(g)*. Bidders failing to meet the individual DBE goal may nevertheless be awarded projects provided that the bidder can demonstrate good faith efforts to obtain DBE participation. *49 C.F.R. 23.45(h)(2)*. The District of Columbia has discretion on a case-by-case basis to determine if the prime contractor has actively and aggressively attempted to meet the goal. *49 C.F.R. § 23.45*. The regulations provide a nonexhaustive, nonexclusive list of criteria that may be considered by the District of Columbia in determining whether a bidder has made good faith efforts. *49 C.F.R. § 23.45*. *Go To Headnote*

Ellis v. Skinner, 961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir.), cert. denied, *506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286, 1992 U.S. LEXIS 6630 (1992).*

Overview: *Where Utah had been able to meet the 10-percent set-aside requirement of the federal disadvantaged business enterprise program, it was not required to justify its factual findings because it was not able to obtain a waiver of the requirement.*

49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- The disadvantaged business enterprise (DBE) program established by the Surface Transportation Assistance Act of 1982, *96 Stat. 2097*, 2100, and renewed by the Surface Transportation and Uniform Relocation Assistance Act of 1987, *101 Stat. 132*, 145, requires states — as a prerequisite to the receipt of federal funds — to set aside at least 10 percent of all federally aided highway contracts to DBEs. Each participating state must set annual goals for DBE participation. 49 C.F.R. § 23.64. A state may set its annual goal at less than 10 percent DBE participation if the state can document its efforts to meet the statutory 10 percent requirement and can provide information justifying a lesser goal. 49 C.F.R. §§ 23.64, 23.65. Once the state has set an annual goal, it must set levels of DBE participation for each project. *49 C.F.R. § 23.45(g)*. The state may award a project to bidders that fail to meet the project's DBE goal if the bidder can demonstrate its good faith efforts to obtain DBE participation. *49 C.F.R. § 23.45(h)*. *Go To Headnote*

Ellis v. Skinner, 961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir.), cert. denied, *506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286, 1992 U.S. LEXIS 6630 (1992).*

Overview: *Where Utah had been able to meet the 10-percent set-aside requirement of the federal disadvantaged business enterprise program, it was not required to justify its factual findings because it was not able to obtain a waiver of the requirement.*

49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

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C.F.R. § 23.45(g). The state may award a project to bidders that fail to meet the project's DBE goal if the bidder can demonstrate its good faith efforts to obtain DBE participation. 49 C.F.R. § 23.45(h). Go To Headnote

Ellis v. Skinner, 753 F. Supp. 329, 36 Cont. Cas. Fed. (CCH) ¶ 76010, 1990 U.S. Dist. LEXIS 17002 (D. Utah 1990), aff'd, 961 F.2d 912, 1992 U.S. App. LEXIS 6470 (10th Cir. 1992).

Overview: *A Utah minority set-aside program for public contracts, enacted pursuant to federal statutes, was held to be constitutional because the judiciary deferred to Congress' role to legislate Fourteenth Amendment equal protection guarantees.*

Former 49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- As a condition to receiving federal highway funds, the Surface Transportation Assistance Act of 1982, and the Surface Transportation and Uniform Relocation Assistance Act of 1987, require states to set aside at least 10 percent of all federally-aided highway contracts to Disadvantaged Business Enterprises (DBE). The federal statutes permit states to use a DBE set-aside of less than 10 percent upon application to and approval by the U.S. Secretary of Transportation as set forth in U.S. Department of Transportation regulations. 49 C.F.R. §§ 23.64(e), 23.65, and 49 C.F.R. Part 23, Subpart D, Appendix D (1989). Go To Headnote

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, 922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991).

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- One way that a state may achieve its overall goal is by setting individual goals for disadvantaged business subcontractor participation on each prime contract under 49 C.F.R. § 23.45(g)(2)(ii). Like the overall disadvantaged business participation goals, specific project goals must be practical and related to the potential availability of disadvantaged businesses in desired areas of expertise under 49 C.F.R. 23.45(g)(1). Specific project goals must be based on known availability of qualified disadvantaged businesses under 49 C.F.R. § 23.45(g)(7). Go To Headnote
- For all contracts on which disadvantaged business subcontractor participation goals have been established, the apparently successful prime contractor must submit information about the participation of disadvantaged firms before the State commits itself to the performance by the prime contractor under 49 C.F.R. § 23.45(h)(1). If the level of disadvantaged business participation does not meet the contract goals, the State may grant a waiver of the goals to the prime contractor if the State is satisfied that the prime contractor has made good faith efforts to meet the goals under 49 C.F.R. § 23.45(h)(2). Each state has discretion to consider whether, under all relevant circumstances, the contractor has actively and aggressively attempted to meet the goal under 49 C.F.R. 23.45, Appendix A. The federal government has provided a non-exclusive, non-exhaustive list of the kinds of efforts that states may consider. It is not intended to be a mandatory checklist. Go To Headnote
- The federal implementing regulations, 49 C.F.R. § 23.45(k), permit states to use set-aside programs as one portion of an overall program to meet the goals set under the 1987 Surface Transportation Act. The set-aside programs allow certain contracts to be awarded to the successful bidder from a pool of bidders limited exclusively to disadvantaged businesses. States may implement set-aside programs where not prohibited by state or local law and determined by the recipient to be necessary to meet disadvantaged business enterprise goals. Go To Headnote
- The set-aside program itself includes requirements for disadvantaged business participation on projects let to disadvantaged business prime contractors. Each bid by disadvantaged prime contractors must include a goal that at least 25 percent of the total number of workers in all trades employed on the project will be disadvantaged individuals and a subcontracting plan that provides sufficient detail to enable the secretary to determine that the prime contractor has made or will make a good faith effort to award at least 20 percent of the total contract amount to bona fide independent disadvantaged business subcontractors. States may use set-asides to meet their federal goals under the

1987 federal Surface Transportation Act only in cases where at least three disadvantaged business enterprises with capabilities consistent with contract requirements exist so as to permit competition under *49 C.F.R. § 23.45(k)*. *Go To Headnote*

- The State is within the bounds of federal authority when it uses the total project costs to set individual goals for disadvantaged business subcontractor participation on projects that receive federal funding. Federal regulations require that goals set on specific contracts be based on the known availability of qualified disadvantaged businesses under *49 C.F.R. § 23.45(g)(7)*. *Go To Headnote*

- According to the federal regulations, *49 C.F.R. § 23.45(k)*, under the 1987 Surface Transportation Act, set-asides can be used only when there exist at least three disadvantaged businesses with capabilities consistent with contract requirements exist so as to permit competition. *Go To Headnote*

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.64 was redesignated. See now 49 CFR 26.45.

- Pursuant to *49 C.F.R. § 23.61*, unless the secretary of the United States Department of Transportation (USDOT) determines otherwise, not less than 10 percent of the funds authorized by the Surface Transportation and Uniform Relocation Assistance Act must be expended by recipient states for small business concerns owned and controlled by "socially and economically disadvantaged individuals." The regulation further provides that the 10 percent level of participation will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least 10 percent. If the goal submitted is less than 10 percent, there is a procedure for seeking USDOT approval of a lesser goal. A state must show its efforts to locate disadvantaged businesses, to make such businesses aware of contracting opportunities, to encourage disadvantaged businesses, and must provide information concerning legal or other barriers impeding participation of disadvantaged businesses, the availability of such businesses to work on the recipient's contracts, the size and other characteristics of the minority population in the recipient's jurisdiction and the relevance of such statistics to the potential availability of such businesses. 49 C.F.R. § 23.64. *Go To Headnote*

Gauvin v. Trombatore, 682 F. Supp. 1067, 1988 U.S. Dist. LEXIS 2624 (N.D. Cal. 1988).

Overview: *Black businessman's claims against state transportation department and employees in official capacities violated 11th Amendment; other claims failed for lack of specificity; leave to amend was granted. Remaining "claims" failed to state a claim.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- The Disadvantaged Business Enterprises (DBE) program does not require that each individual contract meet the 10 percent goal. Rather, the state is authorized to set DBE goals that are practical and related to the availability of DBEs in desired areas of expertise for a particular project. *49 C.F.R. § 23.45(g)(1)*. Only the overall, statewide goals are required to be submitted to the U.S. Department of Transportation for approval. *49 C.F.R. §§ 23.45(g)(3)(i)*, 23.64(c). An administrative complaint can be filed with the U.S. Department of Transportation on any charge that a state transportation department has abused its discretion in setting individual contract goals. *49 C.F.R. § 23.73* et seq. Consequently, no private right of action exists for violation of the statute on these grounds. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Gilbert Cent. Corp. v. Kemp, 637 F. Supp. 843, 1986 U.S. Dist. LEXIS 24200 (D. Kan. 1986).

Overview: *The Kansas Secretary of Transportation properly rejected the low bid on a construction contract because the low bidder failed to meet disadvantaged business contract goals and the secretary's interpretation of the federal regulations was reasonable.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- The purpose of the federal regulations promulgated by the Federal Highway Administration and appearing at 49 C.F.R. Pt. 23 is to encourage the fullest possible participation in covered contracts by firms owned and controlled by minorities and women. Such minority business enterprises (MBE) consist of both disadvantaged businesses (DB) and women-owned business enterprises (WBE). "Recipients" of federal financial assistance are required to set both overall and contract goals for MBE participation. *49 C.F.R. § 23.45(g)(2)(i)*, (ii). Moreover, such overall and contract goals for MBE participation must be subdivided into participation goals for both DB and WBE. *49 C.F.R. § 23.45(g)(4)*. The regulations further require that recipients inform prospective bidders, in the solicitation for bids, that the apparent successful bidder will be required to submit information concerning MBE participation, including: (1) the names and addresses of MBE firms that will participate in the contract, (2) a description of the work each named MBE firm will perform, and (3) the dollar amount of participation by each named MBE firm. *49 C.F.R. § 23.45(h)(1)(i)*. So long as this information is submitted prior to the signing of the actual contract, the recipient may select the time at which it requires MBE information to be submitted. *49 C.F.R. § 23.45(h)(ii)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Gilbert Cent. Corp. v. Kemp, 637 F. Supp. 843, 1986 U.S. Dist. LEXIS 24200 (D. Kan. 1986).

Overview: *The Kansas Secretary of Transportation properly rejected the low bid on a construction contract because the low bidder failed to meet disadvantaged business contract goals and the secretary's interpretation of the federal regulations was reasonable.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- The purpose of the federal regulations promulgated by the Federal Highway Administration and appearing at 49 C.F.R. Pt. 23 is to encourage the fullest possible participation in covered contracts by firms owned and controlled by minorities and women. Such minority business enterprises (MBE) consist of both disadvantaged businesses (DB) and women-owned business enterprises (WBE). "Recipients" of federal financial assistance are required to set both overall and contract goals for MBE participation. *49 C.F.R. § 23.45(g)(2)(i)*, (ii). Moreover, such overall and contract goals for MBE participation must be subdivided into participation goals for both DB and WBE. *49 C.F.R. § 23.45(g)(4)*. The regulations further require that recipients inform prospective bidders, in the solicitation for bids, that the apparent successful bidder will be required to submit information concerning MBE participation, including: (1) the names and addresses of MBE firms that will participate in the contract, (2) a description of the work each named MBE firm will perform, and (3) the dollar amount of participation by each named MBE firm. *49 C.F.R. § 23.45(h)(1)(i)*. So long as this information is submitted prior to the signing of the actual contract, the recipient may select the time at which it requires MBE information to be submitted. *49 C.F.R. § 23.45(h)(ii)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004)*.

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Under the Disadvantaged Business Enterprise program of the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, a state receiving federal highway funds must annually submit to the U.S. Department of Transportation (DOT) an overall goal for DBE participation in its federally funded highway contracts. *49 C.F.R. § 26.45(f)(1)*. The overall goal must be based on demonstrable evidence as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. *49 C.F.R. § 26.45(b)*. The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *49 C.F.R. § 26.45(d)*. The state must meet the maximum feasible portion of its overall goal through raceneutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *49 C.F.R. § 26.51(a)*, (c). *Go To Headnote*

Public Contracts Law: Dispute Resolution: General Overview

S. Fla. Chapter of the Associated Gen. Contrs. v. Broward County, 544 F. Supp. 2d 1336, 2008 U.S. Dist. LEXIS 8630 (S.D. Fla. 2008).

Overview: *County officials were required only to establish that they had fully complied with federal regulations under 49 C.F.R. pt. 26 in implementing Disadvantaged Business Enterprise program established pursuant to the Transportation Equity Act for the 21st Century. Additional steps were not required to ensure constitutionality under the 14th Amendment.*

- The regulations of the United States Department of Transportation promulgated pursuant to the Transportation Equity Act for the 21st Century provide a detailed, step-by-step process through which recipients of the federal funds are required to set and reach goals for Disadvantaged Business Enterprise participation in funded projects. *49 C.F.R. § 26.45*. *Go To Headnote*

Transportation Law: Bridges & Roads: Funding

C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 2013 U.S. Dist. LEXIS 74236 (D. Minn. 2013).

Overview: *Because a bidder that lacked good-faith efforts to meet disadvantaged business enterprise subcontractor requirements for a highway project did not show irreparable harm from rejection of its bid and did not show likelihood of success because agency procedures were proper, it could not obtain preliminary injunctive relief under Fed. R. Civ. P. 65.*

- *49 C.F.R. § 26.45(a)(1)*requires recipients of federal highway funds to set an overall goal for disadvantaged business enterprise (DBE) subcontractor participation in United States Department of Transportation (DOT) assisted contracts. Such a contract goal may not be a rigid quota. *49 C.F.R. § 26.43(a)*. Instead, the recipient must ensure that the primary (main) contractor awarded a DOT-assisted contract has either (1) met the goal for DBE subcontractor participation or (2) if unsuccessful in doing so, has made a good-faith effort to achieve it. *49 C.F.R. § 26.53(a)*. Determining whether a contractor has made a good-faith effort turns on several factors listed by the DOT in an appendix to the regulations entitled "Guidance Concerning Good Faith Efforts." 49 C.F.R. pt. 26, app. A. The inquiry is a flexible one, based on (among other things) the means used by the contractor to obtain DBE participation, the scope of its negotiations with DBE subcontractors, and whether it undertook efforts to divide subcontracted work into smaller units (if feasible) to facilitate participation. 49 C.F.R. pt. 26, app. A, § IV. A contracting authority must consider these factors when assessing good-faith efforts. 49 C.F.R. pt. 26, app. A, § II. *Go To Headnote*

Transportation Law: Bridges & Roads: U.S. Federal Highway Administration

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- The State is within the bounds of federal authority when it uses the total project costs to set individual goals for disadvantaged business subcontractor participation on projects that receive federal funding. Federal regulations require that goals set on specific contracts be based on the known availability of qualified disadvantaged businesses under *49 C.F.R. § 23.45(g)(7)*. *Go To Headnote*

Transportation Law: Public Transportation

Transworld Prods. Co. v. Canteen Corp., 908 F. Supp. 1, 1995 U.S. Dist. LEXIS 18669 (D.D.C. 1995).

Overview: *Because a transit authority's vending contract did not involve the expenditure of any federal funds, federal disadvantaged business enterprise statutes did not apply to the contract, and a subcontractor conceded arguments it failed to address.*

49 CFR 23.45 was redesignated. See now 49 CFR 26.45.

- Recipients of federal funds must develop and use affirmative action techniques to facilitate minority business enterprise participation in contracting activities. *49 C.F.R. § 23.45(c)*. The statute sets forth a target: not less than 10 percent of the amounts authorized will go to certified disadvantaged business enterprises (DBE). The Surface Transportation and Uniform Relocation Assistance Act of 1987, *101 Stat. 132* (1987), § 106(c), *101 Stat. 145*. An overall goal of less than 10 percent may be accepted but must be supported by specific factual findings justifying a lesser percentage. A state must petition the Secretary of Transportation to obtain a waiver of the 10 percent minimum overall goal. 49 C.F.R. §§ 23.64(e), 23.65. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.53

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart C — Goals, Good Faith Efforts, and Counting

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/ offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii)A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

(3)

(i) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.

(ii) Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)

(1)

(i) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(ii) You must include in each prime contract a provision stating:

(A) That the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided in this paragraph (f); and

(B) That, unless your consent is provided under this paragraph (f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of

the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contracor;

(iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondisrciminatory bond requirements.

(iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(vii) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vi) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(vii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(viii)A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(ix) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

(g) When a DBE subcontractor is terminated as provided in paragraph (f) of this section, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

(h) You must include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.

(i) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

(j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5133, Feb. 2, 1999; *76 FR 5083*, 5098, Jan. 28, 2011; *79 FR 59566*, 59595, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59595, Oct. 2, 2014, amended this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Real Property Law: Construction Law: General Overview

Transportation Law: Bridges & Roads: Funding

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Once it has set a disadvantaged business enterprises (DBE) goal, a recipient may only award a prime contract to a bidder/offeror that documents that it has either (1) obtained enough DBE participation to meet the goal, or (2) made adequate good faith efforts to meet that goal, even if it did not succeed in obtaining enough DBE participation to do so. *49 C.F.R. § 26.53(a)*. *Go To Headnote*

- A higher bid from a disadvantaged business enterprise (DBE) than from a non-DBE is not a sufficient reason for a prime contractor's failure to meet the DBE goal on a contract, unless the difference is "excessive or unreasonable." 49

C.F.R. pt. 26, app. A § IV(D)(2). A recipient must apply the requirements of this section to DBE bidders/offerors for prime contracts. *49 C.F.R. § 26.53(g)*. *Go To Headnote*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, a recipient may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years. *49 C.F.R. § 26.51(f)(3)*. Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE participation goal so long as the bidder has made adequate good faith efforts to meet the goal. *49 C.F.R. § 26.53(a)(2)*. The regulations also prohibit the use of quotas. *49 C.F.R. § 26.43*. *Go To Headnote*

S.A. Healy Co. v. Washington Metropolitan Area Transit Authority, 615 F. Supp. 1132, 33 Cont. Cas. Fed. (CCH) ¶73771, 1985 U.S. Dist. LEXIS 16827 (D.D.C. 1985).

Overview: *Agency could make a good faith inquiry into a joint venture to determine if the minority business enterprise had the ability to perform 20 percent of the contract work. Substitution of minority enterprise was permissive, not mandatory.*

Former 49 CFR 23.45 was revised. See now 49 CFR 26.53.

- If the minority business enterprise participation submitted in response to paragraph (h)(1) of this section does not meet the minority business enterprise contract goals, the apparent successful competitor shall satisfy the recipient that the competitor has made good faith efforts to meet the goals. *49 C.F.R. § 23.45 (h)(2) (1985)*. *Go To Headnote*

- The recipient may select the time at which it requires minority business enterprise information to be submitted. Provided, that the time of submission shall be before the recipient commits itself to the performance of the contract by the apparent successful compe*titor. 49 C.F.R. § 23.45(h)(1)(ii) (1985)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 2013 U.S. Dist. LEXIS 74236 (D. Minn. 2013).

Overview: *Because a bidder that lacked good-faith efforts to meet disadvantaged business enterprise subcontractor requirements for a highway project did not show irreparable harm from rejection of its bid and did not show likelihood of success because agency procedures were proper, it could not obtain preliminary injunctive relief under Fed. R. Civ. P. 65.*

- *49 C.F.R. § 26.45(a)(1)*requires recipients of federal highway funds to set an overall goal for disadvantaged business enterprise (DBE) subcontractor participation in United States Department of Transportation (DOT) assisted contracts. Such a contract goal may not be a rigid quota. *49 C.F.R. § 26.43(a)*. Instead, the recipient must ensure that the primary (main) contractor awarded a DOT-assisted contract has either (1) met the goal for DBE subcontractor participation or (2) if unsuccessful in doing so, has made a good-faith effort to achieve it. *49 C.F.R. § 26.53(a)*. Determining whether a contractor has made a good-faith effort turns on several factors listed by the DOT in an appendix to the regulations entitled “Guidance Concerning Good Faith Efforts.” 49 C.F.R. pt. 26, app. A. The inquiry is a flexible one, based on (among other things) the means used by the contractor to obtain DBE participation, the scope of its negotiations with DBE subcontractors, and whether it undertook efforts to divide subcontracted work into smaller units (if feasible) to facilitate participation. 49 C.F.R. pt. 26, app. A, § IV. A contracting authority must consider these factors when assessing good-faith efforts. 49 C.F.R. pt. 26, app. A, § II. *Go To Headnote*

- *49 C.F.R. § 26.53(e)*does not preclude recipients of federal funds from utilizing the standard methods to determine disadvantaged business enterprise participation or good-faith efforts. The process described in § 26.53(e) is merely a suggestion. *Go To Headnote*

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006).*

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

- Prime contractors to whom a state awards federally funded transportation contracts must undertake good faith efforts to satisfy a contract's disadvantaged business enterprise (DBE) utilization goal by allocating the designated percentage of funds to DBE firms. *49 C.F.R. § 26.53(a)*. States are prohibited from instituting rigid quotas that do not account for a prime contractor's good faith efforts to subcontract work to DBEs. 49 U.S.C.S. § 26.43(a). *Go To Headnote*

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- In determining whether a disadvantaged business enterprises (DBE) bidder/offeror for a prime contract has met a contract goal, a recipient is directed to count the work the DBE has committed to performing with its own forces. *49 C.F.R. § 26.53(g)*. Although United States Department of Transportation (USDOT) DBE regulations do not explicitly bar consideration of DBE status in the award of prime contracts, the regulations do state that a recipient may use contract goals only on those USDOT-assisted contracts that have subcontracting possibilities. *49 C.F.R. § 26.51 (e)(1)*. *Go To Headnote*

Real Property Law: Construction Law: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- A higher bid from a disadvantaged business enterprise (DBE) than from a non-DBE is not a sufficient reason for a prime contractor's failure to meet the DBE goal on a contract, unless the difference is "excessive or unreasonable." 49 C.F.R. pt. 26, app. A § IV(D)(2). A recipient must apply the requirements of this section to DBE bidders/offerors for prime contracts. *49 C.F.R. § 26.53(g)*. *Go To Headnote*

Transportation Law: Bridges & Roads: Funding

C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 2013 U.S. Dist. LEXIS 74236 (D. Minn. 2013).

Overview: *Because a bidder that lacked good-faith efforts to meet disadvantaged business enterprise subcontractor requirements for a highway project did not show irreparable harm from rejection of its bid and did not show likelihood of success because agency procedures were proper, it could not obtain preliminary injunctive relief under Fed. R. Civ. P. 65.*

- *49 C.F.R. § 26.45(a)(1)*requires recipients of federal highway funds to set an overall goal for disadvantaged business enterprise (DBE) subcontractor participation in United States Department of Transportation (DOT) assisted contracts. Such a contract goal may not be a rigid quota. *49 C.F.R. § 26.43(a)*. Instead, the recipient must ensure that the primary (main) contractor awarded a DOT-assisted contract has either (1) met the goal for DBE subcontractor participation or (2) if unsuccessful in doing so, has made a good-faith effort to achieve it. *49 C.F.R. § 26.53(a)*. Determining whether a contractor has made a good-faith effort turns on several factors listed by the DOT in an appendix to the regulations entitled "Guidance Concerning Good Faith Efforts." 49 C.F.R. pt. 26, app. A. The inquiry is a flexible one, based on (among other things) the means used by the contractor to obtain DBE participation, the scope of its negotiations with DBE subcontractors, and whether it undertook efforts to divide subcontracted work into

smaller units (if feasible) to facilitate participation. 49 C.F.R. pt. 26, app. A, § IV. A contracting authority must consider these factors when assessing good-faith efforts. 49 C.F.R. pt. 26, app. A, § II. *Go To Headnote*

- *49 C.F.R. § 26.53(e)* does not preclude recipients of federal funds from utilizing the standard methods to determine disadvantaged business enterprise participation or good-faith efforts. The process described in § 26.53(e) is merely a suggestion. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.69

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

§ 26.69 What rules govern determinations of ownership?

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c)

(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

Examples to paragraph (c):

(i) An individual pays $ 100 to acquire a majority interest in a firm worth $ 1 million. The individual's contribution to capital would not be viewed as substantial.

(ii)A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute $ 100 and $ 10,000, respectively, to acquire a firm grossing $ 1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

(iii) The disadvantaged owner of a DBE applicant firm spends $ 250 to file articles of incorporation and obtains a $ 100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if —

(1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be —

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations;

(iv) Indispensable to the firm's potential success;

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) You must always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual —

(1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

(2) Through inheritance, or otherwise because of the death of the former owner.

(h)

(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is —

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that —

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2)A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because —

(1)A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5137, Feb. 2, 1999; *79 FR 59566*, 59597, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59597, Oct. 2, 2014, revised paragraphs (a) and (c), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Transportation Law: Air Transportation: Airports: Concessionaires

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Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

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Evidence: Procedural Considerations: Burdens of Proof: Preponderance of Evidence

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

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- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Shearin Constr., Inc. v. Mineta, 232 F. Supp. 2d 608, 2002 U.S. Dist. LEXIS 23083 (E.D. Va. 2002).

Overview: *The DOT's denial of disadvantaged business enterprise status to the company was not arbitrary or capricious where the owner failed to show that her ownership and management of the company was real, substantial, and continuing as the statute required.*

- In determining whether an entity qualifies as a Disadvantaged Business Enterprise, under *49 C.F.R. § 26.69(f)* "contribution" includes special expertise that must be documented in business records. *Go To Headnote*

• A plaintiff applying for certification as a Disadvantaged Business Enterprise (DBE) has the burden to clearly demonstrate that monies utilized to acquire ownership interest in the DBE firm derives from the personal contributions of the disadvantaged owners. *49 C.F.R. § 26.69(e)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Beach Erectors, Inc. v. United States DOT, 2012 U.S. Dist. LEXIS 127632 (E.D.N.Y. Sept. 7, 2012).

Overview: *DOT Departmental Office of Civil Rights' determination that an owner lacked required the managerial and technical competence and experience necessary to maintain control over a corporation, under 49 C.F.R. § 26.71(g), was not arbitrary or capricious, under 5 U.S.C.S. § 706, because, inter alia, the owner lacked technical and field work experience.*

• Recipients of certain federal funds—such as the New York Metropolitan Transit Authority—must apply the regulations set forth in 49 C.F.R. pt. 26 to determine whether an applicant firm is eligible for Disadvantaged Business Enterprise (DBE) certification. *49 C.F.R. § 26.71(a)*. To be eligible for DBE status, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. *49 C.F.R. § 26.69(b)*. There is a rebuttable presumption that, inter alia, women are socially and economically disadvantaged individuals. *49 C.F.R. §§ 26.61(c)* & *26.67(a)(1)*. In addition to determining social and economic disadvantaged status, the recipient of federal funds must determine whether the applicant firm is controlled by the socially and economically disadvantaged owner. *49 C.F.R. § 26.61(e)*. This determination is to be made by considering all the facts in the record, viewed as a whole. *49 C.F.R. § 26.71(a)*. *Go To Headnote*

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

• Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

Transportation Law: Air Transportation: Airports: Concessionaires

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

• A firm seeking certification for the Federal Airport Concessions Disadvantaged Business Enterprise Program must demonstrate, among other things, that the contributions of capital or expertise by the socially and economically

disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan. *49 C.F.R. § 26.69(e)*. *Go To Headnote*

- The Federal Airport Concessions Disadvantaged Business Enterprise Program regulations clearly contemplate the use of borrowed funds by disadvantaged individuals in the acquisition of a firm. First, the regulations state that unsecured loans from non-disadvantaged owners of the firm are insufficient contributions of capital. Second, the regulations explicitly state that loans from financial institutions do not render a firm ineligible. The last sentence of *49 C.F.R. §26.69(e)* says loans from financial institutions do not create ineligibility even if the debtor's ownership interest is security for the loan, which does not require that such loans be so secured. *Go To Headnote*

- For purposes of the Federal Airport Concessions Disadvantaged Business Enterprise Program, when marital assets are used to acquire an ownership interest asserted by one spouse, the portion of the joint assets state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm is counted as the individual spouse's contribution toward the ownership interest, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest. *49 C.F.R. § 26.69(i)(1)*. *Go To Headnote*

Transportation Law: Air Transportation: Airports: Funding

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

- A firm seeking certification for the Federal Airport Concessions Disadvantaged Business Enterprise Program must demonstrate, among other things, that the contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan. *49 C.F.R. § 26.69(e)*. *Go To Headnote*

- The Federal Airport Concessions Disadvantaged Business Enterprise Program regulations clearly contemplate the use of borrowed funds by disadvantaged individuals in the acquisition of a firm. First, the regulations state that unsecured loans from non-disadvantaged owners of the firm are insufficient contributions of capital. Second, the regulations explicitly state that loans from financial institutions do not render a firm ineligible. The last sentence of *49 C.F.R. §26.69(e)* says loans from financial institutions do not create ineligibility even if the debtor's ownership interest is security for the loan, which does not require that such loans be so secured. *Go To Headnote*

- For purposes of the Federal Airport Concessions Disadvantaged Business Enterprise Program, when marital assets are used to acquire an ownership interest asserted by one spouse, the portion of the joint assets state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm is counted as the individual spouse's contribution toward the ownership interest, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest. *49 C.F.R. § 26.69(i)(1)*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.63

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

§ 26.63 What rules govern group membership determinations?

(a)

(1) If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (see § 26.61(c)), you have a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group.

(2) You must provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence as outlined in paragraph (b) of this section.

(3) In implementing this section, you must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group could violate § 26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR part 21.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.89.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5136, Feb. 2, 1999; *68 FR 35542*, 35554, June 16, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

68 FR 35542, 35554, June 16, 2003, revised paragraph (a), effective July 16, 2003.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.65

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

Notice

. This section has more than one version with varying effective dates.

§ 26.65 What rules govern business size determinations? [Effective January 13, 2021]

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE for the purposes of Federal Highway Administration and Federal Transit Administration-assisted work in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see *13 CFR 121.104*), over the firm's previous three fiscal years, in excess of $26.29 million. The Department will adjust this amount for inflation on an annual basis. The adjusted amount will be published on the Department's website in subsequent years.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5136, Feb. 2, 1999; *72 FR 15614*, 15617, Apr. 2, 2007; *74 FR 15222*, 15224, Apr. 3, 2009; *79 FR 59566*, 59596, Oct. 2, 2014; *85 FR 80646*, 80647, Dec. 14, 2020]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566 , 59596, Oct. 2, 2014, amended this section, effective Nov. 3, 2014; *85 FR 80646*, 80647, Dec. 14, 2020, revised paragraph (b), effective Jan. 13, 2021.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.67

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

§ 26.67 What rules determine social and economic disadvantage?

(a) Presumption of disadvantage.

(1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)

(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed $ 1.32 million.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual's personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the

submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other State to which the individual's firm has applied for certification under § 26.85 of this part.

(b) Rebuttal of presumption of disadvantage. (1) An individual's presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds $ 1.32 million, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

Example to paragraph (b)(1)(i):

An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than $ 1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than $ 1.32 million.

(ii)

(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:

(1) Whether the average adjusted gross income of the owner over the most recent three year period exceeds $ 350,000;

(2) Whether the income was unusual and not likely to occur in the future;

(3) Whether the earnings were offset by losses;

(4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

(5) Other evidence that income is not indicative of lack of economic disadvantage; and

(6) Whether the total fair market value of the owner's assets exceed $ 6 million.

(B) You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds $ 1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) Transfers within two years.

(1) Except as set forth in paragraph (c)(2) of this section, recipients must attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(d) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds $ 1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5136, Feb. 2, 1999; *64 FR 34569*, 34570, June 28, 1999; *68 FR 35542*, 35554, June 16, 2003; *76 FR 5083*, 5099, Jan. 28, 2011; *79 FR 59566*, 59596, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59596, Oct. 2, 2014, revised this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Administrative Law: Governmental Information: Freedom of Information: General Overview

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Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Public Contracts Law: Business Aids & Assistance: Small Businesses

Tax Law: Federal Taxpayer Groups: S Corporations: Basis (IRC secs. 1361, 1367)

Administrative Law: Governmental Information: Freedom of Information: General Overview

City of Atlanta v. Corey Entm't, Inc., 278 Ga. 474, 604 S.E.2d 140, 2004 Ga. LEXIS 841 (2004).

Overview: *Federal regulations did not prohibit the disclosure of tax documents the corporation sought to evaluate the propriety of the city's award of airport advertising contract to individual's business, and, thus, judgment ordering disclosure was affirmed.*

- *Title 49 C.F.R. § 26.67(a)(2)(iv)*prohibits the release of an individual's personal net worth statement and any documentation supporting it. *Go To Headnote*

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

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Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

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ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). Go To Headnote

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005), aff'd, *473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007)*.

Overview: *Illinois Department of Transportation's (IDOT) program for disadvantaged business enterprises (DBE) was narrowly tailored under the Equal Protection Clause to achieve the federal government's compelling interest because, inter alia, IDOT's goal represented a "plausible lower-bound estimate" of DBE participation in the absence of discrimination.*

- *49 C.F.R. § 26.67(a)(1)*contains a rebuttable presumption that women (and members of certain racial minority groups) are socially and economically disadvantaged individuals. Go To Headnote

W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005), cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49, 2006 U.S. LEXIS 1153 (2006)*.

Overview: *Transportation Equity Act for the 21st Century, which required states to implement minority preference programs in federally funded transportation contracts, did not deny equal protection on its face but, absent evidence of actual discrimination, a state's application of the statute in rejecting a non-minority contractor's bid was unconstitutional.*

- The regulations implementing the Transportation Equity Act for the 21st Century, *Pub. L. No. 105-178, 112 Stat. 107* (1998), seek to create a level playing field on which disadvantaged business enterprises can compete fairly for contracts assisted by the U.S. Department of Transportation. *49 C.F.R. § 26.1(b)*. A disadvantaged business enterprise (DBE) is defined as a small business owned and controlled by one or more individuals who are socially and economically disadvantaged. *49 C.F.R. § 26.5*. Although the term "socially and economically disadvantaged" is race- and sex-neutral on its face, the regulations presume that Black Americans, Hispanic Americans, Native Americans,

Asian-Pacific Americans, Subcontinent Asian Americans, and women are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)*. This presumption of disadvantage is rebutted where the individual has a personal net worth of more than $ 750,000 or a preponderance of the evidence demonstrates that the individual is not in fact socially and economically disadvantaged. § 26.67(b). Firms owned and controlled by someone who is not presumed to be disadvantaged (i.e., a white male) can qualify for DBE status if the individual can demonstrate that he is in fact socially and economically disadvantaged. § 26.67(d). *Go To Headnote*

A. Esteban & Co. v. Metro. Transp. Auth., 2004 U.S. Dist. LEXIS 3694 (S.D.N.Y. Mar. 8, 2004).

Overview: *Contractor's § 1983 suit against city public transportation authority and its officers about removal of its disadvantaged business certification status was dismissed. The contractor was properly treated as a new applicant and it did not qualify.*

- *49 C.F.R. § 26.67(2)(i)*requires an applicant for disadvantaged enterprise status to certify, along with supporting documentation, that his personal net worth does not exceed $ 750,000. *Go To Headnote*

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- To qualify as a disadvantaged business enterprise, a contractor must be independently owned and operated, not dominant in its field of operation, and at least 51 percent owned—and controlled by—one or more socially and economically disadvantaged individuals. Transportation Equity Act for the 21st Century, *Pub. L. 105-178*, § 1101(b)(2), *112 Stat. 107* (1998); *15 U.S.C.S. §§ 632(a)(1)*, *637(a)(6)(A)*, *637(d)*. Recipients must rebuttably presume that women and members of certain racial minority groups are socially and economically disadvantaged individuals and must require each presumptively disadvantaged business owner to submit a signed, notarized certification that he or she is, in fact, socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. *Go To Headnote*

- A firm does not qualify for disadvantaged business enterprise (DBE) status if its average annual gross receipts over the preceding three fiscal years exceed $ 16.6 million, as adjusted by the United States Department of Transportation for inflation. Transportation Equity Act for the 21st Century, *Pub. L. 105-178*, § 1101 (b)(2)(A), *112 Stat. 107* (1998). Further, any individual whose personal net worth exceeds $ 750,000 is not economically disadvantaged, *49 C.F.R. § 26.67(b)(1)*; on the other hand, a firm owned by an individual who is not presumptively disadvantaged may qualify as a DBE if it can demonstrate that the individuals who own and control the firm are in fact socially and economically disadvantaged. *49 C.F.R. § 26.67(d)*. *Go To Headnote*

- Under United States Department of Transportation disadvantaged business enterprise (DBE) regulations, recipients have the responsibility to ensure that DBEs attest to the accuracy of the information provided to the recipient and continue to meet the requirements for that status. *49 C.F.R. § 26.83(c)(7)(ii)*, (j). Recipients must require each individual owner of a firm applying to participate as a DBE to certify that he or she has a personal net worth that does not exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)*. Any person may file with the recipient a written complaint alleging that a DBE-certified firm is ineligible for specific reasons. *49 C.F.R. § 26.87(a)*. When such a complaint is made, the recipient must review all available information concerning the firm and, if it determines that there is reasonable cause to believe the firm is ineligible, provide written notice to that firm setting forth the reasons for the proposed determination and give the firm an opportunity for an informal hearing on the matter. *49 C.F.R. § 26.87(a)*, (d)-(k). *Go To Headnote*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, the presumption that women and minorities are socially disadvantaged is deemed rebutted if such individual's personal net worth exceeds $ 750,000, *49 C.F.R. § 26.67(b)(1)*, and a firm owned by an individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. *49 C.F.R. § 26.67(d)*. Other aspects of the regulations, as well, provide recipients and prime contractors with ample flexibility: recipients may obtain waivers or exemptions from any requirement, *49 C.F.R. § 26.15(b)*. *Go To Headnote*

- Under United States Department of Transportation disadvantaged business enterprise (DBE) regulations and the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. 105-178, 112 Stat. 107* (1998), preferences are limited to small businesses with average annual gross receipts in the preceding three fiscal years of $ 16.6 million or less, TEA-21 § 1101(b)(2)(A), and businesses whose owners' personal net worth exceeds $ 750,000 are excluded. *49 C.F.R. § 26.67(b)(1)*. A recipient that has a "reasonable basis" to challenge a woman or minority individual's status as socially or economically disadvantaged may initiate a proceeding to review the matter, *49 C.F.R. § 26.67(b)(2)*, and any person may file with the recipient a written complaint stating reasons that a DBE-certified firm should be found ineligible. *49 C.F.R. § 26.87(a)*. A firm owned by a white male may qualify as socially and economically disadvantaged nevertheless. *49 C.F.R. § 26.67(d)*. *Go To Headnote*

Whitworth-Borta, Inc. v. Burnley, 1988 U.S. Dist. LEXIS 17669 (W.D. Mich. June 28, 1988).

Overview: *Corporation was not entitled to Minority Business Enterprise certification as an engineering consulting firm because minority owner did not have any engineering training, so that it was highly unlikely that he managed the corporation's operations.*

Former 49 CFR 23.5 was revised. See now 49 CFR 26.67.

- A business concern which qualifies as a minority business enterprise (MBE) under 49 C.F.R. pt. 23 is entitled to affirmative action assistance in contracts and programs funded by the United States Department of Transportation. A minority business enterprise is a small business concern which is "owned and controlled" by one or more minorities or women. *49 C.F.R. § 23.5*. "Owned and controlled" means a business: (a) Which is at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and (b) Whose management and daily business operations are controlled by one or more such individuals. *49 C.F.R. § 23.5*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Beach Erectors, Inc. v. United States DOT, 2012 U.S. Dist. LEXIS 127632 (E.D.N.Y. Sept. 7, 2012).

Overview: *DOT Departmental Office of Civil Rights' determination that an owner lacked required the managerial and technical competence and experience necessary to maintain control over a corporation, under 49 C.F.R. § 26.71(g), was not arbitrary or capricious, under 5 U.S.C.S. § 706, because, inter alia, the owner lacked technical and field work experience.*

- Recipients of certain federal funds—such as the New York Metropolitan Transit Authority—must apply the regulations set forth in 49 C.F.R. pt. 26 to determine whether an applicant firm is eligible for Disadvantaged Business Enterprise (DBE) certification. *49 C.F.R. § 26.71(a)*. To be eligible for DBE status, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. *49 C.F.R. § 26.69(b)*. There is a rebuttable presumption that, inter alia, women are socially and economically disadvantaged individuals. *49 C.F.R. §§ 26.61(c)* & *26.67(a)(1)*. In addition to determining social and economic disadvantaged status, the recipient of federal funds must determine whether the applicant firm is controlled by the socially and economically disadvantaged owner. *49 C.F.R. § 26.61(e)*. This determination is to be made by considering all the facts in the record, viewed as a whole. *49 C.F.R. § 26.71(a)*. *Go To Headnote*

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small

business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Braunstein v. Ariz. DOT, 683 F.3d 1177, 115 Fair Empl. Prac. Cas. (BNA) 481, 2012 U.S. App. LEXIS 13150 (9th Cir. 2012).

Overview: *A district court's entry of summary judgment was affirmed because a business owner lacked standing to pursue his equal protection and Title VI of the Civil Rights Act claims, but its imposition of attorneys' fees under 42 U.S.C.S. § 1988 and sanctions under 28 U.S.C.S. § 1927 was reversed.*

- United States Department of Transportation regulations require that states receiving federal highway funds maintain a Disadvantaged Business Enterprise (DBE) program. *49 C.F.R. § 26.21*. To qualify as a DBE, a for-profit small business must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. The regulations presume that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and certain other ethnic minorities are socially and economically disadvantaged. *49 C.F.R. § 26.67(a)(1)*. The presumption of disadvantage is rebutted when an individual has a personal net worth above a specified amount. *49 C.F.R. § 26.67(b)(1)*. *Go To Headnote*

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Small Businesses

Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964, 2003 U.S. App. LEXIS 20287 (8th Cir. 2003), cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3399 (2004)*, cert. denied, *541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729, 2004 U.S. LEXIS 3400 (2004).*

Overview: *Minority contractors' constitutional challenges to the Transportation Equity Act for the 21st Century failed because the implementing regulations narrowly tailored the goal of increasing minority contractor participation to the labor markets.*

- Under the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. No. 105-178*, § 1101(b)(1), *112 Stat. 107*, 113, the Disadvantaged Business Enterprises (DBE) program provides contracting advantages to small businesses owned and controlled by socially and economically disadvantaged individuals. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. In determining whether a contractor qualifies as a DBE, grantee states must employ a rebuttable presumption that women and members of most racial minority groups are socially and economically disadvantaged. TEA-21 § 1101(b)(2)(B), 112 Stat. at 113. An individual whose personal net worth exceeds $ 750,000 is not economically disadvantaged. *49 C.F.R. § 26.67(b)*. Small businesses do not qualify if their earnings exceeded $ 16.6 million per year in the previous three fiscal years. TEA-21 § 1101(b)(2)(A), 112 Stat. at 113. *Go To Headnote*

Tax Law: Federal Taxpayer Groups: S Corporations: Basis (IRC secs. 1361, 1367)

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Under United States Department of Transportation disadvantaged business enterprise (DBE) regulations and the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. 105-178, 112 Stat. 107* (1998), preferences are limited to small businesses with average annual gross receipts in the preceding three fiscal years of $ 16.6 million or

less, TEA-21 § 1101(b)(2)(A), and businesses whose owners' personal net worth exceeds $ 750,000 are excluded. *49 C.F.R. § 26.67(b)(1)*. A recipient that has a "reasonable basis" to challenge a woman or minority individual's status as socially or economically disadvantaged may initiate a proceeding to review the matter, *49 C.F.R. § 26.67(b)(2)*, and any person may file with the recipient a written complaint stating reasons that a DBE-certified firm should be found ineligible. *49 C.F.R. § 26.87(a)*. A firm owned by a white male may qualify as socially and economically disadvantaged nevertheless. *49 C.F.R. § 26.67(d)*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.71

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

§ 26.71 What rules govern determinations concerning control?

(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

(c)A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in § 26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1)A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)

(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)

(1)A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners — as distinct from the family as a whole — control the firm, then the socially and economically disadvantaged owners have failed to

carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4)A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

(o)A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or

licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5138, Feb. 2, 1999; *76 FR 5083*, 5099, Jan. 28, 2011; *79 FR 59566*, 59597, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59597, Oct. 2, 2014, revised paragraphs (e) and (l), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Administrative Law: Judicial Review: Administrative Record: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Transportation Law: Air Transportation: Airports: Concessionaires

Transportation Law: Air Transportation: Airports: Funding

Administrative Law: Judicial Review: Administrative Record: General Overview

Shearin Constr., Inc. v. Mineta, 232 F. Supp. 2d 608, 2002 U.S. Dist. LEXIS 23083 (E.D. Va. 2002).

Overview: *The DOT's denial of disadvantaged business enterprise status to the company was not arbitrary or capricious where the owner failed to show that her ownership and management of the company was real, substantial, and continuing as the statute required.*

- In determining whether an entity qualifies as a Disadvantaged Business Enterprise, under *49 C.F.R. § 26.71(b)* an independent business is defined as one the viability of which does not depend on its relationship with another firm or firms. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Shearin Constr., Inc. v. Mineta, 232 F. Supp. 2d 608, 2002 U.S. Dist. LEXIS 23083 (E.D. Va. 2002).

Overview: *The DOT's denial of disadvantaged business enterprise status to the company was not arbitrary or capricious where the owner failed to show that her ownership and management of the company was real, substantial, and continuing as the statute required.*

- In determining whether an entity qualifies as a Disadvantaged Business Enterprise, under *49 C.F.R. § 26.71(b)* an independent business is defined as one the viability of which does not depend on its relationship with another firm or firms. *Go To Headnote*

- In determining whether an entity qualifies as a Disadvantaged Business Enterprise, non-disadvantaged employees of an applicant may be delegated various areas of the management policymaking, or daily operations of the firm as long as the socially and economically disadvantaged owners of the firm retain the power to hire and fire any person to whom such authority is delegated and it is otherwise clear to the recipient that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy. *49 C.F.R. § 26.71(f)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Beach Erectors, Inc. v. United States DOT, 2012 U.S. Dist. LEXIS 127632 (E.D.N.Y. Sept. 7, 2012).

Overview: *DOT Departmental Office of Civil Rights' determination that an owner lacked required the managerial and technical competence and experience necessary to maintain control over a corporation, under 49 C.F.R. § 26.71(g), was not arbitrary or capricious, under 5 U.S.C.S. § 706, because, inter alia, the owner lacked technical and field work experience.*

- Recipients of certain federal funds—such as the New York Metropolitan Transit Authority—must apply the regulations set forth in 49 C.F.R. pt. 26 to determine whether an applicant firm is eligible for Disadvantaged Business Enterprise (DBE) certification. *49 C.F.R. § 26.71(a)*. To be eligible for DBE status, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. *49 C.F.R. § 26.69(b)*. There is a rebuttable presumption that, inter alia, women are socially and economically disadvantaged individuals. *49 C.F.R. §§ 26.61(c)* & *26.67(a)(1)*. In addition to determining social and economic disadvantaged status, the recipient of federal funds must determine whether the applicant firm is controlled by the socially and economically disadvantaged owner. *49 C.F.R. § 26.61(e)*. This determination is to be made by considering all the facts in the record, viewed as a whole. *49 C.F.R. § 26.71(a)*. *Go To Headnote*

- The regulations provide some guidance as to whether a particular socially and economically disadvantaged owner controls her firm. An owner may delegate various areas of the management, policy-making, or daily operations of the firm to other participants in the firm, so long as such delegations are revocable and the owner retains the power to hire

and fire any person to whom such authority is delegated. *49 C.F.R. § 26.71(f)*. To have the requisite control over her firm, the owner must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. *49 C.F.R. § 26.71(g)*. While the owner is not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees, she must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management and policy-making. § 26.71(g). *Go To Headnote*

- The current regulations require disadvantaged owners to have managerial and technical competence and experience directly related to the firm's operations. *49 C.F.R. § 26.71(g)*. *Go To Headnote*

- The regulations provide that a disadvantaged owner is not required to have greater experience or expertise in a given field than managers or key employees. *49 C.F.R. § 26.71(g)*. It is not arbitrary and capricious, however, for the United States Department of Transportation Departmental Office of Civil Rights to compare the owner's technical expertise to that of her non-disadvantaged male employees as part of its determination whether the owner possessed the ability to intelligently and critically evaluate information and to use this information to make independent decisions concerning the firm's daily operations, management, and policy-making. *Go To Headnote*

Corey Airport Servs. v. City of Atlanta, 632 F. Supp. 2d 1246, 2008-2 Trade Cas. (CCH) ¶76351, 77 Fed. R. Evid. Serv. (CBC) 882, 2008 U.S. Dist. LEXIS 75508 (N.D. Ga. 2008), rev'd, remanded, *587 F.3d 1280, 22 Fla. L. Weekly Fed. C 274, 2009 U.S. App. LEXIS 25048 (11th Cir. 2009)*.

Overview: *Testimony of public bidder's expert on definition of relevant market did not meet reliability standard of Fed. R. Evid. 702 where expert impermissibly based analysis on initial assumption that antitrust violation occurred. Bidder's 15 U.S.C.S. § 1 claim failed due to lack of proof as to relevant market or actual detrimental effects to competition.*

- The City of Atlanta, Georgia, as a recipient of federal transportation funding, must insure that the Disadvantaged Business Enterprises (DBEs) it certifies are actually owned and controlled by disadvantaged individuals by scrutinizing the relationships of the purported DBE firms with non-DBE firms in such areas as personnel, facilities, equipment, financial and bonding support, and other resources. *49 C.F.R. § 26.71(b)(1) (2005)*. As part of that scrutiny, for each DBE applicant the City must: conduct an on-site visit to the applicant's offices; analyze the firm's stock ownership, bonding, and financial capacity; compile a list of equipment owned by the firm; compile a list of licenses held by key personnel within the firm; and require applicants to complete and submit a DBE application form. *49 C.F.R. § 26.83 (2005)*. *Go To Headnote*

Transportation Law: Air Transportation: Airports: Concessionaires

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

- Federal Airport Concessions Disadvantaged Business Enterprise (DBE) Program regulations require that a firm be an independent business in order to qualify for the Program: Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. (1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. (2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm. (3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence

of the potential DBE firm. (4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice. *49 C.F.R. § 26.71(b)*. *Go To Headnote*

Transportation Law: Air Transportation: Airports: Funding

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.65

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

Notice

. This section has more than one version with varying effective dates.

§ 26.65 What rules govern business size determinations? [Effective until January 13, 2021]

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see *13 CFR 121.402*), over the firm's previous three fiscal years, in excess of $ 23.98 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5136, Feb. 2, 1999; *72 FR 15614*, 15617, Apr. 2, 2007; *74 FR 15222*, 15224, Apr. 3, 2009; *79 FR 59566*, 59596, Oct. 2, 2014; *85 FR 80646*, 80647, Dec. 14, 2020]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566 , 59596, Oct. 2, 2014, amended this section, effective Nov. 3, 2014; *85 FR 80646*, 80647, Dec. 14, 2020, revised paragraph (b), effective Jan. 13, 2021.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

Overview: *A judgment was properly entered against subcontractor, who asserted U.S. Const. amend. XIV equal protection challenge to Illinois Department of Transportation's (IDOT) 2005 disadvantaged business enterprise program. Program was narrowly tailored to meet compelling interests identified in federal law. IDOT complied with 49 C.F.R. §§ 26.45(c), 26.51.*

- To qualify as a disadvantaged business enterprise (DBE), a company must be at least 51% controlled by individuals who are both socially and economically disadvantaged. *49 C.F.R. § 26.5*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. *15 U.S.C.S. § 637(a)(5)*. Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

N. Contr., Inc. v. Illinois, 473 F.3d 715, 2007 U.S. App. LEXIS 320 (7th Cir. 2007), reh'g denied, reh'g, en banc, denied, *2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007)*.

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those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *15 U.S.C.S. § 637(a)(6)(A)*. A DBE owner's net worth cannot exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)(i)*. *49 C.F.R. § 26.67(a)(1)* requires federal fund recipients to presume, rebuttably, that women and members of racial minority groups are socially and economically disadvantaged if an individual belonging to one of these groups attests to these qualifications in a signed and notarized document. The regulations do not foreclose the classification to members of any racial group or gender. A company with gross revenue exceeding $ 16.6 million cannot qualify as a DBE. *49 C.F.R. § 26.65(b)*. A company is not a DBE when it is not owned by women or members of any racial minority group. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.73

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

§ 26.73 What are other rules affecting certification?

(a)

(1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(b)

(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of this Part, the firm is eligible for certification.

(c)DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

(d) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm — even a DBE firm — cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

Example 1: Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

Example 2: Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

Example 3: Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so you may certify the subsidiary, if all other requirements are met.

Example 4: Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

Example 5: Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

Example 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of § 26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification.

(h)A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of § 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

(i) The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).

(1) Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:

(i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendents of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(iii) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(2) As a recipient to whom an ANC-related entity applies for certification, you do not use the DOT uniform application form (see Appendix F of this part). You must obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (i)(1) of this section. You must also obtain sufficient information about the firm to allow you to administer your program (e.g., information that would appear in your DBE Directory).

(3) If an ANC-related firm does not meet all the conditions of paragraph (i)(1) of this section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5139, Feb. 2, 1999; *68 FR 35542*, 35555, June 16, 2003; *76 FR 5083*, 5099, Jan. 28, 2011; *79 FR 59566*, 59598, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59598, Oct. 2, 2014, amended paragraphs (g) and (h), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Business & Corporate Law: General Partnerships: Management Duties & Liabilities: Rights of Partners: Losses & Profits

Business & Corporate Law: Joint Ventures: Formation

Contracts Law: Types of Contracts: Joint Contracts

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

Evidence: Procedural Considerations: Burdens of Proof: Preponderance of Evidence

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Business & Corporate Law: General Partnerships: Management Duties & Liabilities: Rights of Partners: Losses & Profits

S.A. Healy Co. v. Washington Metropolitan Area Transit Authority, 615 F. Supp. 1132, 33 Cont. Cas. Fed. (CCH) ¶73771, 1985 U.S. Dist. LEXIS 16827 (D.D.C. 1985).

Overview: *Agency could make a good faith inquiry into a joint venture to determine if the minority business enterprise had the ability to perform 20 percent of the contract work. Substitution of minority enterprise was permissive, not mandatory.*

Former 49 CFR 23.53 was revised. See now 49 CFR 26.73.

- A joint venture is eligible under *49 C.F.R. § 23.53(c) (1985)* if the minority business enterprise (MBE) partner of the joint venture meets the standards for an eligible MBE partner set forth in the regulation and the MBE partner is responsible for a clearly defined portion of the work to be performed and shares in the ownership, risks, and profits of the joint venture. *49 C.F.R. 23.53(g)* further provides: Except as provided in *49 C.F.R. § 23.55*, the denial of a certification by the Department or a recipient shall be final, for that contract and other contracts being let by the recipient at the time of the denial of certification. MBEs and joint ventures denied certification may correct deficiencies in their ownership and control and apply for certification only for future contracts. *49 C.F.R. § 23.53(c) (1985)*. *Go To Headnote*

Business & Corporate Law: Joint Ventures: Formation

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Contracts Law: Types of Contracts: Joint Contracts

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Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

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Evidence: Procedural Considerations: Burdens of Proof: Preponderance of Evidence

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.61

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart D — Certification Standards

§ 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in § 26.67(a) are socially and economically disadvantaged. This means they do not have the burden of proving to you that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in § 26.67(a). Applicants do have the obligation to provide you information concerning their economic disadvantage (see § 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5135, Feb. 2, 1999; *68 FR 35542*, 35554, June 16, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

68 FR 35542, 35554, June 16, 2003, revised paragraph (c), effective July 16, 2003.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

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Transportation Law: Air Transportation: Airports: Concessionaires

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Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

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Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

• In the context of the Federal Airport Concessions Disadvantaged Business Enterprise (DBE) Program, the burden is on the firm seeking certification. The firm must, by a preponderance of the evidence, show that it is truly an independent business. *49 C.F.R. § 26.61(b)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Shearin Constr., Inc. v. Mineta, 232 F. Supp. 2d 608, 2002 U.S. Dist. LEXIS 23083 (E.D. Va. 2002).

Overview: *The DOT's denial of disadvantaged business enterprise status to the company was not arbitrary or capricious where the owner failed to show that her ownership and management of the company was real, substantial, and continuing as the statute required.*

- The Secretary of the Department of Transportation has promulgated rules and procedures for determining whether an entity qualifies as a Disadvantaged Business Enterprise. To qualify, an entity must establish that it meets the stated requirements for group membership or individual disadvantage, business size, ownership, and control. *49 C.F. R. § 26.61(b)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Beach Erectors, Inc. v. United States DOT, 2012 U.S. Dist. LEXIS 127632 (E.D.N.Y. Sept. 7, 2012).

Overview: *DOT Departmental Office of Civil Rights' determination that an owner lacked required the managerial and technical competence and experience necessary to maintain control over a corporation, under 49 C.F.R. § 26.71(g), was not arbitrary or capricious, under 5 U.S.C.S. § 706, because, inter alia, the owner lacked technical and field work experience.*

- Recipients of certain federal funds—such as the New York Metropolitan Transit Authority—must apply the regulations set forth in 49 C.F.R. pt. 26 to determine whether an applicant firm is eligible for Disadvantaged Business Enterprise (DBE) certification. *49 C.F.R. § 26.71(a)*. To be eligible for DBE status, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. *49 C.F.R. § 26.69(b)*. There is a rebuttable presumption that, inter alia, women are socially and economically disadvantaged individuals. *49 C.F.R. §§ 26.61(c)* & *26.67(a)(1)*. In addition to determining social and economic disadvantaged status, the recipient of federal funds must determine whether the applicant firm is controlled by the socially and economically disadvantaged owner. *49 C.F.R. § 26.61(e)*. This determination is to be made by considering all the facts in the record, viewed as a whole. *49 C.F.R. § 26.71(a)*. *Go To Headnote*

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

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- Disadvantaged Business Enterprise (DBE) status is governed by regulations in 49 C.F.R. pt. 26. Through part 26 the United States Department of Transportation, Office of Civil Rights Review (USDOT) seeks to, among other things, ensure nondiscrimination in the award and administration of DOT-assisted contracts, create a level playing field on which DBEs can compete fairly for DOT-assisted contracts, help remove barriers to the participation of DBEs in DOT-assisted contracts, and assist the development of firms that can compete successfully in the marketplace outside the DBE program. *49 C.F.R. § 26.1*. *49 C.F.R. § 26.3*. It provides that such recipients may certify firms as eligible to participate as DBEs. *49 C.F.R. §§ 26.61(a)*, *26.5*. Such certification provides firms with some advantages, in that the USDOT seeks to have not less than ten percent of authorized funds go to DBEs, and recipients of funds are to set an overall goal for DBE participation in USDOT-assisted contracts. *49 C.F.R. §§ 26.41*, *26.45(a)(1)*. A recipient of USDOT contracts must have a DBE program. *49 C.F.R. § 26.21*. DBE status may prompt a contractor to hire a subcontractor regardless of non-union status. 49 C.F.R. § pt. 26 app. A § IV.E. *Go To Headnote*

- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the

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Transportation Law: Air Transportation: Airports: Concessionaires

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

- A firm is eligible for the Federal Airport Concessions Disadvantaged Business Enterprise Program as long as (1) it is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) its management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. *49 C.F.R. § 26.5*. Critical to this court's review, the firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control. *49 C.F.R. § 26.61(b)*. *Go To Headnote*

- In the context of the Federal Airport Concessions Disadvantaged Business Enterprise (DBE) Program, the burden is on the firm seeking certification. The firm must, by a preponderance of the evidence, show that it is truly an independent business. *49 C.F.R. § 26.61(b)*. *Go To Headnote*

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.84

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.84 [This section was removed. See 76 FR 5083, 5100, Jan. 28, 2011.]

[NO TEXT IN ORIGINAL]

Statutory Authority

(*23 U.S.C. 324*; *42 U.S.C. 2000d*, et seq.; 49 U.S.C 1615, *47107*, *47113*, *47123*; Sec. 1101(b), *Pub. L. 105-178, 112 Stat. 107*, 113.)

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*68 FR 35542*, 35555, June 16, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5100, Jan. 28, 2011, removed this section, effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR 26.81

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of March 4, 1999, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

(1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d)A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The "home state" UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this part), the information required by § 26.31. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made and shall revise the print version of the Directory at least once a year.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5140, Feb. 2, 1999; *76 FR 5083*, 5100, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5100, Jan. 28, 2011, amended paragraph (g), effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Types of Contracts: Construction Contracts

Transportation Law: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

Overview: *Defendant could not bring a Fourth Amendment challenge to a search of corporate offices because he did not have a reasonable expectation of privacy; under USSG § 2B1.1, in a disadvantaged business enterprise fraud case, the amount of loss was the face value of the contracts less the fair market value of the services provided.*

- A state agency will announce a disadvantaged business enterprise (DBE)-participation goal when soliciting bids for a transportation construction contract, and bids for the contract must show how the contractor will meet the goal. If the prime contractor is not a DBE, this is usually demonstrated by showing that certain subcontractors that will work on a contract are DBEs. States themselves certify businesses as DBEs. *49 C.F.R. § 26.81*. A business must be certified as a DBE before it or a prime contractor can rely on its DBE status in bidding for a contract. § 26.81(c). In order to count towards a contract's DBE participation, a DBE must perform a commercially useful function on the contract. *49 C.F.R. § 26.55(c)*. Therefore, a certified DBE whose role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation cannot be counted towards DBE participation. § 26.55(c)(2). *Go To Headnote*

Public Contracts Law: Types of Contracts: Construction Contracts

United States v. Nagle, 803 F.3d 167, 2015 U.S. App. LEXIS 17187 (3d Cir. 2015), cert. denied, *136 S. Ct. 1238, 194 L. Ed. 2d 186, 2016 U.S. LEXIS 1484 (2016).*

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Transportation Law: General Overview

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.83

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.83 What procedures do recipients follow in making certification decisions?

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c)

(1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(i) Perform an on-site visit to the firm's principal place of business. You must interview the principal officers and review their resumes and/or work histories. You may interview key personnel of the firm if necessary. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing

(iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;

(iv) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;

(v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.

(vi) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

(viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this part.

(2) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.

(3) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information contained in the application at any time in the application process.

(d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e)[Reserved]

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h)

(1) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of § 26.87 of this part, except as provided in § 26.67(b)(1) of this part.

(2) You may not require DBEs to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section or relating to suspension of certification under § 26.88), a complaint, or other information concerning the firm's eligibility. If information comes to your attention that leads you to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and job sites.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts (e.g., submission of Federal tax returns). If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an

additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under § 26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. You may also apply the waiting period provided under § 26.86(c) of this part to a firm that has established a pattern of frequently withdrawing applications before you make a decision.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5141, Feb. 2, 1999; *68 FR 35542*, 35555, June 16, 2003; *76 FR 5083*, 5100, Jan. 28, 2011; *79 FR 59566*, 59598, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59598, Oct. 2, 2014, revised paragraphs (c), (h) and (j), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Administrative Law: Judicial Review: Reviewability: Final Order Requirement

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

Evidence: Procedural Considerations: Burdens of Proof: Preponderance of Evidence

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Administrative Law: Judicial Review: Reviewability: Final Order Requirement

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.51 was redesignated. See now 49 CFR 26.83.

- The preliminary administrative certification procedure for a disadvantaged business enterprise is imposed on recipients of federal-aid highway contracts. *49 C.F.R. § 23.51*. The denial of certification by the recipient is final, subject only to a firm's right to appeal, in writing, to the Department of Transportation. 49 C.F.R. § 23.54(g). If appeal is taken, the Department must investigate and determine and inform the applicant of its certification or its denial of eligibility. *49 C.F.R. § 23.55*. *Go To Headnote*

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

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Evidence: Inferences & Presumptions: Presumptions: Creation of Presumptions

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance

of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

Evidence: Inferences & Presumptions: Presumptions: Rebuttal of Presumptions

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Evidence: Procedural Considerations: Burdens of Proof: Preponderance of Evidence

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Under United States Department of Transportation disadvantaged business enterprise (DBE) regulations, recipients have the responsibility to ensure that DBEs attest to the accuracy of the information provided to the recipient and continue to meet the requirements for that status. *49 C.F.R. § 26.83(c)(7)(ii)*, (j). Recipients must require each individual owner of a firm applying to participate as a DBE to certify that he or she has a personal net worth that does not exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)*. Any person may file with the recipient a written complaint alleging that a DBE-certified firm is ineligible for specific reasons. *49 C.F.R. § 26.87(a)*. When such a complaint is made, the recipient must review all available information concerning the firm and, if it determines that there is reasonable cause to believe the firm is ineligible, provide written notice to that firm setting forth the reasons for the proposed determination and give the firm an opportunity for an informal hearing on the matter. *49 C.F.R. § 26.87(a)*, (d)-(k). *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Firms that are owned and controlled (at least fifty-one percent) by socially and economically disadvantaged individuals may apply for Disadvantaged Business Enterprise (DBE) certification, *49 C.F.R. §§ 26.67(d)*, *26.69(b)*, *26.73(e)*. Persons who are members of certain designated groups, including blacks, Hispanics, Native Americans, and women, are presumed to be socially and economically disadvantaged, though the presumption is rebuttable. *49 C.F.R. § 26.61(c)*. Other individuals or firms seeking DBE certification bear the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged. § 26.61(d). If no presumption applies, the recipient determines DBE status on a case-by-case basis. § 26.67(d). Recipients of United States Department of Transportation, Office of Civil Rights Review funds determine the eligibility of firms as DBEs. *49 C.F.R. § 26.83(b)*. To do so, they receive and review an appropriate application; perform an on-site visit to the firm's offices; analyze the ownership of an applicant that is a corporation; analyze the firm's bonding, financial capacity, and work history; obtain a statement from the firm regarding the type of work preferred; obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and key personnel possess. § 26.83(c). *Go To Headnote*

Corey Airport Servs. v. City of Atlanta, 632 F. Supp. 2d 1246, 2008-2 Trade Cas. (CCH) ¶76351, 77 Fed. R. Evid. Serv. (CBC) 882, 2008 U.S. Dist. LEXIS 75508 (N.D. Ga. 2008), rev'd, remanded, *587 F.3d 1280, 22 Fla. L. Weekly Fed. C 274, 2009 U.S. App. LEXIS 25048 (11th Cir. 2009)*.

Overview: *Testimony of public bidder's expert on definition of relevant market did not meet reliability standard of Fed. R. Evid. 702 where expert impermissibly based analysis on initial assumption that antitrust violation occurred. Bidder's 15 U.S.C.S. § 1 claim failed due to lack of proof as to relevant market or actual detrimental effects to competition.*

- The City of Atlanta, Georgia, as a recipient of federal transportation funding, must insure that the Disadvantaged Business Enterprises (DBEs) it certifies are actually owned and controlled by disadvantaged individuals by

scrutinizing the relationships of the purported DBE firms with non-DBE firms in such areas as personnel, facilities, equipment, financial and bonding support, and other resources. *49 C.F.R. § 26.71(b)(1) (2005)*. As part of that scrutiny, for each DBE applicant the City must: conduct an on-site visit to the applicant's offices; analyze the firm's stock ownership, bonding, and financial capacity; compile a list of equipment owned by the firm; compile a list of licenses held by key personnel within the firm; and require applicants to complete and submit a DBE application form. *49 C.F.R. § 26.83 (2005)*. *Go To Headnote*

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.51 was redesignated. See now 49 CFR 26.83.

- The preliminary administrative certification procedure for a disadvantaged business enterprise is imposed on recipients of federal-aid highway contracts. *49 C.F.R. § 23.51*. The denial of certification by the recipient is final, subject only to a firm's right to appeal, in writing, to the Department of Transportation. 49 C.F.R. § 23.54(g). If appeal is taken, the Department must investigate and determine and inform the applicant of its certification or its denial of eligibility. *49 C.F.R. § 23.55*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.85

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.85 Interstate certification.

(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (See § 26.83(j)) and any notices of changes (See § 26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a DBE firm.

(2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.

(3) If you have filed a certification appeal with DOT (See § 26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by *49 CFR 26.85(c)* and the information is complete and, in the case of the information required by § 26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (See § 26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A,

you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by "State A" or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(i) Evidence that State A's certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii)A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under s § 26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)

(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm,

in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

(i) The name of the firm;

(ii) The name(s) of the firm's owner(s);

(iii) The type and date of the action;

(iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*68 FR 35542*, 35555, June 16, 2003; *76 FR 5083*, 5100, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5100, Jan. 28, 2011, revised this section, effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.86

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.86 What rules govern recipients' denials of initial requests for certification?

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b)[Reserved]

(c) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm. An applicant's appeal of your decision to the Department pursuant to § 26.89 does not extend this period.

(d) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.89.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5142, Feb. 2, 1999; redesignated and amended at *68 FR 35542*, 35555, June 16, 2003; *79 FR 59566*, 59598, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59598, Oct. 2, 2014, removed and reserved paragraph (b), and amended paragraph (c), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Administrative Law: Judicial Review: Administrative Record: General Overview

Administrative Law: Judicial Review: Reviewability: Final Order Requirement

Administrative Law: Judicial Review: Standards of Review: De Novo Review

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Administrative Law: Judicial Review: Administrative Record: General Overview

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- In the event a recipient denies a firm's request for Disadvantaged Business Enterprise (DBE) certification, the firm must be provided with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. *49 C.F.R. § 26.86(a)*. Afterward, the firm may appeal the denial to the United States Department of Transportation, Office of Civil Rights Review (USDOT), where it is directed to the Office of Civil Rights. *49 C.F.R. §§ 26.89(d)*, (a)(1), (a)(3). Following receipt of an appeal, USDOT requests a copy of the recipient's complete administrative record pertaining to the DBE application; within twenty days of the request the recipient must provide the administrative record, including a hearing transcript. § 26.89(d). USDOT decides the appeal based solely on the administrative record. § 26.89(e). It does not conduct a de novo review or hold a hearing, although it may allow supplementation of the record by the applicant firm. § 26.89(e). *Go To Headnote*

Administrative Law: Judicial Review: Reviewability: Final Order Requirement

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.53 was redesignated. See now 49 CFR 26.86.

- The preliminary administrative certification procedure for a disadvantaged business enterprise is imposed on recipients of federal-aid highway contracts. *49 C.F.R. § 23.51*. The denial of certification by the recipient is final, subject only to a firm's right to appeal, in writing, to the Department of Transportation. *49 C.F.R. § 23.53(g)*. If appeal is taken, the Department must investigate and determine and inform the applicant of its certification or its denial of eligibility. *49 C.F.R. § 23.55*. *Go To Headnote*

Administrative Law: Judicial Review: Standards of Review: De Novo Review

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- In the event a recipient denies a firm's request for Disadvantaged Business Enterprise (DBE) certification, the firm must be provided with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. *49 C.F.R. § 26.86(a)*. Afterward, the firm may appeal the denial to the United States Department of Transportation, Office of Civil Rights Review (USDOT), where it is directed to the Office of Civil Rights. *49 C.F.R. §§ 26.89(d)*, (a)(1), (a)(3). Following receipt of an appeal, USDOT requests a copy of the recipient's complete administrative record pertaining to the DBE application; within twenty days of the request the recipient must provide the administrative record, including a hearing transcript. § 26.89(d). USDOT decides the appeal based solely on the administrative record. § 26.89(e). It does not conduct a de novo review or hold a hearing, although it may allow supplementation of the record by the applicant firm. § 26.89(e). *Go To Headnote*

Environmental Law: Litigation & Administrative Proceedings: Judicial Review

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.53 was redesignated. See now 49 CFR 26.86.

- The preliminary administrative certification procedure for a disadvantaged business enterprise is imposed on recipients of federal-aid highway contracts. *49 C.F.R. § 23.51*. The denial of certification by the recipient is final, subject only to a firm's right to appeal, in writing, to the Department of Transportation. *49 C.F.R. § 23.53(g)*. If appeal is taken, the Department must investigate and determine and inform the applicant of its certification or its denial of eligibility. *49 C.F.R. § 23.55*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- In the event a recipient denies a firm's request for Disadvantaged Business Enterprise (DBE) certification, the firm must be provided with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. *49 C.F.R. § 26.86(a)*. Afterward, the firm may appeal the denial to the United States Department of Transportation, Office of Civil Rights Review (USDOT), where it is directed to the Office of Civil Rights. *49 C.F.R. §§ 26.89(d)*, (a)(1), (a)(3). Following receipt of an appeal, USDOT requests a copy of the recipient's complete administrative record pertaining to the DBE application; within twenty days of the request the recipient must provide the administrative record, including a hearing transcript. § 26.89(d). USDOT decides the appeal based solely on the administrative record. § 26.89(e). It does not conduct a de novo review or hold a hearing, although it may allow supplementation of the record by the applicant firm. § 26.89(e). *Go To Headnote*

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.53 was redesignated. See now 49 CFR 26.86.

- The preliminary administrative certification procedure for a disadvantaged business enterprise is imposed on recipients of federal-aid highway contracts. *49 C.F.R. § 23.51*. The denial of certification by the recipient is final, subject only to a firm's right to appeal, in writing, to the Department of Transportation. *49 C.F.R. § 23.53(g)*. If appeal is taken, the Department must investigate and determine and inform the applicant of its certification or its denial of eligibility. *49 C.F.R. § 23.55*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.87

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

(a) Ineligibility complaints.

(1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) Recipient-initiated proceedings. If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) DOT directive to initiate proceeding.

(1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) Hearing. When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) Separation of functions. You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) Grounds for decision. You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4)A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see § 26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see § 26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) Notice of decision. Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

(h)[Reserved]

(i) Status of firm during proceeding.

(1)A firm remains an eligible DBE during the pendancy of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) Effects of removal of eligibility. When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) Availability of appeal. When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.89.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5142, Feb. 2, 1999; *68 FR 35542*, 35556, June 16, 2003; *76 FR 5083*, 5101, Jan. 28, 2011; *79 FR 59566*, 59599, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59599, Oct. 2, 2014, revised paragraphs (f), and (g), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

Administrative Law: Judicial Review: Standards of Review: General Overview

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Transportation Law: Interstate Commerce: Federal Powers

Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

A. Esteban & Co. v. Metro. Transp. Auth., 2002 U.S. Dist. LEXIS 9353 (S.D.N.Y. May 24, 2002), dismissed without prejudice, *2003 U.S. Dist. LEXIS 407 (S.D.N.Y. Jan. 3, 2003)*.

Overview: *Company, which had lost disadvantaged business enterprise status (DBE), submitted a number of prices to the contractors. The contractors were only entitled to get DBE credit for contracts formed prior to the company's loss of status.*

- The term "contract" is defined as a legally binding relationship obligating a seller to furnish supplies or services and the buyer to pay for them. *49 C.F.R. § 26.5*. The meaning of the term "executed" as used in the regulation can be discerned from a reading of the language and, in particular, from a comparison of the two subparts of *49 C.F.R. § 26.87*. From the examination of the language of the regulation itself it is clear that an executed subcontract refers to a binding written agreement. *Go To Headnote*

Administrative Law: Judicial Review: Standards of Review: General Overview

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Evidence: Inferences & Presumptions: General Overview

Milwaukee County Pavers Assoc. v. Fiedler, 731 F. Supp. 1395, 1990 U.S. Dist. LEXIS 2503 (W.D. Wis. 1990), aff'd, *922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir. 1991)*.

Overview: *Upon summary judgment motions, state officials were enjoined from implementing setting of goals for disadvantaged business subcontractor participation on state-funded projects because federal regulations did not permit the affirmative action program.*

Former 49 CFR 23.69 was redesignated. See now 49 CFR 26.87.

• States may certify as disadvantaged business enterprises only those businesses that meet the eligibility standards in 49 C.F.R. § 23.62. Under 49 C.F.R. § 23.62, a firm is disadvantaged if it is a small business concern and is owned and controlled by individuals who are socially and economically disadvantaged. The regulation adopts the definition of small business in the Small Business Act and imposes the additional requirement that the business concern may not have annual average gross receipts in excess of $ 14 million. States are directed to make a rebuttable presumption that women and members of specified racial and ethnic minority groups are socially and economically disadvantaged and to determine on a case-by-case basis whether individuals who are not members of those groups are socially and economically disadvantaged. Also, as part of its certification procedure, the State must provide a procedure through which third parties may challenge the certification of individuals presumed to be socially and economically disadvantaged under 49 C.F.R. § 23.69. *Go To Headnote*

Governments: Public Improvements: Financing

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.69 was redesignated. See now 49 CFR 26.87.

• The administrator of the United States Department of Transportation (USDOT) has authority to approve a goal less than 10 percent if a finding is made that the recipient is making all appropriate efforts to increase disadvantaged business participation to 10%, and that despite such efforts, the lower goal is a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66. Pursuant to 49 C.F.R. § 23.68, the failure of a state that receives federal highway construction funds to have an approved minority business enterprise program and an approved overall goal can result in the suspension or termination of federal funds. The same section provides that the state has the opportunity to explain to the federal administrator why the goal could not be achieved and why meeting the goal was beyond the state's control, and the administrator has authority to grant exceptions. 49 C.F.R. § 23.69 provides that a recipient state must establish a procedure whereby the individual status of those persons presumed due to race or ethnicity to be "socially and economically disadvantaged" can be challenged by a third party. The recipient must ultimately resolve the challenge, determining that the person is or is not socially and economically disadvantaged. The state's decision is then appealable to the USDOT pursuant to *49 C.F.R. § 23.55*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

• Under United States Department of Transportation disadvantaged business enterprise (DBE) regulations, recipients have the responsibility to ensure that DBEs attest to the accuracy of the information provided to the recipient and continue to meet the requirements for that status. *49 C.F.R. § 26.83(c)(7)(ii)*, (j). Recipients must require each individual owner of a firm applying to participate as a DBE to certify that he or she has a personal net worth that does not exceed $ 750,000. *49 C.F.R. § 26.67(a)(2)*. Any person may file with the recipient a written complaint alleging that a DBE-certified firm is ineligible for specific reasons. *49 C.F.R. § 26.87(a)*. When such a complaint is made, the recipient must review all available information concerning the firm and, if it determines that there is reasonable cause to believe the firm is ineligible, provide written notice to that firm setting forth the reasons for the proposed

determination and give the firm an opportunity for an informal hearing on the matter. *49 C.F.R. § 26.87(a)*, (d)-(k). *Go To Headnote*

- Under United States Department of Transportation disadvantaged business enterprise (DBE) regulations and the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. 105-178, 112 Stat. 107* (1998), preferences are limited to small businesses with average annual gross receipts in the preceding three fiscal years of $ 16.6 million or less, TEA-21 § 1101(b)(2)(A), and businesses whose owners' personal net worth exceeds $ 750,000 are excluded. *49 C.F.R. § 26.67(b)(1)*. A recipient that has a "reasonable basis" to challenge a woman or minority individual's status as socially or economically disadvantaged may initiate a proceeding to review the matter, *49 C.F.R. § 26.67(b)(2)*, and any person may file with the recipient a written complaint stating reasons that a DBE-certified firm should be found ineligible. *49 C.F.R. § 26.87(a)*. A firm owned by a white male may qualify as socially and economically disadvantaged nevertheless. *49 C.F.R. § 26.67(d)*. *Go To Headnote*

A. Esteban & Co. v. Metro. Transp. Auth., 2002 U.S. Dist. LEXIS 9353 (S.D.N.Y. May 24, 2002), dismissed without prejudice, *2003 U.S. Dist. LEXIS 407 (S.D.N.Y. Jan. 3, 2003)*.

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Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

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Gauvin v. Trombatore, 682 F. Supp. 1067, 1988 U.S. Dist. LEXIS 2624 (N.D. Cal. 1988).

Overview: *Black businessman's claims against state transportation department and employees in official capacities violated 11th Amendment; other claims failed for lack of specificity; leave to amend was granted. Remaining "claims" failed to state a claim.*

Former 49 CFR 23.69 was redesignated. See now 49 CFR 26.87.

- The regulations set forth under the Disadvantaged Business Enterprises (DBE) program provide for detailed administrative remedies for such allegations that a state transportation department has certified and permitted those that are not truly owned and operated by socially and economically disadvantaged individuals to participate in a project. These remedies include appeal to the Secretary of the U.S. Department of Transportation. 49 C.F.R. § 23.69. There is no indication in the statute that Congress intended to provide a private right to institute a civil action challenging certification of DBEs. Accordingly, a plaintiff cannot state a claim on this basis. *Go To Headnote*

Tax Law: Federal Taxpayer Groups: S Corporations: Basis (IRC secs. 1361, 1367)

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

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- Under United States Department of Transportation disadvantaged business enterprise (DBE) regulations and the Transportation Equity Act for the 21st Century (TEA-21), *Pub. L. 105-178, 112 Stat. 107* (1998), preferences are limited to small businesses with average annual gross receipts in the preceding three fiscal years of $ 16.6 million or less, TEA-21 § 1101(b)(2)(A), and businesses whose owners' personal net worth exceeds $ 750,000 are excluded. *49 C.F.R. § 26.67(b)(1)*. A recipient that has a "reasonable basis" to challenge a woman or minority individual's status as socially or economically disadvantaged may initiate a proceeding to review the matter, *49 C.F.R. § 26.67(b)(2)*, and any person may file with the recipient a written complaint stating reasons that a DBE-certified firm should be found ineligible. *49 C.F.R. § 26.87(a)*. A firm owned by a white male may qualify as socially and economically disadvantaged nevertheless. *49 C.F.R. § 26.67(d)*. *Go To Headnote*

Transportation Law: Interstate Commerce: Federal Powers

Gauvin v. Trombatore, 682 F. Supp. 1067, 1988 U.S. Dist. LEXIS 2624 (N.D. Cal. 1988).

Overview: *Black businessman's claims against state transportation department and employees in official capacities violated 11th Amendment; other claims failed for lack of specificity; leave to amend was granted. Remaining "claims" failed to state a claim.*

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.88

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.88 Summary suspension of certification.

(a)A recipient shall immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) of this part when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

(b)

(1)A recipient may immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by § 26.83(i) of this part or fails to timely file an affidavit of no change under § 26.83(j).

(2) In determining the adequacy of the evidence to issue a suspension under paragraph (b)(1) of this section, the recipient shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct the recipient to take action pursuant to paragraph (a) or (b) this section if it determines that information available to it is sufficient to warrant immediate suspension.

(d) When a firm is suspended pursuant to paragraph (a) or (b) of this section, the recipient shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

(e) Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under § 26.87 of this part to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

(f) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

(g) Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under § 26.87 of this part. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

(h) The decision to immediately suspend a DBE under paragraph (a) or (b) of this section is not appealable to the US Department of Transportation. The failure of a recipient to either lift the suspension and reinstate the firm or commence a

decertification proceeding, as required by paragraph (g) of this section, is appealable to the U.S. Department of Transportation under § 26.89 of this part, as a constructive decertification.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*79 FR 59566*, 59599, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59599, Oct. 2, 2014, added this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.101

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under *23 CFR 1.36*; in the case of the FAA program, actions consistent with *49 U.S.C. 47106(d)*, *47111(d)*, and *47122*; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5144, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5144, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Gauvin v. Trombatore, 682 F. Supp. 1067, 1988 U.S. Dist. LEXIS 2624 (N.D. Cal. 1988).

Overview: *Black businessman's claims against state transportation department and employees in official capacities violated 11th Amendment; other claims failed for lack of specificity; leave to amend was granted. Remaining "claims" failed to state a claim.*

Former 49 CFR 23.73 was redesignated. See now 49 CFR 26.101.

- The Disadvantaged Business Enterprises (DBE) program does not require that each individual contract meet the 10 percent goal. Rather, the state is authorized to set DBE goals that are practical and related to the availability of DBEs in desired areas of expertise for a particular project. *49 C.F.R. § 23.45(g)(1)*. Only the overall, statewide goals are required to be submitted to the U.S. Department of Transportation for approval. *49 C.F.R. §§ 23.45(g)(3)(i)*, 23.64(c). An administrative complaint can be filed with the U.S. Department of Transportation on any charge that a state transportation department has abused its discretion in setting individual contract goals. *49 C.F.R. § 23.73* et seq. Consequently, no private right of action exists for violation of the statute on these grounds. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.105

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

§ 26.105 What enforcement actions apply in FAA Programs?

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including *49 U.S.C. 47106(d)*, *47111(d)*, and *47122*, and regulations implementing them.

(b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5145, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5145, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.89

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.89 What is the process for certification appeals to the Department of Transportation?

(a)

(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in § 26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal or in the interest of justice.

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The Department will also notify the SBA in writing when DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5143, Feb. 2, 1999; *65 FR 68949*, 68951, Nov. 15, 2000; *68 FR 35542*, 35556, June 16, 2003; *73 FR 33326*, 33329, June 12, 2008; *79 FR 59566*, 59599, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59599, Oct. 2, 2014, revised paragraphs (a)(1), (a)(3), (c), and (e), effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

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Administrative Law: Agency Adjudication: Decisions: General Overview

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

- *49 C.F.R. § 26.89(f)(1)*and (f)(5), when taken together, distinguish between the grounds upon which a decision is based and the facts that support those grounds. *Go To Headnote*

Administrative Law: Agency Adjudication: Hearings: General Overview

Beach Erectors, Inc. v. United States DOT, 2012 U.S. Dist. LEXIS 127632 (E.D.N.Y. Sept. 7, 2012).

Overview: *DOT Departmental Office of Civil Rights' determination that an owner lacked required the managerial and technical competence and experience necessary to maintain control over a corporation, under 49 C.F.R. § 26.71(g), was not arbitrary or capricious, under 5 U.S.C.S. § 706, because, inter alia, the owner lacked technical and field work experience.*

- If the recipient of federal funds denies a firm's application for Disadvantaged Business Enterprise (DBE) certification, the applicant firm may appeal the denial to the United States Department of Transportation Departmental Office of Civil Rights (OCR). *49 C.F.R. § 26.89(a)*. The OCR makes its decision based solely on the entire administrative record and does not make a de novo review of the matter and does not conduct a hearing. *49 C.F.R. § 26.89(e)*. The OCR will reverse an initial denial of DBE certification only if it concludes that the denial was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification. *49 C.F.R. § 26.89(f)(2)*. Reversal is not required if it would be based solely upon a procedural error that did not result in fundamental unfairness to the applicant or substantially prejudice the opportunity of the applicant to present its case. *49 C.F.R. § 26.89(f)(3)*. The regulations further provide that the OCR will not uphold an initial decision based on grounds not specified in that decision, and the OCR's decision is based on the status and circumstances of the firm as of the date of the decision being appealed. *49 C.F.R. § 26.89(f)(5)*, (6). *Go To Headnote*

Administrative Law: Judicial Review: Administrative Record: General Overview

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- In the event a recipient denies a firm's request for Disadvantaged Business Enterprise (DBE) certification, the firm must be provided with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. *49 C.F.R. § 26.86(a)*. Afterward, the firm may appeal the denial to the United States Department of Transportation, Office of Civil Rights Review (USDOT), where it is directed to the Office of Civil Rights. *49 C.F.R. §§ 26.89(d)*, (a)(1), (a)(3). Following receipt of an appeal, USDOT requests a copy of the recipient's complete administrative record pertaining to the DBE application; within twenty days of the request the recipient must provide the administrative record, including a hearing transcript. § 26.89(d). USDOT decides the appeal based solely on the administrative record. § 26.89(e). It does not conduct a de novo review or hold a hearing, although it may allow supplementation of the record by the applicant firm. § 26.89(e). *Go To Headnote*

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- On review of a Federal Airport Concessions Disadvantaged Business Enterprise Program decision under *49 U.S.C.S. § 47107(e)* and *49 C.F.R. § 26.89*, a court, like the Department of Transportation, will consider the entire administrative record. *Go To Headnote*

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- United States Department of Transportation, Office of Civil Rights Review (USDOT) may reverse the recipient's denial of Disadvantaged Business Enterprise (DBE) certification only if it determines, based on the entire administrative record, that the denial was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of part 26 concerning certification. *49 C.F.R. § 26.89(f)(1)*, (f)(2). A procedural error that did not result in fundamental unfairness or substantially prejudice the presentation of the case does not require reversal. § 26.89(f)(3). USDOT may remand the matter to the recipient if the record is incomplete or unclear on significant matters or if it instructs the recipient on proper application of part 26 in the case. § 26.89(f)(4). USDOT may not affirm based on grounds not specified in the recipient's decision. § 26.89(f)(5). However, under § 26.89(f)(1), the decision is affirmed unless USDOT determines, based on the entire administrative record, that the decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part. USDOT cannot go beyond the grounds set forth by the recipient, but USDOT is not limited to only the facts referenced by the recipient regarding those grounds; it may consider and reference the entire record. *Go To Headnote*

Administrative Law: Judicial Review: Reviewability: Final Order Requirement

Double "LL" Contrs. v. State ex rel. Oklahoma DOT, 1996 OK 30, 918 P.2d 34, 1996 Okla. LEXIS 28 (Okla. 1996).

Overview: *An order by the Oklahoma Department of Transportation revoking a contractor's Disadvantaged Business Enterprise certification was not appealable because it was not a final order and administrative remedies had not been exhausted.*

Former 49 CFR 23.55 was redesignated. See now 49 CFR 26.89.

- The Disadvantaged Business Enterprise (DBE) program administered by the Oklahoma Department of Transportation is defined and regulated wholly by federal law. Federal statutes and United States Department of Transportation (USDOT) rules and regulations not only establish the criteria for determining DBE certification, but also provide for administrative remedy when certification is denied or revoked. Under *49 C.F.R. § 23.55(a)*, a party whose DBE certification is revoked by a state agency has the right to appeal to USDOT. The United States Secretary of Transportation has the discretion to sustain decertification during the pendency of the appeal, but only after providing the aggrieved party with the opportunity to show cause by written statement as to why eligibility should continue. *49 C.F.R. § 23.55(c)*. As a result, the administrative process does not end and legal obligations are not definitively imposed until USDOT considers the matter on appeal and either reverses or affirms decertification. *Go To Headnote*

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Business & Corporate Law: General Partnerships: Management Duties & Liabilities: Rights of Partners: Losses & Profits

S.A. Healy Co. v. Washington Metropolitan Area Transit Authority, 615 F. Supp. 1132, 33 Cont. Cas. Fed. (CCH) ¶73771, 1985 U.S. Dist. LEXIS 16827 (D.D.C. 1985).

Overview: *Agency could make a good faith inquiry into a joint venture to determine if the minority business enterprise had the ability to perform 20 percent of the contract work. Substitution of minority enterprise was permissive, not mandatory.*

Former 49 CFR 23.55 was revised. See now 49 CFR 26.89.

- A joint venture is eligible under *49 C.F.R. § 23.53(c) (1985)* if the minority business enterprise (MBE) partner of the joint venture meets the standards for an eligible MBE partner set forth in the regulation and the MBE partner is responsible for a clearly defined portion of the work to be performed and shares in the ownership, risks, and profits of the joint venture. *49 C.F.R. 23.53(g)* further provides: Except as provided in *49 C.F.R. § 23.55*, the denial of a certification by the Department or a recipient shall be final, for that contract and other contracts being let by the recipient at the time of the denial of certification. MBEs and joint ventures denied certification may correct deficiencies in their ownership and control and apply for certification only for future contracts. *49 C.F.R. § 23.53(c) (1985)*. *Go To Headnote*

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Contracts Law: Types of Contracts: Joint Contracts

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Governments: Public Improvements: Bridges & Roads

Cone Corp. v. Florida Dep't of Transp., 1989 U.S. Dist. LEXIS 16752 (N.D. Fla. July 10, 1989), adopted, *1989 U.S. Dist. LEXIS 16743 (N.D. Fla. Aug. 1, 1989)*.

Overview: *In action alleging that Florida Department of Transportation's affirmative action programs violated equal protection, the highway construction corporations satisfied strict scrutiny because there was no evidence of prior racial discrimination.*

Former 49 CFR 23.55 was redesignated. See now 49 CFR 26.89.

- The administrator of the United States Department of Transportation (USDOT) has authority to approve a goal less than 10 percent if a finding is made that the recipient is making all appropriate efforts to increase disadvantaged business participation to 10%, and that despite such efforts, the lower goal is a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66. Pursuant to 49 C.F.R. § 23.68, the failure of a state that receives federal highway construction funds to have an approved minority business enterprise program and an approved overall goal can result in the suspension or termination of federal funds. The same section provides that the state has the opportunity to explain to the federal administrator why the goal could not be achieved and why meeting the goal was beyond the state's control, and the administrator has authority to grant exceptions. 49 C.F.R. § 23.69 provides that a recipient state must establish a procedure whereby the individual status of those persons presumed due to race or ethnicity to be "socially and economically disadvantaged" can be challenged by a third party. The recipient must ultimately resolve the challenge, determining that the person is or is not socially and economically disadvantaged. The state's decision is then appeal able to the USDOT pursuant to *49 C.F.R. § 23.55*. *Go To Headnote*

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Chaz Constr., LLC v. Codell, 137 Fed. Appx. 735, 2005 FED App. 0386N, 2005 U.S. App. LEXIS 8453 (6th Cir. 2005).

Overview: *Although district court did not err in requiring disadvantaged business enterprises (DBE) to plead reliance as to claim under RICO, 18 U.S.C.S. § 1961 et seq., against state officials who allegedly engaged in fraudulent administration of DBE program, denial of Fed. R. Civ. P. 15(a) motion to amend was erroneous because amendments were not futile.*

- Kentucky law provides third parties the right to challenge the Disadvantaged Business Enterprise certification of any company the third-party believes is ineligible. 600 Ky. Admin. Regs. 4:010, § 10. In addition, Kentucky law provides parties adversely affected by a decision of the Kentucky Transportation Cabinet the right to appeal the Cabinet's decision. 600 Ky. Admin. Regs. 4:010, § 11. This appeal guarantees a hearing within 30 days. 600 Ky. Admin. Regs. 4:010, § 11(2)(a). A dissatisfied party may appeal the Cabinet's decision to the United States Department of Transportation. 600 Ky. Admin. Regs. 4:010, §§ 10(10), 11(5); *49 C.F.R. § 26.89*. *Go To Headnote*

Oglesby Constr. v. Skinner, 1990 U.S. App. LEXIS 9811 (6th Cir. June 15, 1990).

Overview: *The state's decertification of a contractor's status as a disadvantaged business enterprise on the basis of his income did not violate due process and was not based upon race because only minority business were considered for certification.*

49 CFR 23.55 was redesignated. See now 49 CFR 26.89.

- Under either method of decertification, the alleged disadvantaged business enterprise (DBE) ultimately has a right to appeal a decertification to the U.S. Department of Transportation (USDOT). *49 C.F.R. § 23.55*; 49 C.F.R. § 23.69(c). The USDOT may also review state certification determinations on its own initiative or in response to information supplied by third parties. *49 C.F.R. § 23.55*. The USDOT merely investigates the allegations of third-party complaints, but has no duty to decertify any businesses itself. If a business is not satisfied with the USDOT's final decision, it may seek review in a district court. *5 U.S.C.S. § 702*. *Go To Headnote*

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Beach Erectors, Inc. v. United States DOT, 2012 U.S. Dist. LEXIS 127632 (E.D.N.Y. Sept. 7, 2012).

Overview: *DOT Departmental Office of Civil Rights' determination that an owner lacked required the managerial and technical competence and experience necessary to maintain control over a corporation, under 49 C.F.R. § 26.71(g), was not arbitrary or capricious, under 5 U.S.C.S. § 706, because, inter alia, the owner lacked technical and field work experience.*

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Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- In the event a recipient denies a firm's request for Disadvantaged Business Enterprise (DBE) certification, the firm must be provided with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. *49 C.F.R. § 26.86(a)*. Afterward, the firm may appeal the denial to the United States Department of Transportation, Office of Civil Rights Review (USDOT), where it is directed to the Office of Civil Rights. *49 C.F.R. §§ 26.89(d)*, (a)(1), (a)(3). Following receipt of an appeal, USDOT requests a copy of the recipient's complete administrative record pertaining to the DBE application; within twenty days of the request the

recipient must provide the administrative record, including a hearing transcript. § 26.89(d). USDOT decides the appeal based solely on the administrative record. § 26.89(e). It does not conduct a de novo review or hold a hearing, although it may allow supplementation of the record by the applicant firm. § 26.89(e). *Go To Headnote*

• United States Department of Transportation, Office of Civil Rights Review (USDOT) may reverse the recipient's denial of Disadvantaged Business Enterprise (DBE) certification only if it determines, based on the entire administrative record, that the denial was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of part 26 concerning certification. *49 C.F.R. § 26.89(f)(1)*, (f)(2). A procedural error that did not result in fundamental unfairness or substantially prejudice the presentation of the case does not require reversal. § 26.89(f)(3). USDOT may remand the matter to the recipient if the record is incomplete or unclear on significant matters or if it instructs the recipient on proper application of part 26 in the case. § 26.89(f)(4). USDOT may not affirm based on grounds not specified in the recipient's decision. § 26.89(f)(5). However, under § 26.89(f)(1), the decision is affirmed unless USDOT determines, based on the entire administrative record, that the decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part. USDOT cannot go beyond the grounds set forth by the recipient, but USDOT is not limited to only the facts referenced by the recipient regarding those grounds; it may consider and reference the entire record. *Go To Headnote*

Harrington Trucking v. Iowa Dep't of Transp., Highway Div., 526 N.W.2d 528 (Iowa 1995).

Overview: *A corporation's petition for judicial review, which essentially sought judicial review of a federal agency's action, was properly dismissed because Iowa courts did not have subject matter jurisdiction to review federal agency action.*

Former 49 CFR 23.55 was redesignated. See now 49 CFR 26.89.

• The preliminary administrative certification procedure for a disadvantaged business enterprise is imposed on recipients of federal-aid highway contracts. *49 C.F.R. § 23.51*. The denial of certification by the recipient is final, subject only to a firm's right to appeal, in writing, to the Department of Transportation. *49 C.F.R. § 23.53(g)*. If appeal is taken, the Department must investigate and determine and inform the applicant of its certification or its denial of eligibility. *49 C.F.R. § 23.55*. *Go To Headnote*

Public Contracts Law: Dispute Resolution: General Overview

Oglesby Constr. v. Skinner, 1990 U.S. App. LEXIS 9811 (6th Cir. June 15, 1990).

Overview: *The state's decertification of a contractor's status as a disadvantaged business enterprise on the basis of his income did not violate due process and was not based upon race because only minority business were considered for certification.*

49 CFR 23.55 was redesignated. See now 49 CFR 26.89.

• Under either method of decertification, the alleged disadvantaged business enterprise (DBE) ultimately has a right to appeal a decertification to the U.S. Department of Transportation (USDOT). *49 C.F.R. § 23.55*; 49 C.F.R. § 23.69(c). The USDOT may also review state certification determinations on its own initiative or in response to information supplied by third parties. *49 C.F.R. § 23.55*. The USDOT merely investigates the allegations of third-party complaints, but has no duty to decertify any businesses itself. If a business is not satisfied with the USDOT's final decision, it may seek review in a district court. *5 U.S.C.S. § 702*. *Go To Headnote*

Transportation Law: Air Transportation: Airports: Concessionaires

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

- *49 C.F.R. § 26.89(f)(6)*is not restrictive as to determining whether an applicant is an independent business: the Departmentof Transportation may rely on historical events so long as they continue to affect the status and circumstances of the firm as of the date of the decision being appealed. *Go To Headnote*

Transportation Law: Air Transportation: Airports: Funding

Grove, Inc. v. United States DOT, 578 F. Supp. 2d 37, 2008 U.S. Dist. LEXIS 72223 (D.D.C. 2008).

Overview: *Federal Airport Concessions Disadvantaged Business Enterprise Program regulations implementing 49 U.S.C.S. § 47107(e) allowed certification of a woman's concessionaire business where her capital contribution was composed of joint marital assets and a bank loan; however, the concessionaire failed to show it was independent of its other investors.*

- *49 C.F.R. § 26.89(f)(1)*and (f)(5), when taken together, distinguish between the grounds upon which a decision is based and the facts that support those grounds. *Go To Headnote*
- On review of a Federal Airport Concessions Disadvantaged Business Enterprise Program decision under *49 U.S.C.S. § 47107(e)* and *49 C.F.R. § 26.89*, a court, like the Department of Transportation, will consider the entire administrative record. *Go To Headnote*

- *49 C.F.R. § 26.89(f)(6)*is not restrictive as to determining whether an applicant is an independent business: the Departmentof Transportation may rely on historical events so long as they continue to affect the status and circumstances of the firm as of the date of the decision being appealed. *Go To Headnote*

Transportation Law: Commercial Vehicles: Licensing & Registration

Chaz Constr., LLC v. Codell, 137 Fed. Appx. 735, 2005 FED App. 0386N, 2005 U.S. App. LEXIS 8453 (6th Cir. 2005).

Overview: *Although district court did not err in requiring disadvantaged business enterprises (DBE) to plead reliance as to claim under RICO, 18 U.S.C.S. § 1961 et seq., against state officials who allegedly engaged in fraudulent administration of DBE program, denial of Fed. R. Civ. P. 15(a) motion to amend was erroneous because amendments were not futile.*

- Kentucky law provides third parties the right to challenge the Disadvantaged Business Enterprise certification of any company the third-party believes is ineligible. 600 Ky. Admin. Regs. 4:010, § 10. In addition, Kentucky law provides parties adversely affected by a decision of the Kentucky Transportation Cabinet the right to appeal the Cabinet's decision. 600 Ky. Admin. Regs. 4:010, § 11. This appeal guarantees a hearing within 30 days. 600 Ky. Admin. Regs. 4:010, § 11(2)(a). A dissatisfied party may appeal the Cabinet's decision to the United States Department of Transportation. 600 Ky. Admin. Regs. 4:010, §§ 10(10), 11(5); *49 C.F.R. § 26.89*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.107

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under *18 U.S.C. 1001* or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5145, Feb. 2, 1999; *76 FR 5083*, 5101, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5101, Jan. 28, 2011, amended paragraphs (a) and (b), effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- The United States Department of Transportation (USDOT) may refer to the Department of Justice for prosecution any person who makes a false or fraudulent statement in connection with participation of a disadvantaged business enterprises in any USDOT-assisted program. *49 C.F.R. § 26.107(e)*. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.109

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

(a) Availability of records.

(1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (*5 U.S.C. 552* and *552a*). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

(b) Confidentiality of information on complainants. Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) Cooperation. All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) Intimidation and retaliation. If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5145, Feb. 2, 1999; *68 FR 35542*, 35556, June 16, 2003; *76 FR 5083*, 5101, Jan. 28, 2011]

Annotations

Notes

[EFFECTIVE DATE NOTE:

76 FR 5083, 5101, Jan. 28, 2011, revised paragraph (a)(2), effective Feb. 28, 2011.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

City of Atlanta v. Corey Entm't, Inc., 278 Ga. 474, 604 S.E.2d 140, 2004 Ga. LEXIS 841 (2004).

Overview: *Federal regulations did not prohibit the disclosure of tax documents the corporation sought to evaluate the propriety of the city's award of airport advertising contract to individual's business, and, thus, judgment ordering disclosure was affirmed.*

- *Title 49 C.F.R. § 26.109(a)(2)*prohibits the release of tax documents an individual has submitted to a governmental entity because that regulation requires the governmental entity holding the tax documents to safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information consistent with federal, state, and local law. *Go To Headnote*

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.91

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart E — Certification Procedures

§ 26.91 What actions do recipients take following DOT certification appeal decisions?

(a) If you are the recipient from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under § 26.89 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5144, Feb. 2, 1999]

Annotations

Notes

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NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR 26.103

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

§ 26.103 What enforcement actions apply in FHWA and FTA programs?

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

(a) Noncompliance complaints. Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) Compliance reviews. The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) Reasonable cause notice. If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) Conciliation.

(1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) Enforcement actions.

(1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5144, Feb. 2, 1999]

Annotations

Notes

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NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR PART 26 APPENDIX C

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

APPENDIX C TO PART 26 — DBE BUSINESS DEVELOPMENT PROGRAM GUIDELINES

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.

(D) The business plan should contain at least the following:

(1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.

(2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.

(3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

(4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

(5) Such other information as the recipient may require.

(E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:

(1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;

(2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;

(3) The types of contract opportunities being sought, based on the firm's primary line of business; and

(4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages; (1) a developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and objectives of its business plan, the following factors, among others, should be considered by the recipient:

(1) Profitability;

(2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;

(3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;

(4) Ability to obtain bonding;

(5)A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and

(6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the

participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.

(M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5146, Feb. 2, 1999]

Annotations

Notes

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Research References & Practice Aids

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Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR PART 26 APPENDIX A

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

Appendix A to Part 26 — Guidance Concerning Good Faith Efforts

I.When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A.

(1) Conducing market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B.Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C.Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D.

(1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.

(2)A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E.

(1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2)A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F.Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G.Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H.Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V.In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the

goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)((vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI .A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5145, Feb. 2, 1999; *79 FR 59566*, 59600, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59600, Oct. 2, 2014, revised this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Governments: Public Improvements: Bridges & Roads

Governments: State & Territorial Governments: Employees & Officials

Public Contracts Law: Bids & Formation: Subcontracts & Subcontractors: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

Real Property Law: Construction Law: General Overview

Transportation Law: Bridges & Roads: Funding

Governments: Public Improvements: Bridges & Roads

H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233, 2010 U.S. App. LEXIS 15141 (4th Cir. 2010).

Overview: *A district court's judgment was affirmed as to the facial validity of N.C. Gen. Stat. § 136-28.4 and its application to African American and Native American subcontractors since there was strong evidence that minority participation goals were needed, but its judgment was reversed as to the constitutionality of § 136-28.4 as applied to women.*

- In evaluating whether a bidder has made good faith efforts in the context of the Minority Business Enterprise and Women Business Enterprise Programs for Highway and Bridge Construction Contracts (Program), the North Carolina Department of Transportation considers, inter alia, whether the bidder solicited minority and women subcontractors through all reasonable and available means and allowed sufficient time for them to respond; followed up on these solicitations; selected work to be performed by minority and women subcontractors to increase the likelihood of meeting Program goals; provided minority and women subcontractors with adequate information about the plans, specifications, and requirements of the contract"; negotiated in good faith with minority and women subcontractors; accepted quotes from minority and women subcontractors in the absence of sound reasons to reject them; and assisted minority and women subcontractors in obtaining bonding, lines of credit, or insurance. 49 C.F.R. § 26 app. A, cited in 19A N.C. Admin. Code 2D.1110. *Go To Headnote*

Governments: State & Territorial Governments: Employees & Officials

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Public Contracts Law: Bids & Formation: Subcontracts & Subcontractors: General Overview

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

N. Contr., Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. Mar. 3, 2004).

Overview: *Federal government's interest for enacting a DOT disadvantaged business enterprises program was compelling but issues of fact remained regarding whether the state government's resulting program was narrowly tailored to achieve that interest.*

- Under United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) regulations, examples of the types of actions a recipient should consider as part of the bidder's good faith efforts to obtain DBE participation include soliciting interest of DBEs at pre-bid meetings; advertising and/or written notices; breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces; providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract; negotiating in good faith with interested DBEs; not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities; making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the Recipient or contractor; making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and effectively using the services of available minority/women community organizations, contractors' groups, and government business assistance offices. 49 C.F.R. pt. 26, app. A § IV. *Go To Headnote*

- A higher bid from a disadvantaged business enterprise (DBE) than from a non-DBE is not a sufficient reason for a prime contractor's failure to meet the DBE goal on a contract, unless the difference is "excessive or unreasonable." 49 C.F.R. pt. 26, app. A § IV(D)(2). A recipient must apply the requirements of this section to DBE bidders/offerors for prime contracts. *49 C.F.R. § 26.53(g)*. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 2013 U.S. Dist. LEXIS 74236 (D. Minn. 2013).

Overview: *Because a bidder that lacked good-faith efforts to meet disadvantaged business enterprise subcontractor requirements for a highway project did not show irreparable harm from rejection of its bid and did not show likelihood of success because agency procedures were proper, it could not obtain preliminary injunctive relief under Fed. R. Civ. P. 65.*

- *49 C.F.R. § 26.45(a)(1)*requires recipients of federal highway funds to set an overall goal for disadvantaged business enterprise (DBE) subcontractor participation in United States Department of Transportation (DOT) assisted contracts. Such a contract goal may not be a rigid quota. *49 C.F.R. § 26.43(a)*. Instead, the recipient must ensure that the primary (main) contractor awarded a DOT-assisted contract has either (1) met the goal for DBE subcontractor participation or (2) if unsuccessful in doing so, has made a good-faith effort to achieve it. *49 C.F.R. § 26.53(a)*.

Determining whether a contractor has made a good-faith effort turns on several factors listed by the DOT in an appendix to the regulations entitled "Guidance Concerning Good Faith Efforts." 49 C.F.R. pt. 26, app. A. The inquiry is a flexible one, based on (among other things) the means used by the contractor to obtain DBE participation, the scope of its negotiations with DBE subcontractors, and whether it undertook efforts to divide subcontracted work into smaller units (if feasible) to facilitate participation. 49 C.F.R. pt. 26, app. A, § IV. A contracting authority must consider these factors when assessing good-faith efforts. 49 C.F.R. pt. 26, app. A, § II. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Minority-Owned Businesses

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Women-Owned Businesses

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR PART 26 APPENDIX D

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

APPENDIX D TO PART 26 — MENTOR-PROTEGE PROGRAM GUIDELINES

(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protege program, a recipient must obtain the approval of the concerned operating administration.

(B)

(1) Any mentor-protege relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protege. The formal mentor-protege agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protege through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protege is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protege agreement.

(C)DBEs involved in a mentor-protege agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protege firm must be certified before it begins participation in a mentor-protege arrangement. If the recipient chooses to recognize mentor/protege agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protege agreement.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5147, Feb. 2, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 5096, 5147, Feb. 2, 1999, added Part 26, effective Mar. 4, 1999.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR PART 26 APPENDIX G

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

Appendix G to Part 26 — Personal Net Worth Statement

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Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*79 FR 59566*, 59617, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59617, Oct. 2, 2014, added this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR PART 26 APPENDIX F

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Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

Appendix F to Part 26 — Uniform Certification Application Form

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Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*68 FR 35542*, 35559, June 16, 2003; *79 FR 59566*, 59603, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59603, Oct. 2, 2014, revised this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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49 CFR PART 26 APPENDIX B

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

Code of Federal Regulations > Title 49 Transportation > Subtitle A — Office of the Secretary of Transportation > Part 26 — Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs > Subpart F — Compliance and Enforcement

Appendix B to 49 CFR Part 26 — Uniform Report of DBE Awards or Commitments and Payments Form

INSTRUCTIONS FOR COMPLETING THE UNIFORM REPORT OF DBE AWARDS/COMMITMENTS AND PAYMENTS

Recipients of Department of Transportation (DOT) funds are expected to keep accurate data regarding the contracting opportunities available to firms paid for with DOT dollars. Failure to submit contracting data relative to the DBE program will result in noncompliance with Part 26. All dollar values listed on this form should represent the DOT share attributable to the Operating Administration (OA): Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) to which this report will be submitted.

1.Indicate the DOT (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.

2.If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If you are an FTA recipient, indicate the Grant/Project numbers covered by this report. If more than ten attach a separate sheet.

3.Specify the Federal fiscal year (i.e., October 1-September 30) in which the covered reporting period falls.

4.State the date of submission of this report.

5.Check the appropriate box that indicates the reporting period that the data provided in this report covers. For FHWA and FTA recipients, if this report is due June 1, data should cover October 1-March 31. If this report is due December 1, data should cover April 1-September 30. If the report is due to the FAA, data should cover the entire year.

6.Provide the name and address of the recipient.

7.State your overall DBE goal(s) established for the Federal fiscal year of the report being submitted to and approved by the relevant OA. Your overall goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral projections (both of which include gender-conscious eutral projections). The Race Conscious projection should be based on measures that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a race conscious measure. The Race Neutral projection should include measures that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.

Section A: Awards and Commitments Made During This Period

The amounts in items 8(A)-10(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts and should be rounded to the nearest dollar.

Line 8: Prime contracts awarded this period: The items on this line should correspond to the contracts directly between the recipient and a supply or service contractor, with no intermediaries between the two.

8(A). Provide the total dollar amount for all prime contracts assisted with DOT funds and awarded during this reporting period. This value should include the entire Federal share of the contracts without removing any amounts associated with resulting subcontracts.

8(B). Provide the total number of all prime contracts assisted with DOT funds and awarded during this reporting period.

8(C). From the total dollar amount awarded in item 8(A), provide the dollar amount awarded in prime contracts to certified DBE firms during this reporting period. This amount should not include the amounts sub contracted to other firms.

8(D). From the total number of prime contracts awarded in item 8(B), specify the number of prime contracts awarded to certified DBE firms during this reporting period.

8(E&F). This field is closed for data entry. Except for the very rare case of DBE-set asides permitted under 49 CFR part 26, all prime contracts awarded to DBES are regarded as race-neutral.

8(G). From the total dollar amount awarded in item 8(C), provide the dollar amount awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral in item 7 and the explanation in item 8 of project types to include.

8(H). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Neutral methods.

8(I). Of all prime contracts awarded this reporting period, calculate the percentage going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Line 9: Subcontracts awarded/committed this period: Items 9(A)-9(I) are derived in the same way as items 8(A)-8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.

9(A). If filling out the form for general reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded in prime contracts in 8(A), and therefore should never be greater than the amount awarded in prime contracts. If filling out the form for project reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded or previously in prime contracts in 8(A). The sum of all subcontract amounts in consecutive periods should never exceed the sum of all prime contract amounts awarded in those periods.

9(B). Provide the total number of all sub contracts assisted with DOT funds that were awarded or committed during this reporting period.

9(C). From the total dollar amount of sub contracts awarded/committed this period in item 9(A), provide the total dollar amount awarded in sub contracts to DBEs.

9(D). From the total number of sub contracts awarded or committed in item 9(B), specify the number of sub contracts awarded or committed to DBEs.

9(E). From the total dollar amount of sub contracts awarded or committed to DBEs this period, provide the amount in dollars to DBEs using Race Conscious measures.

9(F). From the total number of sub contracts awarded orcommitted to DBEs this period, provide the number of sub contracts awarded or committed to DBEs using Race Conscious measures.

9(G). From the total dollar amount of sub contracts awarded/committed to DBEs this period, provide the amount in dollars to DBEs using Race Neutral measures.

9(H). From the total number of sub contracts awarded/committed to DBEs this period, provide the number of sub contracts awarded to DBEs using Race Neutral measures.

9(I). Of all subcontracts awarded this reporting period, calculate the percentage going to DBEs. Divide the dollar amount in item 9(C) by the dollar amount in item 9(A) to derive this percentage. Round percentage to the nearest tenth.

Line 10: Total contracts awarded or committed this period. These fields should be used to show the total dollar value and number of contracts awarded to DBEs and to calculate the overall percentage of dollars awarded to DBEs.

10(A)-10(B). These fields are unavailable for data entry.

10(C-H). Combine the total values listed on the prime contracts line (Line 8) with the corresponding values on the subcontracts line (Line 9).

10(I). Of all contracts awarded this reporting period, calculate the percentage going to DBEs. Divide the total dollars awarded to DBEs in item 10(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Section B: Breakdown by Ethnicity & Gender of Contracts Awarded to DBEs This Period

11-17. Further breakdown the contracting activity with DBE involvement. The Total Dollar Amount to DBEs in 17(C) should equal the Total Dollar Amount to DBEs in 10(C). Likewise the total number of contracts to DBEs in 17(F) should equal the Total Number of Contracts to DBEs in 10(D).

Line 16: The “Non-Minority” category is reserved for any firms whose owners are not members of the presumptively disadvantaged groups already listed, but who are either “women” OR eligible for the DBE program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report.

Section C: Payments on Ongoing Contracts

Line 18(A-E). Submit information on contracts that are currently in progress. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

18(A). Provide the total dollar amount paid to all firms performing work on contracts.

18(B). Provide the total number of contracts where work was performed during the reporting period.

18(C). From the total number of contracts provided in 18(A) provide the total number of contracts that are currently being performed by DBE firms for which payments have been made.

18(D). From the total dollar amount paid to all firms in 18(A), provide the total dollar value paid to DBE firms currently performing work during this period.

18(E). Provide the total number of DBE firms that received payment during this reporting period. For example, while 3 contracts may be active during this period, one DBE firm may be providing supplies or services on all three contracts. This field should only list the number of DBE firms performing work.

18(F). Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 18(D) by the total dollars of all payments in 18(B). Round percentage to the nearest tenth.

Section D: Actual Payments on Contracts Completed This Reporting Period

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts, and should be rounded to the nearest dollar.

19(A). Provide the total number of contracts completed during this reporting period that used Race Conscious measures. Race Conscious contracts are those with contract goals or another race conscious measure.

19(B). Provide the total dollar value of prime contracts completed this reporting period that had race conscious measures.

19(C). From the total dollar value of prime contracts completed this period in 19(B), provide the total dollar amount of dollars awarded or committed to DBE firms in order to meet the contract goals. This applies only to Race Conscious contracts.

19(D). Provide the actual total DBE participation in dollars on the race conscious contracts completed this reporting period.

19(E). Of all the contracts completed this reporting period using Race Conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 19(D) by the total dollar value provided in 19(B) to derive this percentage. Round to the nearest tenth.

20(A)-20(E). Items 21(A)-21(E) are derived in the same manner as items 19(A)-19(E), except these figures should be based on contracts completed using Race Neutral measures.

20(C). This field is closed.

21(A)-21(D). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.

21(C). This field is closed.

21(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 21(D) by the Total Dollar Value of Contracts Completed in 21(B) to derive this percentage. Round to the nearest tenth.

23. Name of the Authorized Representative preparing this form.

24. Signature of the Authorized Representative.

25. Phone number of the Authorized Representative.

**Submit your completed report to your Regional or Division Office.

Click here to view this image.

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5146, Feb. 2, 1999; *68 FR 35542*, 35556, June 16, 2003; *79 FR 59566*, 59601, Oct. 2, 2014]

Annotations

Notes

[EFFECTIVE DATE NOTE:

79 FR 59566, 59601, Oct. 2, 2014, revised this section, effective Nov. 3, 2014.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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End of Document

49 CFR PART 26 APPENDIX E

This document is current through December 21, 2020 issue of the Federal Register, with the exception of the amendments appearing at 85 FR 82150, 85 FR 82376, 85 FR 83300, 85 FR 83162, 85 FR 83366, and 85 FR 82905.

APPENDIX E TO PART 26 — INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see *13 CFR 124.103(c)* and *124.104*).

Social Disadvantage

I.Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) Education. Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) Employment. Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) Business history. The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities-especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)-may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

Economic Disadvantage

(A) General. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) Submission of narrative and financial information.

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2)[Reserved]

(C) Factors to be considered. In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) Transfers within two years.

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

Statutory Authority

Authority Note Applicable to Title 49, Subtit. A, Pt. 26

History

[*64 FR 5096*, 5147 Feb. 2, 1999; *68 FR 35542*, 35559, June 16, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

68 FR 35542, 35559, June 16, 2003, removed and reserved section (B)(2) under Economic Disadvantage, effective July 16, 2003.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING PART:

[*PUBLISHER'S NOTE: UNITED STATES SUPREME COURT CASES SIGNIFICANTLY DISCUSSING PART 26 — Adarand Constructors, Inc. v Mineta (2001, US) 151 L Ed 2d 489, 122 S Ct 511*.]

Notes to Decisions

Evidence: Inferences & Presumptions: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Transportation Law: Air Transportation: Airports: Funding

Evidence: Inferences & Presumptions: General Overview

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir.), cert. denied, *500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714, 1991 U.S. LEXIS 3264 (1991)*.

Overview: *Decision to enjoin state law based set aside program and not federal program was affirmed where reverse discrimination was unconstitutional but federal program was not pursuant to constitutional enforcement authority.*

Former 49 CFR PART 23 APP C was redesignated. See now 49 CFR PART 26 APPENDIX E.

- In explaining that the racial presumption is rebuttable, the federal regulation, 49 C.F.R. pt. 23, subpt. D, app. C, states: "This," the regulation is referring to the proposition that the presumption is rebuttable, means that, as part of a challenge to the eligibility of a firm, a third party may present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups. *Go To Headnote*

Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: General Overview

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 36 Cont. Cas. Fed. (CCH) ¶76003, 57 Empl. Prac. Dec. (CCH) ¶41072, 1991 U.S. App. LEXIS 501 (7th Cir.), cert. denied, *500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714, 1991 U.S. LEXIS 3264 (1991)*.

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Public Contracts Law: Business Aids & Assistance: Minority, Women-Owned & Disadvantaged Businesses: Disadvantaged Businesses

Best Wood Judge Firewood & Tree Serv. v. United States DOT, 784 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 32405 (E.D. Wis. 2011).

Overview: *Business owner did not meet the elements of social disadvantage under 49 C.F.R. pt. 26 because the business owner's anti-union beliefs were not universal, showing that non-union status was not a characteristic but rather a choice; his distaste for his local union was a matter of choice and he failed to establish that his criticisms were accurate.*

- Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. 49 C.F.R. pt. 26 app. E. Go To Headnote

- 49 C.F.R. pt. 26, app. E, Soc. Disadv. § I requires that each of the elements be met by the applicant. Go To Headnote

Corey Airport Servs. v. City of Atlanta, 632 F. Supp. 2d 1246, 2008-2 Trade Cas. (CCH) ¶76351, 77 Fed. R. Evid. Serv. (CBC) 882, 2008 U.S. Dist. LEXIS 75508 (N.D. Ga. 2008), rev'd, remanded, *587 F.3d 1280, 22 Fla. L. Weekly Fed. C 274, 2009 U.S. App. LEXIS 25048 (11th Cir. 2009)*.

Overview: *Testimony of public bidder's expert on definition of relevant market did not meet reliability standard of Fed. R. Evid. 702 where expert impermissibly based analysis on initial assumption that antitrust violation occurred. Bidder's 15 U.S.C.S. § 1 claim failed due to lack of proof as to relevant market or actual detrimental effects to competition.*

- The City of Atlanta, Georgia administers a Disadvantaged Business Enterprise (DBE) program in connection with its public contracts. Because the City accepts federal funding for its airport, the DBE program is subject to the federal DBE rules promulgated by the U.S. Department of Transportation, which are codified at 49 C.F.R. §§ 23, 26 (2005). Under those rules, a DBE firm is one that is at least 51% owned by one or more individuals who are both socially and economically disadvantaged and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. *49 C.F.R. § 26.5 (2005)*. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within society because of their identities as members of certain groups and without regard to their individual qualities. 49 C.F.R. § 26, app. E (2005). Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. 49 C.F.R. § 26, app. E (2005). Go To Headnote

Transportation Law: Air Transportation: Airports: Funding

Corey Airport Servs. v. City of Atlanta, 632 F. Supp. 2d 1246, 2008-2 Trade Cas. (CCH) ¶76351, 77 Fed. R. Evid. Serv. (CBC) 882, 2008 U.S. Dist. LEXIS 75508 (N.D. Ga. 2008), rev'd, remanded, *587 F.3d 1280, 22 Fla. L. Weekly Fed. C 274, 2009 U.S. App. LEXIS 25048 (11th Cir. 2009)*.

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Research References & Practice Aids

Hierarchy Notes:

Title 49, Subtit. A

Title 49, Subtit. A, Pt. 26

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Appendix C: Definitions Revised 9/2020

Appendix C: Definitions Revised 9/2020

Access is the ability to physically enter or pass through an FAA area or a facility; or having the physical ability or authority to obtain FAA sensitive information, materials, and resources. In relation to classified information, access is the ability, authority, or opportunity to obtain knowledge of such information or materials.

Acquisition Career Program within FAA requires personnel in specified engineering and management disciplines and specialty functions to apply for, acquire, and maintain certification at the appropriate level for the work they perform. Certification requirements align with federal acquisition certification programs.

Acquisition Category is the classification assigned to investment initiatives by the Acquisition Executive Board and endorsed by the Joint Resources Council. The FAA classifies investment initiatives by investment type (new investment, software enhancement, technology refreshment, variable quantity, facility initiative, or support service contract) and then categorizes based on qualitative and quantitative criteria such as cost, risk, and political sensitivity.

Acquisition Category Determination Request is the form that a service organization or program office fills out on behalf of the sponsoring Director when seeking to obtain an acquisition category designation from the Acquisition Executive Board for an investment initiative.

(FAA) Acquisition Executive is the official that manages acquisition management policy within the FAA; chairs the Joint Resources Council; approves acquisition category designations and AMS tailoring requests; chairs acquisition quarterly program reviews; and approves OMB Major IT Business Cases for designated capital investments before submission to the Department of Transportation and Office of Management and Budget.

Acquisition Executive Board is the executive-level body that assists and supports the Acquisition Executive and Joint Resources Council in establishing, changing, communicating, and implementing acquisition management policy, practices, procedures, and tools. The Acquisition Executive Board also recommends to the Joint Resources Council the appropriate acquisition category for investment initiatives.

Acquisition Executive Board Secretariat is the official who coordinates AEB meeting dates, agendas, and logistics; reviews and manages the adjudication of ACAT determination requests; receives and distributes to AEB members proposed changes to acquisition management policy, process, practices, and procedures; facilitates review of proposed policy, guidance, practice, and procedure changes by FAA organizations to ensure timely adjudication; and maintains the official repository of AEB decision documentation, meeting minutes, and assigned action items.

Acquisition Management System establishes policy and guidance for all aspects of lifecycle acquisition management for the Federal Aviation Administration. It is a fully coordinated set of policies, processes, and computer-based management tools that guide the workforce through the lifecycle management process from the determination of service needs to the procurement and

lifecycle support of products and services that satisfy those needs. It also defines all procurement policy and guidance for the agency.

Acquisition Planning is the process by which all acquisition-related management and engineering disciplines of an investment initiative are developed, coordinated, and integrated into a comprehensive plan for obtaining a capability that meets specified requirements within cost and schedule boundaries. Acquisition planning is normally associated with detailed program planning during final investment analysis, but is also important at other times of the lifecycle management process when products and services are required.

Acquisition Planning and Control Documents are an integrated set of planning and control documents required for JRC-approved investment initiatives. They consist of the program requirements document, business case, implementation strategy and planning document, program management plan, and acquisition program baseline or execution plan. These documents constitute an integrated set with clear progression and traceability from service need to requirements to implementation strategy to actions and work activities necessary to obtain a product that satisfies ratified service needs.

Acquisition Program Baseline establishes the performance an investment program must achieve, as well as the cost and schedule boundaries within which the program is authorized to proceed. It is a formal document approved by the Joint Resources Council at the final investment decision, and is the implementation contract between the FAA and the service organization acquiring an approved product or service.

Acquisition Quarterly Program Review is conducted by the Joint Resources Council to oversee the cost, schedule, and technical performance of ongoing investment programs using a standard set of program and performance measures (AMS Section 2.1.5). The reviews use SPIRE, earned-value management (or equivalent), and enterprise architecture data to assess technical, cost, and schedule issues that may affect the ability of the program to meet its acquisition program baseline or execution plan values.

Acquisition Readiness Team is a cross-functional group formed in support of the Operations Governance Board to collaborate with customers and develop decision-ready investment packages for mission-support operations-funded investment initiatives. The team is comprised of subject-matter experts that assist with planning for more complex, higher risk initiatives through the Operations Support Pathway process.

Acquisition Strategy is the overall approach for acquiring a capability to meet agency requirements and perform within the boundaries set forth in the acquisition program baseline or execution plan. The strategy considers all aspects of an initiative such as acquisition approach, contracting, logistics, testing, systems engineering, safety and security, risk management, program management, impact on facilities and infrastructure, human factors, schedules, and cost. Results are documented in the implementation strategy and planning document during final investment analysis.

Acquisition Strategy Artifact is a key document produced for mission-support capital investments

funded from the Operations appropriation. It documents the best-value approach for procuring a solution for an FAA mission-support operations-funded initiative.

Acquisition System Advisory Group is a cross-organizational body that serves as the technical arm of the Acquisition Executive Board. It evaluates proposed changes to the acquisition management system to ensure they improve and strengthen it and are consistent with agency direction.

Acquisition Workforce Council is the executive-level body that supports the Acquisition Executive in establishing, communicating, and implementing acquisition workforce plans and programs to ensure the FAA has the necessary acquisition talent today and in the future. It sets acquisition workforce certification requirements and oversees implementation and annual update of FAA Acquisition Workforce Plan.

Affiliate Business is a business that controls or has the power to control another business, or a third party that controls or has the power to control another business (contractual relationships must be considered).

Affordability is the relative capacity of the FAA to fund a specific investment initiative when evaluated against all other investment needs of the agency.

Agreement With a State Government, Local Government, and/or Public Authority is a written agreement between the FAA and a state or local government or public authority where the FAA agrees to receive from, or exchange supplies or services with, the other party.

Agreements With Private Parties are written documents executed by the parties, which call for the exchange of services, equipment, personnel, or facilities, or require the payment of funds to the FAA, or confirm mutual aid and assistance and outline the specific responsibilities of each party.
The term includes agreements under which the FAA provides services, equipment, personnel, or facilities and obtains reimbursement on a negotiated basis from the other party. The term excludes procurement contracts for real estate, supplies, and services.

Agreements With Public Entities Other Than Federal Agencies are written documents executed by the parties, which call for the exchange of services, equipment, personnel, or facilities, or require the payment of funds to the FAA, or confirm mutual aid and assistance and outline the specific responsibilities of each party. The term includes agreements under which the FAA provides services, equipment, personnel, or facilities and obtains reimbursement on a negotiated basis from the other party.

Alternative Dispute Resolution is any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures may include, but are not limited to, assisted settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration. These procedures may involve the use of neutrals.

Alternatives Analysis is the second phase of the Operations Support Pathway. The line of business, along with input and review of the acquisition readiness team for Governance Path C initiatives,

creates required planning artifacts. Alternatives analysis is also required during initial investment analysis for F&E-funded capital assets.

AMS Building Blocks are foundation elements of the FAA Acquisition Management System. They include the FAA acquisition career program, acquisition planning and control documents, the FAA standard work breakdown structure, policy and functional flowcharts, investment planning, measurement and analysis, portfolio management, quality assurance, service management, and verification and validation.

AMS Table of Acquisition Categories contains the criteria for assigning the appropriate acquisition category to each investment initiative, as well as implementation requirements and approval authority for each category.

AMS Tailoring Request Process is the means by which a service organization may request tailoring of the AMS lifecycle management process for an investment initiative. The service organization or program office must submit the tailoring request to the Acquisition Executive Board before the investment analysis readiness decision

Appraisal refers to a formal written statement that a qualified appraiser prepares independently and impartially, giving an opinion, as of a specified date, of the defined value of a described parcel of real property, supported by the presentation and analysis of relevant market information. An appraisal is used to determine the fair market rent, and value or just compensation for purchase of a specific property. For the purposes of FAA Real Property Acquisitions, all appraisals should conform to the Uniform Appraisal Standards for Federal Land Acquisitions (the "Yellow Book").

Approval is the agreement that an item is complete and suitable for its intended use.

Architect-Engineer Services are (1) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services; (2) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and (3) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

Architecture Review Board oversees the technical content of the mission-support component of the FAA Enterprise Architecture. It works with the lines of business to identify and resolve cross-domain issues and to time phase new operational improvements and sustainment actions intended to remedy service shortfalls and technical opportunities related to non-NAS mission-support service needs.

Auctioning Techniques is a method of screening vendors using commercial competition. Auctioning techniques include indicating to an offeror a cost or price that it must meet to obtain further consideration; advising an offeror of its price standing relative to another offeror; and otherwise furnishing information about the prices of other offerors prices. Use auctioning techniques only for commercially available products.

Baseline is any of the following: (1) an agreed-to-description of the attributes of a product or service at a point in time, which serves as a basis for defining change; (2) an approved and released document or a set of documents that provide a defined basis for managing change; (3) currently approved and released configuration documentation; or (4) a released set of files consisting of a software version and associated configuration documentation.

Baseline Variances are positive or negative deviations from baseline values. The FAA uses baseline variances to evaluate whether an investment program is proceeding as planned or whether it is deviating from plan thereby requiring management attention and action.

Best Value is a term used during procurement source selection to describe the solution that is the most advantageous to the FAA, based on the evaluation of price and other factors specified by the FAA. This approach provides the opportunity for trade-offs between price and other specified factors, and does not require that an award be made to either the offeror submitting the highest-rated technical solution or to the offeror submitting the lowest cost/price, although the ultimate award decision may be to of these offerors.

Block Upgrades are planned improvements to operational assets stipulated at the final investment decision that involve the use of sustainment or investment resources to upgrade components of fielded products as needed.

Budget Impact Assessment is the process of assessing the budget impact of each alternative solution developed during investment analysis against all existing programs in the FAA financial baseline for the same years. The FAA uses standard criteria to determine the priority of the candidate investment in relation to all others. If the amount of funding available for the years in question is insufficient, offsets from lower priority programs are identified. A budget impact assessment is also performed when considering baseline changes for existing programs that involve an increase in the cost baseline and the need to reallocate resources.

Business Case summarizes the analytical and quantitative information developed during investment analysis in search of the best means for satisfying a service need. The business case is the primary information document supporting the initial investment decision.

Business Case Analysis focuses on those key factors that demonstrate the value and worth of a proposed investment initiative to the FAA and aviation community. Key factors include but are not limited to lifecycle cost, investment cost, benefits, benefits-to-cost ratio, risk, affordability, net present value, and payback period.

Business Case Decision is the second decision point of the Operations Support Pathway. It applies

only to those initiatives assigned Governance Path C. The Operations Governance Board reviews the scaled business case and decides if the initiative should proceed to solution development.

Cancellation of a procurement is the termination of all requirements for the remaining years of a multi-year contract. Cancellation results when the contracting officer notifies the contractor of non-availability of funds for contract performance in any subsequent program year, or fails to notify the contractor that funds are available for performance of the succeeding program-year requirement.

Cancellation Ceiling is the maximum amount the FAA will pay the contractor which the contractor would have recovered as a part of the unit price, had the contract been completed. The amount actually paid to the contractor upon settlement for unrecovered costs (which can only be equal to or less than the ceiling) is the cancellation charge. This ceiling generally includes only nonrecurring costs.

Capability Shortfall is the difference between the projected demand for services and the ability of the FAA to meet that demand with current assets.

Capital Asset is property of any kind held by a business or organization. It includes all kinds of property, movable or immovable, tangible or intangible, fixed or circulating.

Capital Investment Team is the group that coordinates development of the FAA capital budget request each year and assesses the business justification, affordability, and priority of investment initiatives for the Joint Resources Council.

Capital Planning and Investment Control is the process used by FAA management to identify, select, control, and evaluate proposed capital investments. The CPIC process encompasses all stages of capital management including planning, budgeting, procurement, deployment, and assessment. Within the FAA, the acquisition management system is the CPIC process. Service analysis and investment analysis are the "select" portion of the CPIC process; solution implementation is the "control" phase; and in-service management is the "evaluate" phase.

Capitalization is the classification of costs as long-term investments rather than expenses of current operations.

Capture Team is the group that coordinates integrated decision-making across all investment increments necessary to obtain an operational capability for the National Airspace System. The team monitors implementation of each investment increment and may recommend changes in the distribution of financial assets among those increments to optimize delivery of the operational capability. Capture teams also participate in test activities to validate that an operational capability has achieved its projected benefits and to plan and execute remedial action when it has not.

Cardholder is the individual government employee within an organization who is a warranted contracting officer or to whom a written delegation of procurement authority has been issued by the cognizant Chief of the Contracting Office or designee granting the use of purchase and credit transactions made within the established billing period.

Certification Renewal is the requirement that all acquisition workforce members working in specified core disciplines (see AMS section 5.1) maintain certification in those disciplines by earning continuous learning points. Workforce members earn continuous learning points through training, seminars, conferences, special projects, education, and other developmental activities related to the discipline.

Certified Cost or Pricing Data refers to all facts that, at the time of price agreement for a prospective contract, the seller and buyer would reasonably expect to affect price negotiations. The data requires certification, and is factual, not judgmental, and therefore verifiable. While the data do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data utilized to form the basis for that judgment. Certified cost or pricing data is more than historical accounting data; it is all the facts that can be reasonably expected to contribute to the soundness of estimates of all future costs and to the validity of determinations of costs already incurred.

Change Management is that portion of the configuration control process whereby change to the performance, function, or physical attributes of an entity is managed and recorded to ensure the exact configuration of the entity is known.

Chief Counsel is the official who represents FAA personnel and organizations on legal, governmental, and business issues; promotes the legality and integrity of acquisition actions; **r**epresents the FAA in connection with procurement-related litigation, alternative dispute resolution, and other matters; and serves as core member of the Joint Resources Council.

Chief Financial Officer is the official responsible for managing all aspects of FAA budget formulation, execution, and reporting. The Chief Financial Officer serves as a core member of the Joint Resources Council; jointly approves the acquisition program baseline or execution plan (as appropriate) with other Joint Resource Council members; and approves OMB Major IT Business Cases for designated capital investments before submission to the Department of Transportation and Office of Management and Budget.

Chief Information Officer is the official responsible for managing all aspects of information technology within the FAA. The Chief Information Officer serves as a core member of the Joint Resources Council; chairs the Information Technology Shared Services Committee; approves OMB Major IT Business Cases for designated capital investments before submission to the Department of Transportation and Office of Management and Budget; jointly approves the acquisition program baseline or execution plan for investment programs with other Joint Resources Council members; and oversees the FAA Enterprise Architecture.

Claim, as used herein, means a contract dispute.

Classified Information is official information or material that requires protection in the interest of national security and is classified for such purpose by appropriate classification authority in accordance with the provisions of Executive Orders 12958 "Classified National Security

Information," 12968 "Access to Classified Information," and 12829 "National Industrial Security Program."

Commercial Component means any component that is a commercial item. The term “component” means any item supplied to the Federal government as part of an end item or of another component. See Commercial Item.

Commercial Item can mean any of the following:

[Note: For purposes of this document, the term "commercial item" is interchangeable with the terms "commercially available, "commercially available software "commercial component(s)," "commercial product(s)," and "Commercial Off-the-Shelf (COTS)"]

(1) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes and that has been sold, leased, licensed to the general public; or has been offered for sale, lease, or license to the general public.

(2) Any item that evolved from an item described in paragraph (1) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a government solicitation.

(3) Any item that would satisfy a criterion expressed in paragraphs (1) and (2) of this definition, but for-(i) modifications of a type customarily available in the commercial marketplace; or (ii) modifications of a type not customarily available in the commercial marketplace made to meet Federal government requirements.

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public.

(5) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, and if the source of such services--(i) offers such services to the general public and the Federal government contemporaneously and under similar terms and conditions; and (ii) offers to use the same work force for providing the Federal government with such services as the source uses for providing such services to the general public.

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standards commercial terms and conditions. This does not include services sold based on hourly rates without an established catalog or market price for specific service performed.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) above, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contract; or

(8) Any item, determined by the procuring agency to have been developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local

governments, or to multiple foreign governments.

Commercial-Off-the-Shelf is a product or service developed for sale, lease, or license to the public and is currently available at a fair market value. See Commercial Item.

Commercial Product is a product in regular production sold in substantial quantities to the public and/or industry at established catalog or market prices. See Commercial Item.

Commercially Available refers to products, commodities, equipment, material, or services available in existing commercial markets in which sources compete primarily on established catalog/market prices or for which specific costs/prices established within the industry have been determined to be fair and reasonable. See Commercial Item.

Commissioning within the FAA lifecycle management process occurs when a system, subsystem, equipment, or service is formally accepted and placed into operational service within the National Airspace System. For products to which the flying public has access, commissioning requires written confirmation to airmen and the aviation industry via a notice to airmen.

Commonality refers to the use of identical parts, components, subsystems, or systems to achieve economies in development and manufacture.

Communications, when referring to contracting, means any oral or written communication between the FAA and an offeror that involves information essential for understanding and evaluating an offeror's submittal(s), and/or determining the acceptability of an offeror's submittal(s).

Computer Resources Support consists of the facilities, hardware, system support software, software/hardware development and support tools (e.g., compilers, PROM burners), documentation, and personnel needed to operate and support embedded computer systems. These items represent the resources required for operational support engineering functions and do not include administrative computer resources.

Concept and Requirements Definition is that portion of the FAA lifecycle management process when the program office or service organization (1) translates priority operational needs in the enterprise architecture into preliminary requirements and a solution concept of operations for the capability needed to improve service delivery, (2) quantifies the service shortfall in sufficient detail to enable the definition of realistic preliminary requirements and the estimation of potential costs and benefits associated with resolving the shortfall, and (3) identifies the most promising alternative solutions able to satisfy the service need.

Concept and Requirements Definition Plan specifies how tasks required for concept and requirements definition will be competed; defines roles and responsibilities of participating organizations; defines outputs and exit criteria; establishes a schedule for completion; and specifies needed resources.

Concept and Requirements Definition Readiness Decision is the decision gateway between service analysis and entry into concept and requirements definition. It is when the FAA Enterprise

Architecture Board verifies: (1) a priority service shortfall, operational improvement, or operational sustainment is in an enterprise architecture roadmap; and (2) planning and resources are in place for the conduct for concept and requirements definition.

Concept Development is the second stage in the concept maturity and technology development process. This activity develops and evaluates promising concepts to determine which should undergo further development. Activities include modeling, simulation, and detailed analysis.

Concept Evaluation is the third and final stage in the concept maturity and technology development process. It confirms that a concept has great promise toward meeting the service needs of the aviation community and establishes operational and technical feasibility. Concept evaluation can include concept integration, evolution, or scalability. Representative activities include prototyping and field demonstration.

Concept Exploration is the first stage in the concept maturity and technology development process. The objective is to describe promising concepts with sufficient definition to begin development of a concept of operations and to plan follow-on activities. Outputs are promising and feasible concepts that warrant further development.

Concept Maturity and Technology Development Process governs activities directed toward the production of useful aviation-related materials, devices, systems, and methods, as well as advance the maturity of new concepts. Typical activities include concept feasibility studies, technical analysis, prototype demonstrations, and operational assessments that identify, develop, and evaluate opportunities for improving the delivery of NAS services. These efforts reduce risk, define requirements, demonstrate operational requirements, inform concept and requirements definition activities, and generate information required to support agency investment decisions and product lifecycle management.

Concept Steering Group consists of cross-organizational officials who coordinate activity to develop and validate new concepts and ideas during service analysis, as well as facilitate the review of new ideas and proposed changes to the NAS Concept of Operations.

Condemnation The legal process of taking privately owned land for public use through exercise of eminent domain. Under the 5th Amendment of the United States Constitution, just compensation must be provided for any land taken within the United States. See also Eminent Domain and Inverse Condemnation.

Configuration is (1) the performance, functional, and physical attributes of an existing or planned product or combination of products; or (2) one of a series of sequentially created variations of a product.

Configuration Audit is the examination of artifacts related to a product to verify it has achieved required functional and performance requirements and that product design is accurately documented. The audit includes the review of documents, records, procedures, processes, and physical elements of the product. Sometimes the configuration audit consists of separate functional and physical

configuration audits.

Configuration Change Management is a systematic process that ensures changes to released configuration documentation are properly identified, documented, evaluated for impact, incorporated, verified, and approved by an appropriate authority.

Configuration Control Boards are the official FAA forums for establishing configuration management baselines and approving subsequent changes to those baselines. AMS policy requires the following configuration control boards: service organizations, service areas, mission-support information technology, line of business staff offices, and solution providers.

Configuration Documentation is technical documentation that identifies and defines a product's performance, functional, and physical attributes.

Configuration Identification is the systematic process of assigning and applying unique configuration identifiers to a product, its components.

Configuration Item refers to the fundamental structural unit of a configuration management system. Examples of configuration items include individual requirements documents, software, hardware, models, and plans. Software and hardware configuration items typically satisfy a specific functional or performance requirement.

Configuration Management is a process for establishing and maintaining consistency of a product's performance, functional, and physical attributes with its requirements, design, and operational information throughout its life.

(FAA) Configuration Management Authority coordinates development and establishment of configuration management policy, processes, and guidance within FAA and facilitates execution of configuration management at all organizational levels within the agency.

Configuration Management Process is the means by which the configuration of a product or service is established and managed. It consists of configuration identification, baseline management, configuration change management, configuration status accounting, and configuration verification and validation.

Configuration Status Accounting is the configuration management activity that captures, stores, and accesses configuration information needed to manage products and product information effectively.

Configuration Verification is the action that verifies the product has achieved its required attributes (performance requirements and functional constraints) and its product design is documented accurately.

Continuous Improvement is an ongoing effort to improve products, services, or processes. These efforts can seek "incremental" improvement over time or "breakthrough" improvement all at once. Within the acquisition management system, continuous improvement refers to the modification of AMS policy and guidance to obtain its key objectives of lower cost, shorter time to obtain, and

better performance of agency capital assets.

Continuous Learning Points are measures of knowledge gained by acquisition workforce members to maintain certification for employment in specified acquisition management disciplines (see AMS Section 5.1). Workforce members earn continuous learning points through training, seminars, conferences, special projects, education, and other developmental activities related to each specific discipline.

Contract is a legal instrument used to acquire products, services, utilities, or interests in land or space for the direct benefit or use by the FAA. As used herein, contract denotes the document (for example, contract, memorandum of agreement, purchase order, lease, easement, outgrant, or other legally binding agreement) used to implement an agreement between a customer (buyer) and a seller (supplier).

Contract Dispute means a written request seeking as a matter of right, the payment of money, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. The term does not include a request for payment of an invoice, voucher, or similar routine payments expressly authorized under the terms of the contract, which the contracting officer has not rejected. The term includes a termination for convenience settlement proposal and request for equitable adjustment, but does not include cost proposals seeking definitization of a letter contract or other undefinitized contract action.

Contracting Officer is any individual appointed by the government with the authority to enter into, administer, renew, or terminate contracts, as well as make related determinations and findings. This includes management and oversight of the source selection process associated with procurement actions.

Contractor is the party(ies) receiving a direct procurement contract from the FAA and who is responsible for performance of contract requirements. In terms of real property transactions, the contractor may also be called the Lessor, Permittor, Licensor, or Grantor depending on the type of Contract. See also “Vendor”.

Controversy or Concern during procurement is a material disagreement between the FAA and an offeror that could result in a protest.

Core Policy refers to the official policy governing the acquisition management system within the FAA. It consists of all sections and appendices of this document.

Corporate Portfolio Management is the process of making investment decisions within context of overall strategic planning and goals of the agency. Individual investment options must fit logically within this context and provide highest value to the agency and aviation community when compared against other investment options.

Conveyance- A term used to refer to any document that transfers title to, or an interest in, real property. The term is also used in describing the act of transferring.

Cost as used within procurement policy consists of contractor expenses for contract performance, either estimated or actual.

Cost Accounting is the method of accounting that collects, classifies, and records all costs incurred in performing an activity or accomplishing a purpose.

Cost or Pricing Data - See "Certified Cost or Pricing Data" and "Information Other than Certified Cost or Pricing Data".

CRD Readiness Decision is the event in the AMS lifecycle management process that evaluates an investment opportunity for entry into concept and requirements definition. The FAA Enterprise Architecture Board makes the decision upon verification that the investment opportunity is in response to a priority service need in an enterprise architecture roadmap and that all resources and planning necessary for the conduct of concept and requirements definition are in place.

Critical Operational Issue is a key operational effectiveness or suitability issue that the agency must examine during operational test to determine the ability of a product or service to perform its intended mission.

Critical Performance Requirements are those requirements of a solution that represent attributes or characteristics considered essential to meeting the service need the investment program is seeking to satisfy. They are part of the total program requirements that define the operational framework and performance baseline for the investment program. The agency records critical performance requirements and associated values in the program requirements document and acquisition program baseline or execution plan.

Customer is an external user of FAA products or services, such as airlines and the flying public. See User.

Data is recorded information of any nature (including administrative, managerial, financial, and technical) regardless of medium or characteristics.

Data Item Description is a document that defines the data required from a contractor. It specifically defines the data content, format, and intended use.

Data Standardization and Management applies standards to facilitate data sharing across systems, programs, government agencies, and industry. Data standardization improves the transportability of data, facilitates cost-effective development and re-engineering, and improves the quality, utility, and integrity of FAA information products and resources. The FAA data management program consists of data registration, data standardization, data certification, and lifecycle data management.

Declaration of Operational Readiness occurs when the approving official(s) determines that the solution to a service need has achieved all essential functional and performance requirements and is

fully suitable for operational service.

Declaration of Taking is the document filed by the United States Attorney (Department of Justice) with a court of competent jurisdiction to obtain specified rights, title, or interest in property.

Decommissioning is the formal process within FAA for removing an operational asset from active status. Note that decommissioning and disposal are separate actions; e.g. facilities are decommissioned before disposition occurs. See also "disposal."

Deed is a legal document conveying title to a property.

Demand, as used in the context of service analysis, is the current or projected need for FAA products, services, or capacity based on input from diverse sources such as the aviation community, enterprise architecture, long-range planners, operators and maintainers of the National Airspace System, and other FAA support systems.

Deploy the Solution includes all activities necessary to install a new capability and bring into operational use. For NAS products and services, this may include transportation and delivery of equipment, installation and checkout, contractor acceptance and inspection, integration with other operational assets, field familiarization, declaration of initial operational capability, joint acceptance and inspection, dual operations, declaration of operational readiness, and removal and disposal of obsolete equipment. For operations-funded mission-support, non-developmental, commercially available, and solutions involving procedural or process changes, deployment activities may be much simpler. In all cases, deployment must include the activities necessary to achieve an operationally effective (meets user needs) and suitable (essential logistics support) solution.

Deployment is the transformation of a mechanical, electrical, or computer product from a packaged form to an operational state. It consists of all activities necessary to make a product or service available for use.

Deployment Phase is the fourth stage of the Operations Support Pathway. It is when the acquiring organization works with key stakeholders to implement the new service or capability and fulfill the requirements in the Functional and Performance Requirements document approved at the Investment Commitment Decision.

Deployment Planning is the process that prepares for and assesses whether a solution is suitable for deployment into its operational environment. Deployment planning is part of a continuous in-service review process that begins early in the lifecycle management process. All investment initiatives undergo some degree of deployment planning to ensure key aspects of fielding a new capability are planned and implemented, as well as to ensure the deployment does not create a critical deficiency in the operational environment.

Design to Cost is a concept that establishes cost elements as management goals to best balance lifecycle cost, acceptable performance, and schedule. Under this concept, cost is a design constraint during the design, development, and production phases, and a management discipline throughout the product lifecycle.

Development Testing determines whether a product or service has achieved its specified technical and performance requirements. Another objective is to verify the product or service is fully integrated and stable. The development contractor performs development testing witnessed by the FAA. Test activities can be conducted at the contractor's facility, the William J. Hughes Technical Center, or FAA field sites. The government may conduct development testing if the government develops the solution.

Developmental Assurance Program for Software is the combination of quality assurance with software development activity to ensure the product meets predetermined quality specifications and software development methodology, procedure, and process conform to agency standards.

DID Library is a database located on the FAA Acquisition System Toolset that contains standard, tailored data item descriptions organized within specific functional disciplines for use by service organizations and program offices when preparing screening information requests and FAA contracts.

Direct-work Maintenance Staffing refers to the direct person-hours required to operate, maintain, and support a product for the duration of its lifecycle.

Disapproval is the conclusion by the appropriate authority that an item submitted for approval is either not complete or is not suitable or its intended use.

Discriminating Criteria/Key Discriminators, as used in procurement, are those factors expected to be especially important, significant, and critical in the ultimate source selection decision.

Disposal is the process of removing and disposing of systems, equipment, services, products, facilities, real property, and resources no longer needed for operational use. Within the FAA, disposal is the responsibility of the service organization or program office installing a new capability. Disposal includes restoration of sites, disposal of government property, recovery of precious metals, and cannibalization of useful assets.

Dispute as used herein, means a contract dispute or claim.

Dispute Resolution Officer is a licensed legal practitioner who is a member of the Office of Dispute Resolution, and who has authority to conduct proceedings, which, if agreed to by the parties and concurred in by the FAA Administrator, result in binding decisions on the parties.

(FAA) Disputes Resolution System is a process established within the FAA for resolving corporate protests of FAA screening information requests and contract awards, as well as contract disputes.

Dominant Business is a controlling or major influence in a market in which a number of businesses are engaged. Factors such as business volume; number of employees; financial resources; competitiveness; ownership or control of materials, processes, patents, and license agreements; facilities; sales territory; and nature of the business must be considered.

Dual Operations is the simultaneous operation of legacy and replacement assets at an operational

site to ensure uninterrupted service during the transition from an existing capability to a new capability.

Earned Value Management is a management tool to provide timely, accurate, auditable, actionable, and reliable cost, schedule and technical performance information for an investment program to both internal management and external stakeholders. Additionally, it provides early warning measures of variances in program cost, schedule, and technical performance as the basis for corrective management action.

Earned Value Management Determination is the request a service organization or program office submits as the basis for a determination by the Joint Resources Council concerning the application of earned value management to developmental activity by either a contractor or government institution.

Earned Value Management Focal Point is the agency representative who coordinates earned value management activities within the FAA and with other government agencies, industry, and professional associations.

Earned Value Management System is the management process applied to developmental activity to monitor variances in program cost and schedule based on the comparison and reporting of worked performed with work planned.

Easement is a type of contract that grants the right to use the real property of another for a specific purpose. The easement is itself a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. Easements can be granted for a specific term or in perpetuity. The purposes and conditions upon which the agency may grant easements are limited by law.

Economically Disadvantaged Individuals means disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not disadvantaged.

Eminent Domain- The inherent right of the Government to take private property for public use. See also “Condemnation” and “Inverse Condemnation”.

End Product is a system, service, facility, or operational change intended for delivery to a customer or end user.

Enterprise Architecture Products include the operational view family (business) and systems view family (engineering). Operational view family components represent a set of graphical and textual products that describe the changes in tasks and activities, operational elements, and information exchanges required to accomplish NAS service delivery or Air Traffic Organization (ATO) business processes. The business process and application views present this information in the Federal Enterprise Architecture Framework (FEAF) with the data architecture providing the terms used to describe information exchanges between processes. System-view family components represent a set

of graphical and textual products that describe systems and interfaces that directly or indirectly support, communicate, or facilitate NAS service delivery or ATO business processes. In the FEAF, the application view describes interfaces between applications.

Enterprise Architecture Roadmaps are the transition plans for moving the current "as is" architecture to the future "to be" state. Within the FAA, there are enterprise architecture roadmaps for the National Airspace System and for Mission Support Information Technology business systems.

Environmental, Occupational Safety & Health, and Energy Considerations are the federal, state, and local regulations, and FAA orders, specifications, and standards pertaining to environmental and occupational safety and health requirements, and energy and water requirements with which FAA investment programs must comply.

Environmental Screening- refers to the act of conducting Environmental Due Diligence as described in FAA Order 1050.19C, or as amended.

Evolutionary Product Development is the process of limiting the design challenge for a product development cycle by deferring risky technology and immature requirements to later updates. The objective is to minimize risk and facilitate the achievement of cost, schedule, and performance goals, while simultaneously achieving the insertion of low-risk new technology.

Excess Property is real or personal property under the control of the agency, which is not required for the agency's needs, and the discharge of its responsibilities.

Execution Plan is the document that records cost, schedule, and performance parameters for investment programs that do not require an acquisition program baseline (i.e., facilities and variable quantity). The execution plan defines those program cost, schedule, and performance parameters that are to be reported and tracked monthly.

FAA Acquisition System Toolset is the official record of the acquisition management system. It is an information system available via the Internet at http://fast.faa.gov. FAST contains official acquisition management policy and guidance, process flowcharts, contract clauses, document templates and instructions, checklists, practices, and other job-related aids for use by the workforce.

FAA Enterprise Architecture defines the operational and technical framework for all capital assets of the agency. It is comprised of the NAS Enterprise Architecture and the Mission Support Enterprise Architecture. The NAS Enterprise Architecture is a repository of architectural views that describe the current (as-is), mid-term, and far-term (to-be) perspectives of the NAS architecture, as well as a strategic roadmap for transitioning from the "as is" to the "to be" architecture. The Mission Support Enterprise Architecture contains the information technology assets and investments needed by agency for business planning and administration. It includes all mission-support applications, systems, policies, and procedures not directly involved in air traffic control.

FAA Enterprise Architecture Board is the group that reviews, assesses, and submits for approval to the Joint Resources Council enterprise architecture products, policy, guidance, and processes. It ensures the FAA enterprise architecture reflects the current and target states of agency operations,

standards, systems, and infrastructure.

FAA Enterprise Architecture Board Secretariat is the official who coordinates FEAB meeting dates and agenda and arranges logistics for the meetings. The Secretariat also analyzes FEAB processes and recommends opportunities for improvement; and maintains the official repository for FEAB decision documents, meeting minutes, and assigned action items.

FAA Lifecycle Management Process is the Capital Investment Planning and Control Process of the FAA. Service analysis and investment analysis constitute the select process. Solution implementation is the control process. In-service management is the evaluation process.

FAA Strategic Plan links the long-range vision and goals of the agency directly to the service needs of the aviation community. It also defines top-level performance measures and multi-year performance targets to satisfy those service needs.

Facility is a building, structure, or other aspect, including utility systems, pavements, and land.

Facilities & Equipment is the Congressional appropriation designated for purchase or construction of facilities, systems, hardware and software, services, and other assets necessary to fulfill the mission responsibilities of the agency.

Facility Initiative is an acquisition category associated with new construction, replacement, modernization, repair, remediation, lease, or disposal of manned and unmanned FAA facilities and infrastructure.

Facility Milestones are standard milestones the FAA uses when planning, funding, obtaining, and deploying facilities. They are located on the decisions/reviews/milestones page in the FAA Acquisition System Toolset.

F&E-Funded Capital Assets are those investment initiatives subject to the policies and practices defined in the FAA lifecycle management process. They include any investment initiative or program seeking resources from the facilities and equipment appropriation.

Fair Market Value (FMV) is the price an asset would sell for on the open market when the parties involved are aware of all the facts, are acting in their own interest, are free of any pressure to buy or sell, and have ample time to make the decision.

Fee is compensation paid to a consultant for professional services rendered or profit included in a cost plus fee type contract for work performed under the contract.

Field Familiarization is the process by which the operational workforce becomes fully competent to operate and maintain a newly deployed asset or service. Field familiarization occurs at every deployment site and is a condition for declaring full operational capability.

Final Investment Analysis is the phase of the FAA lifecycle management process during which an investment analysis team develops the implementation strategy for the solution selected by the Joint

Resources Council for implementation, solicits offers to the industry for the solution and evaluates responses, and plans and baselines the investment program in preparation for the final investment decision.

Final Investment Analysis Plan is the document that defines work activities, resources, schedules, roles and responsibilities, and products required to complete final investment analysis. The plan also specifies exit criteria and a planning date for the final investment decision.

Final Investment Decision is the event at which the Joint Resources Council decides whether it will approve, fund, and baseline a proposed investment initiative.

Firm, as defined for architect-engineering services, is any individual, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

Firm Term is the portion of a lease term that is not subject to termination rights and the FAA is contractually committed to rental payments.

Firmware is combination of a hardware device and computer instructions or computer data that reside as read-only software "burned into" the hardware device. Various types of firmware include devices whose software code is erasable or reprogrammable to some degree.

First-level Technical Support comprises maintenance of the National Airspace System infrastructure and includes certifying equipment for performing periodic maintenance, restoration, troubleshooting, and corrective activities.

Fixture is personal property that is so related to real property that a real property interest arises in it (e.g., installed furnace).

(AMS Policy) Flowcharts within the acquisition management system contain descriptions, approving officials, references, templates, and other aids for each activity within a phase of the lifecycle management process. Generic processes assist service organizations and program offices with product planning, development, procurement, production, testing, delivery, and implementation activities of the lifecycle management process. AMS policy flowcharts are found in AMS building blocks on FAST**.**

(Process) Flowcharts exist within the acquisition management system for representative types of investment program (systems and software, facilities, services) and functional disciplines (e.g., human factors, information systems security, configuration management, integrated logistics support). These flowcharts identify actions and activities the service organization or program office may need to execute to achieve projected capability, value, and benefits. Instructions, templates, best practices, good examples, and lessons-learned are attached to many flowchart activities to assist specialists as they plan and execute what make sense for their investment program.

Functional Analysis is the process that transforms an operational need or market opportunity into a product or service description that supports detailed design.

Functional Baseline is the approved documentation describing a product's functional, interoperability, and interface characteristics, as well as the verification required to demonstrate achievement of those characteristics.

Functional and Performance Requirements Artifact is a key document produced for mission-support operations-funded capital investments. It defines the high-level scope and essential characteristics of a mission-support initiative.

Functional Configuration Audit is the formal examination of the "as-tested" functional characteristics of a configuration item. The audit determines whether the item has achieved the requirements specified in its functional baseline documentation and identifies and records any discrepancies.

Functional Portfolio Management is the process that oversees investment packages that cut across service organizations to provide fully integrated functional capability for the National Airspace System. The FAA employs functional portfolio management in such areas as weather, surveillance, communications, automation, and navigation.

Functional Requirements define the functions of a product or service or of their components. Functional requirements drive the application architecture of a product or service, while non-functional requirements drive the technical architecture.

Governance Path is a risk-based classification assigned to a mission-support operations-funded capital investment by the Operations Governance Board. Governance Path A and B investments are lower risk and entail fewer planning requirements, while Governance Path C investments are higher-risk and entail more planning requirements.

Governance Path Readiness Decision is the first decision point of the Operations Support Pathway. The Operations Governance Board assigns a governance path to each initiative and assigns an acquisition readiness team (if applicable).

Government and Market Survey Artifact is a key document produced for mission-support operations-funded Capital initiatives. It provides a checklist of important activities for identifying alternatives and procurement options.

Ground Lease is a lease of land only, on which the tenant usually owns a building or is required to build as specified in the lease.

Hardware Products are material items and their components (e.g., mechanical, electrical, electronic, hydraulic, pneumatic). Hardware products do not include computer software or technical documentation.

Highest and Best Use is an appraisal concept that means “the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.”

Historically Black Colleges and Universities are institutions determined by the U.S. Secretary of

Education to meet the requirements of 34 CFR § 608.2 and listed therein.

Holdover is created when the FAA continues to occupy leased premises beyond the lease term.

Human Factors is a multi-disciplinary effort to generate and apply human performance information to acquire safe, efficient, and effective operational systems.

Human Factors Engineering is the application of information on human physical and psychological characteristics to the design of devices and systems for human use.

Implementation Strategy and Planning Document conveys critical, relevant, and meaningful program planning information to the Joint Resources Council as a basis for investment decision-making. The ISPD integrates all aspects of planning for solution implementation and in-service management of a proposed investment program; e.g., acquisition planning, management and control, schedule, systems engineering, solution development and production, physical and functional integration, integrated logistics support, safety and health, security and privacy, test and evaluation, and deployment.

Independent Government Cost Estimate is an unbiased estimate of what a responsible contractor would propose to perform based solely on the contract specification and statement of work. It is developed by the Government independently of any potential vendors. It is a tool to assist in determining the reasonableness or unreasonableness of vendor proposals.

Independent Operational Assessment is an evaluation of new investments before deployment to verify their operational effectiveness, suitability, and safety by an independent operational assessment organization.

Independent Operational Assessment Readiness Declaration is a declaration in writing by the Vice President of the acquiring organization to the Vice President of the Office of Safety and Technical Training that the solution is ready to enter independent operational assessment. The declaration occurs after completion of all site test activities by the contractor and program management office.

Indian means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs in accordance with 25 U.S.C. § 1452(c) and any "Native" as defined in the Alaska Native Claims Settlement Act (43 U.S.C. § 1601).

Indian Organization means any governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe for the purposes of 25 U.S.C., chapter 17.

Indian-Owned Economic Enterprise means any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership must constitute not less than 51 percent of the enterprise.

Indian Tribe means any Indian tribe, band, group, pueblo, or community, including native villages

and native groups (including corporations organized by Kenai, Juneau, Sitka and Kodiak) as defined in the Alaska Native Claims Settlement Act, which is recognized by the Federal Government as eligible for services from BIA in accordance with 25 U.S.C. § 1452 (c).

Information Other than Certified Cost and Pricing Data refers to pricing data, cost data, and judgmental information necessary to determine a fair and reasonable price and/or to determine realism. Such data may include the identical types of data as certified cost or pricing data, but without the certification. The data may also include any information reasonably required to explain the estimating process, including, but not limited to: judgmental factors applied and mathematical or other methods used in the estimate and the nature and amount of contingencies included in a proposed price.

Information Systems Security refers to the processes and methodologies involved with keeping information confidential, available, and assuring its integrity. It also refers to access controls that prevent unauthorized personnel from entering or accessing an information system.

Information Systems Security Assessment determines: (1) information security risk factors of an investment initiative, (2) information security requirements, (3) a rough cost estimate for achieving information security, and (4) a rough estimate of annual operational benefits gained from implementing security requirements.

Information Systems Security Certification and Authorization certifies that an information system is certified and authorized for deployment. It is an entrance criterion for the in-service decision.

Information Technology is the application of computers to store, study, retrieve, transmit, and manipulate data or information, often in the context of a business or other enterprise.

Information Technology Shared Services Committee is an executive-level group that oversees the development and approval of the agency's mission-support information technology strategy. The committee directs, reviews, and oversees implementation of mission-support information technology projects, and evaluates the operational performance of the information technology shared services function.

Information Technology Research & Development Organization coordinates information technology mission-support investment activity across service organizations to ensure alignment with FAA strategic and performance goals, as well as to eliminate redundant activity, service gaps, and duplicate benefits.

Initial Investment Analysis is the phase within the FAA lifecycle management process during which the most advantageous solution to an approved service need is determined. It involves: (1) a market search to determine industry capability, (2) analysis of various alternative approaches for satisfying agency requirements including preparation of an initial business case, and (3) an affordability assessment to determine what the FAA can afford, all in preparation for the initial investment decision.

Initial Investment Analysis Plan is an artifact completed during the later stages of concept and requirements definition. The plan (1) defines the scope and assumptions of initial investment analysis, (2) describes alternatives and their associated rough lifecycle costs, (3) identifies the planned activities of initial investment analysis and describes how tasks will be accomplished, (4) defines outputs and exit criteria, (5) establishes a schedule for completion, (6) defines roles and responsibilities of participating organizations, and (7) estimates the resources needed to complete the work.

Initial Investment Decision is the event at which the Joint Resources Council decides whether to select a solution for implementation and authorize entry into final investment analysis or to reject or return a proposed investment for further analysis.

Initial Operational Capability occurs when site personnel declare a new capability ready for conditional or limited operational use. This occurs after successful installation and checkout, site acceptance testing, and field familiarization. Initial operational capability requires satisfaction of operational requirements, as well as full logistics support and training for technicians and air traffic specialists.

In-Service Decision is the event at which the decision authority decides whether to accept a product or service for operational use. It occurs during the solution implementation phase of the FAA lifecycle management process. This decision allows deployment activities to begin at each installation site.

In-Service Decision Authority is the official who decides whether to approve a new capability for operational use. The Joint Resources Council designates the in-service decision authority at the final investment decision and may retain authority for the decision.

In-Service Decision Briefing and Action Plan are key artifacts required for the in-service decision. The in-service briefing informs the decision authority concerning status and issues relevant to the in-service decision. The action plan specifies all actions the service organization or program office must complete as a condition of the in-service decision.

In-Service Decision Executive Secretariat is the official who manages the deployment planning process for the Joint Resources Council and administers all activities and artifacts associated with the in-service decision, including preparation of the in-service strategy, briefing, record of decision, and action plan.

In-Service Management Phase is that timeframe in the FAA lifecycle management process extending from the decision to approve a product or service for operational use and continuing until it is retired from service**.**

In-Service Management Planning records the actions and activities the service organization or program office must execute to support the operation and maintenance of deployed assets. It covers such activities as configuration management, preventive and corrective maintenance, training, infrastructure upkeep, and logistics support along with activities to support post implementation reviews and operational analyses.

In-Service Review Checklist is the document the service organization or program office uses to identify and resolve readiness issues before the in-service decision and to obtain concurrence from stakeholder organizations that readiness issues have been or will be resolved.

In-Service Record of Decision is the artifact prepared by the In-Service Executive Secretariat that specifies the decisions and conditions of the in-service decision. It includes as an attachment the plan that specifies all actions the service organization or program office must complete as a condition of the in-service decision.

Integrated Baseline Review is a joint assessment conducted by the program manager and contractor to establish a mutual understanding of the performance measurement baseline for the prime mission contract. This understanding provides the basis for agreement on a plan of action to evaluate the risks and management processes that operate during execution of the contract.

Integrated Logistics Support is the management discipline employed to plan, establish, and maintain a full lifecycle support system for FAA products and services. It applies to the sustainment and disposal of fielded products and services, as well as new investment programs. The objective is to sustain the required level of service to the end user at optimal lifecycle cost to the FAA.

Integrated Program Management Report is a contractually required report prepared by the contractor that contains performance information derived from the contractor's internal management system. The report provides the status of progress on the contract.

Interagency Agreement is a written agreement between the FAA and another Federal agency whereby the FAA agrees to receive from or exchange supplies or services with the other agency, and FAA funds are obligated.

Interested Party is one who:

(1) Prior to the close of a solicitation, is an actual or prospective participant in the procurement, excluding prospective subcontractors; or

(2) After the close of a solicitation, is an actual participant who would be next in line for award under the solicitations scheme if the protest is successful. An actual participant who is not in line for award under the solicitation scheme is ineligible to protest unless that party's complaint alleges specific improper actions or inactions by the agency that caused the party to be other than in line for award. Proposed subcontractors are not eligible to protest.

Where a contract has been awarded prior to the filing of a protest, the awardee may be considered an interested party for purposes of participating in the protest proceedings.

Interface Control Documentation is a drawing or other documentation that depicts physical, functional, and test interface characteristics between two or more related or co-functioning items.

Interface Requirements Document is the artifact that specifies the interface requirements to a product or system. It may describe the inputs and outputs of a single product or system or the interface between two products or systems.

Interfaces are the performance, functional, and physical attributes required to exist at a common boundary.

Interim Payment is a form of contract financing for cost-reimbursement contracts where the FAA pays a contractor periodically during the course of a contract for allowable costs it incurs in the performance of the contract. Interim payments issued during the course of a contract do not include the final payment issued after contract completion.

Intra-agency Agreement is a written agreement between the FAA and Office of the Secretary of Transportation or another Department of Transportation operating administration where the requesting organization agrees to provide or exchange supplies or services with the FAA, and FAA funds are obligated.

Inverse Condemnation is an action brought against the government by a property owner to obtain just compensation for a taking of property effected without a formal exercise of eminent domain. This generally occurs when the Government limits the use of private land, through continued occupancy or otherwise, to the extent that the value of the land is greatly reduced, or where the Government has allowed the public to make use of private land. See also Condemnation, Eminent Domain, and Holdover.

Investment Analysis Readiness Decision determines whether the solution ConOps, preliminary requirements, architecture products and amendments, and preliminary alternatives are sufficiently mature to warrant entry into investment analysis. The Joint Resources Council makes the decision within context of all ongoing and planned investment activities to sustain and improve service delivery. It ensures proposals for new investment are consistent with overall corporate needs and planning.

Investment Analysis Team is a cross-functional team scaled to the size and complexity of a proposed analysis that is responsible for the conduct of investment analysis. Team membership is flexible depending on the needs of the analysis, but typically includes system engineers, technical experts, logistics specialists, specialty engineers, testers, operational subject-matter experts, and business case analysts. Security and regulatory specialists are team members when potential solutions involve facility, asset, personnel, or information security; hazardous materials; emergency operations; or when solutions affect aircraft, airspace, or the public.

Investment Commitment Decision is the final decision point in the Operations Support Pathway. The Operations Governance Board reviews the completed scaled business case and other required artifacts and either approves the initiative to proceed to deployment, recommends revision of planning documents, or recommends that the line of business cancel the initiative.

Investment Increment is a discrete investment activity or program that may provide individual benefits or combine with other investment increments to achieve the benefits of an operational capability.

Investment Initiative is an FAA-sponsored activity to determine the best overall solution to an

approved service need or operational shortfall in an FAA Enterprise Architecture roadmap. The FAA Enterprise Architecture Board authorizes the investment initiative at the concept and requirements readiness decision when it approves entry into concept and requirements definition. The initiative becomes an investment program at the final investment decision if approved, funded, and baselined for implementation by the Joint Resources Council.

Investment Management Plan Artifact is a key document produced for mission-support operations-funded capital investments. It provides a timeline for key milestones and change management activities necessary for successful implementation of a mission-support operations-funded investment**.**

Investment Opportunity is an approach identified during service analysis and strategic planning as a means for improving service delivery or obviating a service shortfall. If approved for further analysis by the FAA Enterprise Architecture Board at the readiness for concept and requirements definition decision, the investment opportunity enters concept and requirements definition and becomes an investment initiative.

Investment Planning occurs throughout the AMS lifecycle management process. During service analysis and strategic planning, investment planning focuses is on prioritizes corporate service needs and shortfalls and deciding when to seek solutions within realistic budgetary constraints. Investment planning during the remainder of the AMS lifecycle management process supports the definition, acquisition, deployment, and lifecycle support of affordable solutions to approved service needs.

Investment Planning and Analysis Office is the organization that leads the preparation of business cases for JRC investment decisions and assists service teams and program offices during service analysis, concept and requirements definition, and investment analysis concerning investment planning and scheduling.

Investment Program is a sponsored, fully funded effort initiated at the final investment decision of the FAA lifecycle management process by the Joint Resources Council in response to a priority agency need. Typically, an investment program is a separate budget line and may have multiple procurements and several projects, all managed within the single program.

Joint Resources Council is the senior investment review board for the FAA responsible for making corporate-level investment decisions based on specified knowledge (decision criteria) the service organization or program office must provide before entry into a decision point. The Joint Resources Council also oversees implementation of FAA investment programs.

JRC Executive Secretariat is the official that supports the FAA Acquisition Executive and manages the investment decision-making process for all F&E-funded investment initiatives.

Just Compensation is full and fair equivalent compensation for the loss sustained by a taking for public use.

Key Site is the location at which a new capital asset or service is first tested and evaluated for

operational use. This typically entails demonstration that the new asset or service satisfies functional and performance requirements in the program requirements document, and is fully supported and operable by the FAA workforce.

Knowledge-Based Decision-Making involves the use of agreed upon decision criteria and knowledge to facilitate the most suitable outcome for specific decisions.

Legal Coordination with agency counsel is required on competitive acquisitions with an estimated total value greater than $100,000 and on non-competitive acquisitions with an estimated total value greater than $10,000. FAA counsel also advises service organizations and program offices regarding legal issues and represents them in litigation and other legal matters.

Lifecycle is the entire spectrum of activity for an FAA capital asset starting with the identification of service need and extending through design, development, production or construction, deployment, operational use, sustaining support, and retirement and disposal.

Lifecycle Acquisition Management Process is a series of knowledge-gathering management phases and decision points that comprise the lifecycle of FAA products and services. It consists of seven phases (research for service analysis, service analysis and strategic planning, concept and requirements definition, initial investment analysis, final investment analysis, solution implementation, and in-service management) and five decision points (readiness for concept and requirements definition, readiness for investment analysis, initial investment decision, final investment decision, and in-service decision).

Lifecycle Cost is the total cost to the FAA of acquiring, operating, maintaining, supporting, and disposing of systems or services over their service life. Lifecycle cost includes total investment costs, development costs, and operational costs and involves all appropriations (i.e., Research, Engineering, and Development; Facilities and Equipment, and Operations).

Line of Business is a term used to characterize the major organizations of the FAA having roles and responsibilities in the FAA Acquisition Management System. The lines of business within FAA are: Air Traffic Organization; Aviation Safety; Airports; Commercial Space Transportation; and Security and Hazardous Materials Safety.

Line of Business Portfolio Management requires each line of business and staff office to oversee, coordinate, and integrate the service activity of offices within their organizations to achieve the highest possible overall contribution to agency strategic goals and targets.

Logistics Manager is the service team or program office member who plans, establishes, and maintains an integrated support package for the lifecycle of FAA products and services that are the responsibility of the team or office.

Maintenance Planning is the process conducted to determine and plan hardware and software maintenance concepts and packages for the lifecycle of a product or service.

Maintenance Support Facility consists of the permanent or semi-permanent real property assets

required to support a product over its service life. Associated management activity includes studies to define types of facilities or facility improvements, locations, space needs, environmental requirements, real estate requirements, and equipment.

Market Research consists of collecting and analyzing information about vendor capabilities to satisfy FAA requirements.

Market Survey refers to any method used to survey industry to obtain information and comments, and to determine competition, capabilities, and estimate costs. For real property procurements, it refers to the process of gathering information about properties and visiting specific properties in the market to determine whether the property is suitable for FAA's needs and if the properties are competitively available. In the context of the lifecycle management process, market surveys are part of Concept and Requirements Definition, and Investment Analysis. During these lifecycle phases, market surveys provide information about the range of alternatives and market capabilities, risk, and cost of potential solutions to mission needs.

Measurement and Analysis is a management and control process applied throughout the lifecycle of an investment initiative or operational asset to assess progress, forecast performance, determine status, and define corrective action. Measurement and analysis provides information and visibility toward accomplishing program goals and supporting management information needs.

Measures (or Metrics) are measurements taken over time to monitor, assess, and communicate vital information about the results of a program or activity. Measures are generally quantitative, but can be qualitative.

Memorandum of Agreement is a written document executed by the parties, which creates a legally binding commitment and may require the obligation of funds. However, when the FAA acquires services, equipment, personnel, or facilities from a contractor for the direct benefit or use of the FAA, the acquiring organization must use a procurement contract.

Memorandum of Understanding is a written document executed by the parties that establishes policies or procedures of mutual concern. It does not require either party to obligate funds and does not create a legally binding commitment.

Mike Monroney Aeronautical Center houses the FAA Logistics Center, FAA Academy, and Enterprise Services Center. The Logistics Center establishes and maintains supply support for NAS systems. The Academy provides learning solutions for the FAA and global community. The Enterprise Services Center provides an array of information technology services and financial management for a wide range of federal agencies.

Minority Educational Institutions are institutions verified by the U.S. Secretary of Education to meet the criteria set forth in 34 CFR § 637.4. Also includes Hispanic-serving institutions as defined by 20 U.S.C. § 1059c (b)(1).

Mission-Support Capital Investments are agency business-system initiatives and other non-NAS investment opportunities included in the Mission Support Enterprise Architecture, as well other

investment opportunities not within any FAA architecture but deemed within scope of the Operations Governance Board.

Mission-Support OPS-Funded Process establishes policy and guidance for all aspects of acquisition management for the procurement of mission-support operations-funded investment initiatives.

Multi-Year Contracts are contracts covering more than one year but not in excess of five years of requirements. Multi-year contracts cover total contract quantities and annual quantities for a particular level and type of funding, as displayed in a five-year development plan. Each program year is annually budgeted and funded. At the time of award, funds need only to have been appropriated for the first year. Multi-year contracts protect the contractor against loss resulting from cancellation by contract provisions, which allows reimbursement of costs included in the cancellation ceiling.

Multi-Year Funding refers to Congressional authorization and appropriation covering more than one fiscal year. It permits the Executive Branch more than one year to obligate the funds. The term does not apply to two-year or three-year funds that cover only one fiscal year requirement.

NAS Change Proposal is a proposed change to a configuration management baseline of a National Airspace System asset submitted to the appropriate configuration control board using the approved NCP form.

NAS Concept of Operations is a controlled document that describes and specifies the operational capabilities of National Airspace System over time.

NAS Configuration Control Board is the body that ensures traceability of all NAS configuration items to specific service teams and program offices. The Board also controls changes to NAS systems and associated documentation not assigned to a lower-level configuration control board or not identified for control by the Joint Resources Council.

NAS ConOps Change Development and Decomposition Process is the means by which (1) the agency modifies the NAS Concept of Operations to incorporate new service concepts, (2) the NextGen Management Board and Joint Resources Council approve new operational capabilities, and (3) new capabilities are decomposed into NAS operational requirements, functional and performance requirements, and investment increments.

NAS Operational Requirements Document records National Airspace System operational requirements decomposed from the narrative of operational improvements and operational sustainments in the NAS Concept of Operations.

NAS Requirements Document is the top-level source for programs to use when deriving their respective requirements for the National Airspace System. The document defines requirements without constraining technical design alternatives, while also identifying global design principles necessary to evolve the NAS. The document supports National Airspace System design, enterprise architecture engineering, and acquisition activities for new and upgraded systems, as well as routine

changes to operational equipment.

NAS Segment Implementation Portfolio Management is the process that oversees investment portfolios that cut across service organizations to provide fully integrated operational capabilities for the National Airspace System. Examples include precision-based navigation and improved runway operations. More than one service organization may be involved with implementation and in-service management of these investment packages.

NAS Systems Engineering Organization works with service organizations and program offices in the conduct of systems engineering activities throughout the AMS lifecycle management process. The organization also leads corporate-level service analysis for the National Airspace System, and manages the NAS Architecture.

NAS Technical Documentation is the set of documents that describe technical requirements of the National Airspace System.

National Airspace System is the airspace, navigation facilities, and airports of the United States along with their associated information, services, rules, regulations, policies, procedures, personnel and equipment. It includes components shared jointly with the military.

National Aviation Research Plan describes the FAA research, engineering, and development portfolio. This portfolio focuses RE&D investments on the operational needs of the agency and flying public and aligns with national priorities.

Need Assessment is the first phase of the Operations Support Pathway. During this phase, the line of business submits an operations support pathway intake form to the Operations Governance Secretariat who uses it to conduct a risk assessment and make a Governance Path recommendation to the Operations Governance Board.

Neutral means an impartial third party, who serves as a mediator, fact finder, or arbitrator, or otherwise functions to assist parties resolve issues in controversy. A neutral person may be a permanent or temporary officer or employee of the federal government or any other individual who is acceptable to the parties. A neutral person must have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless the neutral person fully discloses such interest in writing to all parties and all parties agree that the neutral person may serve.

New Investment is an acquisition category associated with the research, design, development, and implementation of a new FAA product, system, or service. A new investment typically introduces new capabilities or provides new or improved functionality.

NextGen Implementation Plan is an executive-level outline of activities to move the National Airspace System from its current state to the future of air traffic control. The FAA publishes the plan annually to reflect prior-year accomplishments and new commitments.

NextGen Lifecycle Integration Organization coordinates service analysis activity across service organizations to ensure alignment with FAA strategic and performance goals and to eliminate

redundant activity, duplicate benefits, service gaps, and service overlap. The organization leads planning and activities for concept and requirements definition, and develops, maintains, communicates, and supports enterprise-wide planning artifacts that describe the lifecycle of the National Airspace System.

NextGen Management Board is an executive-level group that oversees implementation of NextGen investment initiatives. The Board resolves policy issues necessary for successful implementation of NextGen capabilities, and approves updates to the NAS Concept of Operations and NAS Segment Implementation Plan.

NextGen Organization manages planning and execution of research activity within the FAA, as well as coordinate planning and development of the next generation air traffic control system.

No-Year Funding refers to Congressional funding that does not require obligation in any specific year or years.

Non-Developmental Item is an item previously developed for use by federal, state, local, or foreign government and for which no further development is required.

Non-Materiel is an acquisition category that encompasses engineering studies and analyses, development of procedures, airspace changes, standards for avionics development, process reengineering, or other types of intellectual property development. These activities are not stand-alone investment initiatives when they are an element of and included within the acquisition of a product, system, or service.

Non-Materiel Solution is a solution to an FAA capability shortfall identified during concept and requirements definition or investment analysis that is operationally acceptable to users, requires no development or production activity, and is obtainable within approved budgets and baselines. Non-materiel solutions typically involve regulatory change, process re-engineering, training, procedural change, or transfer of operational assets between sites.

Nonrecurring Costs are those production costs generally incurred on a one-time basis. They include the cost of such items as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, pre-production engineering, initial spoilage and rework, and specialized workforce training.

Obtain the Solution is a term that includes all tasks and activities necessary to procure and deploy the key products or services of an investment program to achieve projected benefits within approved cost and schedule baselines. The term includes such activities as contract award, contract administration, program management, resource management, risk management, systems engineering, logistics support, test and evaluation, and site acquisition and adaptation. It may involve developing operational procedures and standards; obtaining physical, personnel, and information security; modifying the physical infrastructure; and coordinating collateral action by the aviation industry.

(FAA) Office of Dispute Resolution for Acquisition is an independent organization within the

FAA reporting to the FAA Chief Counsel staffed with dispute resolution officers with the authority to adjudicate contract disputes between government officials and commercial organizations or individuals.

On-Airport Memorandum of Agreement (MOA) refers to a MOA between the FAA and an Airport Sponsor that has accepted Airport Improvement Program (AIP) funding.

Operations Governance Board is the executive body that reviews, approves, oversees, and informs the Joint Resources Council and other agency executive boards and organizations concerning mission-support operations-funded capital investments.

Operations Governance Board Secretariat manages the mission-support operations-funded process in support of the Operations Governance Board. The Secretariat receives and reviews initial intake forms; conducts preliminary reviews to recommend a governance path to the OGB; coordinates meeting dates, agenda, and logistics; and maintains the official repository of OGB decision documents, records of decision, meeting minutes, and action items.

OMB Information Technology Dashboard is a database that provides detailed information on major information technology investment spending at federal agencies, including ratings from the Chief Information Officers that reflect the level of risk facing each agency's investments.

OMB Major Information Technology Business Case describes the justification, planning, and implementation of an individual capital asset within the information technology investment portfolio. The business case serves as a key artifact of the agency's enterprise architecture and capital planning investment control process.

Operation and Retirement is the fifth and final phase of the Operations Support Pathway. It starts after a product or service begins operational use and continues for as long as the product or service is in use. It ends when the operational asset is retired from use.

Operational Analysis is the process by which the FAA evaluates the ability of in-service assets to provide the services needed by users and customers. Operational analysis consists of gathering and analyzing reliability, maintainability, and availability data; managing supportability information to determine whether an operational asset can continue to provide the expected service for its intended life; monitoring cost data to ensure actual support costs are in line with planned costs; and managing asset viability against stakeholder needs.

Operational Assets are those assets used in the conduct of operations by the FAA. Examples include the systems, procedures, information, facilities, data, and infrastructure used to provide air traffic services, as well as all mission-support and business assets necessary to support the day-to-day operation of the agency.

Operational Baseline is the approved technical documentation that defines and represents installed operational hardware and software.

Operational Capability is a grouping of operational improvements and operational sustainments

necessary to achieve specific service outcomes and benefits.

Operational Capability Business Case defines the rough costs and benefits of a proposed operational capability. It is the key decision document for establishing a new operational capability.

Operational Capability Portfolio is the array of investment increments which when deployed and integrated will achieve the performance and functionality specified for the operational capability. The NextGen Management Board establishes operational capability portfolios to achieve priority NAS performance and operational goals subject to concurrence by the Joint Resources Council.

Operational Capability Portfolio Manager is the individual responsible for successful implementation and deployment of an operational capability and the achievement of associated performance goals and benefits.

Operational Effectiveness measures how well a deployed solution satisfies its intended service need and performance requirements.

Operational Improvement is a change to FAA operational assets that improves one or more national airspace services.

Operational Readiness refers to the condition whereby local site personnel have demonstrated the ability to operate and maintain a newly fielded capability in the National Airspace System fully.

Operational Readiness Date is when site operational personnel are satisfied that a fielded solution can support full and sustained air traffic operations. The milestone occurs after joint acceptance and inspection when the approving site official signs the facility log designating the new solution as the primary means for air transportation operations. Legacy assets usually remain powered on in backup mode for approximately 30 days and then removed.

Operational Requirements are those statements that identify the essential capabilities, associated requirements, performance measures, and the process or series of actions needed to achieve new service capabilities or to address service deficiencies, evolving threats, emerging technologies, or cost improvements.

Operational Suitability is the degree to which a new product or service is ready for operational use with consideration given to the following factors: reliability, availability, compatibility, transportability, interoperability, usage rates, maintainability, safety, human factors, supportability, and logistics.

Operational Sustainment is a discrete activity to sustain the operational use of one or more current NAS services.

Operational Test determines whether a new or modified product or service is operationally effective and suitable for use in the National Airspace System and whether the existing infrastructure is ready to accept the product or service.

Operations and Maintenance Appropriation is one-year funding used primarily for operating and

maintaining fielded assets in a state of readiness including the following: personnel salaries, training, repair of facilities and equipment, travel and transportation, procurement of services, supplies, equipment, communications, recruiting, and depot maintenance.

Operations Governance Board is the oversight authority for mission-support operations-funded capital investments and the Operations Support Pathway process.

Operations Support Pathway is the process followed by mission-support operations-funded capital investments to document the investment rationale, produce the required artifacts, and achieve an Operations Governance Board investment decision.

Operations Support Pathway Intake Form is the initial document produced for mission-support operations-funded capital investments. It includes basic program information. The acquiring organization submits the form to the Investment Management Process Division (AAP-200) and OGB Secretariat at least 21 days before the commitment of funding to any contract, task order, or inter-agency agreement in support of the proposed project.

Option(s) is a unilateral contractual right through which the FAA may, within a specified time, choose to purchase additional quantities of supplies or services or extend the term of a contract.

Other Transaction, as referenced in Public Law 104-264, October 9, 1996, is a transaction that does not fall into the category of procurement contracts, grants, or cooperative agreements.

Outgrant refers to grant of interest or right to allow secondary use of FAA controlled land or space by either another Government Entity ("Outgrant Permit") or third party ("Outgrant License").

Owners within context of the Air Traffic Organization are the President, Congress, flying public and American taxpayer. For real property transactions, the term "Owners" refers to the actual owner of record for any real property.

Packaging, Handling, Storage, and Transportation are the resources, processes, procedures, design considerations, and methods to ensure all subsystems, equipment, and support items are preserved, packaged, handled, and transported properly. Included are environmental considerations and equipment preservation requirements for short and long-term storage and transportability.

Performance is a quantitative measure characterizing a physical or functional attribute relating to the execution of an operation or function. Performance attributes include quantity (how many or how much), quality (how well), coverage (how much area, how far), timeliness (how responsive, how frequent), and readiness (availability, mission/operational readiness). Performance is an attribute for all systems, people, products, and processes including those for development, production, verification, deployment, operations, support, training, and disposal. Supportability parameters, manufacturing process variability, and reliability are all performance measures.

Performance Measurement Baseline is a time-phased resource plan against which the service organization or program office measures the accomplishment of authorized work. The baseline

includes a schedule of all required work, the budgeted cost for this work, and the performance parameters critical to meeting the service need the investment program is seeking to satisfy.

Permit is a grant of temporary use of a real property interest, similar to a license. A permit, as opposed to a license, is used between Federal Entities.

Personal Property is a class of property that can include any asset other than real property.

Personally Identifiable Information is information that an entity can use on its own or with other information to identify, contact, or locate a single person, or to identify an individual in context.

Personnel Security consists of the standards and procedures used to determine and document that the employment or retention in employment of an individual will promote the efficiency of the service and is clearly consistent with the interests of national security.

Physical Configuration Audit is the formal examination of the "as-built" configuration of a configuration item against its technical documentation to establish or verify the product baseline. The physical configuration audit is complete when the service team or program office corrects any discrepancies resulting from the audit.

Physical Security is the protection of personnel, hardware, software, networks, and data from physical actions and events that could cause serious loss or damage to an enterprise, agency, or institution. This includes protection from fire, flood, natural disasters, burglary, theft, vandalism, and terrorism.

Portfolio-Level Agreement defines the objectives, scope, schedule, deliverables, measures of success, and resources required for completion of a portfolio of projects.

Portfolio Management is the centralized management of one or more portfolios of investments that enable executive management to meet organizational goals and objectives through efficient decision-making on portfolios, programs, and operations

Portfolio Management Criteria are standard criteria used within the FAA for selecting, controlling, and evaluating investment portfolios (see AMS Section 1.2.4.1.2 Portfolio Management Criteria)

Portfolio Manager is the individual responsible for management and oversight of an investment portfolio designed to achieve specific operational capabilities.

Post Implementation Review is a review conducted at an early deployment site to ensure user needs are satisfied, identify any systemic problems that must be corrected, and determine whether cost, schedule, and benefit objectives are being achieved.

Post Implementation Review Quality Officer is the official responsible for working with service organizations and program offices when planning, conducting, and reporting the results of post-implementation reviews on designated operational assets.

Preplanned Product Improvement is a planned future improvement to a developmental asset that enhances the future application of the projected technology. It includes improvements to operational assets that go beyond the current performance envelope to achieve a needed operational capability.

Prescreening is the evaluation of case files for impacts on safety, air traffic services, other intangible benefits, as well as cost/benefit implications, to determine whether the acquiring organization should implement a proposed change.

Price equals cost and any fee or profit involved in the procurement of a product or service.

Primary Engineer or Principal Consultant is the individual held responsible for the overall performance of a service, including what others accomplish under separate or special service contracts.

Procurement Strategy Meeting is a meeting of organizations having an inherent interest in a contemplated procurement. The purpose is to reach a consensus on the course of an acquisition and to obtain the necessary approvals to proceed.

Procurement Team is the contracting officer, legal counsel, program officials, and other supporting staff responsible for the successful completion of a specific procurement.

Product Baseline is approved documentation describing all the necessary functional and physical characteristics of a configuration item and the selected functional and physical characteristics designated for production acceptance testing. The product baseline of a configuration item may also include the actual equipment and software.

Program Decision-making within the acquisition management system requires the corporate-level decision-makers to establish and fund investment programs and service organizations or program offices to implement and manage them.

Product Demonstration Decision is the event that determines whether product design is stable and whether it satisfies all contract requirements.

Product Team or Service Team is a chartered group of professionals with the mission, resources, leadership, and cross-functional membership necessary to execute an assigned element of a service organization’s mission.

Production Decision is the event that determines whether a supplier can produce a product that meets contract cost, schedule, and quality targets.

Program Management Plan defines how the service organization or program office will execute the implementation strategy approved by the Joint Resources Council at the final investment decision. The intent is to ensure the acquiring organization understands and plans the full scope of the implementation effort including agreements with key supporting organizations (e.g., logistics, test, information security, safety, systems engineering) that will provide resources or otherwise contribute to successful program implementation.

Program Requirements Document establishes the operational framework and top-level performance and functional requirements that must be satisfied by the solution to a service need. The document is first prepared in the concept and requirements definition phase of the AMS lifecycle management process and finalized before the final investment decision.

Program Work Breakdown Structure is a common framework containing uniform work activity definitions for use by the acquisition management workforce when planning program implementation activities and estimating associated costs. Work activity associated with each investment program must define, obtain, and support over the service life the air traffic control and other services specified in the program requirements document and needed by the aviation industry and flying public.

Protest is a written, timely objection submitted by a protester regarding an FAA screening information request or contract award.

Protester is a prospective offeror whose direct economic interest would be affected by the award or failure to award an FAA contract, or an actual offeror with a reasonable chance to receive award of an FAA contract.

Public Benefit Discount Conveyance is a method of disposal of Government real property by which state or local Government entities may obtain property at less than fair market value.

Quality Assurance is the systematic monitoring and evaluation of the various aspects of a product, service, or facility to ensure that program outputs satisfy quality requirements.

Rational Basis consists of documented facts that are: (1) objective and verifiable (not unreasonable, capricious, or arbitrary), (2) understandable to a reasonable person, and (3) supported by substantial evidence that results in a logical conclusion.

Real Estate Contracting Officer is a trained and warranted official who contracts for real property within the FAA.

Real Estate Management System is the data repository for all real property assets owned or leased by the FAA.

Real Property is defined as "land, and generally whatever is erected upon or affixed to land, e.g. building. Also rights issuing out of, annexed to, exercisable within or about the land."

Realism refers to the determination that a proposed price is not so low that contract performance is put at risk from either a technical or cost perspective. Realism analysis determines whether proposed costs and/or prices are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the various elements of the offeror's technical proposal. Realism analysis may be performed as cost realism, reviewing each element of cost, or price realism where only the price is reviewed in terms of potential performance risk.

Real Property Council oversees the governance process to support appropriate oversight and

transparency of FAA's real property portfolio and real property acquisitions.

Reasonableness is a price that, in its nature and amount, does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness is the same as a "fair and reasonable" price.

Record Drawings are drawings submitted by a contractor, or subcontractor at any tier, to show the construction of a particular structure or work as actually completed under the contract.

Recording is the act of entering or recording documents affecting or conveying interest in real estate in the recorder's office established in each county.

Recurring Costs are production costs that vary with the quantity of the output or product, such as labor and materials.

Release is the designation by the originating activity that an appropriate authority approved a document or software version that is now subject to configuration change management procedures.

Requirements specify the conditions or capabilities the agency needs or wants. They form the basis for a contract, standard, specification, or other formally imposed document.

Research and Development Appropriation are the funds provided by the Congress to support designated and approved research, engineering, and development work by the FAA.

Research, Engineering, and Development Advisory Committee coordinates with the lines of business to develop the FAA RE&D portfolio each year. It also reviews status of the non-NextGen-funded portion of the RE&D portfolio each year.

Research, Engineering, and Development Executive Board is the group that develops the RE&D portfolio each year using strategic planning in the National Aviation Research Plan as a guide. The National Aviation Research Plan links FAA research activities to broader strategic planning in the NAS ConOps, NextGen Implementation Plan, NAS Architecture, and Joint Planning Development Office.

Research, Engineering, and Development Portfolio is the group of projects developed each year by the RE&D Executive Board and reviewed by the RE&D Advisory Committee proposed for funding and execution. The portfolio consists of systematic studies to gain knowledge or understanding of concepts, products, or procedures that could potentially benefit the aviation community such as research related to materials and human factors.

Research, Engineering, and Development Process governs selection and execution of the RE&D portfolio. Research activities within the portfolio inform the NAS enterprise architecture and concept maturity and technology development activities, but do not lead directly to an investment initiative**.**

Reliability, Maintainability, and Availability are three attributes that collectively affect both the utility and the lifecycle cost of a product or system. Reliability is the probability of failure-free

performance of an item over a specified timeframe. Maintainability is the ability to perform a successful repair action within a given time. Availability is the quality of being ready for use.

Research for Service Analysis contributes to early phases of the AMS lifecycle management process. It consists primarily of (1) research, engineering, and development activity to gain knowledge or understanding of concepts, products, or procedures that could potentially benefit the aviation community, and (2) concept maturity and technology development directed toward the production of useful materials, devices, systems, and methods, as well as advance the maturity of new concepts.

Resources refer to a stock or supply of money, materials, staff, and other assets that a person or organization can use to function effectively.

Right of Entry is a form of license, typically granted to perform surveys and/or exploration work prior to acquisition or lease of land.

Right of Way is the right given by one landowner to another to pass over the land, construct a roadway or use as a pathway, without actually transferring ownership.

Risk Management Process consists of activities that identify, classify, mitigate, monitor, and manage potential risks to minimize the negative impact they may have on an organization or operation.

(FAA) Safety Management System is a mandatory risk management process that program offices use throughout the AMS lifecycle to assess, define, and manage safety risk in the National Airspace System.

Safety Risk Management is the assessment of safety risk to the National Airspace System, including documentation of changes and defining strategies for monitoring the safety risk associated with changes to or replacement of existing NAS systems.

Safety Risk Management Guidance for System Acquisitions contains detailed guidance on how to conduct required safety analyses for system acquisitions that potentially affect safety risk in the National Airspace System when fielded.

Scaled Business Case Artifact is a key document produced for mission-support operations-funded capital investments. The artifact summarizes the business case analysis completed during the Operations Support Pathway process and includes a lifecycle cost estimate. The Operations Governance Board makes an investment decision based, in large part, on the strength and completeness of the scaled business case.

Screening is the process of evaluating submittals from offerors to determine (1) which offerors/products are qualified to meet a specific type of supply, (2) which offerors are most likely to receive award, or (3) which offerors provide the best value to the FAA.

Screening Decision is the narrowing of the number of offerors participating in the source selection

process to only those offerors most likely to receive an award.

Screening Information Request is any request made by the FAA for documentation, information, or offer for the purpose of determining which offeror provides the best value solution for a particular procurement.

Second-level Engineering Support provides engineering support of the National Airspace System infrastructure and includes defining solution performance standards, developing and publishing procedures, designing solution improvements, and providing support to first-level technical support personnel.

Security Authorization is the process that assesses fielded products and services against mandatory security requirements as a basis for receiving a successful in-service decision.

Security Risk Management is the process whereby service organizations and program offices identify and reduce to acceptable levels all threats and vulnerabilities that could result in injury to personnel, loss or destruction of critical assets, or disruption of FAA information systems. Security risk management applies to all agency investments including mission-critical NAS operational systems and mission-support and administrative systems.

Seismic Safety Legislation mandates that Federal agencies follow national and local seismic building codes, whichever provides the greatest margin of safety, when constructing new buildings or modifying existing buildings.

Selection Decision is the determination to make an award by the source selection official to the offeror providing best value to the FAA.

Senior Investment Review Board is the group of top-level managers within the FAA that makes corporate-level resource decisions, including authorization and funding for investment programs and changes to the enterprise architecture. The board also oversees execution of agency investment programs and authorizes changes in scope and / or funding when cost, schedule, or performance baselines cannot be achieved. Within the FAA, the Joint Resources Council is the senior investment review board.

Sensitive Unclassified Information is a broad category of information that includes material covered by such designations as For Official Use Only, Law Enforcement Sensitive, Sensitive Homeland Security Information, Sensitive Security Information, and Critical Infrastructure Information.

Service Analysis is the activity in the FAA lifecycle management process that determines the capacity of agency assets to satisfy existing and emerging demands for services. Each FAA line of business conducts service analysis within their domain of responsibility.

Service Analysis and Strategic Planning is that portion of the FAA acquisition management process that determines what capabilities must be in place now and in the future to meet agency goals and the service needs of customers. Results are captured in the “as is” and “to be” states of the

FAA enterprise architecture, as well as in the roadmaps for moving from the current to the future state.

Service Management within context of the acquisition management system is the application of agency resources (investment, research, and operations) to the cost-effective delivery of safe and secure services to its customers. The FAA accomplishes delivery and management of these services through service organizations, which are responsible and accountable for service delivery throughout the service life of agency products and services.

Service Organizations plan and manage resources, as assigned, to deliver services within their area of responsibility. Within the FAA, service organizations include any service unit or team, program office, directorate, or other organizational entity engaged in the delivery and sustainment of air traffic services, safety, security, regulation, certification, operations, commercial space transportation, airport development, or administrative services and assets.

Service Shortfall is a verified inability of the FAA to provide the services needed by its customers and users. Lines of business use service performance data and analyses of current and projected customer service needs to identify service shortfalls within their domain of responsibility. Aviation research by NASA and other industry and government organizations may also identify emerging service shortfalls or technological opportunities for improving service delivery.

Service Team Leader is the individual who guides, coaches, facilitates, and serves as spokesperson for service team members in the conduct of activity to execute assigned responsibilities.

Service Team Logistics Manager is the individual who supports the service team or program office throughout the AMS lifecycle management process to achieve efficient and effective logistics support for products and services throughout their service life.

Service Team is chartered group of management and technical specialists responsible for planning, obtaining, and managing over their service life the products and services assigned by the Joint Resources Council or the line of business.

Shortfall Analysis by a service organization or program office establishes the foundation for understanding a service shortfall or new opportunity for improving service delivery, as well as the impact on the users and customers of FAA services. The shortfall analysis is the basis for approving a service need or operational capability for inclusion in the FAA enterprise architecture and its roadmaps.

Simplified Purchases are those products or services of any nature that are smaller in dollar value, less complex, shorter term, routine, or are commercially available and generally purchased on a fixed price basis.

Single-Source Contracting awards a contract, without competition, to a single supplier of products, services, or real property.

Site Acceptance Test confirms that an acquired solution meets all contract requirements and

interfaces correctly with the environment in which it will operate.

Site Restoration is the process of returning a site to its original condition after the FAA no longer needs it for air traffic or other services.

Small Business, including its affiliates, is an independently owned and operated business that is not dominant in producing the products or performing the services the FAA is purchasing, and one that qualifies as a small business under the federal government's criteria and North American Industry System Classification Codes size standards.

Small Business Set-aside is the reservation of a procurement exclusively for participation by small businesses.

Small Disadvantaged Business is a small business concern that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals and that has its management and daily business controlled by one or more such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one of these entities, which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian organization. The contractor must presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities or any other individual found to be disadvantaged by the FAA. The contractor must presume that socially and economically disadvantaged entities also include Indian tribes and Native Hawaiian organizations.

Small Socially and Economically Disadvantaged Business means a small business concern that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals, and that has its management and daily business controlled by one or more such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian organization, or a publicly owned business having at least 51 percent of its stock unconditionally owned by one of these entities, which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian organization. The contractor must presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities or any other individual found to be disadvantaged by the FAA. The contractor must presume that socially and economically disadvantaged entities also include Indian tribes and Native Hawaiian organizations.

Socially Disadvantaged Individuals are people subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

Software Enhancement is an acquisition category that includes additions or modernizations to the software of systems previously fielded and operating within the FAA. A software enhancement typically introduces new capabilities or provide improved functionality to an existing asset and has minimal impact to hardware or the acquisition of hardware.

Solution, as used in the FAA Acquisition Management System, is a generic term meaning the assets or capability obtained (procured) and deployed to satisfy a priority service need or to remedy an operational shortfall in the FAA enterprise architecture. The solution may consist of systems and equipment, facilities, infrastructure, services, procedural and process changes, or any combination of these or other assets necessary to satisfy the service need or capability shortfall.

Solution ConOps is the artifact that defines how a solution will operate in its intended service environment. It defines the roles and responsibilities of key participants (e.g., controllers, maintenance technicians, pilots), explains operational issues that system engineers must understand when developing requirements, identifies procedural issues that may lead to operational change, and establishes a basis for identifying alternative solutions and estimating their likely costs and benefits.

Solution Development is the third phase of the Operations Support Pathway. The line of business and acquisition readiness team refine and update required artifacts, address any Operations Governance Board action items given at the Business Case Decision, and finalize their procurement strategy.

Solution Implementation is the phase of the AMS lifecycle management process that begins after the final investment decision when Joint Resources Council establishes an investment program and assigns responsibility to a service organization. Solution implementation ends when the new capability goes into operational service at the last deployment site.

Solution Planning specifies how the service organization or program office will obtain and deploy the products and services of an investment program during solution implementation and support them throughout their service life. AMS planning and control documents (i.e., implementation strategy and planning document, program management plan, and program work breakdown structure) specify solution planning.

Solution Provider is the organization (e.g., service organization, program office, or regional office implementing a construction program) responsible for an assigned investment program and for providing the products or services needed to satisfy agency requirements.

SOW Templates located on the FAA Acquisition System Toolset contain model statement of work paragraphs tailored for specific types of investment initiatives for use by the acquisition workforce when preparing screening information requests or contract statements of work.

Source Evaluation Team is the group of subject-matter experts responsible for all aspects of obtaining and evaluating vendor offers for agency contracting initiatives.

Source Selection Official is the authority responsible for source selection and contract award to the vendor offering best value to the government for a specific investment opportunity. This responsibility includes ensuring the competence of the source evaluation team and soundness of the source selection criteria, process, and evaluation plans.

Specification refers to a set of documented requirements that a product or service must satisfy. A requirement specification is a documented requirement or set of requirements to be satisfied by a given material, design, product, or service. A functional specification defines the functions a solution must provide. A design or product specification describes the features of either a designed solution or final produced solution.

SPIRE is the web-based management tool used to define and track the status of FAA investment programs. SPIRE is the acronym for Simplified Program Information and Evaluation.

Standardization is the practice of acquiring parts, components, subsystems, or systems with common design or functional characteristics to obtain economies in ownership costs.

Stakeholder organizations as used within the acquisition management system refer to any user or customer organization within and outside the FAA having a vested interest in the products and services of an investment program. Examples include the operators and maintainers of deployed assets, system safety and information systems security specialists, human factors engineers, and training and logistics support organizations.

Standard Program Milestones are those milestones used by service organizations and program offices when planning, executing, and reporting progress on agency investment programs, including entries in the OMB Major IT Business Case (designated programs only) and acquisition program baseline or execution plan. The link to standard milestones for system and facility investment programs are located in FAST on the decisions, reviews, and standard milestones page.

Standard Program Performance Measures are those measures used by service organizations and program offices to assess progress, forecast performance, determine status, and define corrective action for agency investment programs. The status of these measures serves as early warning indicators of program issues before they develop into major problems. The following are the major categories of program performance measures: financial, schedule, technical, resources, program management assessment, and external interests.

Standard Selection Criteria for the initial investment decision are lifecycle costs, benefits, risk, benefit-to-cost ratio, consistency with the FAA enterprise architecture, and impact on FAA strategic goals.

Strategic Sourcing is the collaborative and structured process of critically analyzing an organization’s spending and using this information to make business decisions about acquiring products and services more effectively and efficiently.

Statement of Work is a document that defines program-specific activities, deliverables, and

timelines for a vendor providing services to the FAA.

Subject-Matter Expert is an authority in a particular area or topic.

Succeeding Lease is a new lease that immediately follows an expiring lease. See also "Superseding Lease".

Superseding Lease is a lease that replaces an existing lease, prior to the scheduled expiration of the existing lease term. See also "Succeeding Lease".

Supplemental Lease Agreement (SLA) is also known as a contract modification and is used for modifications to existing lease requirements.

Supply, as used in the context of service analysis, is the existing or projected ability to provide services to customers based on information from field organizations that operate and maintain the National Airspace System, the aviation community, and planned investments in the enterprise architecture.

Supply Chain Management is the oversight of materials, information, and finances as they move in a process from supplier to manufacturer to wholesaler to retailer to consumer. Supply chain management involves coordinating and integrating these flows both within and among companies.

Supply Support consists of the management actions, procedures, and techniques used to determine requirements, acquire, catalog, track, receive, store, transfer, issue, and dispose of items of supply. This includes provisioning for initial support, maintaining asset viability, and replenishing spares.

Support Contracts Review Board is the group that evaluates all support services procurements valued at $10 million or more.

Supportability is the degree to which product design and planned logistics resources meet product use requirements.

Support Equipment consists of all equipment (mobile or fixed) needed to support maintenance of a product or service. Support equipment includes associated multi-use end-items, handling and maintenance equipment, tools, metrology and calibration equipment, test equipment, and automatic test equipment. It also includes the procurement of integrated logistics support necessary to maintain the support equipment itself. Operational engineering support systems and facilities are also integral parts of the support equipment lifecycle.

Support Services Contract is an acquisition category that includes contracts associated with procuring technical, engineering, scientific, professional, management and administrative expertise, advice, analysis, studies, or reports. Support services contracts follow contracting guidance in FAST.

Survey for real property acquisitions refers to the formal examination and recording of an area and features of an area so as to construct a map, plan, or legal description.

Sustainment consists of those activities associated with keeping fielded products operational and

maintained. Sustainment also applies to the planning, programming, and budgeting for support of fielded products, referred to as sustainment funding.

System Milestones are those milestones used by service organizations and program offices when planning, executing, and reporting progress on investment programs that are acquiring systems for air traffic control and other agency services. The link to standard milestones for systems are located in FAST on the decisions, reviews, and standard milestones page.

System Safety Assessment integrates the results of various analyses to verify the overall safety of a solution or system. The assessment determines whether the investment program has achieved qualitative development assurance levels for systems, equipment, hardware, and software, as well as quantitative safety requirements defined in the functional hazard assessment and preliminary system safety assessment.

System Safety Program consists of the activities applied during all phases of the AMS lifecycle management process to identify safety risks and devise and implement ways to eliminate or control risks to an acceptable level.

Systems Engineering Manual provides a framework for implementing systems engineering across the FAA. The manual defines the preferred systems engineering processes to be followed throughout the AMS lifecycle management process; provides effective systems engineering methods and tools; identifies competency areas for the practice of systems engineering; defines system engineering best practices used to support program management activities; and acts as a reference for the development of training classes within the FAA.

Technical Data is recorded information regardless of form or character (such as manuals, drawings and operational test procedures) of a scientific or technical nature required to operate and sustain a product or service over its lifecycle. While computer programs and related software are not technical data, documentation of these programs and related software are technical data. Financial data or other information related to contract administration are not technical data.

Technical Leveling is the act of helping an offeror bring its proposal/offer up to the level of other proposals/offers through successive rounds of communication, such as pointing out weaknesses resulting from an offeror's lack of diligence, competence, or inventiveness in preparing their proposal.

Technical Opportunity exists when a product or capability not currently used in the National Airspace System has the potential to enable the FAA to perform its mission more safely, efficiently, or effectively.

Technology Refreshment is an acquisition category intended to keep fielded products, systems, and services maintained and operational. It does not result in new or improved functionality, and any new technology introduced is strictly incidental. Service-life extension and replacement-in-kind are types of technology refreshment.

Technical Review Board is the group that oversees the NAS Architecture in support of the FAA Enterprise Architecture Board. It works with service organizations and program offices to evaluate new operational improvements and sustainments and to time-phase priority opportunities within the NAS architecture roadmap.

Technical Transfusion is the disclosure by the FAA of technical information from one vendor submittal that results in the improvement of another submittal.

TechStat Reviews assess underperforming investment programs. The review is an in-depth examination of program performance data from the OMB Information Technology Dashboard, SPIRE, associated earned value management data, and program management and control data. The TechStat review results in a corrective action plan to improve program execution within the approved program baseline or execution plan or results in other actions if the program is unlikely to improve as baselined.

Tenant Improvement refers to alterations to the interior of the building to meet the functional demands of the tenant.

Termination for Convenience is a procedure that may apply to any FAA contract, including multi-year contracts. As contrasted with cancellation, termination can be effected at any time during the life of a contract (cancellation is effected between fiscal years) and can be for the total quantity or a partial quantity (whereas cancellation must be for all subsequent fiscal year quantities).

Termination Liability is the maximum cost the FAA would incur if it terminates a contract. In the case of a multi-year contract terminated before completion of current fiscal year deliveries, termination liability would include an amount for both current-year termination charges and out-year cancellation charges.

Termination Liability Funding refers to obligating contract funds to cover contractor expenditures plus termination liability, but not the total cost of completed end items.

Test and Evaluation is an activity conducted to provide essential information in support of investment decision-making; assess technical and investment risk; verify the attainment of technical performance specifications and objectives; and verify and validate that deployed systems, solutions, and capabilities are operationally effective and suitable for their intended use.

Test and Evaluation Master Plan describes the strategy and the scope of the test program and is the primary test management document for investment programs. The TEMP describes planning and preparation activities for the test program, the testing to be accomplished, organizational responsibilities, and how program offices will report test results. It also documents the methodologies that will evaluate the effectiveness and suitability of systems, services, and operational capabilities against program and operational requirements. Testing described in the TEMP also supports investment and program decisions.

Title refers to legal ownership as evidenced by a deed or other instrument.

Total Estimated Potential Value (TEPV) is the sum of the initial award, unexercised options, the value of any Indefinite Delivery/Indefinite Quantity (IDIQ) Contract Line Items (CLINs), estimates for unpriced CLINs, such as preplanned product improvements, estimated value of partially priced items, and any other items the Contracting Officer deems relevant to establishing potential total contract value. The potential contract value should exclude anticipated change orders, pre-planned product improvements not established as contract line items, and any other anticipated actions not included in the written contract. Where duplicative or alternative options are established (i.e., if option 1 is exercised, option 2 will not be exercised), the Contracting Officer should include only the value which reflects the highest priced option. For incentive contracts, the maximum liability of the Government should be included in the potential contract value. For IDIQ contracts, the total contract value is the stated maximum amount the total of issued delivery orders cannot exceed. For real property transactions, TEPV equals the total cost of the contract including any options.

Training, Training Support, and Personnel Skills is activity that analyses, designs, develops, implements, and evaluates training artifacts necessary to operate and maintain the solution. This includes needs analyses, job and task analyses, individual and team training, resident and nonresident training, on-the-job training, job aids, and logistic support for training aids and training installations.

Transfer Agreement is an instrument used to transfer ownership of real property, or interest therein, between the FAA and other entities, public or private, for direct or indirect consideration in order to secure an operational or financial benefit to the Government.

Unauthorized Commitment is an agreement entered into by a representative of the FAA who does not have the authority to obligate the FAA to spend appropriated funds.

Underutilized refers to an entire property or portion thereof, with or without improvements, that is used only at irregular intervals or intermittent periods by the accountable executive agency for current program purposes of that agency, or is used for current program purposes that can be satisfied by only a portion of the property. Underutilized real property is to be declared excess.

Unit is one of a quantity of items (products, parts, etc.)

User within the acquisition management system is a term that refers to an internal user of a product or service such as air traffic controllers or maintenance technicians.

Validation is confirmation that the products and outputs of an investment program will fulfill their intended purpose when placed in their intended environment. Validation may address all aspects of a product or output in any of its intended environments such as operation, training, manufacturing, maintenance, or support services.

Variable Quantity is an acquisition category that includes insertions, modernizations, or additions to quantities of systems or subcomponents previously fielded and in operation within the FAA. The intent is to keep fielded products, systems, and services maintained and operational. This acquisition

category does not result in new or improved functionality

Vendor is a person or company who provides services, products, or real property.

Verification is confirmation that selected work products meet their specified requirements. This includes verification of the final product (system, service, facility, or operational change) as well as intermediate work products against all applicable requirements. Verification is inherently an incremental process. It begins with initial requirements, progresses through subsequent work products, and culminating in verification of the completed final product.

(FAA) Verification & Validation Guideline is the official guidance document whose intent is to ensure the service organization or program office builds the right product (validation) and the product is built right (verification - according to specifications). The guidelines specify the key work products of each phase of the lifecycle management process that the service organization or program office must verify and validate for each AMS decision point.

Very Small Business is a business whose size is no greater than 50 percent of the numerical size standard applicable to the North American Industry System Classification Codes assigned to a contracting opportunity.

William J Hughes Technical Center is an FAA facility where the full spectrum of air transportation systems are tested and evaluated. The Center develops scientific solutions to safety challenges confronting air traffic control, and evaluates integrated solutions for the modernization and sustainment of the National Airspace System.

Work Products in various forms represent, define, or direct the final output or product of an investment program, which may be a system, service, facility, or operational change. Work products can include concepts of operation, processes, plans, procedures, designs, descriptions, requirements, specifications, models, prototypes, contracts, invoices, and other documents.

Work Breakdown Structure is a hierarchical decomposition of the work a service organization or program office must perform to achieve an agency objective or operational capability. It includes work activities internal and external to the FAA. Each descending level of the work breakdown structure represents an increasing definition of the work.

(FAA Standard) Work Breakdown Structure is the official work breakdown structure of the Federal Aviation Administration. It is organized according to the phases of the AMS lifecycle management process (service analysis through in-service management), and it includes all work activities that may need to be planned, costed, and completed as an investment opportunity traverses the lifecycle management process. Section 3 of the FAA Standard Work Breakdown Structure specifies the program WBS for investment programs.

3 Procurement Policy

3.1 Overview

3.1.1 Introduction Revised 9/2020

The goal of the Federal Aviation Administration procurement system is to obtain high quality products, services, construction, and real property in a timely, cost-effective manner, at prices that are fair and reasonable. The procurement system enables the FAA to be innovative and creative so that the right vendor is selected to implement a solution. The FAA procurement system is an integrated part of the lifecycle management process. The FAA procurement system focuses primarily on identifying sources, awarding, and administering contracts.

The FAA procurement system emphasizes competition, selects the vendor with the best value and provides a protest forum through the FAA's Dispute Resolution system. Open communications with industry from initial planning to contract award are the cornerstones of the process.

Procurement documents are tailored to individual requirements and screening improves source selection by focusing efforts on those offerors most likely to receive an award. The procurement system emphasizes "common sense" decision-making, flexibility, business judgment, and a team concept for managing procurements. Service organizations have the proper level of authority to make decisions and are responsible and accountable for their actions.

The FAA's procurement system provides policy and guidance for executing contracts and agreements to acquire products, services, construction, and real property. In support of the FAA's mission, the Administrator, or designee, has broad discretion to select contractors who provide products, services, construction, and real property. Procurement officials should follow the policy and guidance contained herein but, based on prudent discretion and sound judgment, may employ any procedures that do not violate applicable statutes or regulations. The National Acquisition Evaluation Program strategically monitors the implementation of procurement requirements by periodically evaluating acquisition processes in support of FAA efforts to improve the quality of procurement practices.

3.1.2 Applicability

The FAA procurement system applies to all procurements conducted by the FAA, as set forth herein with the exception of assistance relationships, such as grants and cooperative agreements.

3.1.3 Fundamental Principles Revised 9/2020

The FAA procurement system will:

(a) Enable the selection of the contractor with the best value to satisfy the FAA's mission;

(b) Focus on key discriminators between offerors to ensure timely, cost efficient, and quality performance;

(c) Promote discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity;

(d) Encourage the procurement of commercial and non-developmental items;

(e) Provide streamlined methods and initiate innovative processes to conduct timely and cost-effective procurements;

(f) Promote open communication and access to information throughout the procurement process and encourage use of electronic methods for information exchange;

(g) Encourage competition as the preferred method of contracting;

(h) Permit single-source contracting when necessary to fulfill the FAA's mission;

(i) Allow the use of a range of contract types and transactions best suited to a particular procurement;

(j) Authorize the use of purchase cards consistent with prudent business practice;

(k) Provide attainable and reasonable opportunities for small businesses and small businesses owned and controlled by socially and economically disadvantaged individuals in consultation with the Department of Justice to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), as well as the President's July 19, 1995, directive to the heads of executive departments and agencies on the "Evaluation of Affirmative Action Programs;"

(l) Provide an internal process for resolving protests and disputes in a timely, cost-effective and flexible manner;

(m) Promote high standards of conduct and professional ethics;

(n) Require appropriate file documentation to support business decisions;

(o) Assure adequate checks and balances;

(p) Ensure public trust; and

(q) Promote and increase sustainable real property acquisitions and management and disposal practices throughout the asset lifecycle, to the extent feasible, reasonable, and practicable.

3.1.4 Contracting Authority Revised 9/2020

Pursuant to the Federal Aviation Administration Reauthorization Act of 1996, Public Law 104-264 (49 U.S.C. § 106), the Administrator is the final authority for carrying out all functions, powers, and duties of the Administration relating to the acquisition and maintenance of property and equipment of the Administration. The Administrator has broad authority "to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration . . .with any Federal agency, or any instrumentality of the United States, any territory, or possession, or political subdivision thereof, any other governmental entity, or any person, firm, association, corporation, or educational institution, on such terms and conditions as the Administrator may consider appropriate."

The FAA Administrator may establish contracting activities and delegate to the Acquisition Executive broad authority to manage FAA's contracting functions. The Acquisition Executive is authorized to appoint Chief(s) of the Contracting Office (COCO) and redelegate the contracting authority to the COCO and other officials such as the manager of the purchase card program. The COCO may request that the Acquisition Executive further redelegate contracting authority to individuals within the COCO's management or service area such as procurement and real property contracting officers.

All individuals who are delegated contracting authority must have met the training requirements of the AMS and have demonstrated the appropriate knowledge and experience needed to execute this authority on behalf of the Government. Except for the purchase card program manager, these individuals may not redelegate their contracting authority. Contracting authority must be delegated to Contracting Officers or other qualified persons with a written warrant or other certificate of appointment. Contracts, agreements, grants and other transactions may be entered into and signed on behalf of the FAA by Contracting Officers only, or other qualified persons with a written certificate of appointment. The certificate of appointment must expressly state the types of transactions and limitations authorized by the delegation. Absent specific authority in the delegation, that authority does not exist. Information on the limits of the contracting officer's authority must be readily available to the public and FAA personnel.

The Contracting Officer must have warrant authority commensurate with the total estimated potential value (see Appendix C) of a transaction. Modifications after the original award are considered standalone actions when calculating the total estimated potential value; a Contracting Officer's warrant must have a dollar limitation sufficient to award the total value of a modification, but not the entire value of the contract, order, or agreement.

For real property procurements, Contracting Officers are prohibited from entering into any type of contract or agreement, including a letter contract, that acknowledges, authorizes, or in any way states or implies that a real estate broker or a real estate agent represents the FAA or Government in a real property transaction. This prohibition does not restrict the Contracting Officer from contacting Listing or Cooperative Brokers or real estate agents to gather information concerning properties available for sale or lease within a particular geographic area and/or from requesting or receiving market information and rental rates/sale prices with respect to that area. Neither does this section prohibit the Contracting Officer from acknowledging, if asked, that a Cooperative Broker brought a particular property to the Contracting Officer's attention.

Key contracting duties and responsibilities are to be separated among individual people. For a particular requirement, the same person must not requisition, certify funds availability, approve, and obligate funds.

3.1.5 Conflict of Interest Revised 10/2008

Any member of a service organization or Office of Dispute Resolution for Acquisition (ODRA) who is a Federal employee that has a real or apparent conflict of interest must withdraw from participation in the procurement process when required by law (18 U.S.C. § 208) or regulation (5

CFR Part 2635). To sustain the integrity of the procurement process, non- Federal members of a service organization or ODRA are held to the same standards.

3.1.6 Disclosure of Information Revised 10/2008

Source selection information and proceedings must not be discussed outside the service organization. The Source Selection Official (SSO) must determine the extent to which source selection information is disclosed and must execute a certificate of nondisclosure as appropriate.

3.1.7 Organizational Conflicts of Interest

The policy of the FAA is to avoid awarding contracts to contractors who have unacceptable organizational conflicts of interest. The FAA will resolve organizational conflict of interest issues on a case-by-case basis; and when necessary to further the interests of the agency, will waive or mitigate the conflict at its discretion.

3.1.8 Procurement Integrity Act Revised 1/2019

FAA is subject, with modifications as described in the AMS Guidance with FAA-specific language, to the Procurement Integrity Act (41 U.S.C. §§ 2101-2107).

3.1.9 Electronic Commerce in Contracting Revised 9/2020

The FAA may use electronic commerce, including electronic signatures, to conduct and administer procurement actions. The Electronic Signatures in Global and National Commerce Act (E-SIGN) provides equivalency between legally-required written records and the same information in electronic form.

Unless waived by the Chief of the Contracting Office, the FAA's official contract file for contract actions on or after October 1, 2013 must be created in electronic format, and stored and maintained in the "Electronic Document Storage (eDocS) system," the single repository for paperless contract files. Purchase card transactions, awards and documents for real property procurements, and awards made by Real Estate Contracting Officers, awards made by personnel with Delegations of Procurement Authority, and documents requiring a raised seal signifying authenticity, are excluded from the eDocS requirement.

Based on the National Institute of Standards and Technology (NIST) Policy Statement on Hash Functions dated August 5, 2015, the FAA must stop using Secure Hash Algorithm 1 (SHA-1) for generating digital signatures, generating time stamps and for other applications that require collision resistance. Further guidance on the use of SHA-1 is in NIST Special Publication (SP) 800-131A, Revision 1, dated November 6, 2015.

FAA must use SHA-256 or higher for the generation of digital signatures, generating time stamps, and other applications that require collision resistance. NIST provides further guidance on the use of SHA-256 in NIST SP 800-57 Part 1, section 5.6.2 as amended and SP 800-131A, Revision 1. Additional guidance on the use of SHA-3 is in NIST SP 800-185 as amended.

FAA may still use SHA-1 for the following applications: Verifying old digital signatures and time stamps, generating and verifying Hash-Based Message Authentication Codes (HMACs), Key Derivation Functions (KDFs), and random bit/number generation.

3.2 Contracting

3.2.1 Procurement Planning

3.2.1.1 Applicability Revised 9/2020

Written procurement plans are required for all FAA procurements except purchase card transactions and transactions less than $25,000. The specific content of a procurement plan may vary depending on the complexity of the procurement. The procurement planning templates in AMS must be used. For procurements of services, supplies, construction and real property related services, Template A must be used for all simplified and commercial procurements. Template B must be used for all complex procurements for supplies, construction and services, and Template C must be used for all complex real property procurements.

3.2.1.2 Policy Revised 11/2009

Procurement planning is an indispensable component of the total acquisition process. Service organizations are expected to use procurement planning as an opportunity to evaluate/review the entire procurement process, so that sound judgments and decision-making will facilitate the success of the overall program. For procurements not covered by an implementation strategy and planning document, procurement planning should be appropriate and proportionate to the complexity and dollar value of the requirement.

3.2.1.2.1 Market Analysis Revised 9/2020

The purpose of market analysis is to initiate industry involvement, develop and refine the procurement strategy, identify potential sources that are able to meet FAA's requirements, obtain price information, determine whether commercial items exist, determine the level of competition, identify market practices, or obtain comments on requirements. The magnitude and degree of formality of the market analysis should be proportionate to the contemplated procurement. The market analysis may be as simple as a telephone call or as formal as a market survey, advertisement, or real property site visit to learn of industry or market capabilities. All market analyses, formal or informal, should be appropriately documented.

3.2.1.2.2 Procurement Plan Revised 4/2013

A plan for each contemplated procurement or class of procurements should address the significant considerations of the procurement action. A procurement plan may cover more than one contract. The procurement plan represents the service organization agreement for conducting the procurement. See paragraph 3.2.1.1 for documentation requirements.

3.2.1.2.3 Consideration of Agency Wide Contracts Revised 9/2020

Agency Wide Contracts must be used to the maximum extent possible for products, construction, or services. The procurement plan must document which agency wide contracts were considered. If an applicable agency wide contract is available for utilization and is not utilized; the procurement plan must include the rationale for not utilizing the existing agency wide contract.

3.2.1.2.4 Independent Government Cost Estimate Revised 9/2020

An Independent Government Cost Estimate (IGCE) is required for any anticipated procurement action (to include modifications) whose total estimated value is $150,000 or more, except for:

(a) Modifications exercising priced options or providing incremental funding;
(b) Delivery orders for priced services or supplies under an indefinite-delivery contract; or
(c) Supplies or services with prices set by law or regulation.

The Contracting Officer (CO) may require an IGCE for procurement actions (to include modifications) anticipated to be less than $150,000.

3.2.1.3 Guidance and Principles Revised 11/2009

For procurements not covered in a program with an implementation strategy and planning document, the following elements should be considered in planning for procurements.

3.2.1.3.1 Development

Preference should be given to using commercial and previously developed items whenever possible. Development of a product, and its associated costs and risks, should be avoided unless necessary to meet FAA needs. If developmental items are required, the need should be documented in the procurement plan.

3.2.1.3.2 Scope of Procurement Revised 9/2020

The scope of a procurement in terms of complexity, period of performance, dollar value, risk, and other factors should be considered in planning a procurement. As the scope of a procurement increases, the risk of unsuccessful management of the procurement also increases. Appropriate trade-offs should consider elements such as: managing a large complex procurement versus several smaller phased procurements; the systems integration role; total systems responsibility; timing of benefits; technological obsolescence; and other related factors.

3.2.1.3.3 Budget Allocation Release

Consideration should be given to releasing contract-related budget information to industry in situations where the procurement involves development or multiple-year funding and is likely to be conducted competitively. If the service organization decides to release the information, the decision should be identified in the procurement plan.

3.2.1.3.4 Quality Assurance Revised 9/2020

For complex systems or hardware acquisition, the service organization should coordinate with representatives of the Quality Assurance (QA) office as soon as procurement requirements are defined, to establish quality assurance requirements for the proposed procurement.

3.2.1.3.5 Labor Relations

When planning procurements, the service organization should comply with applicable FAA labor relations directives.

3.2.1.3.6 Maintaining Competition Revised 9/2020

Consideration should be given to methods of maintaining competition of any product, real property, construction, or service contract. Methods to be considered may include dual sourcing, obtaining re-procurement data and data rights, open system designs, and any other appropriate methods.

3.2.1.3.7 Single-Source Approval Revised 9/2020

In accordance with AMS 3.2.2.4, below, the service organization determines whether the procurement should be conducted on a competitive or single source basis. The decision to contract with a single-source may be made as part of overall program planning. The rational basis must be documented and approved as part of program planning in the Implementation Strategy and Planning Document (ISPD), procurement plan, or as a separate single source justification document. Approval of the ISPD or procurement plan constitutes approval of a single-source procurement. Any rational basis for a single-source award must obtain a review for legal sufficiency per Section 3.2.2.4.

3.2.1.3.8 Pre-Release of Documents Revised 9/2020

Early release of program documents can be an important part of communication with industry. Releasing draft functional requirements, draft specifications, or a draft Screening Information Request (SIR) can be beneficial to industry, as well as the FAA. Early and more complete releases of the SIR and feedback from industry should be part of the procurement planning strategy.

3.2.1.3.9 Reserved

3.2.1.3.10 Reserved

3.2.1.3.11 Public Announcements Revised 6/2006

3.2.1.3.11.1 General Revised 9/2020

All procurements anticipated to exceed $150,000 must be publicly announced on the Internet or through other means. This requirement does not apply to noncompetitive awards to Socially and Economically Disadvantaged Business (SEDB) (8(a)) firms and Service-Disabled Veteran Owned Small Business (SDVOSB) firms, emergency single source actions, purchases from an established Qualified Vendor List (QVL) or Federal Supply Schedule (FSS), exercise of options, or changes. For actions not anticipated to exceed $150,000, a public announcement is optional if it is not required by 3.2.1.3.11.2.

3.2.1.3.11.2 Procurements Involving Products from Federal Prison Industries Revised 7/2008

All procurements of products available from Federal Prison Industries (FPI) anticipated to exceed $10,000 must be publicly announced on the Internet or through other means, including procurements where FPI products are determined not to be the best value to FAA at the market survey stage. This requirement does not apply to a procurement that satisfies an exception in AMS Policy 3.8.4.2 (concerning procurement of FPI products).

3.2.1.3.12 OMB Circular A-76, Performance of Commercial Activities.

OMB Circular A-76 (Revised), "Performance of Commercial Activities," establishes Federal policy for the competition of commercial activities. Inherently governmental activities are to be performed with Government personnel, but activities identified as not inherently governmental in nature are to be subjected to competition to determine if such activities should continue to be performed by Government personnel. The FAA will follow the policies of the Circular to the extent that such policies are consistent with FAA's statutory authority.

3.2.1.4 Chief Financial Officer Requirements Revised 1/2011

3.2.1.4.1 Reporting of FAA Assets Revised 9/2020

The Chief Financial Officer Act of 1990 requires FAA to furnish annual financial statements reflecting the assets of the agency to the Office of Management and Budget. To generate information needed for accurate financial statements, service organizations must establish appropriate contract line item structure and billing mechanisms for contracts so the agency can accurately state the value of its assets, and assure related accounting classifications are included on financial documents.

3.2.1.4.2 Chief Financial Officer Approval Added 1/2011

The Chief Financial Officer has approval authority over all proposed procurement actions of $10

million or more.

3.2.1.5 Disaster or Emergency Preparedness and Response Revised 7/2007

3.2.1.5.1 Local Area Set-Asides for Disaster or Emergency Added 7/2007

The Contracting Officer may set-aside procurements for competition among only offerors residing or doing business primarily in a geographic area where the President has declared a major disaster or emergency.

3.2.1.5.2 Continuity of Services-Mission Critical Contracts Added 7/2007

FAA may designate mission critical contracts that require continued contractor performance during times of National Emergency or Incidents of National Significance, such as pandemic influenza. These contracts must include provisions and contractor plans detailing how essential services or supplies will still be adequately delivered.

3.2.1.5.3 Health Related Emergency Janitorial Services Added 9/2020

When a health-related emergency occurs and is declared by the United States Department of Health and Human Services Centers for Disease Control and Prevention (CDC) or other authorized Federal, state or local government official, the Contracting Officer is authorized to acquire additional and/or higher level cleaning supplies or services in FAA owned or leased facilities. For FAA facilities leased through the General Services Administration (GSA), the CO must coordinate with GSA's CO to acquire additional cleaning supplies or services as a result of a health related emergency.

3.2.2 Source Selection

3.2.2.1 Applicability Revised 9/2020

Source selection policy and guidance apply to acquisitions for products, services, construction, and real property. The FAA utilizes various competitive procurement methods reflected in AMS procurement guidance for obtaining products, services, construction, and real property.
The first method is described under Complex Source Selection and is used for complex, large dollar, developmental, noncommercial items and services, or complex real property acquisitions. This method is typically used for investments approved by the Joint Resources Council and Real Property Council.

The second method is described under Commercial and Simplified Purchases and, is typically used for commercial items or real property related services that are less complex, smaller in dollar value, and shorter term.

3.2.2.2 Policy Revised 9/2020

The FAA procures products, services, construction, and real property from sources offering the best

value to satisfy FAA's mission needs. Considering complexity, dollar value, and availability of products and services in the marketplace, the FAA has flexibility to use any procurement method deemed appropriate to satisfy FAA's mission.

The FAA provides reasonable access to competition for vendors interested in doing business with FAA. Competition among two or more sources is the preferred method of procurement. When competition is not feasible, procurements may be on a single source basis if there is a documented rationale for the decision; documentation for this decision is not required for procurements with a total estimated value of $10,000 or less.

Except for real property and purchase card acquisitions, or those acquisitions subject to AMS 3.8.4.2, acquisitions with a total estimated value exceeding $10,000 but not over $150,000 are reserved exclusively for competition among Socially and Economically Disadvantaged Business [SEDB/(8(a))] vendors and/or Service-Disabled, Veteran-Owned Small Businesses (SDVOSBs), pursuant to AMS policy 3.6.1.3.4. If the CO determines that an SEDB/(8(a)) or SDVOSB set-aside is not in FAA's best interest due to quality, market prices, or delivery, then the decision must be documented.

For procurements with a total estimated potential value equal to or greater than $150,000, the CO must issue a public announcement informing industry of FAA's procurement strategy before, or concurrent with, releasing an initial SIR. Each SIR must contain specific evaluation criteria that the FAA will use to evaluate offeror's submittals. When using complex source selection methods for products, services or construction, the FAA must include past performance as an evaluation factor. For real property acquisitions, past performance will be considered as part of vendor responsibility determination. If appropriate, the FAA may use the vendors' process capability of suppliers as an evaluation factor according to established criteria. Cost or price considerations must be an evaluation factor in all final selection decisions. Any Request for Offer (RFO) or Solicitation for Offer (SFO) must include a requirement for a formal cost or price proposal. The source evaluation team must document the findings of the evaluation. The Source Selection Official (SSO) must base all selection or screening decisions on evaluation criteria established in each SIR. The CO must conduct debriefings with all offerors that request them.

It is the FAA's policy to award to responsible contractors. To be determined responsible in a procurement for products, services or construction, a prospective contractor must meet the following criteria:

(a) Has or can obtain adequate financial resources to perform a contract;
(b) Has the ability to meet any required or proposed delivery schedules;
(c) Has a satisfactory performance history;
(d) Has a satisfactory record of integrity and proper business ethics;
(e) Has appropriate accounting and operational controls that may include, but are not limited to: production control, property control systems, quality assurance programs, and appropriate safety programs; and
(f) Is qualified and eligible to receive an award under applicable laws or regulations.

For real property contract awards, to be determined responsible, a prospective vendor or owner must meet the following criteria:

(a) Has proper ownership of the property (deed, property/tax records, declaration of taking,

etc.);
(b) Has evidence of authority to enter into contract on behalf of vendor/property owner;
(c) Has a satisfactory performance history, as applicable;
(d) Has a satisfactory record of integrity and proper business ethics; and
(e) If applicable, has affirmed that they can meet the set date for occupancy or completion of work (e.g., tenant improvements/alterations/code compliance).

The CO's signing of the contract constitutes a determination that the prospective contractor/vendor/or owner is responsible with respect to that contract. When an offer is rejected because the prospective contractor/vendor/or owner is non-responsible, the CO must document a determination of non-responsibility in the contract file. The CO has broad discretion in making this determination.

3.2.2.3 Complex Source Selection Revised 9/2020

This section establishes the FAA's policy for evaluating and selecting sources for the award of complex competitive contracts. This process consists of up to five (5) distinct phases, with the screening phase being the cornerstone. The five phases are:

(a) Planning;
(b) Screening;
(c) Selection;
(d) Debriefing (as requested); and
(e) Lessons learned.

3.2.2.3.1 Selection Phases

3.2.2.3.1.1 Planning

Refer to the procurement planning section for further guidance.

3.2.2.3.1.2 Screening

Screening is the process by which the FAA will determine which offeror provides the best value to the FAA. The process is flexible and allows selection and award after one screening request. This process allows the FAA to make an award considering only price and the price-related factors included in the SIR. The number of distinct screening steps for a particular procurement will vary, based on the complexity of the procurement. Provided below is guidance associated with the screening phase.

3.2.2.3.1.2.1 Screening Information Request Revised 9/2020

The purpose of the SIR is to obtain information, which will ultimately allow the FAA to identify

the offeror that provides the best value, make a selection decision, and award the contract to conclude the competitive process. A SIR is a request by the FAA for documentation, information, presentations, proposals, or binding offers. Three categories of SIRs (see below) may be used according to the procurement strategy adopted by the service organization. Once the public announcement has been released, the SIR may be released to start the competitive process. The service organization will determine the type(s) of SIR(s) that are appropriate for each procurement.

For a given procurement, the FAA may make a selection decision after one SIR, or the FAA may have a series of SIRs (with a screening decision after each one) to arrive at the selection decision. This will depend on the types of products, services, construction, and real property to be acquired and the specific source selection approach chosen by the service organization. When it is desired to make a selection decision after one SIR, that SIR should be a request for offer (see below). In general when multiple SIRs are contemplated, the initial SIR should request general information, and future SIRs should request successively more specific information.

Initial SIRs need not state firm requirements, thus allowing the FAA to convey its needs to offerors in the form of desired features, or other appropriate means. However, firm requirements ultimately will be established in all contracts.

Each SIR should contain the following information:

(a) Paper Reduction Act number OMB No. 2120-0595 on the cover page.
(b) A statement identifying the purpose of the SIR (request for information, request for offer, establishment of a QVL and screening).
(c) A definition of need,
(d) A request for specific information (with specific page and time limitations, if applicable),
(e) A closing date stating when submittals must be received in order to be considered or evaluated,
(f) Evaluation criteria (and relative importance, if applicable),
(g) A statement informing offerors how communications with them will be conducted during the screening, and
(h) An evaluation/procurement schedule (including revisions, as required).

The evaluation/procurement schedule should be realistic and should alert the offerors to the fact that the FAA plans to adhere to its schedule and that offerors interested in award will be expected to adhere to this schedule.

There are three categories of SIRs: qualification information, screening information, and request for offers. Each category of SIR is discussed in detail below.

Qualification Information

Qualification information, used to qualify vendors and establish Qualified Vendor Lists (QVLs), should be requested only if it is intended that the resultant QVL will be used for multiple FAA procurements.

Qualification information screens for those vendors that meet the FAA's stated minimum

capabilities/requirements to be qualified to provide a given product or service. All vendors that meet the FAA's qualification requirements will be listed on the appropriate QVL for the stated products or services.

Requested qualification information (including equipment/products) should be tailored to solicit the information that will allow the FAA to determine which of the vendors meet the FAA's minimum qualification requirements for the required products or services. For products, the information required to make such a determination might be equipment/products for FAA testing, vendor testing, testing data, product documentation, and production capability. For services, the information required to make such a determination might be a capabilities statement and performance experience. For software-intensive products or services, the information required to make such a determination might include descriptions about the offeror's software development and maintenance processes, in addition to other general information suggested above for products or services.

Once qualification information is requested, received, and evaluated in accordance with the evaluation plan, a QVL will be established for the given product/service. Once such a list is established, only qualified vendors may compete for the products or services. Where a product available from Federal Prison Industries (FPI) is to be acquired via a QVL, any such acquisition must include FPI and follow the procedures set forth at T 3.8.4.A.4 unless the acquisition satisfies an exception in AMS 3.8.4.2. Public announcement is not required once the QVL is established. This list can be updated at the FAA's discretion. Each list should be reviewed regularly to determine whether it should be updated.

Screening Information

Screening information allows the FAA to determine which offeror(s) are most likely to receive the award, and ultimately which offeror(s) will provide the FAA with the best value. The screening information requested in the SIR should focus on information that directly relates to the key discriminators for the procurement.

The following are examples of the types of information that may form the basis of a screening request:

(a) Equipment/products for FAA testing,
(b) Vendor testing,
(c) Testing data,
(d) Technical documentation (commercial, if available/practicable),
(e) Capability statements,
(f) Quality assurance information,
(g) Performance experience,
(h) Sample problems,
(i) Draft/model contracts,
(j) Technical proposals (including oral presentations, if appropriate/practicable),
(k) Commercial pricing information,
(l) Financial condition information,
(m) Cost or price information,
(n) Cost or price proposals; and

(o) Land or Space requirements.

Request for Offer/Solicitation for Offer

A Request for Offer (RFO)/Solicitation for Offer (SFO) is a request for an offeror to formally commit to provide the products, services, construction or real property required by the acquisition under stated terms and conditions. The response to the RFO/SFO is a *binding offer*, which is intended to become a binding contract if/when it is signed by the CO. The RFO/SFO may take the form of a SIR, a proposed contract, or a purchase order.

3.2.2.3.1.2.2 Communications with Offerors

Communications with all potential offerors should take place throughout the source selection process. During the screening, selection, and debriefing phases of source selection, communications are coordinated with the CO. Communications may start in the planning phase and continue through contract award. All SIRs should clearly inform offerors how communications will be handled during the initial screening phase.

The purpose of communications is to ensure there are mutual understandings between the FAA and the offerors about all aspects of the procurement, including the offerors' submittals/ proposals. Information disclosed as a result of oral or written communication with an offeror may be considered in the evaluation of an offeror's submittal(s).

To ensure that offerors fully understand the intent of the SIR (and the FAA's needs stated therein), the FAA may hold a pre-submittal conference and/or one-on-one meetings with individual offerors. One-on-one communications may continue throughout the process, as required, at the discretion of the service organization. Communications with one offeror do not necessitate communications with other offerors, since communications will be offeror-specific. Regardless of the varying level of communications with individual offerors, the CO should ensure that such communications do not afford any offeror an unfair competitive advantage. During these and future communications, as applicable, the FAA should encourage offerors to provide suggestions about all aspects of the procurement.

Communications may necessitate changes in the FAA's requirements or screening information request and such changes should be processed consistent with Section 3.2.2.3.1.2.4. Where communications do not result in any changes in the FAA's requirements, the FAA is not required to request or accept offeror revisions. The use of technical transfusion is always prohibited. Technical leveling and auctioning techniques are prohibited, except in the use of commercial competition techniques as described in Section 3.2.2.5.3.

3.2.2.3.1.2.3 Receipt/Evaluation of Submittals **Revised 9/2020**

Once offerors have submitted responses to a SIR, the service organization will evaluate the submittals in accordance with the evaluation criteria stated therein and the evaluation plan. To be considered for an award, an offeror must submit a response to the initial SIR, within the time specified in the SIR.

Evaluation Criteria

The evaluation criteria form the basis on which each offeror's submissions are to be evaluated. Once the criteria have been established and disclosed to offerors, criteria should not be modified without first notifying offerors competing at that stage of the process and allowing such offerors to revise their submissions accordingly. Each SIR must contain the specific evaluation criteria to be used to evaluate offeror submittals for that specific SIR. Evaluation criteria should be tailored to the characteristics of a particular requirement and should be limited to only the key discriminators in the ultimate selection decision. The criteria should avoid, whenever possible, the inclusion of detailed sub-criteria (or sub-criteria in general). Further, efforts should be made to ensure that there are no overlapping criteria. Initial SIRs do not require cost or price proposals but should require submission of more generalized cost or price estimates. Cost or price considerations must be an evaluation factor in all selection decision(s). For software acquisitions the criteria should include, whenever appropriate, an evaluation of the maturity of the offeror's software acquisition, development and maintenance processes that are relevant to the procurement. Such evaluations should be performed using standardized instruments such as a Capability-Maturity-Model-based Evaluation.

Evaluation Plan

An evaluation plan must be prepared by the service organization and approved by the SSO for all procurements accomplished under this section. Evaluation plans should be concise and tailored to the specific needs of the procurement. The evaluation plan should include the name of the SSO and the names of the service organization members and evaluators, the evaluation criteria, the evaluation methods and processes, the schedule, and any other information related to the source selection. The evaluation plan should be completed and approved prior to the receipt of responses to any SIR requesting screening or qualification information.

Evaluation Method

The evaluation methodology should be set up to allow for maximum flexibility in selecting the offeror(s) providing the best value. To facilitate such flexibility, the following should be considered in setting up evaluations:

(a) Relative importance between criteria is not required (when relative importance is used, the relative order of importance between criteria should be disclosed).
(b) Each SIR may incorporate separate and/or distinct criteria that relate to the specific SIR discriminators.
(c) The use of either adjectival or numerical ratings is acceptable.
(d) Comparative evaluations between offerors' proposals/products are acceptable.
(e) The service organization should be selective/inventive concerning the screening requirements for document submissions (e.g., oral presentations, sample tests, plant visits, site/space visits, etc.).
(f) Communications with offerors during the evaluation may help clarify submittals, allow a fuller understanding of the offeror submittals, and provide a more comprehensive evaluation.
(g) Testing of products is encouraged to the maximum extent practical ("try before you buy").

(h) Award based on initial offers to other than the low cost or price offer is allowed.

Evaluation Process

The evaluation will be conducted by the service organization, in accordance with the stated evaluation criteria and evaluation plan. The service organization (including any additional required evaluators and/or advisors) should be limited in size and dedicated through the completion of the acquisition. The service organization is expected to apply sound judgment in determining appropriate variations and adaptations necessary for individual situations, provided that these do not constitute a departure from the basic concepts and intent of the evaluation plan and SIR(s).

Communications may be considered in the evaluation of an offeror's submittal(s). Verifiable information from outside sources may be considered in the evaluation and should be disclosed to the offeror during the communication process. Any such findings should be noted in the evaluation report.

Evaluation Report

The service organization must document the results of the evaluation, including recommendations, if applicable.

3.2.2.3.1.2.4 Changes in Requirements

If, after release of a SIR, it is determined that there has been a change in the FAA's requirement(s), all offerors competing at that stage should be advised of the change(s) and afforded an opportunity to update their submittals accordingly.

The SSO has authority to waive a requirement at any time after release of a SIR, without notifying other offerors where the SIR states that offeror specific waiver requests will be considered, and the waiver does not affect a significant requirement that changes the essential character or conditions of the procurement.

All determinations relating to changes in requirements, including waivers, will be documented in the evaluation report.

3.2.2.3.1.2.5 SSO Decision

Based on a review of the service organization's evaluation report, the SSO may either:

(a) Make a selection decision (see the selection phase below);
(b) Make a screening decision by screening those offerors determined to be most likely to receive award, thus continuing the screening phase;
(c) Amend and re-open to initial offerors; or
(d) Cancel the procurement.

To ensure the integrity of the FAA competitive source selection process, all SSO decisions should be based on the evaluation criteria established in the SIR and have a rational basis. All offerors who are eliminated from the competition based on any screening decision should be provided with the basis for their elimination within five (5) working days after the screening decision and should be informed that they may request a debriefing after contract award. During the screening process, the SSO may decide to eliminate an offeror from further consideration without considering the cost or pricing information that was submitted in the response to the SIR. However, the final selection decision must consider the cost or price information that was submitted as part of the proposal.

If a screening decision, rather than a selection decision, is made, the service organization should issue another SIR (and repeat the screening process stated above) in order to make a selection decision (or another screening decision) among the remaining offerors. The screening process, starting at the issuance of the SIR, may be repeated until a selection decision is made or the procurement is canceled. In some circumstances it may be appropriate to down-select to one offeror for negotiation. However, if the FAA and the selected offeror cannot come to an agreement, the FAA may select another competing offeror for communications/award without issuance of further SIRs.

3.2.2.3.1.3 Selection Revised 10/2012

The selection decision must be based on the stated evaluation criteria including cost or price considerations to identify the best value.

The service organization must brief the SSO on their evaluation findings. The selection of the offeror who is expected to provide the best value solution is a matter committed to the discretion of the SSO. The SSO applies sound business judgment to the evaluation of the offeror's proposed solution against the stated evaluation criteria. In each case, the SSO should provide a rational basis for the screening or selection decision. The SSO should document the selection decision in the SSO decision memorandum (in cases where the CO and the Contracting Officer’s Representative are the only service organization members, the evaluation report and the SSO decision memorandum may be one report). In making the selection decision, the SSO may accept or reject the service organization's recommendations provided there is a rational basis.

Based on the SSO's decision, the CO will transmit a proposed contract to the selected offeror. The selected offeror will return a properly executed contract. Upon the CO's signature, the proposed contract becomes a binding contract.

3.2.2.3.1.4 Debriefing

Once an award has been made, all offerors who participated in the competitive process will be notified of the award and given three working days from receipt of the award notification to request a debriefing. Debriefings are intended to provide meaningful feedback to offerors on their submission. The purpose of the debriefing is to improve the offeror's ability to successfully compete for future FAA business by discussing the strengths and weaknesses of the offeror's

submissions. The debriefing should provide the offeror with the following information:

(a) SSO's Selection Decision;
(b) Offeror's evaluated standings relative to the successful offeror(s); and
(c) Summary of the evaluation findings (excerpts from evaluation summary documentation relating to the specific offeror).

The CO should request detailed questions from the unsuccessful offeror so the FAA can provide meaningful information during the debriefing. Debriefings should be conducted, as soon as practicable, with all offerors that request them.

3.2.2.3.1.5 Lessons Learned

A lessons learned memorandum is a valuable tool in which the service organization can relay its procurement experiences to other FAA acquisition personnel. Once an award has been made, the service organization should communicate its learning experiences. The communication should highlight those issues/processes that had significant impact on their procurement. Further, the service organization should discuss changes that could be made to ensure a more comprehensive evaluation and/or timelier award.

3.2.2.3.2 Reserved

3.2.2.3.2.1 Reserved

3.2.2.3.2.2 Reserved

3.2.2.3.2.3 Reserved

3.2.2.3.2.4 Reserved

3.2.2.3.2.5 Reserved

3.2.2.3.2.6 Reserved

3.2.2.4 Single-Source Selection Revised 9/2020

The FAA may contract with a single-source when in FAA's best interest and the rational basis for the decision is documented. This rational basis may be based on actions necessary and important to support FAA's mission, such as emergencies, standardization, and only source available to satisfy a requirement within the time required.

The following types of procurements are exempt from Section 3.2.2.4 requirements:

(a) Procurements not anticipated to exceed $10,000 (requirements must not be split to meet this exception);
(b) Noncompetitive awards made to Socially and Economically Disadvantaged Businesses (SEDB)/(8(a)) or service-disabled veteran owned small businesses (SDVOSB), both of which

are governed under AMS policy 3.6;

(c) Procurements conducted either in accordance with the Javits-Wagner-O'Day Act (AbilityOne Program) or the Randolph-Sheppard Act per AMS 3.8.4.2; and

(d) Procurements for a site-specific requirement for land or antenna/equipment space, where the location of NAS equipment is (1) necessary to the functionality of the NAS, and (2) of continued criticality to the NAS or mission of the FAA; or for operational facilities that house equipment and/or personnel that provide Air Traffic Control services to aircraft operating in the NAS. The head of the Technical Operations service organization, or designee, will provide an annual determination identifying equipment and facilities subject to this subsection (d) exemption.

The decision to contract with a single-source may be made as part of overall program planning. The rational basis must be documented and approved as a part of program planning in the Implementation Strategy and Planning Document (ISPD), a procurement plan, or as a separate document. If the rational basis is documented in the ISPD or procurement plan, the rational basis must be reviewed by Legal for sufficiency. If a separate single-source justification document is used, the justification must be reviewed by Legal for sufficiency, approved by the Service Organization Official, and concurred with by Contracts or, for purchase card transactions, the Purchase Cardholder.

Market analysis must be conducted to support each single-source decision, except for emergencies. The method and extent of the analysis depends on the requirement.

The service organization must provide the CO or the purchase cardholder with supporting documentation that justifies the proposed single source strategy decision. Examples of information that might be documented include results of market analysis, cost or price data, unique qualifications or performance capability, and past performance. Mere conclusions, without adequate objective supporting data, are insufficient.

After the decision to contract with a single source has been approved, a public announcement must be made for any action over $150,000, except in emergencies. The purpose of the announcement is to inform industry about the basis for the decision to contract with the single source.

For supplies, services, construction, or real property, a basic contract may be modified to exercise an option, or to satisfy a follow-on procurement for more of the same products, services, or real property needs without seeking additional competition when, based on market analysis, there is a rational basis not to compete the requirement and the rational basis is documented and approved as discussed in this Section.

The Contracting Officer must justify and document in accordance with this Section any increase in ceiling price of a time-and-materials or labor-hour contract.

3.2.2.4.1 Single-Source Procurement Process

The single-source procurement process includes planning, communications, award, and lessons learned. The actions for an individual phase within the process may vary depending on the

particular circumstances.

3.2.2.4.1.1 Emergencies Revised 1/2020

An emergency situation, including but not limited to a threat to loss of life or property, national security, restoration of an air traffic control facility or to repair critical facility systems to prevent loss of air traffic capability, may require immediate contracting with a single source. In these instances, once funds are committed, the CO may verbally authorize a contractor to proceed and may combine single source phases or complete activities after the fact. As a minimum and as soon as practical, the CO should:

(a) Obtain funding certification;
(b) Document the single source decision; and
(c) Confirm authorization with written notification.

3.2.2.4.1.2 Non-emergencies Revised 1/2017

For single-source non-emergency procurements, planning may include:

(a) Analyzing the market to determine potential sources;
(b) Developing an independent FAA cost estimate for any anticipated procurement action (to include modifications) whose total estimated value is $150,000 or more, if not exempted by AMS 3.2.1.2.4;
(c) Obtaining funding certification;
(d) Obtaining approval of rationale for single source, except for follow-on or exercise of options; and
(e) Issuing public announcement, if in excess of $150,000.

3.2.2.4.1.3 Lessons Learned

Communicating lessons learned is encouraged.

3.2.2.5 Commercial and Simplified Purchase Method Revised 9/2020

The FAA may acquire commercial products, services, and real property related services from the competitive market place by using the simplified purchase method described herein and best commercial practices. Commercial and simplified purchases are used for commercial items or for products, services, or real property related services that have been sold at established catalog or market prices and are generally purchased on a fixed-price basis. However, procurement of products available for purchase from Federal Prison Industries is governed by AMS 3.8.4.2.

3.2.2.5.1 Planning Revised 9/2020

Procurement planning should be accomplished for all simplified and commercial purchases. The level of planning and announcement should be dictated by the nature and complexity of the requirement, commercial availability, dollar value, urgency of the requirement, and degree of previous procurement history.

The purpose of procurement planning is to:

(a) Determine whether commercial items meet the FAA's needs;
(b) Identify potential commercial sources; and
(c) Publicly announce requirements in excess of $150,000.

Market analysis should be simple and straightforward, and may include information based on personal knowledge of the market, historical purchase information, qualified vendors list, commercial catalogs or databases, trade journals, newspapers, other professional publications or local telephone directories.

Contracting mechanisms are at the discretion of the CO. Purchases may also be made using the following mechanisms:

(a) Purchase card;
(b) Purchase card checks;
(c) Purchase order;
(d) Contract;
(e) Orally (only in emergency situations) with proper documents processed as soon as possible following the oral order; and
(f) Other methods, including interagency agreements, when deemed appropriate and properly documented.

3.2.2.5.2 Sourcing Determination Revised 9/2020

The CO should solicit an appropriate number of vendors to ensure quality products, services, and real property related services are delivered in a timely manner at a fair and reasonable price. Requirements should be stated in commercial terms generally understood and accepted in the industry.

3.2.2.5.3 Screening

The CO should determine the appropriate screening approach and format for vendor's responses (e.g., electronic, written, oral, use of standard commercial or FAA forms). The CO may also conduct communications with individual offerors, as appropriate, to address offeror understanding of the requirement, performance capability, prices, and other terms and conditions. For commercially available products, the CO is encouraged to use "commercial competition techniques" such as continuing market research throughout the process by using vendor proposals as the source of prices and commercially available capabilities and sharing that information with other vendors.

3.2.2.5.4 Selection Decision and Award Revised 9/2020

The CO's selection decision must be based on the FAA's stated evaluation criteria. The selection decision for commercial or simplified purchases should be based on the best value to the FAA including, but not limited to, factors such as price, functional specifications, delivery capability, warranty, and payment terms. This may be accomplished through establishing specific evaluation criteria with an accompanying evaluation plan as described under Complex, Source Selection, and making the selection based on the stated criterion. It may also be based on the most favorable solution available in the commercial market, as determined by the FAA, as described under Commercial and Simplified Purchase Method, or through a combination of methods depending on complexity, risk, dollar value, and urgency of the requirement.

3.2.2.5.4.1 Documentation Revised 9/2020

The method of selection and rationale for awards, and a determination that the price is fair and reasonable must be documented. The extent of the documentation depends on the complexity and dollar value of the procurement action.

3.2.2.5.5 Micro-Purchase Threshold Revised 9/2020

Simplified purchases with a Total Estimated Potential Value (TEPV) under the micro-purchase threshold must be performed using the purchase card. The micro-purchase threshold is $10,000 for commercial supplies, construction, services, and real property related services.

3.2.2.6 Unsolicited Proposals

3.2.2.6.1 Policy Added 10/2008

The FAA may consider and accept unsolicited proposals when in the best interest of FAA. Unsolicited proposals are a valuable means for FAA to obtain innovative or unique methods or approaches to accomplishing its mission from sources outside FAA. Advertising material, commercial item offers, contributions, or technical correspondence are not considered to be unsolicited proposals. A valid unsolicited proposal must:

(a) Be innovative and unique;
(b) Be independently originated and developed by the offeror;
(c) Be prepared without FAA supervision;
(d) Include sufficient detail to permit a determination that the proposed work could benefit FAA's research and development, or other mission responsibilities; and
(e) Not be an advance proposal for a known FAA requirement that can be acquired by competitive methods.

3.2.2.6.2 Receipt and Initial Review Revised 10/2008

Unsolicited proposals should be addressed to:

Federal Aviation Administration
Acquisition Policy and Oversight
Acquisition Policy Group (AAP-100)
Attn.: Unsolicited Proposal Coordinator
800 Independence Avenue SW, Room 439W
Washington, DC 20591

Once received, the FAA unsolicited proposal coordinator will review and determine if the document(s) meets the requirements of an unsolicited proposal.

3.2.2.6.3 Prohibitions Added 10/2008

FAA personnel should not use any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a SIR or in communications with any other firm unless the offeror is notified of and agrees to the intended use. However, this prohibition does not preclude using any data, concept, or idea available to FAA from other sources without restrictions.

FAA personnel must not disclose restrictively marked information included in an unsolicited proposal. The disclosure of such information concerning trade secrets, processes, operations, style of work, apparatus, and other matters, except as authorized by law, may result in criminal penalties under 18 U.S.C. § 1905.

3.2.2.7 Contractor Qualifications

3.2.2.7.1 Applicability

This section applies to all contracts and to all proposed contracts with any prospective contractor that is located in the United States, its possessions, or Puerto Rico; or elsewhere, unless application would be inconsistent with the laws or customs where the contractor is located.

3.2.2.7.2 Contractor Responsibility

The CO must ensure that contracts are awarded only to responsible contractors (see Section 3.2.2.2). No award may be made unless the CO makes an affirmative determination of responsibility.

3.2.2.7.3 Contractor Team Arrangements

FAA will recognize the validity of contractor team arrangements, provided, the arrangements and company relationships are fully disclosed in an offer, or for arrangements entered into after submission of an offer, before the arrangement becomes effective.

3.2.2.7.4 Suspension and Debarment

FAA may suspend or debar contractors for cause. FAA will honor suspension, debarment, and ineligibility decisions of other agencies unless FAA has a compelling need to obtain the requirement from that contractor.

3.2.2.8 Describing FAA Needs

3.2.2.8.1 Applicability Revised 9/2020

The requirements herein apply to all FAA procurements and agreements.

3.2.2.8.2 Policy

The FAA will describe its needs clearly and generally in writing, absent special or emergency circumstances. Service organizations may describe needs as minimum requirements, goals, or in another form well suited to the contemplated procurement.

3.2.2.9 Rehabilitation Act

The FAA must comply with Section 508 of the Rehabilitation Act of 1973 in developing, procuring, maintaining or using electronic and information technology. Section 508 of the Rehabilitation Act of 1973 applies to all new procurements after June 21, 2001.

3.2.3 Pricing Methodology, Principles and Standards Revised 10/2011

3.2.3.1 Cost and Price Analysis Revised 9/2020

3.2.3.1.1 Applicability Added 9/2020

This section applies to cost and price analysis for contracts, subcontracts, orders, and modifications for products, services, construction, and real property.

3.2.3.1.2 Policy Added 9/2020

The CO must make a determination that prices are fair and reasonable based on price analysis and, if necessary, cost analysis. Price analysis is the review of price without evaluating separate cost elements and profit/fee, and is required for all pricing actions. Cost analysis is the review of the individual cost elements and profit. Price analysis is the preferred method for evaluating competitive proposals. If the CO determines price competition is not adequate to support a determination of price reasonableness, the CO must require offerors to submit either certified cost or

pricing data or information other than certified cost or pricing data. When the CO determines adequate price competition exists, certified cost or pricing data must not be requested. In situations with established catalog or market prices, prices set by law or regulation, or commercial items, price analysis is sufficient and the CO must not request cost data.

3.2.3.2 Pre- and Post-Award Audits Revised 9/2020

3.2.3.2.1 Applicability Added 9/2020

This section applies to pre- and post-award audits for contracts, subcontracts, orders, and modifications for products, services, and construction.

3.2.3.2.2 Policy Added 9/2020

The CO must request pre-award and post-award audits on all cost reimbursement Contracts (for products or services) exceeding $100 million. In addition, FAA will request pre-award and post-award audits on at least 15% of all cost reimbursement contracts not anticipated to exceed $100 million. For other contract types, the CO may use any method of cost or price analysis to determine fair and reasonable prices.

Pre-award audits and post-award incurred cost audits are the preferred mechanism to assist the CO in ensuring valid indirect and direct costs are billed under cost reimbursement contracts. The CO is responsible for ensuring indirect and direct costs under a cost reimbursement contract are allowable. In situations where an incurred cost audit is not obtained, the CO will still ensure that only allowable costs are paid.

The sponsoring service organization will fund required pre- and post- award audits and must include an estimate of the cost of audits in the acquisition program baseline or execution plan; the implementation strategy and planning document will describe the approach, responsible organizations, and activities for obtaining audits.

3.2.3.3 FAA Cost Principles Revised 9/2020

3.2.3.3.1 Applicability Added 9/2020

This section applies to FAA Cost Principles for contracts, subcontracts, orders, and modifications for products, services, and construction.

3.2.3.3.2 Policy Added 9/2020

The FAA contract cost principles, as described in AMS Procurement Guidance, must be used to price contracts, subcontracts, orders, and modifications whenever cost analysis is performed. Cost principles must also be used for determining, negotiating, or allowing costs when required by a contract clause.

The CO must incorporate FAA cost principles in contracts with commercial organizations as the basis for:

(a) Determining reimbursable costs under (a) cost-reimbursement contracts and cost-reimbursement subcontracts under these contracts performed by commercial organizations and (b) the cost-reimbursement portion of time-and-materials contracts except when material is priced on a basis other than at cost;
(b) Negotiating indirect cost rates, when FAA has division or corporate contract administration responsibilities, quick close-out procedures are used, or indirect rate caps are negotiated in the contract;
(c) Proposing, negotiating, or determining costs under terminated contracts;
(d) Price revision of fixed-price incentive contracts;
(e) Price re-determination of price re-determination contracts; and
(f) Pricing changes and other contract modifications.

When another Government agency has division or corporate contract administration responsibilities, FAA may agree to cost principles of the administering agency to determine or negotiate indirect rates not covered by (a) or (b) above.

3.2.3.4 Cost Accounting Standards Revised 9/2020

3.2.3.4.1 Applicability Added 9/2020

This section applies to Cost Accounting Standards (CAS) for contracts, subcontracts, orders, and modifications for products, services, and construction.

3.2.3.4.2 Policy Added 9/2020

All contractors and subcontractors must use Cost Accounting Standards (CAS) according to 48 CFR Part 99 for estimating, accumulating, and reporting costs in connection with pricing, administering, and settling disputes concerning all negotiated prime and subcontract procurements $2,000,000 or more, except for contracts or subcontracts exempted by these regulations. The following categories of contracts and subcontracts are exempt from all CAS requirements:

(a) Negotiated contracts and subcontracts less than $2,000,000. For purposes of this paragraph, an order issued by one segment to another segment must be treated as a subcontract;
(b) Contracts and subcontracts with small businesses;
(c) Contracts and subcontracts with foreign governments or their agents or instrumentalities or (insofar as the requirements of CAS other than 9904.401 and 99.402 are concerned) any contract or subcontract awarded to a foreign concern;
(d) Contracts and subcontracts in which the price is set by law or regulation;
(e) Firm fixed-priced and fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time-and-materials and labor-hour contracts and subcontracts for acquisition of commercial items;
(f) Contracts or subcontracts of less than $7.5 million, provided that, at the time of award, the business unit of the contractor or subcontractor is not currently performing any CAS-covered contracts or subcontracts valued at $7.5 million or greater;
(g) Contracts and subcontracts to be executed and performed entirely outside the United

States, its territories, and possessions; and

(h) Firm fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data.

3.2.4 Types of Contracts

3.2.4.1 Applicability Revised 9/2020

This section is applicable to contracts for procurement of all products, services, construction and real property.

3.2.4.2 Policy

Contracts may be of any type or combination of types except for cost plus a percentage of cost contracts, which are prohibited. The use of fixed-price contracts is strongly encouraged whenever appropriate. Development contracts may be incrementally phased fixed-price contracts. All contracts, except those issued in emergency situations, must be in writing.

3.2.4.3 Guidance and Principles Revised 10/2018

The types of contracts that may be used for FAA procurements are addressed in AMS guidance. Types of contracts other than those specified in the guidance may be used when approval has been obtained from an official one level above the CO within the contracting organization.

Contracting officers should clearly identify the type of contract(s) at the front of each contract and in SIRs, when appropriate. Where multiple types of contracts are used in one contract, performance requirements, terms and conditions, and prices (or estimated cost and fee) for each type of contract should be clearly separated and partitioned.

The multi-year contract may be used for the acquisition of products and services in accordance with any applicable restrictions and appropriate appropriations acts.

3.2.5 Contractor Ethical Guidelines

3.2.5.1 Applicability

This policy is applicable to all contracts.

3.2.5.2 Policy

FAA business must be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.

3.2.6 Purchase Card Program Added 1/2009

3.2.6.1 Applicability Added 1/2009

Purchase card policy and corresponding guidance apply only to actions conducted through the FAA purchase card program.

3.2.6.2 Policy Added 1/2009

All procurements using an FAA purchase card must be conducted according to applicable laws, regulations, and FAA policy. AMS procurement guidance for purchase cards establishes standards for competition and source selection that supersedes other applicable AMS policy and guidance.

3.2.7 Anti-Counterfeit Management Added 4/2014

3.2.7.1 Applicability Revised 9/2020

Anti-Counterfeit policy and non-conforming parts requirements are applicable to (1) products and services contracts over $50M; (2) construction contracts for NAS applications over $2M; and (3) office equipment and/or supplies for NAS applications over $2M.

3.2.7.2 Suspected Counterfeit and Non-Conforming Parts Added 4/2014

Anti-Counterfeit policy, guidance and procedures apply to securing the FAA equipment supply chain from counterfeit and non-conforming parts.

The CO must ensure that instruction to contractors result in the most efficient and economical way to mitigate the entry of suspected counterfeit and non-conforming parts in the FAA supply chain by:

- Not knowingly procuring suspected counterfeit and non-conforming parts.
- Documenting all occurrences of suspected and confirmed counterfeit parts in the appropriate reporting system, including the Government-Industry Data Exchange Program (GIDEP).
- Making information about counterfeiting accessible at all levels of the FAA supply chain as a method to prevent further counterfeiting.

Notifying the appropriate FAA investigative organization, or US Government intelligence authorities, and those who use the suspected and confirmed counterfeit parts, of incidents at the earliest opportunity

3.3 Contract Funding and Payment Revised 10/2011

3.3.1 Contract Funding and Payment

Contract payment processes expedite the performance of essential contracts. The FAA will structure payment plans and schedules that are conducive to efficient and economical contract performance.

3.3.1.1 Applicability Revised 9/2020

This section applies to all contracts. This section includes:

(a) Payments;
(b) Prompt payment;
(c) Non-delivery payments (commercial and noncommercial);
(d) Contract funding; and
(e) Debt collection.

3.3.1.2 Policy

3.3.1.2.1 Payment Revised 9/2020

Prudent contract payment methodologies expedite the performance of essential products, services, or construction contracts. The CO should strive to structure the contract to allow frequent partial deliveries. If partial deliveries are not possible or the interval between deliveries is long, non-delivery payments may be necessary for efficient and economical contract performance.

3.3.1.2.2 Prompt Payment Revised 9/2020

For products, services, or construction contracts, the FAA should make payments for all acceptable deliveries within 30 days after receipt of a proper invoice and receiving report (fifteen (15) calendar days for contracts with small businesses, whenever practicable). Interest will apply to any payment later than thirty (30) calendar days. However, except under contracts for services, interest will not apply to late payments on interim vouchers under time- and-material, labor-hour, and cost reimbursement contracts.

For real property contracts, the FAA should make payments within thirty (30) calendar days or as provided in the contract. The CO has discretion in applying late payment interest to payments made within the scope of real property contracting actions.

3.3.1.2.3 Non-delivery Payments (Commercial and Noncommercial)

The CO may use any of the non-delivery payment methods available for use. Other types of non-delivery payments may be made as long as they are mutually agreed upon and the interest of the FAA and the U.S. taxpayer are protected (e.g., security, adequate accounting system, etc.). All non-delivery payment plans not described in this section require approval one level above the CO.

3.3.1.2.4 Contract Funding

The FAA must comply with the Anti-Deficiency Act and other fiscal laws.

3.3.1.2.5 Debt Collection

Debt collection is the responsibility of the CO in coordination with the payment office. Interest must be assessed on all uncollected debt in accordance with this section.

3.3.2 Reserved Revised 10/2011

3.4 Bonds, Insurance, and Taxes

3.4.1 Bonds and Insurance

3.4.1.1 Applicability Revised 7/2008

This section applies to construction contracts subject to the Miller Act, and to any other contracts that the CO determines would benefit from use of bonds, guarantees, and insurance to protect FAA's interest.

3.4.1.2 Policy Revised 10/2010

The FAA will comply with the intent of the Miller Act (40 U.S.C. § 270a-270f) by requiring payment and performance bonds for construction contracts over $150,000. The FAA may also require proposal guarantees, payment bonds, performance bonds, and insurance for any contract when necessary to protect FAA's interests.

3.4.2 Taxes

3.4.2.1 Applicability Revised 9/2020

This section applies to all contracts and prescribes guidance for (a) using tax clauses in contracts (including foreign contracts), (b) asserting immunity or exemption from taxes, and (c) obtaining tax refunds. It explains Federal, State, and local taxes on certain products and services acquired by executive agencies and the applicability of such taxes to the Federal Government. It is for the general information of Government personnel and does not present the full scope of the tax laws and regulations.

3.4.2.2 Policy

The FAA policy is to provide appropriate contract clauses for (a) Federal Excise Taxes levied on the sale or use of particular products or services, (b) exemption of Federal Excise Taxes, and (c) exemption of Federal purchases and property from state and local taxes. The service organization must use the appropriate clauses for the tax situation at hand.

3.5 Patents, Rights in Data and Copyrights

3.5.1 Applicability

The policies prescribed in this section are applicable to all contracts involving intellectual property issues.

3.5.2 Policy

Patents, copyrights, and other rights in data are valuable intellectual property. The FAA acquires patents, copyrights, and other rights in data as necessary to:

- Enhance the competitive process;
- Ensure the ability to use, maintain, repair, and modify products procured under FAAcontracts;
- Recoup development costs of, and fund improvements in, products and equipment;
- Develop products for FAA and public use; and
- Protect its position in the competitive marketplace.

3.6 Socio-Economic and Other Policies and Programs

3.6.1 Small Business Program Revised 7/2020

3.6.1.1 Applicability Revised 9/2020

The policies in this Section apply to FAA procurements for products, construction, and services but exclude those procurements using purchase cards, purchase card checks, electric utilities, real property, grants, memoranda of understanding, non-appropriated funds, contracts to be awarded and performed entirely outside of the United States, contracts with foreign governments or international organizations, agreements, and required sources of products/services and use of Government sources including products available from Federal Prison Industries (FPI) (refer to AMS Small Business Program Guidance).

3.6.1.2 Policy Revised 7/2020

The FAA must comply with Presidential directives, constitutional standards, public laws, and DOT Secretary Policy Statements to promote, expand, aggressively provide procurement opportunities as prime contractors and as subcontractors for small businesses, small businesses owned by socially and economically disadvantaged individuals, women-owned small businesses and service-disabled veteran owned small businesses. The FAA's Small Business Program (AAP-20) staff currently has and will continue to have responsibility for:

- FAA's policy and program on the utilization of small business and small businesses owned and controlled by socially and economically disadvantaged individuals;
- Establishing mechanisms for monitoring and evaluating the effectiveness of the small business program; and
- Ensuring FAA-wide implementation and accomplishment of the small business program objectives.

Key features of the small business program will include:

- Competitive/noncompetitive set-asides;
- Establishment of eligibility criteria and measurable prime contracting and subcontracting goals;
- Vigorous outreach efforts;
- Mentor-Protégé Program; and
- Small business forums.

3.6.1.3 Principles for the Small Business Program Revised 7/2020

3.6.1.3.1 Program Goals Revised 7/2020

Prior to the end of each fiscal year, measurable annual FAA wide major procurement program goals (including subcontracting goals) will be established to provide attainable and reasonable opportunities for small businesses and small businesses owned and controlled by socially and economically disadvantaged individuals to participate in contracts awarded by the FAA for the next fiscal year.

To ensure attainment of the program goals, senior management will be held responsible and goal achievement will be monitored at all levels in the agency. Additionally, the AAP-20 Staff will conduct vigorous outreach efforts that may include participating in Small Business Conferences, Small Business forums, etc.

3.6.1.3.2 Prime Contracting with Small Businesses Revised 1/2017

When appropriate, individual procurements may be set aside for competitive award among small businesses. Individual procurements may also be set-aside for small businesses two categories (combined set-asides).

3.6.1.3.3 Reserved Revised 1/2017

3.6.1.3.4 Set-Asides to Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals (8(a) Certified) and Service-Disabled Veterans Revised 7/2020

Except for those acquisitions being purchased using the agency purchase card, or those

acquisitions subject to AMS 3.8.4.2, each acquisition of supplies or services having an anticipated dollar value exceeding $10,000, but not over $150,000, is automatically reserved exclusively for SEDB (8(a)) vendors and/or Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) unless the Contracting Officer determines there is not a reasonable expectation of obtaining offers from responsible SEDB (8(a)) or SDVOSB concerns that are competitive in terms of market prices, quality and delivery. The Contracting Officer must submit the Small Business Set-Aside Determination and Coordination Form if not setting aside for either SEDB (8(a)), SDVOSB, or small business firms for acquisitions exceeding $10,000 but not over $150,000 (see also AMS Small Business Program Guidance for use of this form). **These procurements may be either competitive or noncompetitive.**

In addition, other individual procurements outside the above specified range may be set-aside for competitive award among Socially and Economically Disadvantaged Businesses (SEDBs) that are 8(a) certified, or Service-Disabled Veteran-Owned firms, when appropriate.

3.6.1.3.5 Noncompetitive Awards to SEDB (8(a)) Vendors Revised 7/2020

Individual procurements may be noncompetitively awarded to SEDB (8(a)) vendors when the anticipated total value of the procurement (including all options) is $6.5 million or below for procurements assigned manufacturing North American Industry Classification System codes and $4 million or below for all other procurements. Where a procurement exceeds the noncompetitive threshold, the procurement may be awarded on a noncompetitive basis to SEDB (8(a)) vendors if: (1) there is not a reasonable expectation that at least two or more SEDB (8(a)) sources will submit offers that are in the Government's best interest in terms of quality, price and/or delivery; or (2) the award will be made to a concern owned by an Indian tribe or an Alaska Native Corporation. Noncompetitive awards above $22 million to SEDB 8(a) vendors must be justified and documented as indicated in AMS Small Business Program Procurement Guidance.

3.6.1.3.6 Set-Asides to Service-Disabled Veteran Owned Small Businesses Revised 10/2008

When appropriate, individual procurements may be awarded noncompetitively or set-aside competitively for award among service-disabled veteran owned small businesses.

3.6.1.3.7 Subcontracting with Small Businesses and Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals

When appropriate, subcontracting opportunities will be encouraged.

3.6.2 Labor Laws

3.6.2.1 Applicability Revised 9/2020

The Davis-Bacon Act (40 U.S.C. § 276a), Convict Labor (18 U.S.C. § 4082-(c)(2)), Copeland Act (18 U.S.C. § 874 and 40 U.S.C. § 276c), Walsh-Healey Public Contracts Act (41 U.S.C. §§ 6501-6511), Equal Employment Opportunity (Executive Order 11,141, 29 FR

2477), Service Contract Labor Standards (41 U.S.C. §§ 6701-6707), and other labor laws and regulations will apply to acquisitions for products, services, construction, and real property.

3.6.2.2 Policy Revised 9/2020

The FAA will comply with labor laws when acquiring products, services, construction, and real property consistent with the thresholds established herein the Acquisition Management System.

3.6.3 Environment, Conservation, Occupational Safety, and Drug-Free Workplace Revised 4/2009

3.6.3.1 Applicability Revised 4/2009

This section applies to all FAA Screening Information Requests (SIRs) and contracts performed in the United States.

3.6.3.2 Policy Revised 9/2020

It is the policy of FAA to contract with entities that are in compliance with applicable environmental, energy, safety, and drug-free workplace laws, orders, and regulations.

FAA will ensure that all contract actions and purchases comply with statutory requirements. FAA should prioritize products, services, or real property interests that meet more than one of the applicable requirements and is encouraged to procure products, services, or real property in a cost-effective manner that advance achievement of energy and environmental performance goals. FAA will use Category Management solutions for products or services to the maximum extent practicable, which can help meet sustainability goals and better leverage the government's buying power.

FAA will give purchasing preference to products that:

(a) Meet minimum requirements for recycled content as identified by EPA's Comprehensive Procurement Guideline (CPG) Program;
(b) Are designated as biobased or BioPreferred by USDA; and
(c) Are certified by ENERGY STAR® or designated by the Federal Energy Management Program (FEMP) as energy efficient products.

FAA will maximize substitution of alternatives to ozone-depleting substances in its procurements, as identified under EPA's Significant New Alternatives Policy (SNAP) program.

FAA should also seek sustainable products and services identified by other EPA programs, including WaterSense®, Safer Choice®, and SmartWay® as well as non-federal specifications, standards or labels that meet or exceed those recommended by EPA or meet criteria developed or adopted by consensus standards bodies.

3.6.3.3 Environmental Performance and Sustainability Factors Revised 10/2016

3.6.3.3.1 Recycled-Content Products Revised 9/2020

In order to meet the objectives of Executive Order (EO) 13834, FAA will procure products composed of recycled content, which are produced with waste materials and byproducts recovered or diverted from solid waste. Recycled-content products are designated in EPA's Comprehensive Procurement Guidelines (CPG) and FAA will purchase these products at the highest percentage of recovered content practicable. FAA should purchase uncoated paper (including office products or support services that include the supply of written documents) containing at least 50 percent post-consumer recycled content whenever practicable, but if not practicable, FAA will purchase uncoated printing and writing paper containing at least thirty percent (30 %) post-consumer recycled content or higher. These considerations will be identified in procurement planning and SIR/contract documents. The decision not to procure such items will be based on a determination that such procurement items:

1. Are not reasonably available within a reasonable period of time;
2. Fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or
3. Are only available at an unreasonable price.

3.6.3.3.2 Energy Conservation and Efficiency Revised 9/2020

In order to meet the objectives of EO 13834, the Energy Policy Act of 2005 (EPAct 2005), the Energy Independence and Security Act of 2007 (EISA 2007), and FAA Order 1053.1B (or the latest version), FAA will procure ENERGY STAR© -labeled and FEMP-designated products, and ENERGY STAR buildings, unless the space requirement is exempted by EISA.

FAA will also promote electronics stewardship throughout the acquisition life cycle and ensure a procurement preference for environmentally sustainable electronic products in accordance with statutory mandates such as Electronic Products Assessment Tool (EPEAT)-registered products. These considerations will be identified in the procurement planning and SIR/contract documents when procuring products or services affecting FAA energy consumption. The decision not to procure such items will be based on a determination that such procurement items:

1. Are not reasonably available within a reasonable period of time;
2. Fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or
3. Are only available at an unreasonable price.

Executive Order (EO) 13834, Efficient Federal Operations, sets goals for federal agencies to make their building inventories complaint with the February 2016, Guiding Principles for High Performance and Sustainable Buildings (Guiding Principles). The Guiding Principles establish building standards for: integrated design, energy performance, water conservation, indoor environmental quality, environmental impact of materials, and climate resilience.

3.6.3.3.3 BioPreferred and Biobased Designated Products Revised 1/2020

In order to meet the objectives of EO 13834, the Farm Security and Rural Investment Act of 2002, the Food Conservation and Energy Act of 2008, and the Agricultural Act of 2014, FAA will purchase and use USDA BioPreferred and biobased designated products, which are products derived from plants and other renewable agricultural, marine, and forestry materials and provide an alternative to conventional petroleum derived products. FAA will give preference to products composed of the highest percentage of biobased material practicable. These considerations will be identified in procurement planning, SIR/contract documents. The decision not to procure such items will be based on a determination that such products within a product category:

1. Are not reasonably available within a reasonable period of time;
2. Fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or
3. Are only available at an unreasonable price.

3.6.3.3.4 Alternatives to Ozone Depleting Substances and High Global Warming Potential Hydrofluorocarbons Revised 1/2020

In order to meet the objectives of EO 13834 and the Clean Air Act, FAA will procure Significant New Alternative Policy (SNAP) chemicals or other alternatives to ozone-depleting substances and high global warming potential hydrofluorocarbons, where feasible, as identified by SNAP. FAA will ensure that the product complies with statutory mandates (e.g., biobased) if applicable to the product category. These considerations will be identified in the procurement planning and SIR/contract documents.

3.6.3.3.5 Water Conservation and Efficiency Revised 1/2020

In order to meet the objectives of EO 13834 and FAA Order 1053.1C (or the latest version), FAA should purchase WaterSense certified products and services. These considerations will be identified in the procurement planning and SIR/contract documents when procuring products or services affecting FAA water consumption.

3.6.3.3.6 Chemicals Management Revised 1/2020

In order to meet the objectives of EO 13834, FAA should purchase Safer Choice labeled products to reduce the overall quantity of chemicals and toxic materials acquired, used, and disposed of. FAA will ensure that the product complies with the statutory mandates (e.g., biobased) if applicable to the product category. These considerations will be identified in the procurement planning and SIR/contract documents.

Additionally, FAA will implement EPA's Integrated Pest Management Principles and Water Efficient Landscaping practices to reduce and eliminate the use of toxic and hazardous chemicals and materials.

3.6.3.4 Environmental Review Added 9/2020

The National Environmental Policy Act (NEPA) requires agencies to consider the environmental impact of major federal actions, including certain procurement actions. FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, provides policies and procedures to ensure agency compliance with NEPA (42 United States Code [U.S.C.] §§ 4321-4335), the requirements set forth in the Council on Environmental Quality (CEQ), Title 40, Code of Federal Regulations (CFR), parts 1500-1508, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (CEQ Regulations), and Department of Transportation (DOT) Order 5610.1C, Procedures for Considering Environmental Impacts. The FAA uses the NEPA process to conduct environmental review required by other statutes, such as the Endangered Species Act and the National Historic Preservation Act.

3.6.3.5 Environmental Due Diligence and Real Property Added 9/2020

FAA real property transactions are subject to the requirements of FAA order 1050.19C, Environmental Due Diligence in the conduct of FAA Real Property Transactions and Paragraph 2-7 of Order 1050.1F, in order to identify and minimize potential environmental liabilities associated with the condition of the property and past activities at the site. Environmental due diligence requirements must be completed prior to executing contracts for the initial acquisition or disposal of real property, including the conveyance, sale or transfer of any FAA land, buildings, and structures.

3.6.3.6 Delivery of Electronic and Paper Documents Revised 9/2020

Contractors must submit acquisition-related documents electronically, to the maximum extent practicable. When paper documents are submitted to the FAA, they must be printed or copied double-sided. Refer to the Recycled-Content Products Policy above for additional requirements for delivery of paper documents.

3.6.3.7 Drug-Free Workplace Revised 9/2020

The FAA must deem any offer unqualified and ineligible for award unless the offeror has certified that it is a drug free workplace. After contract award, if there is adequate evidence to suspect that the contractor submitted a false certification or failed to comply with the certification, the FAA may suspend payments, terminate the contract for default, debar or suspend the contractor, or take other appropriate action to obtain quality performance by a lawfully operating contractor.

3.6.3.8 Hazardous and Radioactive Materials Revised 9/2020

3.6.3.8.1 Hazardous Material Identification and Safety Data Revised 9/2020

It is FAA policy to comply with Occupational Safety and Health Administration (OSHA) regulations on hazardous materials, conditions and precautions. To comply with these regulations, FAA must obtain information from contractors when hazardous materials are provided to FAA. Contractors are required to identify any hazardous materials delivered under a contract, as defined in Federal Standard 313; and must provide Safety Data Sheets for all identified hazardous materials.

3.6.3.8.2 Notice of Radioactive Material Revised 9/2020

The contractor is required to notify the FAA, prior to delivery, of radioactive material that requires specific licensing under the Atomic Energy Act of 1954; or material with a specific activity that is greater than 0.002 microcuries per gram, or a specific activity per item exceeds 0.01 microcuries.

3.6.3.9 Waste Management Revised 9/2020

In order to meet the objectives of EO 13834, FAA will demonstrate incremental improvement on reducing the tons of non-hazardous solid waste generated and reducing the percentage of non-hazardous solid waste sent to treatment and disposal facilities. FAA will also demonstrate incremental improvement on reducing the tons of non-hazardous construction and demolition (C&D) materials and debris generated and reducing the percentage of non-hazardous C&D materials and debris sent to treatment and disposal facilities. Contractors must comply with the waste reduction and reporting requirements set forth by FAA with regard to the diversion of non-hazardous solid waste and C&D debris. Waste management will further be accomplished through employing source reduction strategies (such as purchasing items that require less packaging materials during shipping) and reducing printing paper use. Waste management factors must be considered, to the maximum extent practicable, in acquisitions where their application would be meaningful and consistent with meeting FAA requirements. These factors must be identified in the procurement planning and SIR/ contract documents.

3.6.3.10 Seismic Safety Added 9/2020

Buildings, or space, acquired for the FAA or constructed on FAA property must meet current seismic safety requirements as provided in E.O. 12699, E.O. 12941 & P.L. 101-614. It is FAA's policy to mitigate seismic hazards in FAA occupied buildings in order to ensure the safety of its employees. Every effort should be made in the space acquisition process to ensure that FAA employees are housed in seismically safe buildings. New or succeeding leases are to be for space in buildings that comply with seismic standards as described in National Institute of Standards and Technology (NIST) RP-8, Standards for Seismic Safety for Existing Federally Owned or Leased Buildings, December 2011.

3.6.4 Foreign Acquisition Revised 4/2014

3.6.4.1 Buy American Act Revised 9/2020

The FAA will comply with the tenets of the Buy-American Act to maximize the use of the products and construction materials produced in the United States (41 U.S.C. §§ 8301-8305) as well as the obligation set forth by the Act to use only steel and manufactured goods produced in the United States (49 U.S.C. § 50101) as part of the agency's best value determination during the contractor selection process.

3.6.4.2 Export Control Added 4/2014

The FAA will comply with all U. S. Export Control laws and regulations, including the International Traffic in Arms Regulations (ITAR), 22 CFR Parts 120 through 130 and the Export Administration Regulations (EAR), 15 CFR Parts 730 through 774.

3.6.5 Indian Incentive Program

The FAA is subject to the requirements of paragraph 1544 of 25 U.S.C. that establishes an incentive payment for contractors of Federal agencies that subcontract with or use suppliers who are Indian organizations or Indian-owned economic enterprises in performing the contract. This incentive payment may be equal to 5 percent of the amount paid, or to be paid, to a qualifying subcontractor or supplier that is an Indian organization or Indian-Owned economic enterprise.

3.6.6 Fastener Quality Act

The FAA must comply with Pub. L. 101-592, as amended by Pub. L. 104-113 in equipment and construction applications which require the use of high-strength fasteners.

3.6.7 Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (49 CFR Part 24) Added 9/2020

To the extent that it is applicable to FAA real property transactions, Cos must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (promulgated in 49 CFR Part 24). Provisions of the Uniform Act are mandatory and are applicable to each Federal agency that administers programs or provides financial assistance for projects, which involve land acquisition or relocation assistance. The FAA must (1) provide uniform, fair and equitable treatment of persons whose real property is acquired or who are displaced in connection with federally funded projects; (2) ensure relocation assistance is provided to displaced persons to lessen the emotional and financial impact of displacement; (3) ensure that no individual or family is displaced unless decent, safe and sanitary housing is available within the displaced person's financial mean; (4) help improve the housing conditions of displaced persons living in substandard housing; and (5) encourage and expedite acquisition by agreement and without coercion.

3.7 Freedom of Information Revised 10/2018

3.7.1 Applicability Revised 10/2018

Freedom of information is applicable to all FAA procurements including agreements, real property, utilities, credit cards, commercial and simplified purchase method.

3.7.2 Policy Revised 10/2018

The FAA will comply with the Freedom of Information Act which requires that the FAA provide information to the public by (i) publication in the Federal Register; (ii) providing an opportunity to read and copy records; or (iii) upon a reasonable request. Certain information may be exempted from disclosure; such as, classified information, trade secrets, and confidential commercial or financial information, interagency or intra-agency memoranda, or to personal and medical information pertaining to an individual.

3.8 Special Categories of Contracting

3.8.1 Agreements

3.8.1.1 Applicability

3.8.1.2 Use of Agreements Revised 1/2012

It is FAA's policy to use various agreements, other than procurement contracts, to obtain or provide services and supplies when necessary to accomplish the mission of FAA. These agreements may be made with another Federal agency or instrumentality of the Federal government, a modal administration within the Department of Transportation, a state, local government, municipality, or other public entity, and private entities. (See 49 U.S.C. 106(l)). The following is a list of the more commonly used agreements (other than procurement contracts):

(a) Interagency agreements;
(b) Intra-agency agreements;
(c) Reimbursable agreements;
(d) Agreements with other public entities; and
(e) Agreements to provide services to a private entity on an individualized basis.

3.8.1.3 Principles for Agreements

Agreements with other Federal Agencies (as defined in section 551(1) of title 5) are appropriate where FAA provides services or supplies or facilities to another Federal agency, or where FAA is the requesting agency to receive services, or supplies, or facilities from another Federal agency or that agency's contractor. Where the FAA and the Department of Defense are engaged in joint actions to improve or replenish the national air traffic system, the AMS policies governing FAA acquisitions are applicable. In those instances where the FAA acquires goods or services through the Department of Defense or other agencies, the FAA is bound by the acquisition laws governing those agencies.

3.8.2 Service Contracting

3.8.2.1 Applicability

This section applies to advisory and assistance contracts and other services, including personal services such as employees support service as provided for in FAA's Personnel Management System. This section does not apply to FAA employees, temporary, part-time or permanent appointed or hired in accordance with the other applicable portions of the FAA Personnel Management System.

3.8.2.2 Policy

The FAA will generally rely on the private sector for commercial services (see OMB Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services Need by the

Government). In no event may a contract be awarded for the performance of an inherently governmental function. Advisory and assistance contracts must comply with all applicable laws concerning post-employment and other conflict of interest and ethics laws and policies.

3.8.2.3 Personal Services Contracts

3.8.2.3.1 Reserved

3.8.2.3.2 Determination

The FAA may award personal services contracts when the head of a line of business determines that a personal service contract is in the best interest of the agency after thorough evaluation, which includes, but is not limited to the following factors:

(a) Worker's compensation payments and other tax implications;
(b) Government's potential liability for services performed;
(c) Availability of temporary hires to perform the desired services;
(d) Demonstration of tangible benefits to the agency;
(e) Detailed cost comparison demonstrating a financial advantage to the Government from such contract;
(f) Potential post-employment restrictions applicable to former employees;
(g) Legal determination that the work to be performed is not inherently governmental; and
(h) Potential post-employment restrictions pursuant to Federal Workforce Restructuring Act of 1994 Public Law 103-226.

Although personal service contracts are permitted, they should be used only when there is a clear demonstrated financial and program benefit to the FAA. The determination required herein is non-delegable and must be reviewed for legal sufficiency by the Office of the Chief Counsel.

3.8.2.4 Performance Based Service Contracts

Service contracts should incorporate performance based contracting methods to encourage contractor innovation and efficiency, and to help ensure contractors provide timely, cost- effective, and quality performance with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.

3.8.2.5 Cloud Computing Services Contracts **Added 10/2016**

All cloud computing services contracts will be conducted in accordance with Federal Risk and Authorization Management Program (FedRAMP) requirements. Further information on FedRAMP may be found at www.fedramp.gov.

3.8.3 Federal Supply Schedule Contracts

3.8.3.1 Applicability

This section is applicable when FAA awards Federal Supply Schedule delivery orders for recurring products and services. Additionally, this section addresses requirements to utilize

Federal Supply Schedules awarded by GSA, when the FAA is identified in the schedule as a mandatory/non-mandatory user of any supply/service on the schedule.

3.8.3.2 Policy

The FAA may consider awarding Federal Supply Schedule contracts, or placing orders against Federal Supply Schedules awarded by GSA, for recurring products and services when it is determined to be in the best interest of the FAA.

3.8.4 Required Sources of Products/Services and Use of Government Sources

3.8.4.1 Applicability Revised 2/2005

This section applies to procurement of all products and services, except for real property, utilities, and construction.

3.8.4.2 Government Sources for Products and Services Revised 10/2014

The CO may use available Government sources when they offer the best value to satisfy FAA's mission need. However, pursuant to FAA policy, the CO must acquire products and services offered through the Randolph-Sheppard Vending Facilities Program (20 U.S.C. § 107) and AbilityOne (formerly the Javits-Wagner-O'Day Program) (41 U.S.C.§§ 8501-8506).

FAA policy also requires that FAA purchase products offered by Federal Prison Industries (FPI) when the FPI's product represents the best value to FAA, unless an exception below applies. In making a best value determination for FPI products, the CO must utilize the procedures in AMS Procurement Guidance T3.8.4.A.4. The CO must post an announcement for any procurement for products available from FPI in accordance with AMS Policy 3.2.1.3.12. This policy concerning FPI does not apply if:

(a) The monetary value of the procurement would not require a competitive procurement process under AMS Policy 3.2.2.4;

(b) A market analysis would not be required under AMS Policy 3.2.2.4 to support a single-source procurement of the product;

(c) Suitable used or excess products are available from the government;
(d) The products are acquired and used outside the United States;
(e) Services are being acquired; or

(f) FAA has obtained a waiver from FPI with respect to the particular product or class of products at issue in the procurement.

The CO may allow contractors with cost-reimbursement contracts to use Government sources when in FAA's best interest and the products or services are available. Contractors with fixed-price contracts to protect classified information may acquire security equipment through GSA sources after CO approval.

3.8.5 Accounting Treatment of Leases Added 9/2020

3.8.5.1 Applicability Added 9/2020

This section applies to products, services, and real property to the extent authorized by law.

3.8.5.2 Policy Added 9/2020

It is this policy of the FAA to enter into leases for various products and services when it is determined by the CO, based on financial and other considerations, to be in the best interest of the Government compared to the outright purchase of such assets or services.

It is also FAA policy to avoid establishment of capital leases or lease purchases unless the requesting service organization demonstrates they have complied with the requirements of OMB Circular A-11, Part 8, Appendix B "Scoring of Lease Purchases and Leases of Capital Assets."

For FAA's policy on Capitalization of Leases and Leasehold Improvements, see AMS 3.8.8.2.2.6.

3.8.6 Strategic Sourcing Revised 9/2020

The FAA is leveraging its spending through strategic sourcing and will award contracts for products and services to help the agency optimize performance and minimize price to increase the value of each dollar spent. Therefore, when a needed product or service is available through a strategic sourcing contract, purchasing employees must use a strategic sourcing contract.

All strategic sourcing contracts are established following the AMS Policy and Guidance. To increase achievement of socio-economic acquisition goals, all strategic sourcing procurements must be balanced with socio-economic goals for small businesses, small disadvantaged businesses, women-owned small businesses, veteran-owned businesses, and service-disabled veteran-owned businesses in accordance with AMS Policy 3.6.1 Small Business Development Program.

When performance of any strategic sourcing contract requires access to FAA facilities and/or requires handling of sensitive material, the contract must include all of the appropriate clauses and/or restrictions and comply with FAA Order 1600.72A, Contractor and Industrial Security Program and FAA Order 1600.75, Protecting Sensitive Unclassified Information (SUI).

When an organization is going to strategically source a product or service, it must use mandatory government sources as described in AMS Policy 3.8.4 and Procurement Guidance T3.8.4A.

3.8.7 Construction Contracting Added 9/2020

3.8.7.1 Applicability Added 9/2020

This section applies to construction contracts, contracts for dismantling, demolition, or removal of improvements, and to the construction portion of contracts for products or services.

3.8.7.2 Policy Added 9/2020

If portions of multipurpose contracts are so commingled that priced deliverables for construction, service, or supply cannot be segregated and the predominant purpose of the contract is construction, the contract will be classified as construction.

3.8.8 Real Property Special Categories of Contracting Added 9/2020

This section applies to the procurement of all real property interests by lease, purchase, condemnation, or otherwise.

3.8.8.1 Real Property Purchases Added 9/2020

It is policy of the FAA to purchase real property interests that are in the best interest of the FAA and at fair and reasonable prices. A leave versus purchase analysis must be completed for all prospective real property land acquisitions. All lease versus purchase analyses must take into consideration the anticipated term to satisfy the FAA's needs.

The lease versus purchase analysis is used to determine the most cost-effective method acquisition strategy. If cost is not a determining factor for real property acquisitions and a landowner is unwilling to allow FAA use of the property or demands unreasonable lease terms that forces a condemnation proceeding, a lease versus purchase analysis is not required.

3.8.8.2 Leases Revised 9/2020

3.8.8.2.1 Applicability Revised 9/2020

This section applies to real property leases to the extent authorized by law.

3.8.8.2.2 Policy Revised 9/2020

It is the policy of the FAA to enter into leases for real property when it is determined by the Contracting Officer, based on financial and other considerations, to be in the best interest of the Government compared to the outright purchase of real property.

3.8.8.2.2.1 Types of Leases and Applicability Added 9/2020

For all new, superseding, and succeeding leases, APM-200 Policy, Planning & Systems Division, must notify and coordinate with the service organization and contracting office at least thirty six (36) months prior to the lease expiration date for all General Services Administration (GSA) controlled space, and FAA direct land and space leases. For specific lease issues that could

jeopardize timely completion of the new, superseding, or succeeding lease transaction, the cognizant CO may provide earlier notification to the service organization and APM-200.

3.8.8.2.2.2 Lease Authority Added 9/2020

In accordance with the provisions of 49 U.S.C. § 40110(c)(1), the CO may enter into a lease with a term of up to twenty (20) years, notwithstanding the Anti-Deficiency Act. The lease must, however, be appropriately funded by the last day of the first period due under the rental schedule.

3.8.8.2.2.3 Firm Term Leases Added 9/2020

A firm term lease occurs when the FAA cannot terminate or cancel the lease for a period exceeding 365 days and is contractually committed to rental payments beyond that period. (For additional information on lease termination rights, see AMS Guidance T3.10.6.B Termination of Real Property Contracts). Generally, the FAA discourages the use of firm terms; however, the CO may award a lease with a firm term when it is in the agency's best interest. Prior to awarding a firm term lease, the firm term justification must have written concurrence from the Office of Chief Counsel, Chief of the Contracting Office, Director of Aviation Property Management, Director of Budgets and Programs, and final approval from the Federal Acquisition Executive (FAE).

3.8.8.2.2.4 Holdover Tenancy Added 9/2020

A holdover tenancy is created when the FAA continues to occupy leased premises after the lease terms has expired. It is the FAA's policy to avoid holdovers to the extent that it is possible and to limit its use in leases. Indefinite holdover clauses should be limited to land acquisitions or for space leases housing mission critical safety equipment. If using a holdover clause, the CO must document the rationale in the award decision document (Negotiator's Report).

3.8.8.2.2.5 Alterations and Improvements Added 9/2020

Alterations and/or improvements, including Tenant Improvements (TIs), may be required by the FAA to make the leased premises acceptable for FAA occupancy. Post occupancy alterations and improvements must be based upon the service organization's technical requirements, business practices or programmatic needs.

3.8.8.2.2.6 Capitalization of Leases and Leasehold Improvements Added 9/2020

It is FAA policy to avoid establishment of capital leases or lease purchases unless the requesting organization demonstrates they have complied with the requirements of OMB Circular A-11, Part 8, Appendix B “Scoring of Lease Purchases and Leases of Capital Assets”. Capitalized leases and leasehold improvements are not expensed when incurred, but instead are deferred (capitalized) and allocated over the asset's estimated useful life through depreciation expense (for tangible capitalized assets) or amortization expense (for intangible capitalized assets). The FAA must follow the FAA Financial Manual Vol. 8, Property, Plant and Equipment, Chapter 8.6 for capitalization of Leases and Leasehold Improvements.

3.8.8.3 No-Cost Land or Space on Airports Added 9/2020

It is the policy of the FAA to act in accordance with its Land Lease on Airport Work Instructions dated 08/2019 when an airport has received Airport Grant Assurance funds requiring it to provide rent free land or space.

3.8.8.4 Utilities Added 9/2020

The utility acquisition process must be conducted in a fair and equitable manner, following the best commercial business practices, while complying with all applicable regulations. All new construction and major renovation projects at FAA facilities will include installation of advanced meters for electricity in accordance with the Energy Policy Act of 2005 (EP Act of 2005), and gas and steam advanced meters in accordance with the Energy Independence and Security Act (EISA) 2007, Section 434(b). Advanced meters should also be considered to collect water use data for each water supply sources (e.g., domestic potable water and non-potable water, including reclaimed water and rainwater). For existing FAA facilities where no major renovations are anticipated, advanced meters must be implemented where cost-effective and practicable.

3.8.8.5 Condemnation Added 9/2020

Condemnation proceedings, also referred to as eminent domain, may be initiated, in accordance with established procedures, as a last resort for real property acquisitions when negotiations have reached an impasse and a satisfactory conclusion to the procurement cannot be reached. All condemnations require legal participation. When real property is acquired by purchase or condemnation proceedings, the FAA must follow the Department of Justice Condemnation Guidelines and Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016) for title requirements.

3.8.8.6 Disposal of Real Property Added 9/2020

There are two sources of authority under which the FAA may dispose of real property:

(a) Pursuant to 49 U.S.C. § 40110, the FAA has the authority to dispose of airport and airway property and technical equipment used for the special purposes of the FAA for adequate compensation.
(b) Through the General Services Administration (GSA) and is governed by the Federal Property Administrative Services Act of 1949, as amended. This Act authorizes the Administrator of GSA to dispose of real property.

3.8.8.7 Conveyance Added 9/2020

Conveyance is the legal process of transferring real property from the FAA to another owner. It is the policy of the FAA to transfer ownership of real property when it is in the best interest of the FAA and in compliance with FAA Order 1050.19C, Environmental Due Diligence Audits in the Conduct of FAA Real Property Transactions. Buildings and structures being considered for conveyance must be screened by the appropriate FAA environmental and safety professionals for any environmental or safety issues that may require mitigation prior to transfer.

3.8.8.8 Outgrants Added 9/2020

The FAA may convey unutilized or underutilized leased or owned real property to another government entity or third party as long as the use does not interfere with current or known future FAA needs for the property. The term for a new or succeeding outgrant may not exceed five (5) years.

3.8.8.9 Housing Policy Added 9/2020

The purpose of the FAA Housing program is to provide housing for FAA employees supporting the National Airspace System (NAS) who are working in remotely located areas where commercial housing is not available. The FAA must follow OMB Circular A-45 for the acquisition, management and disposal of FAA owned or leased housing facilities. These provisions are applicable for all Lines of Business/Staff Offices and organizational elements having a requirement for and using FAA housing quarters.

3.9 Resolution of Protests and Contract Disputes

3.9.1 Applicability

Protest and contract disputes guidance and principles outlined herein apply to all FAA Screening Information Requests (SIRs), contract awards, and contracts.

3.9.2 Policy Revised 1/2017

By statute, and consistent with the Fundamental Principles of the AMS, the FAA Dispute Resolution Process, administered by the Office of Dispute Resolution for Acquisition (ODRA), serves as the Administrator's exclusive independent venue for bid protests and contract disputes arising under or relating to the AMS. Review of procurement controversies by the Administrator, through the ODRA, helps protect the quality and integrity of the Agency's acquisitions, promotes the public's confidence and ensures that AMS procedures and policies are followed.

The FAA is committed to the early and expeditious resolution of controversy using voluntary mediation, fact-finding, arbitration and other techniques collectively known as "alternative dispute resolution" (ADR). The FAA has pledged to utilize ADR techniques to the maximum extent practicable when such voluntary techniques will produce a fair and expeditious disposition of a controversy.

Protests concerning FAA SIRs or awards of contracts, and contract disputes arising under or related to FAA contracts, must be resolved or adjudicated at the agency level through the FAA Dispute Resolution Process set forth in 14 C.F.R, Part 17. Judicial review, where available, will be in accordance with 49 U.S.C. §46110 and will apply only to final agency decisions. The decision of the FAA will be considered a final agency decision only after an offeror or contractor has exhausted its administrative remedies for a protest or a contract dispute under the FAA Dispute Resolution Process.

3.9.3 Voluntary Waiver of Protest Revised 1/2017

Using procedures described herein, the FAA may determine that it is in the Government's best interest to include a voluntary waiver of protest provision or clause into a Screening Information Request (SIR), contract or class of SIRs or contracts. A provision or clause in such SIRs or contracts prohibiting protests is enforceable provided that:

(a) The Contracting Officer documents the rational basis detailing the factors considered in the determination that prohibiting protests is in the Government's best interest;

(b) The FAA Acquisition Executive (FAE) approves the written rational basis;

(c) The FAA Office of Chief Counsel is provided notice of the rational basis; and

(d) Prior notice is given to the Office of the FAA Administrator that the FAE intends to include a provision or clause that allows for the voluntary waiver protests in a SIR, contract or class of SIRs or contracts.

The use of a no protest provision or clause will only serve to limit protests of orders or contracts placed against an ordering vehicle such as an Indefinite Delivery, Basic Ordering Agreement or other master ordering agreement. Nothing in this section prohibits a challenge to any term or condition of the ordering vehicle made in accordance with the procedures of the FAA Office of Dispute Resolution for Acquisition (ODRA).

3.9.4 FAA Dispute Resolution System Revised 1/2017

The ODRA is established as an organization that is independent of agency organizations responsible for procurement actions. Pursuant to a delegation of authority by the Administrator, the Director of the ODRA manages the FAA dispute resolution process, promotes ADR, conducts dispute resolution proceedings and recommends action to the Administrator on matters concerning protests or contract disputes. The ODRA is authorized, among other things, to

- Adjudicate protests and contract disputes on behalf of the FAA Administrator;
- Promulgate rules of procedure;
- Issue orders and decisions in accordance with delegations of authority from the FAA Administrator;
- Exercise broad discretion to resolve protests and contract disputes;
- Use ADR to settle protests and contract disputes; and
- Provide fair and impartial "Findings and Recommendations", supported by the case record and law.
- Recommend changes to the FAA acquisition system based on matters brought before the office.

The Director of the ODRA may redelegate to Special Masters and Dispute Resolution Officers (DROs) such delegated authority as is necessary for efficient resolution of an assigned protest or contract dispute, including the imposition of sanctions or other disciplinary actions.

The applicable ODRA rules of procedure are set forth in 14 CFR Parts 14 and 17, Procedures for

Protests and Contract Disputes; Amendment of Equal Access to Justice Act Regulations, effective June 28, 1999. These ODRA Rules are incorporated by reference into this section. Further information and guidance concerning the ODRA dispute resolution process for contract disputes and protests can be found on the ODRA Website.

3.9.5 Initial Dispute Resolution at the Contracting Officer Level Revised 1/2017

Offerors and contractors initially should seek resolution of any concerns or controversies at the Contracting Officer level. Contracting Officers should make reasonable efforts to promptly and completely resolve such concerns or controversies, where possible, and will coordinate their dispute resolution efforts with the FAA Procurement Legal Division or their regional or center Assistant Chief Counsel's office. Attempts to resolve disputes at the contracting officer level do not waive or extend the deadlines set forth in 14 CFR Part 17 for filing at the ODRA.

3.9.6 Dispute Resolution at the ODRA Revised 1/2017

ADR is the primary means of dispute resolution that is employed by the ODRA. Upon request, the Office of Dispute Resolution for Acquisition will make available FAA DROs or appropriately qualified persons from outside the FAA to serve as neutrals in ADR proceedings involving protests and contract disputes. The parties may also employ a neutral of their own choosing. With the agreement of the interested parties, the ODRA may provide ADR services in advance of the filing of a contract dispute or bid protest with the ODRA.

The parties may use any ADR technique proposed by the parties that is deemed by the DRO or neutral to be fair, reasonable, and in the best interest of the parties, including, but not limited to, informal communication, mediation, fact-finding, and binding or nonbinding arbitration. Binding arbitration may be employed only if the protester or contractor and the FAA agree to use this method to resolve the merits of the protest or contract dispute. If binding arbitration is agreed to, the decision of the DRO or neutral arbiter will become a final agency decision. If the parties have not agreed to binding arbitration and are unable otherwise to reach an agreement on the merits of the protest or contract dispute through ADR, then the ODRA will adjudicate the matter to a final Agency decision.

3.9.7 Obligation to Continue Performance

The FAA requires continued performance with respect to contract disputes arising under or related to a contract, in accordance with the provisions of the contract, pending resolution of the contract dispute.

3.9.8 Matters Not Subject to Protest Revised 1/2017

The following matters may not be protested before the Office of Dispute Resolution for Acquisition:

(a) FAA purchases from or through, state, local, and tribal governments and public authorities;
(b) FAA purchases from or through other federal agencies;
(c) Grants;
(d) Cooperative agreements;
(e) FAA transactions placed against an ordering vehicle containing a voluntary waiver of protest clause pursuant to paragraph 3.9.3 Voluntary Waiver of Protest; or
(f) Other transactions that do not fall into the category of procurement contracts subject to the AMS.

3.9.9 Confidentiality of the ADR Process

Settlement discussions and documentation provided to facilitate settlement of the issues will be protected and confidential, to the extent provided by law, ADR agreements and ODRA Protective Orders.

3.10 Contract Administration

3.10.1 Contract Administration

3.10.1.1 Applicability

The types of activities included in the contract administration phase are:

(a) Issuing contract modifications;
(b) Monitoring contract deliverables;
(c) Assuring that subcontracting policies and requirements are followed;
(d) Reviewing the contractor's invoices for payment; and
(e) Closing completed contracts.

3.10.1.2 Policy

The terms and conditions of the contract will be the guidance in performing these tasks.

3.10.2 Subcontracting Policies

3.10.2.1 Applicability

This applies to contracts with the exception of real property and utilities, where a prime contractor may need to subcontract a portion of the work.

3.10.2.2 Policy **Revised 9/2020**

The CO must consider requiring "Consent to Subcontracts" when the subcontract work is complex, the dollar value is substantial, or the Government's interest is not adequately protected by competition and the type of prime contract or subcontract.

The CO must consider conducting a Contractor Purchasing System Review for each contractor whose sales to the Government, using other than simplified purchases procedures, are expected to exceed $10 million during the next twelve (12) months.

To the maximum extent practicable, the contractor must incorporate, and require its subcontractors at all tiers to incorporate commercial items or non-developmental items as components of items to be supplied under contract.

3.10.3 Government Property Revised 1/2015

3.10.3.1 Applicability Revised 10/2018

(a) This part prescribes policies and procedures for providing Government property to contractors; contractors' management and use of Government property; and reporting, redistributing, and disposing of contractor inventory.

(b) It does not apply to—

(1) Government property provided under any statutory leasing authority, except as to non-Government use of property;

(2) Property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance based payments;

(3) Disposal of real property;

(4) Software and intellectual property; or

(5) Government property that is incidental to the place of performance, when the contract requires contractor personnel to be located on a Government site or installation, and when the property used by the contractor within the location remains accountable to the Government. Items considered to be incidental to the place of performance include, for example, office space, desks, chairs, telephones, computers, and fax machines.

3.10.3.2 Policy Revised 10/2018

(a) Contractors are ordinarily required to furnish all property necessary to perform Government contracts.

(b) Contracting officers will provide property to contractors only when it is clearly demonstrated—

(1) To be in the Government's best interest;

(2) That the overall benefit to the acquisition significantly outweighs the increased cost of administration, including ultimate property disposal;

(3) That providing the property does not substantially increase the Government's assumption of risk; and

(4) That Government requirements cannot otherwise be met.

(c) The contractor's inability or unwillingness to supply its own resources is not sufficient reason for the furnishing or acquisition of property.

(d) *Exception*. Property provided under contracts for repair, maintenance, overhaul or modification is not subject to the requirements of paragraph (b) of this section.

(e) Government property, other than foundations and similar improvements necessary for installing special tooling, special test equipment or equipment, will not be installed or constructed on contractor-owned real property in such fashion as to become nonseverable, unless the Head of the Contracting Activity determines that such installation or construction is necessary and in the Government's interest.

3.10.3.3 General. Revised 9/2020

(a) Contracting Officers will—

(1) Allow and encourage contractors to use voluntary consensus standards and industry-leading practices and standards to manage Government property in their possession;

(2) Eliminate to the maximum practical extent any competitive advantage a prospective contractor may have by using Government property;

(3) Ensure maximum practical reutilization of contractor inventory for government purposes;

(4) Require contractors to use Government property already in their possession to the maximum extent practical in performing Government contracts;

(5) Charge appropriate rentals when the property is authorized for use on other than a rent-free basis; and

(6) Require contractors to justify retaining Government property not needed for contract performance and to declare property as excess when no longer needed for contract performance.

(b) The FAA will not generally require to establish property management systems that are separate from a contractor's established procedures, practices, and systems used to account for and manage

contractor-owned property.

3.10.3.4 Responsibility and Liability for Government Property Revised 9/2020

(a) Generally, contractors are not held liable for loss of Government property under the following types of contracts:

(1) Cost-reimbursement contracts;

(2) Time-and-material contracts;

(3) Labor-hour contracts; and

(4) Fixed-price contracts awarded on the basis of submission of certified cost or pricing data.

(b) The contracting officer may revoke the Government's assumption of risk when the property administrator determines that the contractor's property management practices are noncompliant with contract requirements.

(c) A prime contractor that provides Government property to a subcontractor will not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract.

(d) With respect to loss of Government property, the contracting officer, in consultation with the property administrator, will determine—

(1) The extent, if any, of contractor liability based upon the amount of damages corresponding to the associated property loss; and

(2) The appropriate form and method of Government recovery (may include repair, replacement or other restitution).

3.10.3.5 Contractors' Property Management System Compliance Revised 9/2020

(a) The contract property administrator will conduct an analysis of the contractor's property management policies, procedures, practices, and systems. This analysis will be accomplished as frequently as conditions warrant, in accordance with FAA procedures.

(b) The property administrator will notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, will request prompt correction of deficiencies, and will request from the contractor a corrective action plan, including a schedule for correction of the deficiencies. If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer will notify the contractor, in writing, that failure to take the required corrective action(s) may result in—

(1) Revocation of the Government's assumption of risk for loss of Government property; and/or

(2) The exercise of other rights or remedies available to the contracting officer.

(c) If the contractor fails to take the required corrective action(s) in response to the notification provided by the contracting officer in accordance with paragraph (b) of this section, the contracting officer will notify the contractor in writing of any Government decision to apply the remedies described in paragraphs (b)(1) and (b)(2) of this section.

(d) When the property administrator determines that a reported case of loss of Government property is a risk assumed by the Government, the property administrator will notify the contractor in writing that it is granted relief of stewardship responsibility and liability. Where the property administrator determines that the risk of loss of Government property is not assumed by the Government, the property administrator will request that the contracting officer hold the contractor responsible and liable.

3.10.3.6 Transferring Accountability Revised 9/2020

Government property will be transferred from one contract to another only when firm requirements exist under the gaining contract (see 3.10.3.2). Such transfers will be documented by modifications to both gaining and losing contracts. Once transferred, all property will be considered Government-furnished property to the gaining contract. The warranties of suitability of use and timely delivery of Government-furnished property do not apply to property acquired or fabricated by the contractor as contractor-acquired property that is subsequently transferred to another contract with the same contractor.

3.10.4 Quality Assurance

3.10.4.1 Applicability

Quality Assurance policy and guidelines are applicable to all acquisitions for systems, equipment, material, and services.

3.10.4.2 Policy Revised 10/2011

For all acquisitions, FAA will:

(a) Ensure appropriate quality assurance requirements are included;
(b) Require contractors to act on contractual quality assurance commitments;
(c) Ensure Government quality and reliability needs are met; and
(d) Accept only products that meet agreed to requirements.

Additionally, for NAS system acquisitions:

(a) Require the contractor to report the status of requirements linked to critical performance

requirements at specified regular intervals;
(b) Coordinate with the Quality Assurance Office to ensure appropriate quality assurance requirements are incorporated; and
(c) Delegate in-plant quality assurance and acceptance authority to the Quality Reliability Officer or other Government agent.

3.10.5 Product Improvement/Technology Enhancement

3.10.5.1 Applicability

Product Improvement/Technology Enhancement guidance and procedures apply to all FAA procurements, agreements, real property, utilities, and commercial and simplified purchase method.

3.10.5.2 Policy

The FAA encourages contractors to submit Product Improvement/Technology Enhancement proposals for review at any time during the performance of a contract. The ability to continuously exchange, upgrade, modify, or add new features to equipment and software in response to increased air traffic activity and/or new advancements in technology and methodology is essential. Contractor proposals which are particularly innovative and address savings for the FAA may be given appropriate consideration in the negotiation.

3.10.6 Termination of Contracts Revised 9/2020

3.10.6.1 Termination of Contracts for Products, Services, and Construction Revised 9/2020

3.10.6.1.1 Applicability Revised 9/2020

This section applies to contracts for products, services, or construction. .

3.10.6.1.2 Policy Revised 9/2020

The termination clauses or other contract clauses authorize contracting officers to terminate contracts for convenience, or for default, and to enter into settlement agreements.

The CO must terminate contracts, whether for default or convenience, when it is in the FAA's interest. The CO may effect a no-cost settlement instead of issuing a termination when (1) it is known that the contractor will accept one, (2) Government property was not furnished, and (3) there are no outstanding payments, debts due the Government, or other contractor obligations.

When the price of the undelivered balance is less than the cost of effecting a termination, the contract should not normally be terminated for convenience but should be permitted to run to

completion.

3.10.6.2 Termination of Real Property Contracts Added 9/2020

3.10.6.2.1 Applicability Added 9/2020

This section applies to contracts for real property.

3.10.6.2.2 Policy Added 9/2020

The termination clauses or other applicable contract clauses authorize the CO to cancel a lease or other contract for an interest in real property at any time, in whole or in part, if the CO determines that a termination is in the best interest of the Government.

3.10.7 Extraordinary Contractual Actions

3.10.7.1 Applicability

This section is applicable when the FAA intends to enter into, amend, or modify contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85-804 (referred to in this section as the "Act") as amended, and Executive Order 10789 (referred to in this section as the "Executive Order").

3.10.7.2 Policy

The FAA may authorize extraordinary contract relief pursuant to Public Law 85-804. Authority to provide such relief is retained by the DOT Secretary for indemnification requests, and by the FAA Administrator or designee for all other requests.

3.10.8 First Article Approval and Testing

First article testing and approval involves evaluating a contractor's initial, preproduction, or sample model or lot. FAA may utilize first article testing and approval to ensure that a contractor can furnish a product that conforms to all contract requirements for acceptance.

3.10.9 Closeout of Completed Contracts Revised 9/2020

The CO must close physically complete contracts and agreements in accordance with FAST Procurement Guidance. Closeout activities for products, services, and construction contracts must include completion and signing of the Contract Closeout Checklist and a Contract Completion Statement.

3.10.10 Real Property Special Contract Administration Actions Added 9/2020

3.10.10.1 Real Estate Asset Management Added 9/2020

All real property assets must be recorded in the designated real property asset management system.

Land and space ownership must be recorded in the real property asset management system after title passes to the Federal Government. Land, structure and space leases must be recorded in real property asset management system after the lease is fully executed. Other real estate assets (e.g., structures) purchased by COs must be recorded in real property asset management system after completion of the Joint Acceptance and Inspection (JAI), as part of the asset close out process.

3.10.10.2 Inspection and Acceptance Added 9/2020

The CO, or designated representative, should arrange to inspect the real property sufficiently in advance of the occupancy date to ensure it is acceptable and ready for use. Substantial, non-punch list item deficiencies that impact FAA use and/or occupancy of the real property in support of its mission must be corrected before acceptance of the real property, related services, or utility service.

3.11 Transportation

3.11.1 Applicability

Transportation guidance and procedures are applicable to all contracts in applying contract transportation and traffic management considerations in the acquisition of products, acquisition of transportation and transportation-related services, and transportation assistance with traffic management. The making and administration of contracts under which payments are made from Government funds for (1) the transportation of products, (2) transportation-related services, (3) transportation of contractor personnel and their personal belongings, and (4) acquiring transportation or transportation-related services by contract methods other than bills of lading, transportation requests, transportation warrants, and similar transportation forms.

3.11.2 Policy

The CO must ensure that instructions to contractors result in the most efficient and economical use of carrier services and equipment through transportation and traffic management administration. The contract office must obtain traffic management advice and assistance in the consideration of transportation factors required for:

- SIRs and awards;
- Contract administration, modification, and termination;
- Transportation of property by the Government to and from the contractor; and
- Plants.

3.12 Reserved

3.13 Other Administrative Matters

3.13.1 Applicability

This section is applicable to all screening information requests and contracts.

3.13.1.1 Plain Language Added 7/2006

When the statement of work for a contract requires the contractor to deliver any document that will be published, either electronically or in hard copy, for dissemination outside the FAA, or for broad dissemination within the FAA, the document must comply with FAA Order 1000.36, "FAA Writing Standards."

3.13.2 Policy

3.13.2.1 AMS Contract Clauses and Provisions Revised 9/2020

AMS clauses and provisions used in screening information requests and contracts must be consistent with the procurement guidance and clause prescriptions, unless there is an approved rational basis for adopting a different approach.

For supplies, services and construction contracts, the Assistant Chief Counsel's office (Acquisition & Fiscal Law) and Chief of the Contracting Office (COCO) must approve in advance each rational basis determination regarding the use or tailoring of a mandatory clause or provision.

For real property contracts, Field Operations, Acquisitions and Real Property branch (Acquisition & Fiscal Law) counsel must approve, in advance, rational basis determinations regarding the use or tailoring of mandatory clauses or provisions. For determinations on mandatory clause use or tailoring that pose significant legal and/or financial risk to the FAA, the Assistant Chief Counsel's office (Acquisition & Fiscal Law), and the COCO must approve in advance each rational basis determination.

3.13.2.2 Reserved

3.13.2.2.1 Reserved

3.13.2.2.2 Reserved

3.13.3 Reserved Revised 7/2013

3.13.4 Contract Data Reporting

The FAA will comply with the uniform reporting requirements of the Federal Procurement Data System.

3.13.5 Congressional Notification of Contract Awards Revised 9/2020

Through the Department of Transportation's Assistant Secretary for Governmental Affairs, the FAA will notify Congress of contract awards and contract modifications. For congressional notification thresholds, see Guidance T3.13.1.

3.13.6 Seat Belt Use by Contractor Employees

The FAA will comply with the requirements of Executive Order 13043 entitled "Increasing Seat Belt Use in the U.S.".

3.14 Security

3.14.1 Applicability

This section is applicable to all screening information requests and contracts.

3.14.2 Policy

3.14.2.1 Contractor Personnel Security Program Revised 10/2018

The acquisition community must ensure an adequate level of security for contractor employees as stated in FAA Order 1600.72A, allowing for compliance with OMB Circular A-130, "Management of Federal Information Resources", Executive Order 12829 "National Industrial Security Program", and DOD Directives 5200.2 and 5220.22M.

All FAA employees and contractor and subcontractor employees are subject to the FAA's Insider Threat Detection and Mitigation Program (ITDMP) provided they meet the definition of an "FAA employee" and fall within the scope of the program as defined in FAA Order 1600.82. For more information on this Program, please see https://www.faa.gov/regulations_policies/orders_notices/ (FAA only).

3.14.2.1.1 Employment Suitability Revised 10/2007

Contractor employees (including contractors, subcontractors, or consultants) must be subject to the same investigative and personal identification verification requirements as Federal employees if in similar positions requiring recurring access to FAA facilities or access to FAA information systems or sensitive information.

3.14.3 Classified Information Revised 7/2007

The CO will ensure that all proposed and awarded procurement actions contain appropriate provisions and clauses if access to classified information is required, in accordance with The National Industrial Security Program Operating Manual, DOD 5220.22-M and FAA Order 1600.72A, Contractor and Industrial Security Program.

3.14.4 Sensitive Unclassified Information

The CO, in coordination with the service organization, will ensure that all contractual actions

contain provisions and clauses to protect the unauthorized dissemination of FAA sensitive information. Such information may entail Sensitive Unclassified Information (SUI), For Official Use Only (FOUO), Sensitive Security Information (SSI), or any other designator assigned by the US Government to identify unclassified information that may be withheld from public release. The Freedom of Information Act (FOIA) provides in exemptions 2 through 9, the guidelines for withholding sensitive unclassified information from the public and how such information must be protected from unauthorized disclosure. Section 552a of Title 5, United States Code (the Privacy Act) identifies information, which if subject to unauthorized access, modification, loss, or misuse could adversely affect the national interest, the conduct of Federal programs or the privacy to which individuals are entitled.

3.14.5 Facility Security Program Revised 1/2019

The Facility Security Risk Management process, as developed through the FAA's Facility Security Management Program, FAA Order 1600.69C, must be an integral part of program concept, planning, engineering design, and the implementation of required protective measures maintained throughout the lifecycle for physical security enhancements.

3.14.6 Information Security and Privacy (IS &P) Revised 10/2018

The Federal Information Security Modernization Act, 2014 (FISMA), OMB Circular A-130, and other federal standards and regulations describe information security for all agency information that is collected, stored, processed, disseminated, or transmitted using agency or non-agency owned information systems. For additional FAA IS &P Program policy, see FAA Order 1370.121 at https://www.faa.gov/regulations_policies/orders_notices/ (FAA only). The contractor must comply with all applicable policies as indicated in the Statement of Work/Specification.

Regarding possible security breaches, in accordance with OMB Memorandum 07-16, when the breach involves a Federal contractor or a public-private partnership operating a system of records on behalf of the agency, the agency is responsible for ensuring any notification and corrective actions are taken.

FAA will notify and consult with the United States Computer Readiness Support Team (US-CERT) regarding information security incidents involving the information and information systems that support the operations and assets of the FAA, including contractor systems that support the FAA.

Offerors must indicate in responding to SIRs for Information Technology (IT) or services in support of IT whether they will be using an international processing hub or exchange for FAA data or information, or if any subcontractors or third parties more than 50% foreign owned will be processing, storing, or backing up the data and information.

Protection of privacy is applicable to all FAA procurements including agreements, real property, utilities, credit cards, commercial and simplified purchase method. When the FAA contracts for the design, development, and/or operation of a system of records on individuals, the FAA will apply the requirements of the Privacy Act to the contractor and its employees working on the contract.

U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The Department of Defense is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.204–7002, Payment for Subline Items Not Separately Priced, to simplify and conform the clause text to current Government contract line item structure terminology.

The objective of this rule is to clarify the intent of the clause for contractors, when submitting invoices under contracts that contain items that are not separately priced. The modification of this DFARS clause supports a recommendation from the DoD Regulatory Reform Task Force. No public comments were received in response to the initial regulatory flexibility analysis.

Based on an average of data for fiscal year 2016 through 2018 from the Federal Procurement Data System and Electronic Document Access, DoD awards approximately 12,435 contracts annually that includes the DFARS clause 252.204–7002. Of the 12,435 awards, approximately 4,924 contracts (40%) are awarded to 1,564 unique small business entities. Based on the available data and the objective of the rule, DoD does not anticipate that this proposed rule will significantly impact small business entities. This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the stated objectives.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 204 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 2. Amend section 204.7104–1:

■ a. In paragraph (b)(3)(iii), by removing "subsection" and adding "section" in its place; and

■ b. By revising paragraph (b)(3)(iv).

The revision reads as follows:

204.7104–1 Criteria for establishing.

* * * * *

(b) * * *

(3) * * *

(iv) When the price for items not separately priced is included in the price of another contract line or subline item, it may be necessary to withhold payment on the priced contract line or subline item until the included line or subline items that are not separately priced have been delivered. See the clause at 252.204–7002, Payment for Contract Line or Subline Items Not Separately Priced.

■ 3. Revise section 204.7109 to read as follows:

204.7109 Contract clauses.

(a) Use the clause at 252.204–7002, Payment for Contract Line or Subline Items Not Separately Priced, in solicitations and contracts when the price for items not separately priced is included in the price of another contract line or subline item.

(b) Use the clause at 252.204–7006, Billing Instructions, in solicitations and contracts if Section G includes—

(1) Any of the standard payment instructions at PGI 204.7108(b)(2); or

(2) Other payment instructions, in accordance with PGI 204.7108(d)(12), that require contractor identification of the contract line item(s) on the payment request.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Revise section 252.204–7002 to read as follows:

252.204–7002 Payment for Contract Line or Subline Items Not Separately Priced.

As prescribed in 204.7109(a), use the following clause:

Payment for Contract Line or Subline Items Not Separately Priced (APR 2020)

(a) If the schedule in this contract contains any contract line or subline items identified as not separately priced (NSP), it means that the unit price for the NSP line or subline item is included in the unit price of another, related line or subline item.

(b) The Contractor shall not invoice the Government for an item that includes in its price an NSP item until—

(1) The Contractor has also delivered the NSP item included in the price of the item being invoiced; and

(2) The Government has accepted the NSP item.

(c) This clause does not apply to technical data.

(End of clause)

252.204–7006 [Amended]

■ 5. Amend section 252.204–7006 introductory text by removing "204.7109" and adding "204.7109(b)" in its place.

[FR Doc. 2020–06726 Filed 4–7–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 232, and 252

[Docket DARS–2019–0025]

RIN 0750–AK25

Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018–D068)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 that provides for accelerated payments to small business contractors and subcontractors.

DATES: Effective April 8, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 25225 on May 31, 2019, to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 provides for accelerated payments to DoD contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. Thirteen respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A

discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

This final rule adds a definition of "accelerated payment" to the clause at DFARS 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. The definition specifies that accelerated payments are made as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Most respondents expressed support for the proposed rule.

Response: DoD acknowledges the respondents' support.

2. Timely Payments to Small Business Subcontractors

Comment: One respondent expressed overall support for the proposed rule if the rule ensures all large business prime contractors are required to pay their subcontractors within 15 days of receiving an invoice from their small business subcontractors, regardless of whether the prime has been paid by the Federal Government. Another respondent suggested an authority to enforce, and a forum to address, grievances for payments from the Government that are past due.

Response: This final rule incorporates the statutory language of section 852 of the NDAA for FY 2019, as implemented via 10 U.S.C. 2307, which establishes the 15-day timeframe as a goal, rather than a firm deadline. The rule provides for prime contractors to make accelerated payments to small business subcontractors after receipt of payment from the Government because a prime contractor who subcontracts with small businesses could be a small business itself. Federal Acquisition Regulation (FAR) subpart 32.9 implements the statutory requirements concerning required documentation for invoice and acceptance, the establishment of payment due dates, and the payment of late payment interest penalties after the due date established under the Prompt Payment Act (*e.g.,* 30 days). DoD payment offices must adhere to these requirements and make payments as quickly as possible, to the fullest extent permitted by law.

Concerning the respondent's suggestion regarding a forum to address late payments, as prescribed in 5 CFR 1315.18, questions concerning delinquent payments should be directed to the designated agency office, or the office responsible for issuing the payment if different from the designated agency office. Questions about disagreements over payment amount or timing should be directed to the contracting officer for resolution. Small business concerns may obtain additional assistance on payment issues by contacting the agency's Office of Small Business Programs.

3. Interest Penalties for Late Payments to Subcontractors

Comment: One respondent suggested that the rule could be improved by also imposing an interest penalty on all small business invoices submitted to the prime contractor that are not paid within 15 days of receipt. Another respondent recommended an authority for the Government to pay interest penalties to both contractors when invoices are past due.

Response: Section 852 does not provide for interest penalties to be paid by the prime contractor for late payments to a subcontractor. Therefore, this final rule does not impose interest penalties beyond those implemented in FAR subpart 32.9 under the Prompt Payment Act. The subcontract between the prime contractor and the subcontractor is a business arrangement between two private parties, and therefore Prompt Payment Act interest penalties do not apply.

4. 15-Day Payment Goal

Comment: Two respondents expressed a preference for the proposed rule to mandate prompt payment instead of making it a goal, however, they commended the DoD proposal to revise the DFARS to implement section 852 of the NDAA for FY 2019 to pay small businesses within 15 days, rather than the current 30-day standard. It is viewed as an important first step for DoD small business contractors. Two other respondents stated that FAR 52.232–40 does not provide for the 15-day payment goal "to the fullest extent permitted by law," which creates a conflict with the specific 15-day goal that section 852 directs DoD to adopt. One of the respondents recommends a new DFARS prescription and contract clause to supplement FAR 52.232–40 be added that provides for the 15-day payment goal "to the fullest extent permitted by law." The respondent supports the revision to DFARS 232.903 to comport with the provisions of section 852 with respect to small business prime contractors.

Response: DoD recognizes the respondents' preference to mandate payment within 15 days instead of making it a goal; and agrees that the goal is an important step for small business contractors working with the DoD. DoD also affirms support for the revision to DFARS 232.903 to implement the provisions of section 852.

Regarding a conflict with the FAR, this final DFARS rule provides details to supplement, rather than conflict with, the requirements of FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors. The rule relies on the FAR clause and the DFARS clause at 252.232–7017, used together in a contract, to communicate to prime contractors the requirements concerning accelerated payments. See section III of this preamble for a more detailed explanation of how the clauses are used together. DoD agrees that it is important to clarify what constitutes an accelerated payment from a prime contractor to a small business subcontractor in the context of this DFARS rule. Therefore, the final rule revises the clause at DFARS 252.232–7017 to define "accelerated payment" as a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

5. Clarifications

a. Small Business Subcontractors

Comment: One respondent suggested that the definition of small business subcontractors be clarified for the purposes of accelerated payments as those that are directly supporting or charged to a DoD contract in which the prime contractor is receiving accelerated payments (*i.e.,* not those supporting indirect, commercial, or foreign efforts by the prime contractor).

Response: This final rule does not provide a definition of "small business subcontractor." This term is defined at FAR 2.101. The definition provided in the FAR applies to the DFARS, including this rule.

b. Section Heading for DFARS 232.009

Comment: One respondent suggested that the heading to DFARS 232.009 be changed to read "Providing accelerated payments to small business contractors and small business subcontractors" because DFARS 232.009–1 adds coverage for both small business and small business subcontractors. In addition, the respondent suggested that the term "small business primes" in

both DFARS 232.009 and DFARS 232.009–1 would be clearer than "small business contractor".

Response: The final rule does not include the respondent's suggested edits. Revising the heading of DFARS 232.009 as suggested would create a disconnect with the title of the new contract clause prescribed in this section. In addition, DFARS 232.009 is numbered to correspond to FAR 32.009, which addresses the same subject matter. This drafting convention allows contracting officers to locate more easily coverage of similar topics in the FAR and DFARS. It is not necessary to add "prime contractors" to the heading because, in the FAR and DFARS, the term "contractor" means the prime contractor.

6. Governmentwide Application of the Rule

Comment: One respondent stated that section 852 addresses two types of accelerated payments, but noted both are applicable to DoD only. The first type addresses payments to small business prime contractors; the second type addresses payments to any DoD prime contractor that subcontracts with small businesses. The respondent indicated a preference for both types of accelerated payments to be made applicable governmentwide. The respondent also stated that, at a minimum, the rule should acknowledge the governmentwide application of making accelerated payments to small business prime contractors, as provided for in FAR clause 52.232–25, Prompt Payment.

Response: DoD affirms the respondent's statement that section 852 of the NDAA for FY 2019 applies to DoD only. As such, this final DFARS rule will be applicable to DoD only. DoD notes, however, that FAR Case 2020–007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns, is in process to implement section 873 of the NDAA for FY 2020, which modifies 31 U.S.C. 3903(a) to require accelerated payments for small business prime contractors and prime contractors that subcontract with small business concerns.

7. Definition of "small business"

Comment: One respondent expressed concern that the rule could be improved by defining what constitutes a small business.

Response: The FAR defines "small business concern" in subpart 2.1, Definitions. The definition of "small business concern" in the FAR applies throughout the DFARS, including to this rule.

8. Estimate of Fees Paid by Small Business Subcontractors

Comment: One respondent commented on DoD's inability to estimate the number of small business subcontractors who have been required to pay fees or provide consideration in return for accelerated payments from prime contractors, or the dollar value of these fees or consideration. The respondent asked if it was feasible to survey a sample of subcontractors to DoD prime contractors regarding the average fees paid to the prime contractors, and use that data to estimate fees paid by subcontractors to DoD prime contractors in general. The respondent also asked if the contractors could be sorted by size (*i.e.,* small, medium, and large), with an average fee for each size contractor, to find a weighted average number of contractors and fee.

Response: Resources are not available for a survey such as the respondent suggested. DoD does not have any data on which to base an estimate of the number of subcontractors required to pay fees or provide consideration to the prime contractor in return for accelerated payments, or the dollar value of the fees or consideration. Public comments did not provide insight into whether small business subcontractors had been required to pay fees or provide consideration for accelerated payments, or the dollar value of such fees or consideration.

9. Initial Regulatory Flexibility Analysis

Comment: One respondent expressed concern that the initial regulatory flexibility analysis prepared for the proposed rule lacked adequate information to allow small businesses to determine the impact of the rule.

Response: See section VII. of this preamble.

C. Other Changes

This final rule adds a reference to the statute (10 U.S.C. 2307(a) to the instruction at DFARS 212.301(f)(xiii)(G) for use of the clause at DFARS 252.232–7017 in commercial item acquisitions. In the contract clause, this final rule adds a new paragraph (a) to provide a definition for "Accelerated payment" also adds the paragraph heading of "Subcontracts" to paragraph (c).

III. Expected Impact of the Rule

Current DoD policy, as stated in DFARS 232.903, is to pay small business contractors as quickly as possible after receipt of invoices and proper documentation. This rule specifies that DoD will provide payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and documentation, and before normal payment due dates. For items that ordinarily require payment in less than 15 days (*e.g.,* perishable food), DoD will provide payment as quickly as possible after receipt of proper invoices and documentation, and before the normal payment due date.

With few exceptions, DoD will provide accelerated payments to small business contractors and to prime contractors that agree to provide accelerated payments to their small business subcontractors without further consideration or fees. DoD will not be able to provide accelerated payments to prime contractors if such payments would result in a violation of the Antideficiency Act. An example would be a lapse in appropriated funds.

This final DFARS rule relies on a FAR clause and a DFARS clause, used together in a contract, to—

(1) Communicate to the prime contractor the requirement to provide accelerated payments to small business subcontractors; and

(2) Obtain the prime contractor's agreement, by signature of the contract, to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor.

DoD contracting officers do not use the DFARS in isolation; they use the DFARS together with the FAR. The FAR currently requires contracting officers to insert the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, in solicitations and contracts. This final DFARS rule will require DoD contracting officers to insert the new DFARS clause 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts that include FAR 52.232–40. This means both clauses will be included in DoD contracts.

The FAR clause and the DFARS clause will work together to require accelerated payments to small business subcontractors when DoD provides accelerated payments to the prime contractor. FAR 52.232–40 currently requires prime contractors to provide accelerated payments to their small business subcontractors when the Government provides accelerated payments to the prime contractors. DFARS clause 252.232–7017 defines "accelerated payment" as "a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment

from the Government or receipt of a proper invoice from the subcontractor, whichever is later." By using both clauses together in a contract, this final DFARS rule requires a prime contractor who receives an accelerated payment from the Government to pay its small business subcontractors as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

DoD estimates that 40,282 contractors (including 30,498 small businesses) will receive accelerated payments each year, based on data obtained from the Federal Procurement Data System (FPDS) and input from subject matter experts from the Defense Finance and Accounting Services and the Office of the Under Secretary of Defense (Comptroller). Specifically, DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. Subject matter experts estimated that DoD would not provide accelerated payments to approximately 1 percent of these contractors (407, including 308 small businesses) because such payments could result in a violation of the Antideficiency Act (*e.g.,* during a lapse in appropriated funds). Therefore, approximately 40,282 contractors (including 30,498 small businesses) per year would receive accelerated payments.

DoD estimates that there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018, based on data from *USASpending.gov* cross-referenced with size representations for DoD contracts. DoD further estimates that approximately 1 percent (95) small business subcontractors may not receive accelerated payments because DoD was not able to provide accelerated payments to the prime contractor (see the previous paragraph).

This rule prohibits contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments. This prohibition would benefit small business subcontractors who have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments. Any costs for prime contractors to implement the prohibition on fees and consideration are expected to be de minimis since DoD expects that only a small number of contractors have required such consideration or fees from their small business subcontractors.

As noted in a preceding paragraph, DoD estimates there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018. It is not possible for DoD to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments, nor is it possible to estimate the dollar value of the consideration provided or fees paid. Despite a request for comments on this specific topic, DoD received no information from the public that would inform these estimates. If any small business subcontractors have been required to provide consideration or pay fees in return for accelerated payments, the prohibition on such consideration or fees could result in cost savings. However, if no small business subcontractors have been required to provide consideration or pay fees, there would be no cost savings as a result of this rule.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule applies the requirements of section 852 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold (SAT) and to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since approximately 96 percent of DoD contracts are valued at or below the SAT, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts at or below the SAT. An exception for contracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since more than half of DoD's contractors are small businesses providing commercial items, including COTS items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs

and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule is necessary in order to amend the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 provides for accelerated payments to DoD contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. Specifically, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if—

(a) A specific payment date is not established by contract; and

(b) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The objective of the rule is to implement section 852 by providing accelerated payments to small business contractors and to small business subcontractors via accelerated payments to prime contractors.

DoD received comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, which are summarized below:

(a) *Number of subcontractors required to pay fees:* DoD did not provide the number of small business subcontractors who have been required to provide consideration or pay fees in return for accelerated payments from prime contractors.

(b) *Conclusion regarding cost savings:* DoD concludes, without sound data, that the rule could result in cost savings because of the proposed prohibition on fees and consideration in return for accelerated payments.

(c) *Conflict with FAR:* The rule conflicts with FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, which does not require payment within 15 days.

(d) *Reason for not accelerating payment:* According to DoD, subject matter experts have estimated that DoD would not provide accelerated payments to approximately 1 percent of contractors because such payments would put DoD at risk of a violation of law. DoD did not qualify these individuals as subject matter experts or provide the bases or assumptions that support their conclusions. DoD did not provide small businesses with information on what would constitute a violation of law that would result in DoD not providing accelerated payments to small businesses.

(e) *Action plan when payments are not accelerated:* The rule does not provide a sound action plan for small businesses who may be denied the legal right to accelerated payments.

DoD provides the following responses, including changes made to the final rule as a result of the comments:

(a) *Number of subcontractors required to pay fees:* DoD has no data on which to base an estimate of the number of small business subcontractors who have been required to pay fees or provide consideration to prime contractors in return for accelerated payments. In the proposed rule, DoD requested public comment on the topic of consideration or fees in return for accelerated payments. However, none of the public comments addressed this topic. Therefore, in the final rule DoD has provided a rough estimate of the number of small business subcontractors on DoD contracts. DoD estimates there were approximately 9,483 small business subcontractors on DoD contracts in FY 2018.

(b) *Conclusion regarding cost savings:* The conclusion that the rule could result in cost savings was based on a reasonable assumption that, if a small business was required to pay a fee in return for accelerated payments, and the rule prohibits that fee, then the small business will not be required to pay the fee in the future. If no small businesses have been required to pay a fee, then there would be no cost savings as a result of this rule. In the final rule, DoD has made this clarification in section III of the preamble for this final rule.

(c) *Conflict with FAR:* The rule provides details to supplement, rather than conflict with, the requirements of FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors. DoD agrees that it is important to clarify what constitutes an accelerated payment from a prime contractor to a small business subcontractor in the context of this DFARS rule. Therefore, the final rule revises the clause at DFARS 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, to clarify that "accelerated payment" means "a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later." See paragraph (e) for an explanation of how the FAR clause and the DFARS clause will be used together to provide for accelerated payments to small business subcontractors.

(d) *Reason for not accelerating payment:* The estimate that 1 percent of contractors would not receive accelerated payments was based on DoD's expectation that this would be a rare occurrence. DoD's subject matter experts from the Defense Finance and Accounting Service and the Office of the Under Secretary of Defense (Comptroller) have provided clarification on the circumstances that could result in DoD not providing accelerated payments to small businesses. DoD would not be able to provide accelerated payments if such payments would result in a violation of the Antideficiency Act. An example would be a lapse in appropriated funds. DoD has made this clarification in section III of the preamble for this final rule.

(e) *Action plan when payments are not accelerated:* DoD's interpretation of section 852 of the NDAA for FY 2019 is that section 852 does not create a right to accelerated payments. It requires DoD, to the fullest extent permitted by law, to pay contractors on an accelerated basis, with a goal of 15 days. It also requires the prime contractor's agreement to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor. As with any issue or concern related to payments, small businesses may seek assistance from the Office of Small Business Programs for DoD or for the DoD component that awarded the prime

contract. This final DFARS rule relies on a FAR clause and a DFARS clause used together in a contract to—

(i) Communicate to the prime contractor the requirement to provide accelerated payments to small business subcontractors; and

(ii) Obtain the prime contractor's agreement, by signature of the contract, to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor.

DoD contracting officers use the FAR and DFARS together to award contracts, not one or the other in isolation. The FAR currently requires contracting officers to insert FAR 52.232–40 in solicitations and contracts. This final rule will require contracting officers to insert the new DFARS clause 252.232–7017 in solicitations and contracts that include FAR 52.232–40. This means both clauses will exist in DoD contracts and will work together to require accelerated payments to small business subcontractors when DoD provides accelerated payments to the prime contractor. FAR 52.232–40 currently requires prime contractors to make accelerated payments to their small business subcontractors upon receipt of accelerated payments from the Government. DFARS clause 252.232–7017 defines accelerated payment as "a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later." By using both clauses together, this final DFARS rule requires a prime contractor who receives an accelerated payment from the Government to pay its small business subcontractors as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

This rule applies to small businesses that are DoD prime contractors. According to data obtained from the Federal Procurement Data System, DoD awarded contracts to an average of 30,806 unique small entities each year from FY 2016 through FY 2018. DoD estimates that it may not be possible to provide accelerated payments to approximately 308 small business contractors (1 percent) because such payments would put DoD at risk of a violation of the Antideficiency Act (*e.g.*, during a lapse in appropriated funds). Therefore, approximately 30,498 small contractors per year would receive accelerated payments.

This rule also applies to small businesses that are subcontractors on DoD prime contracts. DoD estimates that there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018, based on data from www.*USASpending.gov* cross-referenced with size representations for DoD contracts. DoD estimates that approximately 95 small business subcontractors (1 percent) may not receive accelerated payments because DoD was not able to provide accelerated payments to the prime contractor. With regard to the impact of the prohibition on fees or other consideration in return for accelerated payments, it is not possible for DoD to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known, significant alternatives that would accomplish the objectives of the applicable statute.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 232, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 232, and 252 are amended as follows:

■ 1. The authority citations for 48 CFR part 212, 232, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding paragraph (f)(xiii)(G) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xiii) * * *

(G) Use the clause at 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, as prescribed in 232.009–2(2), to comply with 10 U.S.C. 2307(a).

* * * * *

PART 232—CONTRACT FINANCING

■ 3. Add sections 232.009, 232–009–1, and 232.009–2 to read as follows:

232.009 Providing accelerated payments to small business subcontractors.

232.009–1 General.

Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) requires DoD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days.

232.009–2 Contract clause.

Use the clause at 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, that include the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

■ 4. Revise section 232.903 to read as follows:

232.903 Responsibilities.

In accordance with section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), DoD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see 232.906(a)).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 252.232–7017 to read as follows:

252.232–7017 Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration.

As prescribed in 232.009–2, use the following clause:

Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration (APR 2020)

(a) *Definition. Accelerated payment,* as used in this clause, means a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

(b) In accordance with section 852 of Public Law 115–232, the Contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments, as defined in paragraph (a) of this clause, to subcontractors under the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

(c) *Subcontracts.* Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including those for the acquisition of commercial items.

(End of clause)

[FR Doc. 2020–06727 Filed 4–7–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 229 and 252

[Docket DARS–2019–0036]

RIN 0750–AK13

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Tax Relief" (DFARS Case 2018–D049)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of an existing DFARS clause to include the text of another DFARS clause on the same subject, in an effort to streamline contract terms and conditions for contractors, pursuant to action taken by the Regulatory Reform Task Force.

DATES: Effective April 8, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 48512 on September 13, 2019, to modify DFARS clause 252.229–7001, Tax Relief, to incorporate the information included in DFARS clause 252.229–7000, Invoices Exclusive of Taxes or Duties. Combining these clauses results in DFARS clause 252.229–7000 being removed from the DFARS. The rule implements a recommendation of the DoD Regulatory Reform Task Force established under Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda."

No public comments were received in response to the proposed rule. No changes from the proposed rule are made in the final rule.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-The-Shelf Items

This rule does not create any new provisions or clauses. The rule combines two clauses into a single clause and does not change the applicability of the affected clauses.

III. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 20, 1993. This rule is not a major rule as defined at 5 U.S.C. 804.

IV. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD is amending DFARS clause 252.229–7001, Tax Relief, to incorporate the information included in DFARS clause 252.229–7000, Invoices Exclusive of Taxes or Duties. Combining these clauses will result in DFARS clause 252.229–7000 being removed from the DFARS. The objective of this rule is to streamline DoD contract terms and conditions and contractor responsibilities pertaining to foreign taxes and duties. The modification of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force under E.O. 13771.

No public comments were received in response to the initial regulatory flexibility analysis.

This rule is combines two existing clauses that address the same topic into a single comprehensive clause. These clauses apply to solicitations and contracts awarded to a foreign concern for contract performance in a foreign country.

This rule is not expected to impact small business entities because this rule only applies to foreign entities. The Small Business Administration (SBA) identifies a "small business" as a "a business entity organized for profit, with a place of business located in the United States, and which operated primarily within the United States or which makes a significant contribution to the U.S. economy through the payment of taxes or use of American products, materials, or labor" (13 CFR 121.102(a)). This rule only applies to foreign contractors, which do not meet the SBA definition of "small business" entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the stated objectives. This rule is not expected to have a significant economic impact on small entities.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 229 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 229 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 229 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 229—TAXES

229.402–1 [Removed]

■ 2. Remove section 229.402–1.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.229–7000 [Removed and Reserved]

■ 3. Remove and reserve section 252.229–7000.

United States Government Accountability Office

GAO

Report to the Chairman and Ranking Minority Member, Committee on Government Reform, House of Representatives

November 2004

AIR TRAFFIC CONTROL

FAA's Acquisition Management Has Improved, but Policies and Oversight Need Strengthening to Help Ensure Results

GAO-05-23

November 2004

AIR TRAFFIC CONTROL

FAA's Acquisition Management Has Improved, but Policies and Oversight Need Strengthening to Help Ensure Results

GAO Accountability·Integrity·Reliability

Highlights

Highlights of GAO-05-23, a report to the Chairman and Ranking Minority Member, Committee on Government Reform, House of Representatives

Why GAO Did This Study

The Federal Aviation Administration's (FAA) multibillion-dollar effort to modernize the nation's air traffic control (ATC) system has resulted in cost, schedule, and performance shortfalls for over two decades and has been on GAO's list of high-risk federal programs since 1995. According to FAA, performance shortfalls were due, in part, to restrictions imposed by federal acquisition and personnel regulations. In response, Congress granted FAA exemptions in 1995 and directed it to develop a new acquisition management system.

In this report, GAO compared FAA's AMS with (1) the FAR and (2) commercial best practices for major acquisitions, and (3) examined FAA's implementation of AMS and its progress in resolving problems with major acquisitions.

What GAO Recommends

GAO recommends that the Secretary of Transportation advise FAA to, among other things, (1) improve its development of requirements and management of software and (2) more closely align AMS with commercial best practices.

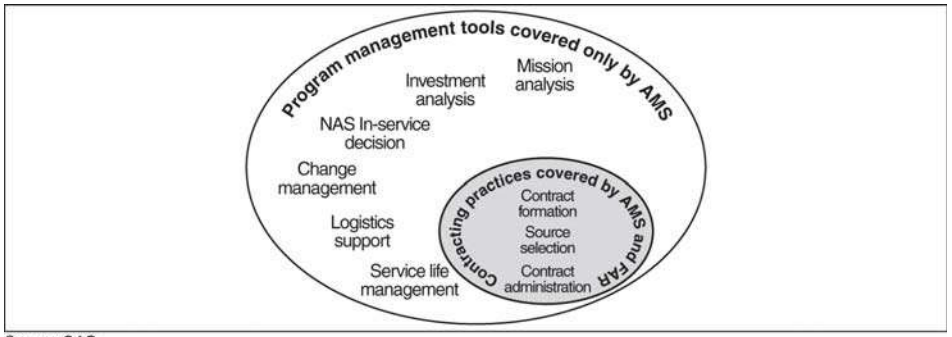
In commenting on a draft of this report, FAA generally agreed with the report's contents and said that our recommendations would be helpful to them as they continue to refine AMS. They also provided us with technical comments, which we have incorporated as appropriate.

www.gao.gov/cgi-bin/getrpt?GAO-05-23.

To view the full product, including the scope and methodology, click on the link above. For more information, contact JayEtta Z. Hecker 512-2834 or heckerj@gao.gov.

What GAO Found

FAA's Acquisition Management System (AMS) is broader and less prescriptive than the Federal Acquisition Regulation (FAR), but both afford managers flexibility. AMS establishes an acquisition life-cycle management system, including both a contracting and program management system, whereas the FAR is primarily a contracting system. In addition, AMS takes the form of guidance—it is not regulatory, while the FAR is a set of published regulations—a legal foundation that has the force and effect of law that most federal agencies are required to follow.



Source: GAO.

AMS provides some discipline for acquiring major ATC systems; however, it does not ensure a knowledge-based approach to acquisition found in the best commercial practices for managing commercial and DOD product developments that we have identified in numerous past reports. Best practices call for (1) use of explicit written criteria to attain specific knowledge at key decision points and (2) use of this knowledge by executives at the corporate level to determine whether a product is ready to move forward. Attainment and use of such knowledge by executives helps to avoid cost, schedule, and performance shortfalls that can occur if they commit to a system design prematurely. While AMS has some good features, including calling for key decision points, it falls short of best practices.

GAO's review of seven major ATC systems and analysis of FAA's performance in acquiring major systems found that AMS has not resolved longstanding problems it experienced prior to its implementation of AMS—including developing requirements and managing software—and is just beginning to focus on how these acquisitions will improve the efficiency of ATC operations. While FAA has made progress by providing guidance for avoiding past weaknesses, it has not applied these improvements consistently. According to FAA officials, reorganization under and improved oversight by FAA's new performance-based Air Traffic Organization should help ensure greater consistency and an increased focus on results. Past GAO reports have demonstrated that the success of an acquisition process depends on good management, whether it be under AMS or the FAR.

Contents

Tables

Figures

Abbreviations

AMS	Acquisition Management System
ASR-11	Airport Surveillance Radar, Model 11

ATC	air traffic control
ATO	Air Traffic Organization
ATOP	Advanced Technologies and Oceanic Procedures
BOE	Cost Basis of Estimate
CFO	Chief Financial Officer
CIO	Chief Information Officer
COO	Chief Operating Officer
CMMI	CMMI Capability Maturity Model Integration
COTS	Commercial-off-the-shelf
DOD	Department of Defense
DOT	Department of Transportation
DOTIG	Department of Transportation Office of Inspector General
ERAM	En Route Automation Modernization
F&E	Facilities and Equipment
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FMFIA	Federal Managers' Financial Integrity Act of 1982
iCMM	integrated Capability Maturity Model
ISC	Initial System Configuration
IT	Information Technology
ITIM	Information Technology Investment Management framework
ITWS	Integrated Terminal Weather System
JRC	Joint Resources Council
LAAS	Local Area Augmentation System
NEXCOM	Next Generation Air/Ground Communications System
NDI	Non-developmental Item
OMB	Office of Management and Budget
RE&D	Research, Engineering and Development
SEI	Software Engineering Institute
SFFAS 4	Statements of Federal Financial Accounting Standards no. 4
STARS	Standard Terminal Automation Replacement System
WAAS	Wide Area Augmentation System

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GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, D.C. 20548

November 12, 2004

The Honorable Tom Davis
Chairman
The Honorable Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
House of Representatives

In late 1981, the Federal Aviation Administration (FAA) began a modernization program to replace and upgrade the National Airspace System's (NAS) equipment and facilities to meet the expected increase in traffic volume, enhance the margin of safety, and increase the efficiency of the air traffic control (ATC) system—the principal component of the NAS. Historically, the modernization program has experienced cost overruns, schedule delays, and performance shortfalls of large proportions and has been on our list of high-risk programs since 1995. To date, FAA has spent $41 billion and expects to spend an additional $7.6 billion through fiscal year 2007 to, among other things, finalize key modernization projects designed to replace radar, navigation, communications, and information-processing systems.[1]

According to FAA, the performance shortfalls in its modernization program were due, in part, to restrictions imposed by federal acquisition and personnel requirements. In response, Congress passed legislation in 1995 that granted FAA unique acquisition and personnel exemptions, or flexibilities, and directed FAA to develop a new acquisition management policy. FAA issued its new acquisition management policy, called the Acquisition Management System (AMS), in 1996 and began using the new system instead of the Federal Acquisition Regulation (FAR). To further address long-standing weaknesses in the ATC modernization program, the President and Congress in 2000 directed FAA to reorganize and establish a new organization. FAA has just begun to do so.

Now that FAA has had several years to implement the earlier procurement flexibilities, as well as some time to reorganize, some results of its acquisition reform should be discernable. Moreover, FAA's experiences in

[1]GAO, *Major Management Challenges and Program Risks: Department of Transportation*, GAO-03-108, (Washington, D.C.: Jan. 2003).

exercising its acquisition flexibilities could provide valuable information to Congress in overseeing the use of these flexibilities.

You asked us to review the steps that FAA has taken to reform its acquisition of major ATC systems and the impact of the reforms on FAA's acquisition outcomes. Specifically, you asked us to (1) compare the scope and flexibility of AMS and the FAR, (2) compare AMS with commercial best practices for major acquisitions, and (3) examine FAA's implementation of AMS and progress in addressing long-standing problems with major acquisitions. In addition, you asked us to review FAA's general procurement of goods and services; we cover this topic in appendix I.

To address the first objective, we compared the topics addressed by, and the implementation options afforded to contracting and procurement officials under AMS and the FAR. To address the second objective, we used a model of best practices that we derived from our body of work on how leading private firms manage costly and complex product developments and how the Department of Defense (DOD) manages major weapon systems acquisitions.[2] We used this model to assess the extent to which FAA's acquisition management policy mirrors the acquisition policies of high-performing organizations in the public and private sectors. This model consists of four phases: (1) concept and technology development; (2) product development, which includes both integration and demonstration activities; (3) production; and (4) operations and support. In between these four phases are three key knowledge decision points at which commercial firms and the government must have sufficient knowledge to make large investment decisions. To address the third objective, we selected the seven ATC systems with the largest budgets to explore the results of FAA's implementation of its acquisition management policy and procedures and to determine how FAA has addressed issues found to have contributed to cost, schedule, or performance problems. In selecting these seven systems, we ensured that some were initiated before and some after April 1996, when FAA implemented AMS. While the results of these analyses are not generalizable to all of FAA's major ATC acquisitions, they indicate the extent to which the agency has made progress in addressing long-standing problems we have identified. To further assess both the implementation

[2]For example, *Best Practices: Capturing Design and Manufacturing Knowledge Early Improves Acquisition Outcome*s, GAO-02-701, (Washington, D.C.: July 15, 2002) and *Best Practices: Better Matching of Needs and Resources Will Lead to Better Weapon System Outcomes*, GAO-01-288, (Washington, D.C.: Mar. 8, 2001).

and the impact of FAA's acquisition reforms, we reviewed our work on FAA's major ATC acquisition efforts since 1996 as well as the work of the Department of Transportation's Office of Inspector General (DOTIG), FAA, and others. We also reviewed the actions that FAA has taken to refine AMS in response to internal and external reviews. Finally, to review FAA's procurement of goods and services across the agency, we used a commercial best-practices model for taking a more strategic approach to procurement, along with interviews with key agency officials, to determine whether FAA has begun to analyze spending trends to identify opportunities to leverage its buying power. We conducted our work from December 2003 through November 2004 in accordance with generally accepted government auditing standards. See appendix II for additional information on our objectives, scope, and methodology.

Results in Brief

AMS consists of broad guidance for acquisition life-cycle management—from defining the requirements for a system through fielding (deploying) and decommissioning it (removing it from service). This broad guidance contrasts with the rather more detailed and prescriptive contract-formation and contract-administration requirements contained in the FAR. AMS is broader in scope because it addresses, among other areas of life-cycle management, both contract and program management, providing both policies and procedures for contracting and a toolset of recommended practices for managing individual acquisition projects over their life cycles. By contrast, the FAR focuses in far greater detail on contracting policies and procedures. FAA managers believe they have greater flexibility in interpreting and applying AMS than they would have under the FAR, in part because, in areas addressed by both, AMS is less directive than the FAR. For example, although AMS states a "preference" for competition, FAA personnel may use single-source contracting when necessary to fulfill FAA's mission. By contrast, other federal agency contracting officials operating under the FAR are generally required to seek "full and open competition"—a more rigorous standard. These other agency officials can generally use sole-source or limited-competition contracting only after higher-level agency procurement officials have approved a written justification. In addition, FAA contracting personnel operate as part of acquisition teams that are responsible to program managers; under the FAR, contracting decisions are made by contracting personnel who are responsible only to contracting officials. Nonetheless, the FAR also affords flexibility because it encourages innovation and addresses a wide selection of contracting methods; therefore, procurement officials can choose the approach that they consider most appropriate to their procurement.

According to some current and former FAA procurement officials with experience in using both the FAR and AMS, the FAR may appear inflexible and cumbersome to inexperienced managers, but those who are familiar with it can navigate it effectively.

AMS provides some discipline through its various phases, activities, and decision points for acquiring major ATC systems; however, it does not ensure the use of a knowledge-based approach found in the best practices for managing commercial product developments and DOD acquisitions[3] that we have identified in numerous past reports. Commercial best practices call for specific knowledge to be captured and used by corporate-level decision-makers to determine whether a product has reached a level of development (product maturity) sufficient to demonstrate its readiness to move forward in the acquisition process. The capture of such knowledge and its use by executives helps to avoid cost overruns, schedule slips, and performance shortfalls that can occur if decision-makers commit to a system design before acquiring critical technology, design, or manufacturing knowledge. AMS has some good features, which indicate a process that has some elements of discipline. For example, like the best practices model, AMS identifies critical junctures that it terms "decision points," the first three of which call for the preparation of detailed technical and programmatic information that FAA's corporate executive-level body, the Joint Resources Council,[4] can use to assess whether or not FAA should initiate an acquisition program. However, AMS departs from recognized best practices primarily by (1) not requiring the attainment of specific knowledge satisfying explicit written criteria for decision-makers to use at each key decision point and (2) not requiring corporate executive-level oversight at all key decisions. For example, AMS allows the Joint Resources Council to delegate two key decisions—the decision to begin production and the decision to place a system in service. FAA maintains that this approach gives program managers flexibility, expedites decision-making, and allows those executives with the most knowledge about a major acquisition to make key decisions about its continued development.

[3]In this report, we refer to both commercial product developments and federal agency acquisitions as acquisitions.

[4]The Joint Resources Council is an executive body consisting of associate and assistant administrators, acquisition executives, the chief financial officer, the chief information officer, and legal counsel. The council makes corporate-level decisions, including those that determine whether an acquisition meets a mission need and should proceed. The council also approves changes to a program's baseline, budget submissions, and the National Airspace System's architecture baseline.

FAA's reliance on delegation assumes that managers will inform their superiors if they are unable to meet the performance schedules and system requirements approved by the Joint Resources Council. However, best practices call for more than this, including the use of measurable criteria at key points in the acquisition process to ensure that specific knowledge has been captured and the independent review of this knowledge by corporate executive-level decision-makers before the acquisition moves forward in its development. These criteria and reviews are particularly important for acquisitions that require a large funding commitment, such as those that include the production of multiple costly units (e.g., radars and controller workstations). In addition, oversight at the corporate-executive or agencywide level is needed to ensure consideration of an acquisition's likely impact on other agency projects or operations. These departures from best practices put FAA's major ATC acquisitions at risk of cost, schedule, and performance shortfalls. We are making recommendations to the Secretary of Transportation to align AMS more closely with commercial best practices.

According to our review of seven major ATC systems and analysis of FAA's performance in acquiring major systems, AMS has not resolved management problems that FAA experienced before it implemented AMS, but the agency is beginning to focus more on the expected results of its major acquisitions. (See table 5.) Specifically, our review found that AMS did not call for requirements that were specific enough to minimize the development of further requirements (requirements growth) or unplanned work in five of these systems. This lack of specificity resulted in the inadequate development or definition of requirements, requirements growth, unplanned work, or a reduction in performance for five of these systems. In addition, for three of these systems, FAA underestimated the difficulty of modifying available software to fulfill its mission needs. Consequently, FAA encountered unexpected software development needs, higher costs, and schedule delays. Because AMS guidance was not sufficient to account for the risks associated with modifying available software, the two systems we reviewed that were initiated after AMS's implementation—though currently meeting cost and schedule milestones—are nevertheless showing symptoms of FAA's past problems with developing requirements and managing software. It is too soon to tell if these two systems will remain within their cost, schedule, and performance parameters. In addition, our work on FAA's major acquisitions, along with that of the DOTIG and others, has shown that many of the problems FAA experienced in acquiring major systems before 1996 persist under AMS and that effective acquisition management, rather than

the use of a specific contracting process (e.g., the FAR or AMS) is the key to successful acquisitions. To its credit, FAA is beginning to focus more on results, largely through its new Air Traffic Organization, which has been charged with taking a more performance-based approach to managing the agency's major acquisitions. This approach includes implementing a training framework for FAA's acquisition workforce. While FAA has taken some steps to develop an evaluation program with criteria for measuring the extent to which this framework is achieving organizational goals by improving the knowledge base of FAA's acquisition workforce, at the time of our audit FAA had no plans to conduct a comprehensive evaluation. We are making recommendations to the Secretary of Transportation to improve FAA's development of requirements and management of complex software, and to comprehensively evaluate FAA's implementation of the training framework to ensure that it is having the intended effect of improving the knowledge base of FAA's acquisition workforce. In commenting on a draft of this report, FAA said that it generally agreed with the report's contents and said that our recommendations would be helpful to them as they continue to refine AMS.

Background

Maintaining that federal procurement requirements contributed to some of its cost, schedule, and performance problems in the 1980s and early 1990s, FAA sought a statutory exemption from the federal acquisition system,[5] including the FAR, and those parts of title 5 of the United States Code, parts II and III, that govern federal civilian personnel management. According to FAA, exemptions from these requirements would enable it to streamline its acquisition processes, be more responsive to the airline industry's needs, and increase the efficiency of ATC operations while maintaining safety. Congress enacted legislation in November 1995 that exempted FAA from key federal procurement statutes and the FAR, and directed FAA to develop a new acquisition management system. In response to these legislative initiatives, FAA implemented a new, streamlined acquisition process—the Acquisition Management System (AMS)— on April 1, 1996.

We developed a knowledge-based model of commercial best practices based on our findings about how leading private firms manage costly and complex acquisitions effectively—that is, within cost, schedule, and

[5]The term "federal acquisition system" is used to refer to the various statutes and regulations that govern procurement practices by federal government agencies—the controlling regulation is the FAR.

performance targets. The use of this knowledge-based model has been found to reduce the risks associated with developing products and increase the likelihood of successful outcomes. The model divides the product development cycle into four phases and related activities. Table 1 presents these phases and activities and explains what takes place during each.

Table 1: Structure of Best Practices Model for Major Product Developments

Phase/Activity	What occurs during this phase or activity
1.Concept and technology development	Leading companies work to understand their mission needs and confirm that the technologies to be used are mature; that is, the technologies needed to meet essential product requirements have been demonstrated to work in their intended environment.
2. Product development	
• Integration	Components and subsystems are integrated into the product to stabilize the overall system design and show that the design can meet the product requirements.
• Demonstration	Tests show that the product will work as required and can be manufactured within targets.
3. Production	Operational test articles are built.
4. Operations and support	Our best practices model does not explicitly cover operations and support activities; however, this phase focuses on maintenance of the system through its retirement.

Source: GAO.

AMS provides guidance for selecting and overseeing investments over their life cycle. Like our best practices model, it is divided into phases and activities, although the divisions sometimes occur at different points. Table 2 summarizes AMS's phases and activities.

Table 2: Structure of AMS

Phase/Activity	What occurs during this phase or activity
Needs and solution identification	
• Mission analysis	FAA identifies a capability shortfall and determines that it needs an investment to better carry out its mission. Recently, FAA began analyzing its mission needs within the context of its overall goals for the National Airspace System.
• Investment analysis	FAA, using an investment analysis team, evaluates alternatives, selects practical and affordable solutions, and develops a baseline of cost, schedule, and performance requirements. This document is called the acquisition program baseline.
Solution implementation	
• System integration	Both hardware and software components and subsystems are integrated into a product. Also, intra- and intersystem compatibility are tested and analyzed.
• System demonstration	Tests show that the product can work as required and be manufactured within targets.
• System production	All activities are carried out to produce needed quantities. Each end item is tested before it leaves the factory to verify that it conforms to specifications and is free from manufacturing defects.
In-service management	All required activities are carried out, including directly operating, providing maintenance functions (both scheduled and unscheduled), and furnishing technical and logistics support for the maintenance of FAA systems, subsystems, services, or equipment.

Source: FAA.

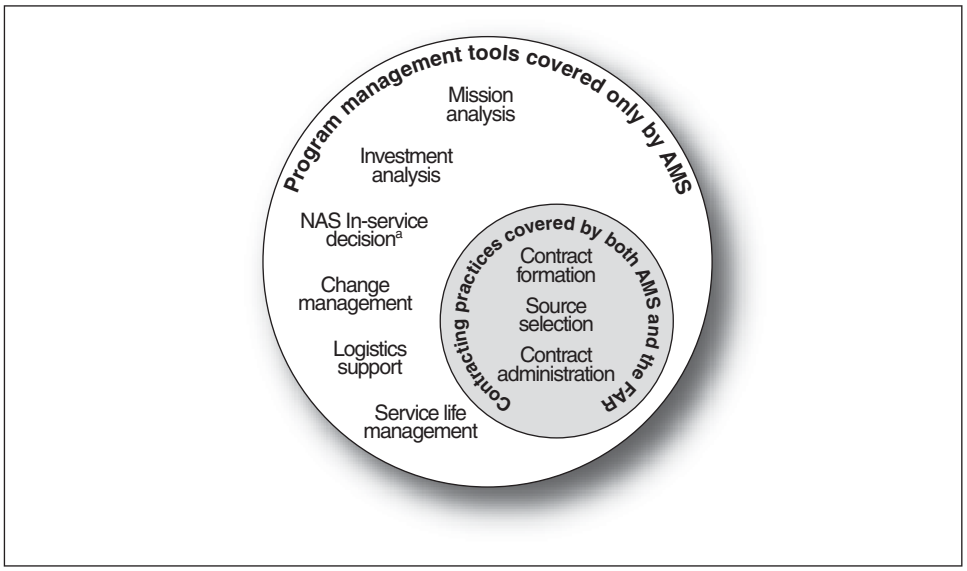
To implement the new, performance-based organization for managing ATC modernization and operations, as the President and Congress directed in 2000, FAA appointed a chief operating officer in August 2003 and formally established the Air Traffic Organization (ATO) in February 2004. ATO, under the direction of a six-member executive council, is now responsible for further implementing acquisition reforms for major ATC systems.

AMS Is Broader and Less Prescriptive Than the FAR

AMS establishes an acquisition life-cycle management system that encompasses both contracting and program management, whereas the FAR is primarily a contracting system that focuses on contract formation and contract administration. As a result, AMS is broader in scope than the FAR. See figure 1. In addition, AMS takes the form of guidance. This guidance is expressed in documentation of FAA policy, handbooks, templates, flowcharts, forms, and standard contract language. It is not regulatory. By contrast, the FAR is a set of published regulations—a legal foundation that has the force and effect of law for the federal agencies that

are required to follow it.[6] Furthermore, the FAR is more detailed and prescriptive in establishing contracting requirements and can require more administrative involvement. This fundamental difference between AMS and the FAR may suggest to some that AMS is more flexible. FAA personnel can choose how to apply AMS's provisions to a major acquisition. Nonetheless, procurement officials under the FAR also have flexibility because the FAR encourages innovation consistent with its direction (and other applicable legal requirements), provides a wide selection of contracting solutions, and permits contracting officials to choose the methods that they consider most suitable for a given situation.

Figure 1: Scope of AMS and the FAR



Source: GAO.

Note: AMS provides policy for the four phases of life-cycle management, as well as 14 functional areas, (e.g., test and evaluation, human factors, procurement, real estate, security, and systems engineering).

[a]The NAS in-service decision is a key program milestone that authorizes the deployment of a system into the National Airspace System after thoroughly testing the system to verify its operational readiness.

[6]Currently, the FAR applies to all federal executive agencies except FAA and the Transportation Security Administration.

AMS Addresses Both Procurement and Project Management, Whereas the FAR Focuses Primarily and in Far Greater Detail on Procurement

AMS comprises six policy sections and five appendixes.[7] The procurement policy section of AMS covers a range of topics, including contract funding and administration, contracting with small and disadvantaged businesses, and compliance with labor laws. According to this section, competition is FAA's preferred method of contracting, but single-source contracting is permitted when appropriate to fulfill the agency's mission. This policy section also describes the procurement of commercially available or nondevelopmental items.

Other sections of AMS cover project management tools that the FAR does not address, such as investment analysis, configuration management,[8] and integrated logistics support.[9] AMS also addresses areas that fall outside project management and procurement, including real property management—an area that becomes important when FAA must lease or purchase real property so that it can install ATC systems such as radars or antennas on property that it does not currently own. FAA's policy directs FAA staff to "conduct this business in a fair and equitable manner following best practices."

Although the FAR includes requirements that address procurement planning[10] and major systems acquisition,[11] it does so only in the context of government procurement policy and procedure. Agencies subject to the FAR find the broader program planning requirements, which appear in AMS but not in the FAR, in documents such as the Office of Management and Budget's Circular A-109 and in their own planning guidance. For

[7]The six sections provide an overview and address life-cycle acquisition management, procurement, configuration management, real property, and integrated logistic support. AMS also includes implementing guidance, flow charts, handbooks, clauses, forms, and other information that expands, illustrates, or supplements policy.

[8]A management process for establishing and maintaining the consistency of a product's performance and physical attributes with its requirements, design, and operational information throughout its life.

[9]Integrated logistics support (ILS) is a critical functional discipline that establishes and maintains a support system for all FAA products and services. Elements of ILS include spare parts, training, supply support, manuals and documentation, maintenance, and repair.

[10]48 C.F.R. pt. 7.

[11]48 C.F.R. pt. 34.

example, DOD has issued a series of directives and instructions on this subject.[12]

The contracting procedures set forth in section 3 of AMS do not prescribe detailed contracting procedures for various categories of procurements, as do those detailed under the FAR. Instead, AMS provides two basic contracting models for obtaining products and services through FAA's contracting process. The first model is called "Complex and Noncommercial Source Selection" and is used for complex, large-dollar, developmental, noncommercial items and services. This is the model that typically would be used for investments approved by the Joint Resources Council. The second model is called the "Commercial and Simplified Purchase Method" and is typically used for commercial items that are less complex and less costly. Procurements of such products or services may be routine in nature and are generally purchased on a fixed-price basis. Generally, source selection under AMS follows a screening process, with the awardee being selected on a "best value" basis from among those who remain in consideration when the selection is made.

AMS Provides Broad Guidance While the FAR Establishes Detailed Requirements, but Managers Have Flexibility under Both

AMS sets out a nonregulatory FAA policy that is binding on FAA personnel as FAA employees. AMS also sets out other guidelines that FAA states should be followed unless there is a rational basis for doing otherwise. AMS is subject to such internal controls and enforcement as the Administrator decides and to general overarching legal requirements, such as the Government Performance and Results Act of 1993 (GPRA).[13] FAA has also deemed certain acquisition laws applicable to its procurements (sometimes with modifications), such as the Service Contract Act.[14] There is also a legal requirement, created by the 1995 legislation exempting FAA from the FAR, that small and socially or economically disadvantaged firms be given all reasonable opportunities to receive contract awards. FAA has adopted a dispute resolution process with some legal underpinnings.[15] Otherwise, as the preface to AMS states, "nothing in this document creates

[12]DOD's 5000 series consists of DOD Directive 5000.1, the Defense Acquisition System, and DOD Instruction 5000.2, Operation of the Defense Acquisition System.

[13]P. L. 103-62, 107 Stat. 285.

[14]P.L. 89-286, 79 Stat. 1034.

[15]14 C.F.R. pt. 17.

or conveys any substantive [legal] rights." In short, although FAA is subject to the general legal requirement that government decisions cannot be arbitrary or capricious, AMS does not establish regulatory requirements for the conduct of procurements and does not create or convey substantive legal rights.

In contrast to AMS, the FAR is a set of published regulatory requirements. It has the force and effect of law, and agencies that are subject to it are bound to follow it. The FAR's requirements provide for a range of procurement strategies and approaches. In addition to negotiated procurement methods, it allows two-step sealed-bid and two-phase design-build methods,[16] among others. It includes streamlined procedures for soliciting and evaluating offers to furnish commercial items, as well as permits the use of simplified acquisition procedures in a broad range of procurements. Furthermore, the FAR supports a diverse selection of available contract types, product-testing tools, and other tools that an agency's contracting personnel may select when conducting an acquisition to meet the agency's needs.

Although contracting personnel in agencies subject to the FAR are required to comply with it, they enjoy broad discretion in their management of procurements. For example, the FAR allows wide latitude in drafting requirements statements, from performance-based statements of work to design specifications as necessary. It allows broad discretion in framing solicitations and in conducting procurements, including scoring proposals, determining how negotiations will be conducted, eliminating firms whose proposals are not competitive, and selecting the awardees whose proposals afford the government the best value when evaluated against the selection criteria established in the solicitations.

Because AMS consists of broad guidance while the FAR comprises detailed and prescriptive regulatory requirements, FAA managers view AMS as giving them more flexibility than they would have under the FAR, particularly in two areas—competition and oversight. Whereas the FAR generally requires full and open competition, AMS calls for providing "reasonable access to" competition to firms interested in obtaining

[16]In two-step sealed bid procurements, the acquisition process is divided into two parts. In the first step, proposals are solicited and evaluated to determine their acceptability without evaluating price. In the second step, offerors who submitted acceptable step-one proposals compete for award on the basis of price. Two-phase design-build selection procedures are a selection method in which a limited number of offerors is selected during the first phase (design) to submit detailed proposals for the second phase (construction).

contracts—a less rigorous standard than full and open competition. AMS further states that the "preferred" method of selecting sources is to compete requirements among two or more sources. By contrast, full and open competition requires that all responsible sources be permitted to compete.[17] Under AMS, there is no policy that firms that want to participate actually get a chance to do so. Rather, FAA told us that its system is beneficial because the agency can use screening requests to preselect competing firms, eliminating those firms that FAA believes are not likely to receive an award. The following example illustrates the differences between AMS and the FAR in their respective requirements on exceptions to competition. FAA may contract with a single source when this approach is determined to be in the best interest of FAA.[18] The FAR, however, allows exceptions to full and open competition only for certain specified conditions (such as unusual and compelling urgency or the availability of only one source). The FAR describes in detail the circumstances of these conditions and the requirements for using them as justification for not providing for full and open competition. The FAR also requires the contracting officer to prepare a justification document that must generally be approved by higher-level agency procurement officials (up to the agency's senior procurement executive) depending on the estimated dollar value of the procurement. The content of this justification is prescribed by the FAR. When not providing for full and open competition, the contracting officer is required under the FAR to solicit offers from as many potential sources as is practicable under the circumstances. The FAR prohibits contracting if the justification for less than full and open competition results from a lack of advanced planning. For a more detailed comparison of AMS and the FAR, see appendix III.

Although some of the FAA personnel we interviewed see AMS as more efficient and flexible than the FAR, other current and former FAA procurement officials we interviewed who have experience using both the

[17]48 C.F.R. § 2.101 (definition of "full and open competition").

[18]A rational basis for such action may be based on emergencies, standardization, or that a source is the only source available to satisfy the requirement within the time required, which are necessary and important to support FAA's mission. The decision to contract with a single source may be made as part of the overall program planning. The rational basis must be documented and approved as a part of the acquisition strategy paper, a procurement plan, or as a separate document. The AMS states that if an acquisition strategy paper is not required, and the service organization determines that a procurement plan is unnecessary, an independent single-source justification should be documented and endorsed by the service organization and approved by the contracting officer.

FAR and AMS did not agree that AMS is more flexible than the FAR. According to these officials, the FAR may appear inflexible and cumbersome to persons who lack experience with it, but those who are familiar with it are able to navigate its complexities effectively. The FAR requires full and open competition, but as experienced procurement personnel know, the system does not break down when emergencies necessitate quick and decisive action. For example, we recently reported that agencies generally complied with applicable FAR requirements in awarding new contracts for work in Iraq using other than full and open competition.[19] In some circumstances, the government's legitimate need for prompt action was sufficient to justify selecting a contractor on an expedited basis from among the firms that appeared able to meet the government's emergency need. In other cases, the agencies reasonably determined that only one source could meet their requirements.

AMS Provides Some Discipline but Does Not Ensure a Knowledge-Based Approach to Acquisition

AMS provides some discipline through its various phases, activities, and decision points for acquiring major ATC systems; however, it does not ensure the use of a knowledge-based approach found in the best practices for managing commercial product developments and DOD acquisitions that we have identified in numerous past reports.[20] Commercial best practices call for specific knowledge to be captured and used by corporate-level decision-makers to determine whether a product has reached a level of development (product maturity) sufficient to demonstrate its readiness to move forward in the acquisition process. The capture of such knowledge and its use by executives helps to avoid cost overruns, schedule slips, and performance shortfalls that can occur if decision-makers commit to a system design before acquiring critical technology, design, or manufacturing knowledge. The absence of these key best practices under AMS puts FAA's major ATC acquisitions at risk of cost overruns, schedule slips, and performance shortfalls.

[19]GAO, *Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges*, GAO-04-605, (Washington, D.C.: June 1, 2004).

[20]For example, GAO, *Best Practices: Capturing Design and Manufacturing Knowledge Early Improves Acquisition Outcomes*, GAO-02-701, (Washington, D.C.: July 15, 2002) and *Best Practices: Better Matching of Needs and Resources Will Lead to Better Weapon System Outcomes*, GAO-01-288, (Washington, D.C.: Mar. 8, 2001).

Best Practices for Managing Acquisitions Call for a Knowledge-Based Approach, Including Criteria for Knowledge Needed and Oversight at the Corporate Executive Level

Commercial best practices call for managing acquisitions using a knowledge-based approach, including (1) using established criteria to attain specific knowledge at three critical junctures in the acquisition cycle, which we call knowledge points, and (2) requiring oversight at the corporate executive level for each of these knowledge points. For example, at each knowledge point, successful product developers apply specific indicators, or criteria, to determine whether they have attained the knowledge they need to move to the next phase or activity in the acquisition process. Such developers also conduct corporate executive-level reviews to ensure that they obtain the insights and perspectives of stakeholders throughout their organization. If the knowledge attained does not meet the criteria for advancement or if the executive reviewers determine that further development is inconsistent with their priorities, the acquisition does not move forward. Table 3 summarizes the knowledge points, criteria, oversight reviews, and timing of oversight reviews included in our model of best practices for major acquisitions.

Table 3: Knowledge-Based Approach Called for in Our Best Practices Model

Knowledge point	Criteria	Oversight review	Timing of oversight review
1. Resources and needs matched	• Match customers' needs with available resources—technology, design, time, and funding. • Demonstrate that technologies needed to meet essential product requirements can work in intended environment. • Complete a preliminary product design using systems engineering to balance customers' desires and available resources.	Executive-level review required to initiate the program.	Knowledge point 1 should precede the commitment to begin product development.
2. Product design stable	• Complete 90 percent of design drawings by critical design review. • Obtain stakeholders' concurrence that drawings are complete and producible. • Review subsystem and system designs. • Demonstrate with prototype that design meets users' requirements. • Identify critical manufacturing processes.	Executive-level review required to move to demonstration.	Knowledge point 2 should precede the commitment to build prototypes to demonstrate the design.
3. Production processes mature	• Demonstrate manufacturing processes. • Build and test production prototypes. • Test production-representative prototypes to achieve reliability goals. • Test production-representative prototypes to demonstrate product performance in operational environment. • Collect statistical process control data.	Executive-level review required to move to production.	Knowledge point 3 should precede the commitment to begin production.

Source: GAO.

Experience with commercial best practices has shown that to the extent that the level of knowledge called for at each knowledge point is not attained, organizations take on risks in the form of unknowns that will persist into the later stages of development, where they will take more time and money to resolve if they become problems. Such problems lead to cost increases and schedule delays.

AMS Has Some Good Features but Does Not Ensure That High Levels of Knowledge Are Attained Before Major Commitments Are Made

AMS has some good features, including phases and key decision points indicative of an acquisition process that has some elements of discipline; however, AMS does not ensure that high levels of knowledge are attained and that corporate executive-level reviews occur before major commitments of agency resources are made. For example, like the best practices model, AMS identifies critical junctures, which it terms "decision points." Three of these decision points occur during the initial acquisition phase (mission need, initial investment, and the final investment decision).

A fourth decision point occurs before production, and a fifth decision point occurs before the start of the final acquisition phase (in-service management). AMS also calls for detailed technical and programmatic information that decision-makers can use at the first three decision points to assess whether or not FAA should initiate an acquisition program. This information includes a final requirements document, a final acquisition program baseline, a final investment analysis report, an acquisition strategy paper, and an integrated program plan. Finally, AMS, like our best practices model, calls for senior executives to review the information and determine whether the acquisition is ready to move forward. The FAA executives who make the decisions at these points include associate and assistant administrators, acquisition executives, the chief financial officer, the chief information officer, and legal counsel; they form the Joint Resources Council (JRC), FAA's senior decision-making body for major ATC acquisitions. Table 4 summarizes this information.

Table 4: AMS's Decision Points, Information Sources, and Oversight Reviews

Decision point by phase/activity	Information sources and oversight reviews
Phase: Needs and solution identification	
• Activity: Mission analysis	
Decision point: Mission need decision	Information sources: Input from users in the field and mission need statement. Oversight review: JRC review called for to move from mission analysis to investment analysis.
• Activity: Investment analysis	
Decision Point: Initial investment decision	Information sources: Initial investment analysis report, initial life-cycle program baseline for the most viable alternative, updated initial requirements document and action plan for final investment analysis. Oversight review: JRC review called for to select a preferred solution.
Decision point: Final investment decision	Information sources: Final requirements document, final acquisition program baseline, final investment analysis report, acquisition strategy paper, integrated program plan. Oversight review: JRC review called for to move from investment analysis to solution implementation.
Phase: Solution implementation	
• Activity: System integration	
• Activity: System demonstration	
Decision point: Production decision	Information sources: Determined by JRC. Oversight review: JRC may retain or delegate decision making authority.
• Activity: System production	

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Decision point by phase/activity	Information sources and oversight reviews
Decision point: In-service decision	Information Sources: Determined by JRC. Oversight Review: JRC review called for to move from solution implementation to in-service management; however, the JRC may retain or delegate decision making authority.
Phase: In-service management	

Source: GAO analysis of FAA data.

Note: In this report, we place FAA's "mission analysis" and "investment analyses" activities in the "Needs and Solution Identification" phase to facilitate comparison with the "concept and technology development" phase in our best practices model. Similarly, we place “system integration” and “system demonstration” in the solution implementation phase for comparative purposes.

AMS departs from the best practices model in two key ways—it does not call for high levels of knowledge to be attained at three critical junctures (knowledge points), and does not call for corporate executive-level oversight at one of five junctures. Specifically, AMS does not establish explicit, written criteria for (1) the information needed to determine technology maturity at solution implementation, (2) releasable drawings at critical design review and production process controls at production. Our best practices model calls for attaining specific knowledge and setting out criteria for what information should be available to help organizations minimize risks in the form of unknowns. Risks associated with such unknowns can persist into the later stages of development, where they can take more time and money to resolve if they become problems, potentially leading to cost increases and schedule delays.

In addition, AMS does not provide for corporate executive-level oversight reviews at two of the three key junctures where our best practices model calls for such reviews. Although AMS calls for three Joint Resources Council reviews during the initial acquisition phase—while our model calls for a single corporate executive-level review—AMS allows the council to delegate its oversight responsibility later in the acquisition process to the program managers within the service organization responsible for an acquisition. By contrast, our model calls for two corporate executive-level reviews later in the acquisition process.

According to FAA, its approach gives program managers flexibility, expedites decision-making, and allows the executives with the most knowledge about a major acquisition to make key decisions about its continued development. FAA’s reliance on this approach assumes that the program managers will inform higher-level managers if they are unable to meet the performance schedules and systems requirements approved by the Joint Resources Council. However, although program managers may

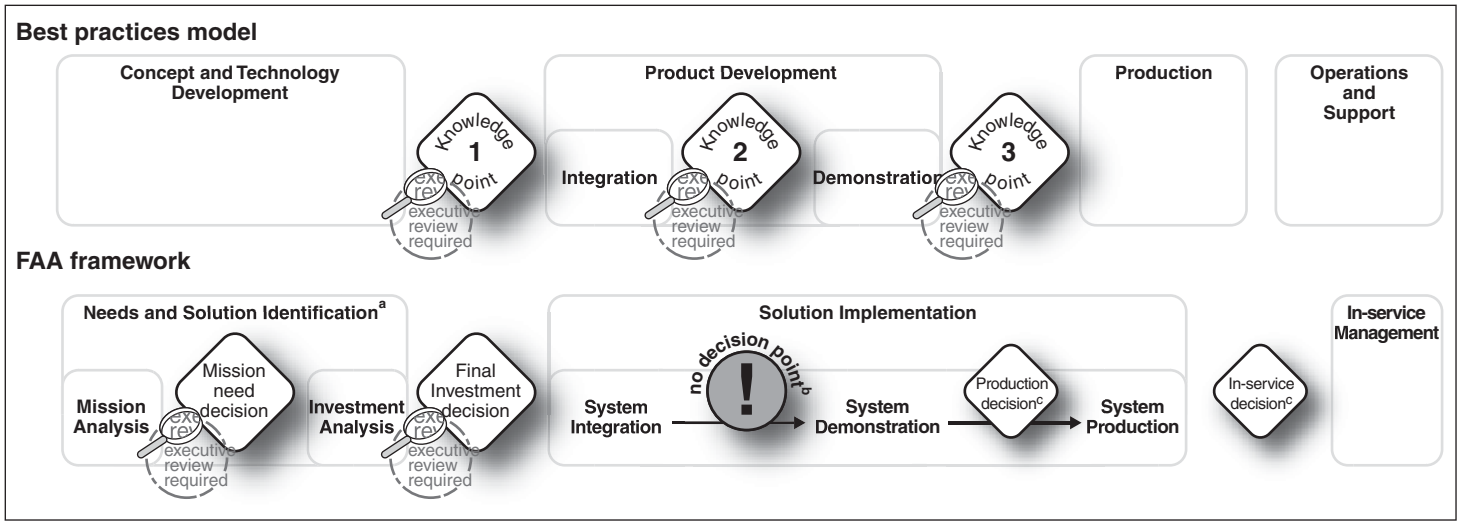
have the most knowledge about their particular acquisition, they may not have the agencywide perspective of the Joint Resources Council members. Having an agencywide perspective, including a broad understanding of an acquisition's potential impact on other agency projects and operations, is especially critical when an acquisition includes the production of multiple units and requires a substantial commitment of agency resources, as do FAA's primarily multimillion-dollar acquisitions, such as controller workstations and radars.

Because decisions about moving a major acquisition forward require both a program manager's specific knowledge of the acquisition itself and a senior executive's understanding of the acquisition's potential impact on other agency projects and operations, our best practices model calls for both measurable criteria at key points in the acquisition process to ensure that specific knowledge has been captured and corporate executive-level reviews to ensure that senior decision-makers have the opportunity to independently consider this knowledge. Without higher-level reviews such as our best practices model recommends and the Joint Resources Council could provide later as well as early in the acquisition process, FAA cannot ensure that it has fully considered the impact of advancing an acquisition on other agency projects and operations. This opportunity for full consideration is a central advantage of managing acquisitions as a portfolio, as we concluded in our August 2004 report on FAA's information technology investment management process.[21]

Figure 2 contrasts FAA's process for reviewing an acquisition's progress under AMS with the process that we found leads to successful commercial acquisitions.

[21]GAO, *Information Technology: FAA Has Many Investment Management Capabilities in Place, but More Oversight of Operational Systems Is Needed*, GAO-04-822, (Washington, D.C.: Aug. 20, 2004).

Figure 2: Review Process under Our Best Practices Model and under AMS



Sources: FAA, GAO.

[a]To facilitate the comparison of AMS with out best practices model in this report, we have done the following: (1) placed FAA's "Mission Analysis" and "Investment Analyses" activities in the "Needs and Solution Identification" phase to make it comparable with the "concept and technology development" phase in our best practices model; (2) depicted only the final investment decision point, recognizing that the investment analysis phase includes an initial investment decision; and (3) placed "system integration" and "system demonstration" in the solution implementation phase.

[b]AMS does not explicitly call for a design review decision point, which would fall between system integration and system demonstration.

[c]The in-service decision is a key program milestone. It authorizes the deployment of a system into the National Airspace System. At times, the JRC delegates its decision authority for the production and in-service decisions to service organizations.

To its credit, FAA continues to improve its AMS process. For example, the agency is currently modifying its mission needs activity to make the selection of major ATC acquisitions more consistent with the overall goals of modernizing the National Airspace System. In addition, the Air Traffic Organization has established an executive council to review major acquisitions before they are sent to the Joint Resources Council. This review is designed to screen acquisitions to determine which ones are important enough to warrant higher-level review by the Council. Finally, FAA is currently revising AMS to bring it in line with the Office of Management and Budget's guidance. Specifically, the agency is incorporating OMB Exhibit 300, which provides the investment justifications and management plans required for major ATC acquisitions.

As Implemented, AMS Has Not Resolved Long-standing Acquisition Problems, but FAA Is Beginning to Focus More on Results

According to our review of seven major ATC systems and analysis of FAA's performance in acquiring major systems, AMS has not resolved the long-standing problems that FAA experienced before implementing AMS, but the agency is beginning to focus more on the expected results of its major acquisitions. (See table 5.) Specifically, our review found that AMS guidance did not call for requirements that were specific enough to minimize requirements growth or unplanned work for five of these systems. This lack of specificity resulted in the inadequate development or definition of requirements, growth in requirements, unplanned work, or a reduction in performance for five of these systems. In addition, for three of these systems, FAA underestimated the difficulty of modifying available software to fulfill its mission needs. Because AMS guidance was not sufficient to account for the risks associated with modifying available software, FAA encountered unexpected software development needs, higher costs, and schedule delays. The two systems we reviewed that were initiated after AMS was implemented are currently meeting cost and schedule milestones; however, both systems are showing symptoms of FAA's past problems with developing requirements and managing software, and it is too soon to tell if these programs will remain within their cost, schedule, and performance parameters. In addition, our work on FAA's major acquisitions, along with that of the DOTIG and others has shown that the problems FAA experienced before 1996 in acquiring major systems persist under AMS and that effective acquisition management, rather than the use of a specific contracting process (e.g., the FAR or AMS) is key to successful acquisitions. To its credit, FAA is beginning to focus more on results, largely through its new Air Traffic Organization, which has been charged with taking a more performance-based approach to managing the agency's acquisitions.

Table 5: Description and Status of Seven Selected ATC Acquisitions

Dollars in millions

Project and description	Original cost	Current cost	Original schedule	Current schedule	Acquisition issues and status
STARS--new controller and maintenance workstations to replace the legacy system at terminal air traffic control facilities[a]	$940.0	$1,460.0	1998	2003	STARS is a joint FAA and DoD program. STARS delays and cost increases resulted from poor requirements definition and schedule estimates. STARS is fully operational at 25 FAA terminal radar facilities and 17 DoD facilities. Only 50 of the planned 172 systems are being deployed. STARS had difficulties in achieving many human factor requirements for improving system efficiency and safety.
ASR-11--digital radar for terminal environments	$743	$891.7	1997	2013	ASR-11 was approved for its in-service decision in September 2003 and is being deployed at 108 sites. These systems are being deployed at a slower pace than originally planned because of budget cuts and deferrals.
ITWS--computer processors and displays to automate weather data near the airport	$276.1	$288.3	September 2001	2002	Currently, six ITWS systems are operational. In May 2004, the ATO Executive Council rebaselined the program to include a new weather-forecasting capability into the production baseline. FAA proposes to defer 12 of the 34 systems it planned to procure.
LAAS--a precision approach and landing system that augments the Global Positioning System	$530.1	$696.1	2002	Deferred at least until 2009	LAAS has been adversely affected by poor requirements development, a lack of understanding of its technical complexity, incomplete software development, and an unrealistic development schedule. Unresolved radio interference precludes the safe operation of LAAS. As a result, FAA has delayed national deployment to continue further research on this issue.
NEXCOM--digital radios to improve air traffic communications	$318.4	$318.4	October 2002	2004	NEXCOM program delays were due to misunderstanding of a program requirement and testing procedures. NEXCOM was recently approved for its in-service decision in July 2004.
ATOP--new workstations and processing capability to control ocean air traffic	$548.2	$548.2	June 2004	2004	ATOP achieved its acquisition program baseline objectives; however, this baseline does not reflect program delays and cost increases resulting from poor requirements development, unrealistic schedule estimates, and inadequate evaluation of software complexity.

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Project and description	Original cost	Current cost	Original schedule	Current schedule	Acquisition issues and status
ERAM--upgrades the existing en route system with improved hardware and software	$3,649.0	$3,649.0	December 2009	December 2009	To date, ERAM has not breached any cost and schedule parameters. However, it remains a high-risk program because of the large amount of software that must be developed. The ERAM contractor is experiencing software engineering difficulties as a result of lower-than-expected productivity and software code growth.

Source: GAO analysis of FAA data.

[a]Terminal air traffic control facilities, known as Terminal Radar Approach Control (TRACON) facilities, direct aircraft in the airspace that extends from the point where the tower's control ends to about 50 nautical miles from the airport. A TRACON can be located at or outside an airport.

Our Reviews of Seven Major Systems Show That Problems with Requirements and Software Management Persist under AMS

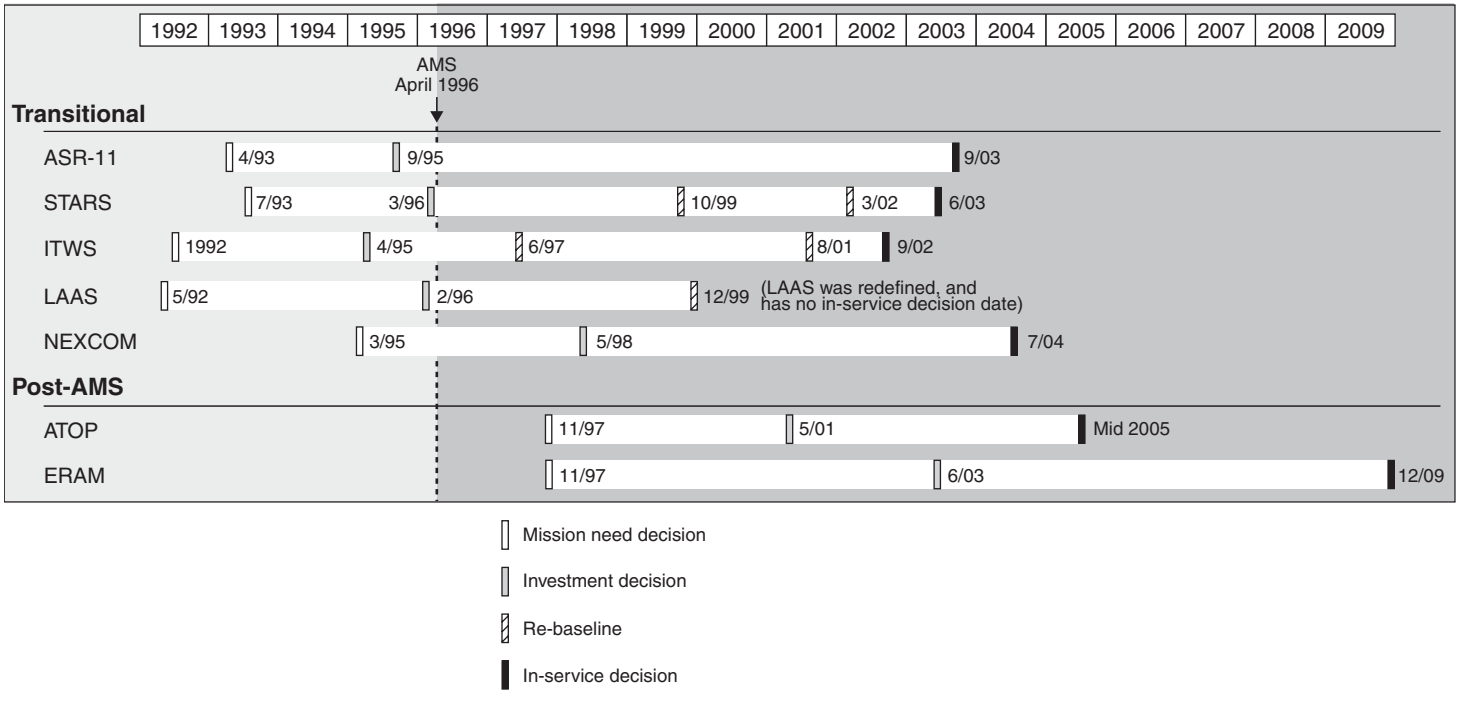
Our reviews of seven of FAA's costliest ATC system acquisitions found that the problems FAA experienced with requirements and software management and their related impact on cost, schedule, and performance goals persist today under AMS.[22] Figure 3 identifies these seven acquisitions and their milestones, which are expressed in terms of AMS decisions even when the acquisitions were initiated before AMS was implemented. (See app. V for a description and the status of each of these projects.) Specifically, for 6 of these 7 major ATC acquisitions, FAA did not consistently (1) clearly define system requirements at the investment decision point or (2) adequately assess software complexity. Moreover, as FAA has acknowledged, it has never managed its major acquisitions by focusing on how each would improve the efficiency of ATC operations while maintaining or improving safety. Although FAA has made progress in improving its acquisition of major ATC systems—by, for example, improving the maturity of its processes for acquiring software, using a "build a little, test a little" approach to acquisitions as it did for Free Flight Phase 1,[23] and restructuring its organization to minimize stovepipes—long-standing problems persist in these areas. In addition, the two systems we

[22]Performance deficiencies in relation to the final requirements or system specifications are used to assess whether the agency's goals have been met. Such deficiencies may not degrade the mission standards needed to ensure the safety and efficiency of the National Airspace System.

[23]Free Flight Phase 1, completed in 2002, provided new information-exchange systems and automated controller tools.

reviewed that were initiated after AMS's implementation are currently operating within cost and schedule goals; however, they are showing symptoms of past problems with developing requirements and managing software complexity. Moreover, our work for more than two decades—before and after AMS's implementation—has cited these types of weaknesses as central reasons for the agency's long history of cost, schedule, and performance shortfalls. This work has also found that the effectiveness of an agency's acquisition management has had a greater impact on the success of its major acquisitions than the contracting process used (e.g., the FAR or AMS).

Figure 3: Key Milestones for Selected ATC Acquisitions Initiated before and after AMS



Source: FAA.

Inadequate Development or Definition of Requirements Led to Requirements Growth or Unplanned Work for Five Acquisitions

For five of the seven acquisitions we reviewed, AMS guidance did not call for requirements that were specific enough to minimize requirements growth or unplanned work. For four of these five acquisitions—STARS, LAAS, NEXCOM, and ATOP—incomplete and poorly defined requirements in the final requirements documents, used at the investment decision point to assess an acquisition's readiness to enter the development phase, led to requirements growth, unplanned development work, or a reduction in system performance.[24] For the fifth acquisition—ASR-11—FAA misjudged the extent to which the high-level requirements that were used to support the commercial-off-the-shelf/nondevelopmental item (COTS/NDI) procurement by the Department of Defense could result in a product capable of meeting FAA's mission or user needs. As a result, unplanned software changes were required.

- FAA's cost estimate for STARS has grown from its original estimate of $0.94 billion in 1996 to $1.46 billion in 2004 and will deploy only 50 of the 172 STARS initially planned. Much of the cost growth has been due to FAA requirements creep. As a result, the STARS program has experienced delays of more than five years from its original plan, in part due to added requirements to the commercial-off-the-shelf Initial System Configuration (ISC). However, the STARS ISC was satisfactory for use by the Department of Defense as deployed.

- A final requirements document was approved, and the development of LAAS was scheduled to begin in 1999. However, poorly established requirements resulted in the addition of 113 new requirements to the initial specification, entailing significant software and hardware changes. Furthermore, LAAS may not achieve its promised capabilities because FAA has been unable to develop technologies necessary to warn pilots of a disruption in the LAAS signal. Until this technology is developed, LAAS cannot be operated safely. As a result, FAA recently cut the fiscal year 2005 funding for LAAS, and the program will revert to a research and development effort.

[24]We reported in August 2004 that FAA had implemented sound requirements development and management practices on four other systems, but noted that process improvement initiatives such as these were not institutionalized across the agency. See GAO, *Air Traffic Control: System Management Capabilities Improved, but More Can Be Done to Institutionalize Improvements*, GAO-04-901, (Washington, D.C.: Aug. 20, 2004).

- FAA developed a final requirements document for the NEXCOM system, but the requirements lacked the specificity needed to assess the development risk. According to a NEXCOM contractor program official, this led to miscommunication about the program requirement relating to signal interference. This official stated that they misunderstood this requirement and had not planned on the additional development work for the NDI solution to meet such program objectives and delayed the program 21 months. Another program requirement involved the NEXCOM radios meeting or exceeding the operational coverage area of the existing voice system. The existing radios had power output levels of 50 watts but the NEXCOM contractor could only achieve 34 watts of power to meet the coverage requirement. A program official stated that the contractor and FAA had not agreed on the testing procedures to assess the power levels. This posed an "unacceptable consequence" and, as a result, FAA performed additional testing or flight checks of the reduced radio performance (50 watts versus 34 watts) and determined that the performance reduction should not affect NEXCOM's mission or its coverage requirement.

- FAA did not follow the AMS guidelines that call for completing a final requirements document before proceeding to the development phase for ATOP. The Joint Resources Council approved a delay in developing the final requirements until after contract award. This decision resulted in schedule delays and additional unplanned software development. The ATOP program office asserted that the requirements remained very stable and that the program is within cost and schedule objectives established by the Council. However, FAA's internal documents revealed that the requirements were not adequately defined. For example, the ATOP Investment Analysis Study reported to the Joint Resources Council prior to contract award that the lack of more detailed ATOP requirements at this stage of acquisition added risk and was of concern to the investment analysis team. Under AMS, this team is responsible for, among other things, conducting risk analyses for the various acquisitions. Furthermore, an ATOP Assessment Team conducted a study in March 2003 and determined that at the ATOP contract award, "requirements were written at a high level and not mutually understood by FAA and the contractor." However, FAA management allowed the ATOP program to proceed to solution implementation without the final requirements document and, according to the contractor, this resulted in schedule delays and growth in the amount of software needing development.

- The high-level requirements for ASR-11, jointly generated by FAA and the Department of Defense, to support a COTS/NDI acquisition, resulted in a product that did not initially meet the FAA mission or user needs. The software changes that were required to meet FAA's target detection needs, as well as significant hardware design changes, parts obsolescence, and production issues, added approximately two years to system qualification and acceptance.

FAA Underestimated Software Complexity for Three Systems

For three of the seven major ATC acquisitions we reviewed—ITWS, LAAS, and ATOP—FAA's AMS guidance was not sufficient to address the risks associated with modifying available software[25] to fulfill FAA's mission needs. In all three cases, FAA officials underestimated the difficulty of modifying available software. Our work has shown that underestimates are likely to result in unexpected software development, higher costs, and schedule delays.

- ITWS experienced delays from the beginning because of the complexity of its software development. Although the program appeared to be progressing according to its baseline, immediately after the critical design review in September 1998, the contractor revealed that it had exceeded the target cost by $4 million. In addition, the contractor claimed that the program did not recognize that the computer processor originally planned for the program was becoming outdated, that the manufacturer planned to discontinue its production because the market was demanding a processor with greater processing and storage capability, and that as a result, the original computer processor would not be available to the program. Consequently, ITWS experienced cost increases, schedule delays, and performance shortfalls. According to the contractor and the original acquisition plan, all systems were scheduled for delivery by December 2001, but that date has now stretched to after 2009.

- LAAS's technology maturity was not adequately assessed, and further development was needed. Specifically, the potential for radio

[25]Available software refers to commercial-off-the-shelf (COTS) and/or nondevelopmental items (NDI). AMS defines COTS as a product or service that has been developed for sale, lease, or license to the general public. The product is currently available at a fair market value. AMS defines an NDI as an item that was previously developed for use by a government (federal, state, local, or foreign) and requires limited further development. For example, the Army's SINCGARS radio is the core of FAA's NEXCOM radio, and the software FAA selected for ATOP was NDI software from the New Zealand air system.

interference through the atmosphere was not understood and could limit LAAS's operations. FAA has now placed all LAAS activities in research and development. FAA did not adequately assess LAAS's software development. At the time of the contract award, the contractor and FAA estimated that 80 percent of the software that LAAS required had been developed. FAA later determined that only 20 percent had been developed. FAA and the contractor attribute this discrepancy to a lack of communication on the steps necessary to satisfy the program's requirements. FAA agrees that it should have conducted a software audit and a software capabilities assessment, but pressures to keep LAAS on schedule resulted in an inadequate assessment.

- The ATOP contractor underestimated by about half the extent to which legacy nondevelopmental item software, which is the core of the ATOP system, met the program's 1,036 requirements. As a result, a significant amount of unanticipated new software code development and other modifications were required.[26]

ATC Systems Have Required Multiple Rebaselining Decisions to Address Delays and Cost Growth

As figure 3 illustrates, FAA initiated at least one rebaselining decision for three of the five acquisitions that were begun before AMS was implemented and were later transitioned to AMS. These rebaselining decisions responded to delays and cost growth—problems that arise when requirements are not stable, a program's design is not fixed, or software code growth is not controlled. For example, FAA rebaselined STARS two times—first in 1999 and again in 2002. Similarly, 2 years after the investment decision for ITWS, FAA rebaselined the program twice, in 1997 and again in 2001. Given the frequency of these past rebaselining decisions for major ATC systems and the number of years that elapsed before or between the rebaselining decisions (3 to 4 years), it is too soon to tell whether the two systems that were initiated under AMS—ATOP and ERAM—will require similar rebaselinings and ultimately meet their cost, schedule, and performance goals. Although both programs are currently operating within their cost and schedule goals and have not yet been rebaselined, FAA has had problems with managing its major acquisitions in the past and is currently having difficulties developing requirements and managing software complexity. Furthermore, as we reported in May 2004,

[26]ATOP is under a fixed-price contract, but the contractor has experienced over $20 million in cost overruns during the development phase. Also, FAA renegotiated the terms of the contract to ensure that the initial software development phase, known as build 1, would meet its June 2004 Initial Operating Capability milestone.

FAA's budget increased from $9 billion in 1998 to $14 billion in 2004 but will be constrained for the foreseeable future. In such a constrained budget environment, cost growth and schedule problems can have serious negative consequences for ongoing modernization efforts—postponed benefits, costly interim systems, delays in funding other systems, or reductions in the number of units purchased.

Internal and External Reviews Have Found That FAA Has Made Some Progress but Continues to Experience Problems in Acquiring Major ATC System under AMS

Reviews of FAA's acquisition process, conducted by FAA, GAO, the DOTIG, and others have shown that FAA has improved its management of major ATC acquisitions in recent years but continues to experience cost overruns, schedule slips, and performance shortfalls under AMS. Table 7 summarizes the results of 22 internal and external reviews of FAA's major ATC acquisitions. According to these reviews, issued from 1997 through 2004, the same problems have persisted over many years, despite various initiatives to address them, and FAA needs to strengthen its management controls. For example, a key FAA review of eight major ATC acquisitions, published in 1999, 3 years after AMS was implemented, found that these acquisitions, though on track to meet their performance goals, were not meeting their cost and schedule baselines. FAA attributed these cost and schedule issues to new or poorly understood requirements, underestimates of the acquisitions' technical complexity, and funding shortfalls.

In addition, our reviews of major FAA acquisitions—initiated before and after AMS was implemented—have found for more than two decades that FAA's failure to meet schedule, cost, and performance baselines for major ATC acquisitions has been due to shortfalls in planning, weak management controls, and a lack of systematic processes for acquiring new systems, including inadequate requirements management, cost-accounting data, and estimates of technical difficulty. As we reported in August 2004, judged against the criteria of GAO's framework for information technology (IT) investment management, which measures the maturity of an organization's investment management processes, FAA has established about 80 percent of the basic selection and control practices that it needs to manage its mission-critical investments for the National Airspace System.[27] For example, FAA's business units actively monitor projects throughout their

[27]AMS does not call for critical design reviews, but they can be done at the program's discretion.

life cycles.[28] However, the agency's senior IT investment board does not regularly review investments that are in the "in-service management," or operational phase, and this creates a weakness in FAA's ability to oversee more than $1 billion of its IT investments. In addition, the agency has not yet established the practices that would enable it to effectively manage its annual IT budget of about $2.5 billion, and agency executives lack assurance that they are selecting and managing the mix of investments that best meets the agency's needs and priorities. DOT has responded to our recommendations to FAA to strengthen its IT investment management capability.

Moreover, other reviews, such as those by Booz-Allen & Hamilton and MITRE, have identified other shortfalls, which reflect a lack of proper management controls and planning. For example, in 1997, Booz-Allen & Hamilton found, among other things, that FAA had not clearly defined organizational roles and responsibilities within the various phases of AMS and that greater guidance and training under AMS were warranted. In 1999, Booz-Allen & Hamilton reported that FAA had not demonstrated improvement in adhering to planned costs and schedules under AMS and that the agency needed to better manage its development of requirements and address persistent funding shortfalls. Moreover, in 2001, a MITRE report on selected major acquisitions found inadequate management controls and deficiencies in both contractors' performance and in FAA's measurement of acquisition performance. See table 7 for a chronological listing of the reviews.

[28]GAO, *Information Technology: FAA Has Many Investment Management Capabilities in Place, but More Oversight of Operational Systems Is Needed* , GAO-04-822, (Washington, D.C.: Aug. 20, 2004).

Table 6: Internal and External Reviews of FAA's Use of AMS for Acquiring Major ATC Systems

Review	Selected findings	Contributing factors
GAO, *Air Traffic Control: Improved Cost Information Needed to Make Billion-Dollar Modernization Investment Decisions*, GAO/AIMD-97-20, (Washington, D.C.: Jan. 22, 1997).	FAA's cost-estimation practices do not satisfy recognized estimating requisites, increasing the likelihood of poor acquisition selection decisions.	FAA's cost-accounting practices do not provide for the proper accumulation of actual project costs.
GAO, *Air Traffic Control: Complete and Enforced Architecture Needed for FAA Systems Modernization*, GAO/AIMD-97-30, (Washington, D.C.: Feb. 3, 1997).	Incompatibilities exist between current and planned ATC acquisitions, resulting in high costs and reduced performance.	FAA lacks a complete systems architecture or overall "blueprint" to guide and constrain the development and maintenance of ATC acquisitions.
GAO, *Air Traffic Control: Immature Software Acquisition Processes Increase FAA System Acquisition Risks*, GAO/AIMD-97-47, (Washington, D.C.: Mar. 21, 1997).	Planned acquisitions frequently are not delivered on time and within budget.	Weaknesses in some key process areas, such as planning, requirements development, and management, limit FAA's ability to consistently acquire software-intensive ATC systems on time and within budget.
FAA, *Evaluation of FAA Acquisition Reform—The First Year: April 1996 - March 1997,* (Washington, D.C.: May 1997).	AMS addresses 15 of the 17 problems facing acquisitions.	Inadequate management has not enabled FAA to meet its goals of reducing acquisition deployment time by 50 percent and cost by 20 percent.
FAA, *Evaluation of FAA Acquisition Reform—The First Two Years: April 1996 - March 1998*, Report #1998-02, (Washington, D.C.: May 29, 1998).	Further improvements are necessary if acquisition reform is going to allow FAA to meet its cost and schedule goals.	Procedural weaknesses limit FAA's ability to achieve cost and schedule goals.
GAO, *Air Traffic Control: Observations on FAA's Air Traffic Control Modernization Program*, GAO/T-RCED/AIMD-99-137, (Washington, D.C.: Mar. 25, 1999).	From the inception of its modernization efforts, FAA has not consistently followed a disciplined management approach for new acquisitions.	Weaknesses persist in key areas, such as how FAA monitors the status of its acquisitions throughout their life cycles.
GAO, *Air Traffic Control: FAA's Modernization Investment Management Approach Could Be Strengthened*, GAO/RCED/AIMD-99-88, (Washington, D.C.: Apr. 30, 1999).	AMS contained weaknesses in the selection of acquisitions and in the review of acquisitions' performance during the postimplementation phase.	FAA lacked adequate cost data for making selection decisions; adequate management controls, and a defined, documented process for conducting reviews during the in-service management phase.
FAA, *Evaluation of FAA Acquisition Reform—The First Three Years: April 1996 - March 1999*, Report #1999-04, (Washington, D.C.: May 28, 1999).	FAA's cost and schedule plans were not on track, but performance plans were met.	Requirements changed or were misunderstood; technical difficulties were underestimated; and funding fell short.
Booz-Allen & Hamilton, *Independent Assessment of the Federal Aviation Administration's Acquisition Management System*, (McLean, VA: July 6, 1999).	FAA has yet to implement a seamless life-cycle approach to acquisitions management.	AMS is not being consistently implemented across all life-cycle phases.
GAO, *National Airspace System: Persistent Problems in FAA's New Navigation System Highlight Need for Periodic Reevaluation*, GAO/RCED/AIMD-00-130, (Washington, D.C.: June 12, 2000).	FAA experienced delays and cost increases in developing its global positioning navigation system; as a result, it is unclear whether the benefits of the system will outweigh the cost.	FAA lacks a comprehensive plan with checkpoints for reviewing the contractor's approach to meeting the system's performance requirements.

(Continued From Previous Page)

Review	Selected findings	Contributing factors
GAO, *National Airspace System: Problems Plaguing the Wide Area Augmentation System and FAA's Actions to Address Them,* GAO/T-RCED-00-229, (Washington, D.C.: June 29, 2000).	FAA experienced cost and schedule problems in developing this navigational system because of unplanned software development needs and a requirement to warn pilots of any system failure that would provide misleading information.	FAA underestimated the complexity of developing the acquisition.
GAO, *National Airspace System: Free Flight Tools Show Promise, but Implementation Challenges Remain,* GAO-01-932, (Washington, D.C.: Aug. 31, 2001).	Three acquisitions that are components of FAA's planned new approach for air traffic management have uncertain potential benefits and may not be worth FAA's investment.	FAA needs better data collection and analysis processes to ensure that benefits are realized.
GAO, *National Airspace System: Better Cost Data Could Improve FAA's Management of the Standard Terminal Automation Replacement System,* GAO-03-343, (Washington, D.C.: Jan. 31, 2003).	The reliability of the life-cycle cost estimate for STARS is uncertain because cost data obtained from the contractor do not reflect the current status of the contract.	The development cost estimate is based on the contractor's projections, which FAA has not yet independently analyzed, as called for under AMS.
GAO, *National Airspace System: Current Efforts and Proposed Changes to Improve Performance of FAA's Air Traffic Control System*, GAO-03-542, (Washington, D.C.: May 30, 2003).	FAA was unable to hire a chief operating officer to head the ATO.	Uncertainties about the position's responsibilities, reporting relationships, and performance measurement criteria hampered the hiring.
DOT/OIG, *Status of FAA's Major Acquisitions*, AV-2003-045, (Washington, D.C.: June 26, 2003).	Cost growth, schedule delays, and performance problems continue with FAA's major acquisitions.	Cost and schedule baselines are not reliable, and decisions are being made with unclear data.
GAO, *Air Traffic Control: FAA's Modernization Efforts—Past, Present, and Future*, GAO-04-227T, (Washington, D.C.: Oct. 30, 2003).	Systemic management issues, including inadequate management controls and human capital issues, have contributed to major ATC acquisitions' persistent cost overruns, schedule delays, and performance shortfalls.	FAA lacked the information technology and financial management systems that would have helped it reliably determine the acquisitions' technical requirements and estimate and control their costs and schedules; and the agency's organizational culture discouraged collaboration among technical experts and users.
GAO, *Information Technology: FAA Has Many Investment Management Capabilities in Place, but More Oversight of Operational Systems Is Needed*, GAO-04-822, (Washington, D.C.: Aug. 20, 2004).	Although weaknesses remain, FAA has established about 80 percent of the basic practices needed to manage its mission-critical acquisitions so that it can be assured that it is selecting and managing the mix of investments that best meets its needs and priorities.	Remaining weaknesses include inadequate management controls and the lack of a defined, documented process for conducting reviews during the in-service management phase.
GAO, *Air Traffic Control: System Management Capabilities Improved, but More Can Be Done to Institutionalize Improvements*, GAO-04-901, (Washington, D.C.: Aug. 20, 2004).	FAA made progress in improving its system management capabilities, but can do more to institutionalize process improvement initiatives.	Process improvement efforts have not been institutionalized.

Source: GAO analysis.

FAA's ATO Is Taking Steps to Improve Major ATC Acquisitions

FAA's recent reorganization, which brought ATC acquisitions and operations together in the ATO,[29] is expected to help the agency address many of the concerns we have identified for more than two decades, including those identified in this report. For example, the ATO is continuing to develop and refine specific guidance for critical areas, such as requirements management, software development, and cost estimation. In addition, as the overseer of both ATC acquisitions and operations, the ATO is in a position to facilitate more effective management of major ATC acquisitions than has occurred in the past. The ATO is attempting, for example, to link acquisition decisions directly with expected improvements in operational efficiency without compromising safety. This is important, given that FAA has spent about $2.5 billion on ATC modernization per year since 1996 while operating costs have continued to rise—from $4.6 billion to $7.5 billion over the past decade. FAA had not completed its reorganization or implemented all of its initiatives at the time of our audit.

Improvements to Requirements Development

With the establishment of the ATO, FAA consolidated requirements development from two organizations (the organization sponsoring an acquisition and the former agencywide acquisition organization) into a single new organization—the Air Traffic System Requirements Service.[30] In addition, the ATO developed guidance to better manage requirements during the middle phase of AMS (solution implementation). According to FAA officials, some more complex development efforts may need to develop systems requirements and a more detailed requirements document than AMS currently calls for in the final requirements document. More important, in January 2003, FAA issued guidance on requirements management, *Roles in Requirements Management During Solution Implementation Phase*, which provides for integrated requirements teams that maintain responsibility for requirements management throughout an acquisition's life cycle. According to this guidance, when the final requirements document is accepted by the Joint Resources Council at the investment decision point, a requirements baseline is established and any

[29]FAA is organized into five business units that include: Airports; Regulation and Certification; Commercial Space Transportation; the Office of Security and Hazardous Materials; and the Air Traffic Organization.

[30]Merging the former Air Traffic Services and the Research and Acquisitions organizations formed the ATO; individual organizations within FAA sponsor specific acquisitions to meet identified needs (e.g., controller workstations and radars).

proposed changes to the requirements must be assessed for their impact on the program and shown to be operationally suitable, affordable, executable, and justifiable. An FAA official on an integrated requirements team stated that any changes that may affect an acquisition's cost and the schedule require approval by the Executive Committee. The FAA official also stated that this guidance has already helped to stabilize NEXCOM's requirements during the solution implementation phase. Other FAA officials representing the Joint Resources Council acknowledged that the guidance should ensure greater control over program requirements growth, but said that not all program offices have consistently applied it.

Improvements to Managing Software and System Acquisition and Development

To better manage software programs for ATC modernization acquisitions, FAA established a centralized process improvement office that reports to the Chief Information Officer (CIO).[31] This office developed an FAA integrated capability maturity model (i-CMM), a software development and management model that is similar to a model developed by Carnegie Mellon University called the Capability Maturity Model Integration (CMMI®), which is used to appraise the maturity of an organization's processes for acquiring software. However, FAA's i-CMM goes beyond Carnegie Mellon's model to reflect international standards. The CMMI® appraisal methodology calls for assessing process areas—such as project planning, requirements management, and quality assurance—by determining whether key practices are implemented and overarching goals are satisfied. Both the i-CMM model and CMMI® appraisal methodologies provide a logical framework for measuring and improving key processes needed for achieving quality software and systems.

However, as we reported in August 2004,[32] FAA projects are not required to use the capability maturity model for process improvement, and individual projects that use the i-CMM model are allowed to choose which process areas they seek to improve and to determine when they are ready for an appraisal of their progress. To date, fewer than half of FAA's major ATC projects have used this model. The recurring weaknesses we identified in our project-specific evaluations are due in part to the flexibility these projects were given in deciding whether and how to adopt this process

[31]The CIO is not part of the ATO; however, the CIO's efforts to improve FAA's acquisition and management of software for major ATC systems are directly related to the ATO's efforts to improve the agency's acquisition of major ATC systems.

[32]GAO, *Air Traffic Control: System Management Capabilities Improved, but More Can Be Done to Institutionalize Improvements*, GAO-04-901, (Washington, D.C.: Aug. 20, 2004).

improvement initiative. Furthermore, after combining its ATC organizations into a single performance-based organization (the ATO), FAA is reconsidering prior policies, and it is not yet clear whether process improvement will remain a priority. Without a strong senior-level commitment to process improvement and a consistent, institutionalized approach to implementing and evaluating it, FAA cannot ensure that key projects will continue to improve systems acquisition and development capabilities. As a result, FAA will continue to risk the project management problems—including cost overruns, schedule delays, and performance shortfalls—that have plagued past acquisitions. To address these shortcomings, we recommended that the Secretary of Transportation address specific weaknesses and institutionalize FAA's process improvement initiatives by establishing a policy and plans for implementing and overseeing process improvement initiatives.

Improvements to Estimating Costs

FAA has taken steps to improve its cost estimation for major ATC projects by issuing guidance on how to develop and use pricing under AMS. For example, AMS policy calls for audit trails to record and explain the values that are used as inputs to cost models. In addition, it calls for agency officials, when reporting to executive oversight agencies and Congress, to disclose the level of uncertainty and imprecision that are inherent in cost estimates for major ATC systems. According to AMS policy, estimators record the procedures, ground rules and assumptions, data, environment, and events that underlie their development or update of a cost estimate. This information supports the credibility of the cost estimate, aids in the analysis of changes in program costs, enables reviewers to assess the cost estimate effectively, and contributes to the population of FAA databases that can be used for estimating the cost of future programs. Finally, despite a delay of many years, FAA officials told us that they are in the final stages of completing the agency's cost-accounting system and plan to have it in place across the agency by the end of this calendar year, which will bring FAA into compliance with the Federal Managers' Financial Integrity Act of 1982. This measure will help reduce the likelihood of cost overruns or improper payments for unallowable costs and provide decision-makers with critical information. As we have reported in the past,[33] a cost-accounting system is critical to managing major ATC acquisitions, because without it, FAA lacks the information it needs to reliably estimate operating costs over an acquisition's life cycle.

[33]GAO, *Air Traffic Control: FAA's Modernization Investment Management Approach Could be Strengthened*, GAO/RCED/AIMD-99-88, (Washington, D.C.: April 30, 1999).

Other Improvement Efforts

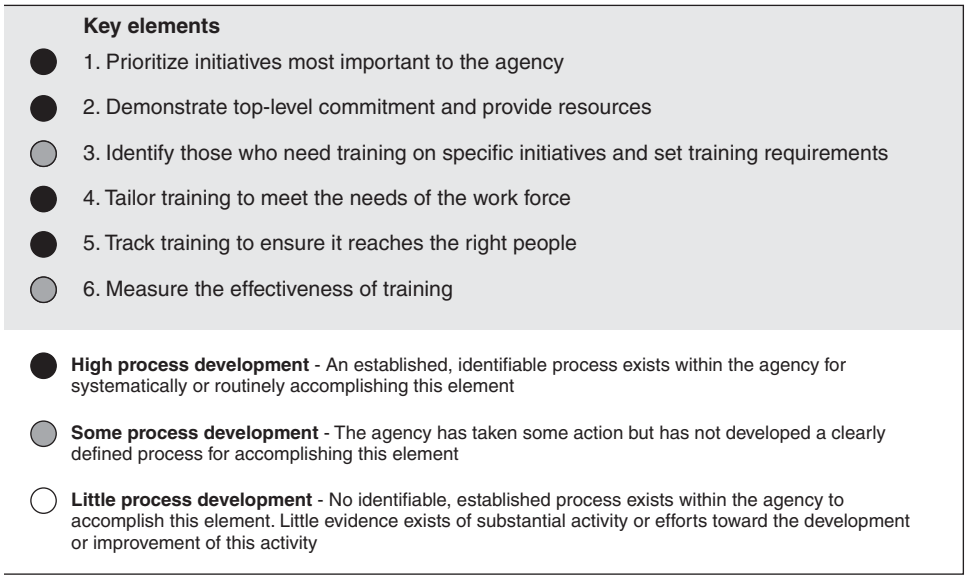
In May 2004, the FAA Administrator testified to Congress that, to date, in attempting to improve the efficiency of ATC operations while maintaining safety, FAA had not managed its major ATC acquisitions to be aware of their cost implications for its operations. The Administrator said, however, that the agency was taking its first steps to fundamentally change how it makes acquisition decisions by adopting a more results-oriented approach. Under this approach, the agency plans to link its decisions to fund major acquisitions directly with their expected contribution to improving operational efficiency and controlling escalating operating costs. Whereas, in the past, FAA measured results in terms of its progress in completing and deploying a major ATC system, it was now going to focus on how a given system improved operational efficiency. Such an approach holds promise for helping FAA more effectively manage its portfolio of major ATC acquisitions by providing a sound basis for choosing among competing priorities. However, because FAA has only recently begun to incorporate this type of analysis of acquisitions' costs and operational efficiency into its decision-making and management processes, it is still too early to assess the results.

In addition, to its credit, FAA has created a training framework for its acquisition workforce, which we found mirrors human capital best practices that we have identified. In January 2003, we reported on FAA's efforts to define and train its workforce to meet the requirements of the Clinger-Cohen Act of 1996.[34] This act required FAA and other civilian agencies to establish education, training, and experience requirements for their acquisition workforce. Our work on public and private best practices has identified six elements of training as critical to acquisition. These elements include (1) prioritizing the acquisition initiatives most important to the agency, (2) securing top-level commitment and resources, (3) identifying those who need training on specific initiatives, (4) tailoring training to meet the needs of the workforce, (5) tracking training to ensure it reaches the right people, and (6) measuring the effectiveness of training. These six elements are crucial for successfully implementing acquisition initiatives and reforms. Agencies that do not focus their attention on these critical elements risk having an acquisition workforce that is ill equipped to implement new processes. The probability of success is higher if training is well planned rather than left to chance. In 2003, we found that FAA's model for training its acquisition workforce largely mirrored public and private-

[34]GAO, *Acquisition Management: Agencies Can Improve Training on New Initiatives*, GAO-03-281, (Washington, D.C.: Jan. 15, 2003).

sector best practices and that the agency had highly developed processes for four of these six elements. See figure 4.

Figure 4: Our Analysis of FAA's Progress as of 2003 in Implementing Key Elements of Training for Its Acquisition Workforce



Source: GAO.

Since 2003, FAA has taken some steps to measure the effectiveness of its training. For example, the agency collects and reviews participants' assessments of the knowledge they have gained, the extent that learning objectives were achieved and the applicability and usefulness of the training. In addition, members of FAA's Intellectual Capital Investment Plan Council[35] have attempted to make qualitative judgments about the impact of the training on the effectiveness or efficiency of their organizations. However, FAA is still developing an evaluation program with metrics to measure the extent to which organizational goals are achieved when individual training objectives are met. Industry and government experts believe training and human capital investments are prerequisites for

[35]In October 1997, FAA created the Intellectual Capital Investment Plan Council to address the development needs of staff in its research and acquisition organization. The council is made up of directors and deputy directors from the agency's acquisition and research programs.

successfully introducing and implementing effective acquisition best practices. FAA's acquisition workforce plays a critical role in addressing long-standing weaknesses that we and others have identified with FAA's acquisition of major ATC systems. Given the importance of training for acquisition workforces, it will be important for the ATO to put mechanisms in place to comprehensively evaluate the effectiveness of the training it provides to improve the knowledge base of FAA's acquisition workforce.

To improve its investment management decision-making and oversight of major ATC acquisitions, the ATO also initiated the following procedures:

- Integrate AMS and the Office of Management and Budget's Capital Planning and Investment Control Process[36] to develop a process for analyzing, tracking, and evaluating the risks and results of all major capital investments made by FAA.

- Conduct Executive Council reviews of project breaches of 5 percent in cost, schedule, and performance to better manage cost growth;

- Issue monthly variance reports to upper management to keep them apprised of cost and schedule trends.

- Monitor progress in meeting the goals identified in FAA's Flight Plan, the agency's blueprint for action through 2008. The Executive Council tracks this progress monthly and reports to the Administrator, using a color-coded system to keep her apprised of how well FAA is meeting its goals. Green denotes that a goal will be met, yellow denotes that some of the activities leading to a main goal may be in jeopardy but the overall goal can be achieved, and red denotes serious concerns about reaching a goal without major intervention. A formal progress report is issued quarterly and made publicly available on the agency's Web site; and

[36]Capital Planning and Investment Control is a disciplined process that links planning to budgeting to procurement to operations, maintenance, and management.

- Increase the use of cost monitoring or earned value management systems[37] to improve oversight of programs.

Despite FAA's current and planned efforts to improve its acquisition of major ATC systems under the ATO, given the newness of these efforts and the agency's poor track record in this area for more than two decades, it is critical for FAA to (1) modify AMS to more fully reflect the best practices followed by high-performing acquisition organizations, (2) follow through on planned improvement initiatives, and (3) adopt a continuous improvement approach to acquiring new ATC systems.

Conclusions

In the early 1990s, FAA contended that it needed relief from the FAR to remedy long-standing problems with cost, schedule, and performance shortfalls in its major ATC acquisitions; however, our work for more than two decades in this area has found that acquiring major ATC systems successfully depends more on managing an acquisition process well than on using a specific contracting process (e.g., the FAR or AMS). While our recent work has shown some improvement in FAA's management of major ATC system acquisitions, some key problems that existed before 1996 persist under AMS—including difficulty with clearly defining system requirements at the investment milestone and adequately assessing complex software requirements. These problems continue to make these acquisitions vulnerable to cost, schedule, and performance shortfalls. Without further measures to improve the development and management of requirements and to better estimate the complexity of the software development needed for major ATC systems, such shortfalls are likely to persist.

Although AMS provides some discipline for acquiring major ATC systems through its various phases, activities, and decision points, it does not require that (1) specific knowledge be attained using explicit written criteria and (2) corporate executive-level oversight be provided to determine—independently from the program offices—whether a system

[37]Earned value management compares the actual work performed at certain stages of a job to its actual costs—rather than comparing budgeted and actual costs, the traditional management approach to assessing progress. By measuring the value of the work that has been completed at certain stages in a job, earned value management can alert program managers, contractors, and administrators to potential cost overruns and schedule delays before they occur and to problems that need correcting before they worsen.

has reached a level of development (product maturity) sufficient to move forward in the acquisition process. Commercial best practices call for such knowledge-based decision-making at the corporate executive-level to help ensure that acquisitions are not moved into the development phase prematurely, to obtain greater predictability in ATC system program costs and schedules, to improve the quality of the ATC systems that are deployed, and to deliver new capability to the National Airspace System faster. A knowledge-based approach is also important because it provides assurance that agency decision-makers have critical information about an acquisition's ability to meet a mission need and FAA's readiness to move forward in the acquisition process before making large commitments of agency resources. Absent such an approach, FAA lacks assurance that it has obtained the critical technological, design, or manufacturing knowledge that best practices call for to avoid cost overruns, schedule slips, and performance shortfalls. As a result, FAA is not doing all that it can to systematically address persistent shortcomings in its management of major ATC acquisitions. Moreover, although FAA has established a framework for training its acquisition workforce under the ATO, it has not yet developed comprehensive performance criteria to evaluate how effectively it has implemented this framework. As a result, the agency lacks assurance that its use of this framework is having the intended effect of improving the knowledge base of this workforce.

Recommendations for Executive Action

We are making five recommendations to the Secretary of Transportation. To reduce the risk of persistent cost and schedule shortfalls in major ATC system acquisition programs, to improve the quality of the ATC systems that are deployed, and to deliver new capability to the National Airspace System faster, we recommend that the Secretary of Transportation advise the FAA Administrator to take the four following actions:

- Modify AMS to specify that requirements be more clearly defined for major ATC systems, including providing more detailed guidance on setting clear, objective, and measurable requirements that reflect customers' needs, before making large investments of agency resources.

- Establish a strategy for identifying and measuring all additional development needed for complex software (e.g., commercial-off-the-shelf or nondevelopmental items) used for major ATC systems.

- Develop explicit written criteria for the key decision points called for under best practices, including the capture of specific design and manufacturing knowledge.

- Require corporate executive-level decisions at these key decision points (before an acquisition moves from integration to demonstration and, again, before it moves to production).

In addition, to assure FAA that the training framework it has adopted for the ATO's acquisition workforce is improving the knowledge base of this workforce as intended, we recommend that the Secretary advise the Administrator to develop performance criteria to comprehensively evaluate the framework's effectiveness.

Agency Comments

We provided copies of a draft of this report to DOT for review and comment and met with Department and FAA officials, including the ATO's Vice President for Acquisition and Business Services, to obtain their comments. FAA officials told us that they have made great strides in improving their acquisition of major ATC systems under AMS; however, they recognize that there is room for improvement and are firmly committed to implementing best practices for acquisitions. These officials generally agreed with the report's findings and conclusions and said that our recommendations would be useful to them as they continue to refine their acquisition management system, including training their acquisition workforce. The agency provided us with oral comments, primarily technical clarifications, which we have incorporated as appropriate.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to interested congressional committees, the Secretary of Transportation, and the Administrator, FAA. We will also make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

Please call me at (202) 512-2834 if you or your staff have any questions concerning this report. Key contributors to this report are listed in appendix VI.

JayEtta Z. Hecker
Director, Physical Infrastructure Team

FAA Has Begun Analyzing Spending Trends to Take a More Strategic Approach to Procurement

Our review of the Federal Aviation Administration's (FAA) general procurement of goods and services focused on the Air Traffic Organization (ATO) and its predecessor offices. According to FAA officials, the ATO has recently begun to consider ways to better leverage its buying power by taking a more strategic approach to procurement. While FAA uses the Acquisition Management System (AMS) for all FAA acquisitions, including the procurement of such goods and services as office supplies, computers, telephone services, and engineering and technical support services, these procurement activities take place in a decentralized environment of independent, transaction-oriented buying processes. Each FAA unit determines its need for goods and services and procures them as necessary, leaving headquarters with limited oversight of the agency's total procurement spending. For example, in 2003, FAA units carried out over 346,000 procurement actions for goods and services and purchase cardholders[1] made an additional 335,000 transactions. This fragmented environment does not permit the agency to leverage its buying power through lower-cost, consolidated contracts, at the local, regional, or national level and to rationalize the number of suppliers best suited to meet the agency's needs. At the same time, as part of a strategic procurement effort, FAA can use spend analysis to monitor trends in small and disadvantaged business participation so that it can balance the goals of lower-cost contract consolidation and promoting small business contracting opportunities.

Spend analysis, a tool used in a strategic approach to procurement, provides knowledge about how much is being spent for what goods and services, who the buyers are, who the suppliers are, and where the opportunities are to leverage buying power. Our past work[2] shows that private companies are using spend analysis as a foundation for employing a strategic approach to procurement. The analysis identifies where numerous suppliers are providing similar goods and services—often at varying prices—and where purchasing costs can be reduced and performance improved by better leveraging buying power and reducing the

[1]Through the purchase card program, agency personnel can acquire the routine goods and services they need directly from vendors as long as the purchase is $2,500 or less.

[2]GAO, *Best Practices: Using Spend Analysis to Help Agencies Take a More Strategic Approach to Procurement*, GAO-04-870, (Washington, D.C.: Sept. 16, 2004); *Best Practices: Improved Knowledge of DOD Service Contracts Could Reveal Significant Savings*, GAO-03-661, (Washington, D.C.: June 9, 2003); and *Best Practices: Taking a Strategic Approach Could Improve DOD's Acquisition of Services*, GAO-02-230, (Washington, D.C.: Jan. 18, 2002).

number of suppliers to meet the company's needs. Our research on commercial best practices has found that spend analysis is an important driver of strategic planning and execution. As part of an overall strategic procurement effort, companies use spend analysis to (1) define the magnitude and the characteristics of their spending, (2) understand their internal clients and supply chain, (3) create lower-cost consolidated contracts, and (4) monitor spending with small and disadvantaged businesses to achieve socioeconomic procurement goals.

We previously reported[3] that six agencies, including DOT, did not take advantage of opportunities to obtain more favorable prices on purchase card buys with frequently used vendors—vendors where an agency spends more than $1 million annually. In these six agencies, which accounted for over 85 percent of federal government purchase card spending, frequently used vendors accounted for purchases totaling nearly $3 billion in 2002. We recommended several actions—including conducting spend analysis using available data and gathering additional information where feasible—that could ultimately help these agencies achieve $300 million annually in potential savings.

In fiscal year 2003, FAA procured nearly $4 billion in goods and services and spent an additional $132 million using purchase cards. According to senior FAA officials, the agency has just begun to implement a strategic approach to general procurements. Other federal agencies are beginning to use strategic tools such as spend analysis to improve their spending for goods and services, and some have initiatives under way to obtain more favorable prices on purchase card buys. According to a senior FAA acquisition official, FAA has to balance the need of its units to independently make purchases that pertain solely to unit requirements with the agency's need to aggregate purchases of goods and services that are used by more than one unit. FAA has hired a consultant to help begin the use of spend analysis. This effort could reduce the agencywide costs for mobile wireless services by 40 percent—an effort expected to save the agency $8 to $10 million annually. FAA intends to expand its use of spend analysis to target other procurement category savings opportunities, including information technologies, training, facilities, and professional services, as its accounting systems improve.

[3]GAO, *Contract Management: Agencies Can Achieve Significant Savings On Purchase Card Buys*, GAO-04-430, (Washington, D.C.: Mar. 12, 2004).

FAA has taken some preliminary steps to set up a spend analysis program; however, progress has been challenging for FAA because of deficiencies in its accounting systems. For example, because the agency's accounting system did not identify all of the mobile wireless services for which it was being billed, the contractor implementing the spend analysis had to obtain this information from the wireless providers. FAA will need to expedite its efforts in this area to fully realize potential savings. Our prior research has shown that setting up a spend analysis program can be challenging. Companies have had problems accumulating sufficient data from internal financial systems that do not capture information on all of what a company buys or is using in different, unconnected parts of the company. Despite these challenges, companies that have developed formal, centralized spend analysis programs have been able to track their costs and identify areas for strategic sourcing and savings opportunities.

In our recent report on spend analysis,[4] we found that DOT, at the time of our review, had not yet begun to collect the data needed for a strategic approach to procurement; however, the department is engaged in ongoing efforts to improve procurements, and its top leadership is committed to using spend analysis to change the way goods and services are purchased. One obstacle to using spend analysis that the department cited during our review was a lack of comprehensive and reliable spending data. However, since we completed our review, the department reports stepping up efforts to use currently available data and evaluate business intelligence software to overcome those obstacles. In commenting on our report, Transportation's senior procurement executive told us that the department is expanding its spend analysis efforts. For example, his office recently reviewed purchase card spending data to identify volume discount opportunities and is now using the results to negotiate new discount agreements with several office product vendors. In addition, he told us that to facilitate future agencywide purchase card spend analyses, DOT awarded a task order in June 2004 to one bank card company that will provide purchase-card audit software and enhanced data-mining capabilities. He also indicated that the department's leadership supports fiscal year 2005 funding to enhance spend analysis capabilities and that software options for the new agencywide spend analysis system are now being evaluated as part of an ongoing financial and procurement review.

[4]GAO, *Best Practices: Using Spend Analysis to Help Agencies Take a More Strategic Approach to Procurement*, GAO-04-870, (Washington, D.C.: Sept. 16, 2004).

Objectives, Scope, and Methodology

To compare FAA's Acquisition Management System (AMS) with the Federal Acquisition Regulation (FAR), we reviewed AMS and changes in it over time. We also compared FAA's acquisition authority under the FAR and under AMS. In addition, we identified relevant recommendations from reports that we, the Department of Transportation's Inspector General (DOTIG), and others have issued to determine which recommendations have been implemented, rejected, or left open, and to evaluate how those recommendations have modified FAA's acquisition policies and practices. We also collected and summarized published reports and analyzed available life-cycle management data on the current status of major and nonmajor acquisitions being carried out under AMS.

To determine the ways in which FAA's acquisition policies compare with our best practices model, we used information from several of our products that examine how commercial best practices can improve outcomes for acquisition programs. This model consists of four phases: (1) concept and technology development; (2) product development, which includes both integration and demonstration activities; (3) production; and (4) operations and support. In between these four phases are three key knowledge points at which commercial firms must have sufficient knowledge to make large investment decisions. We also reviewed and analyzed AMS, accessible at http://fast.faa.gov. Furthermore, to clarify the content of FAA's acquisition process, we met with various FAA vice-presidents and officials from FAA's Acquisition Planning and Policy Division. Next, we compared and contrasted FAA's acquisition policies with the best practices for commercial acquisitions identified in our past reports. Our analysis focused on whether FAA's policies contained the measurable criteria and management controls necessary to achieve FAA's intent of minimizing cost, schedule, and performance risks. We also interviewed current and former FAA procurement officials that have experience using both the FAR and AMS.

To determine if FAA has effectively implemented its new acquisition authority and improved its acquisition outcomes, we reviewed seven of FAA's most expensive major ATC acquisitions, including the Airport Surveillance Radar 11 (ASR-11), Standard Terminal Automation Replacement System (STARS), Integrated Terminal Weather System (ITWS), Local Area Augmentation System (LAAS), Next Generation Air/Ground Communications System (NEXCOM), Advanced Technologies and Oceanic Procedures (ATOP), and En Route Automation Modernization (ERAM). See table 7 for specific program costs.

Table 7: Program Costs for the Seven Systems We Reviewed

Dollars in millions	
Program	**Total program cost as of 9/30/04**
STARS	$1,460.0
ASR-11	891.7
ITWS	288.3
LAAS	696.1
NEXCOM	318.4
ATOP	548.2
ERAM	2,154.6
Total	**$6,357.3**

Source: GAO analysis.

Note: These amounts are for facilities and equipment only (not operations and maintenance).

We also selected these seven acquisitions because we considered them to fall into two basic categories-pre-AMS and post-AMS. Five of the acquisitions were initiated before AMS was implemented in April 1996 and were transitioned into AMS at various times before their completion. The two remaining acquisitions—ATOP and ERAM—were initiated and have remained completely under AMS. We then reviewed program documents and reports and interviewed program and agency officials responsible for developing these acquisitions, as well as other acquisitions experts in the private sector. For some acquisitions, we discussed programmatic issues with representatives of the primary contractor for the specific acquisition to obtain information on the practices and procedures used for the acquisition. In addition, we interviewed some current and former FAA procurement officials with experience using both the FAR and AMS to obtain their views on the use of each contracting process and how the two compare. Furthermore, to see how FAA has progressed in addressing problems with its acquisitions, we reviewed our work on acquisitions over the last 20 years, as well as reports by the DOTIG, FAA, Booz-Allen & Hamilton, and MITRE. Because the data in this report on cost, schedule and performance are used as background information or to otherwise provide a description of acquisitions, we did not assess their reliability.

The effect of the current budget process on FAA's ability to successfully modernize the National Airspace System, including acquiring major ATC systems is not within the scope of this review.

Comparison of the Scope and Flexibility of FAA's Acquisition Management System and the Federal Acquisition Regulation Process

Background

FAA's business processes, including its acquisition of major systems, differ significantly from the business processes followed by most other federal agencies. FAA relies on its Acquisition Management System (AMS), which establishes FAA internal acquisition policy. AMS resulted from the adoption of language in the Department of Transportation and Related Agencies Appropriations Act,[1] which directed the FAA Administrator to develop and implement an acquisition management system for FAA. The adoption of this language (section 348) followed FAA's assertions that the requirement that it conduct procurements in accordance with the Federal Acquisition Regulation (FAR) was at least a contributing factor in its repeated failure to complete air traffic control (ATC) and other modernization programs on schedule. The Administrator was directed to put in place a system that would address the "unique needs of the agency" that FAA contended prevented its acquisitions from being timely and cost-effective.

Section 348 distinguished FAA from other federal agencies by removing FAA from the federal acquisition system. Under section 348, FAA was no longer subject to title III of the Federal Property and Administrative Services Act of 1949,[2] which among other things requires that the government procure supplies and services competitively. It removed FAA as an agency subject to the Office of Federal Procurement Policy Act[3] and eliminated the requirement that FAA comply with the FAR. While mandating that FAA conduct its acquisitions so that "all reasonable opportunities to be awarded contracts shall be provided to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals," section 348 eliminated the requirement that FAA comply with the Small Business Act.[4] Furthermore, it made the procurement protest system of the U.S. Government Accountability Office inapplicable to FAA, although disappointed offerors

[1]P. L. 104-50, § 348, 109 Stat 436 (1995). Included in the United States Code as 49 U.S.C. § 40110.

[2]41 U.S.C. Ch. 4.

[3]41 U.S.C. Ch. 7.

[4]15 U.S.C. Ch. 14A.

can still file protests with FAA's Office of Dispute Resolution for Acquisition.[5]

AMS Defines an Investment/Life-Cycle Project Management System

Much of AMS guidance concerns project, financial, and property life-cycle management issues. In fact, FAA's policy describes AMS as applying to all investment programs regardless of cost or the appropriation funding them. It recognizes that a single investment program may span multiple procurements and projects. It applies, according to its terms, to the activities associated with needs analysis, determination of requirements, analysis of investment alternatives, establishment of investment programs, allocation and expenditure of resources, procurement and deployment of needed products and services, in-service management of fielded capability, and eventual disposal of obsolete products.

AMS focuses on the following key program milestones:

- Mission Analysis—encompasses those key corporate and service-level processes that define, coordinate, and integrate the work of service organizations,[6] thereby providing strategic direction to keep FAA responsive to the service needs of its customers. Mission analysis is used to update a mission need statement, which in turn may identify capability shortfalls or technological opportunities, that is, unmet needs. Unmet needs are presented to the Joint Resources Council (JRC) for a mission need decision. To be approved, the unmet need should be supported by the updated mission need statement and the initial requirements document, including a concept of use, and the initial investment plan.

- Investment Analysis—builds on the results of the mission need decision by developing detailed plans and final requirements for each proposed investment program and by defining an acquisition program baseline that establishes cost, schedule, performance, benefit, and risk-management boundaries for the program. AMS calls for planning the entire solution—an effort that may use market survey data but is based

[5]14 C.F.R. pt. 17.

[6]AMS views FAA as consisting of numerous service-level organizations, which in turn are organizational subunits that deliver services within FAA, to industry or to the public, including technical as well as nontechnical service providers.

in large measure on FAA's assumptions and data. The service organization produces a final implementation and life-cycle support strategy. A detailed program plan and an acquisition program baseline are also produced. The results are presented to the JRC for a "final investment decision."[7]

- Solution Implementation—encompasses acquiring, accepting, deploying, installing and preparing for the operational use of an approved investment. Approval of the investment carries with it authorization for the service organization to conduct all acquisitions needed to execute the investment decision, subject to any constraints established in the final investment decision.

- In-Service Decision—is an FAA system qualification milestone, which is achieved when an otherwise operational investment is satisfactorily tested to demonstrate its operational effectiveness and suitability before it is placed in service in the National Airspace System. The JRC designates the decision maker.

- In-Service Management—covers activities throughout a system's life cycle, starting at the time that an investment becomes operational. In-service product improvements may eliminate latent defects, fix systemic problems, and enhance the utility of the investment. These changes may be made within the approved acquisition program baseline without corporate-level approval. In-service management also includes planning, programming, and developing supporting budget input; monitoring and assessing performance, cost of ownership, and support trends; and planning for service-life investment decisions.

- Service Life Extension—seeks a new investment decision by the JRC when a current capability is unable to satisfy demand or when another solution may be more effective. The JRC can decide to revalidate the mission need satisfied by the solution by upgrading or refurbishing fielded capability or by replacing that capability with another equivalent or new superior solution. The JRC may also decide that the capability should be retired.

[7]Investment analysis also includes identifying and analyzing alternatives; developing life-cycle cost estimates; assessing net present value, return on investment, and benefits; assessing affordability; analyzing risk; evaluating the impact of an alternative on enterprise architecture; and planning for deployment and implementation.

Only a Portion of AMS Deals Directly with the Procurement Process

Although the FAR includes requirements addressing procurement planning and major system acquisition, AMS as just outlined differs significantly from the FAR in its focus and scope. The FAR addresses planning[8] and major system acquisition[9] in the context of government procurement policy and procedure. Agencies other than FAA find the broader program planning and management issues addressed in AMS outside of the FAR, in documents such as the Office of Management and Budget's (OMB) Circular A-109, in their own planning guidance, such as the Department of Defense's (DOD) 5000 series,[10] and in established knowledge-based best practices. As indicated earlier, much of AMS focuses on just such issues. Only AMS section 3 addresses procurement policy and procedure.[11]

AMS States a Nonregulatory FAA Policy

A further significant foundational difference between AMS and the FAR is that AMS sets out a nonregulatory FAA policy, whereas the FAR was adopted and is maintained as a set of published governmentwide regulatory requirements, which form a legal basis for federal agencies' contract decision-making. AMS is binding on FAA personnel as FAA employees and establishes other guidelines that FAA states should be followed unless there is a rational basis for doing otherwise. AMS is subject to such internal controls as the Administrator chooses to enforce and general overarching legal requirements, such as the Government Performance and Results Act of 1993 (GPRA).[12] There is a legal requirement, created by section 348, that small and socially or economically disadvantaged firms be given all reasonable opportunities to receive contract awards. FAA in its Office of Dispute Resolution for Acquisition has adopted a dispute resolution process with some legal underpinnings.[13] Otherwise, as the preface to AMS states, "nothing in this document creates or conveys any substantive [legal]

[8]48 C.F.R. pt. 7.

[9]48 C.F.R. pt. 34.

[10]DOD's 5000 series consists of DOD Directive 5000.1, The Defense Acquisition System and DOD Instruction 5000.2, Operation of the Defense Acquisition System.

[11]Section 5 of AMS focuses on the acquisition of real property, a subject that is also not covered by FAR.

[12]P. L. 103-62; 107 Stat. 285.

[13]14 C.F.R. pt. 17.

rights." In short, FAA has assumed no legal obligation to follow AMS other than to ensure that its actions are not arbitrary and capricious or contrary to law. By contrast, the FAR has the force and effect of law, and agencies that are subject to the FAR are bound to follow it.

AMS Chapter 3 Parallels a Subset of the FAR

When FAA personnel apply the procurement methodology in AMS chapter 3, they are applying guidance that closely parallels some of the procedures set out in the FAR. The AMS Chapter 3 acquisition process parallels a subset of the varied selection of procurement methods available under the FAR, requiring that all competitive FAA contracts be negotiated with the awardee being selected on a "best value" basis. The FAR also provides a much more detailed set of information and guidance than does AMS. A comparison of high-level differences and similarities between AMS and the FAR is presented in table 8.

Table 8: Comparison of AMS and the FAR

	AMS	FAR
Best value source selection	Yes, following screening.	Yes, although other methods are also available for use when appropriate.
Public announcement of requirement	Public announcement through Internet or other means when value of contract is anticipated to exceed $100,000.	Yes, for proposed contract actions expected to exceed $25,000.
Competition	FAA's policy is to provide reasonable access to competition for firms interested in obtaining contracts. In selecting sources, the preferred method of procurement is to compete requirements among two or more sources.	Full and open competition—all responsible sources are permitted to compete.
Sole-source procurement	Yes, when deemed to be in FAA's "best interest" as determined by the service organization on the basis of "adequate objective supporting data."	Yes, full and open competition need not be obtained under certain specified conditions based upon a written justification from the contracting officer that is approved at an appropriate level of authority.
Prequalification	Yes, qualification information screens for those vendors that meet FAA's stated minimum capabilities or requirements for providing a given product or service.	Yes, for products or manufacturers when justified in writing and conducted in a manner that meets requirements justifying the use of qualifications requirements.
Basic methodology in negotiated procurement	FAA issues one or more "screening requests," which may include requests for binding offers from competing firms.	Agency issues a solicitation, usually a request for proposals.
Methodology for negotiation	FAA encourages one-on-one communications throughout the process provided that no offeror is given an "unfair advantage."	Clarification and discussions are permitted; one offeror cannot be favored over another.

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	AMS	FAR
Evaluation and award selection	Selection is based on evaluation in accord with criteria identified in the screening request. The selection decision is a judgmental decision made by the source selection official.	Selection is based on evaluation in accord with criteria identified in the request for proposals. The selection decision is a judgmental decision made by the source selection official.
Use of simplified acquisition methods	Commercial and simplified purchases are used for commercial items or for products or services that have been sold at established catalog or market prices and are generally purchased on a fixed-price basis.	Generally required for purchases up to $100,000, for noncommercial items, or on a test basis, up to $5,000,000 for commercial items competition is to be obtained to the maximum practicable extent.
Use of credit card purchases	Permitted.	Permitted.
Procurement methodology	AMS does not include the level of detail found in the FAR. It does not prescribe many of the procurement methods and techniques permitted under the FAR, but encourages use of "any method of procurement deemed appropriate."	Provides a broad selection of procurement methods and techniques suitable for use in most circumstances.
Responsibility	Awards to responsible offerors only.	Awards to responsible offerors only.

Source: GAO analysis.

AMS Includes a Less Rigorous Competition Requirement Than Does the FAR

As table 8 indicates, AMS incorporates a less rigorous competition standard than the FAR imposes on the rest of the government. AMS states that it is FAA's policy to provide reasonable access to competition for firms interested in obtaining contracts. According to AMS, in selecting sources, the preferred method of procurement is to compete requirements among two or more sources. However, there is no requirement to ensure that firms that want to participate actually get a chance to do so. Instead FAA may limit competition for further consideration in its screening process to firms with known capabilities or past performance.

The FAR Gives Procurement Professionals Tighter Control over Procurement Decisions

AMS states that authority is delegated to appropriate levels. Once the final investment decision is made, and subject only to any constraints imposed by that decision, the service-level organization is responsible for conducting required acquisitions. Contracting personnel as well as other specialists are then assigned to teams that are responsible to a program manager within the service-level organization. FAA states that this approach increases the pace of doing business. By comparison, the FAR gives contracting professionals clear control over contracting decisions by requiring that procurement decisions be made by procurement professionals—typically contracting officers or their superiors.

Although FAA Project Managers View AMS as More Efficient and Flexible Than the FAR, Some Procurement Officials We Interviewed Do Not Agree

As part of our work, we interviewed project management personnel within FAA as well as current and former FAA procurement officials that have experience using both the FAR and AMS. Generally, FAA personnel see AMS as more efficient and flexible than the FAR, although 9 years after AMS's adoption, many FAA officials have only limited knowledge of and experience with the FAR. The FAA project managers we interviewed see AMS as more efficient and flexible than the FAR,[14] but some procurement officials with experience in applying both AMS and the FAR did not agree with the view that the FAR was unduly rigid. According to these officials, the FAR may appear inflexible and cumbersome to persons who are inexperienced with it, but those who are familiar with it are able to navigate its complexities effectively. For example, even though the FAR generally requires full and open competition—a process that can take time to give all interested firms an opportunity to participate—contracting officers may be able to expedite the procurement process by using authorized streamlined procedures or, if circumstances warrant, by justifying sole-source or limited competition.

[14]And up to $10,000,000 under limited special circumstances.

How FAA's Acquisition Policy Adapted Key Recommendations Made by GAO and DOT (1996-2003)

FAA Refined AMS in Response to Recommendations

Since FAA developed and implemented AMS in 1996, GAO and the DOTIG have made recommendations to improve FAA's acquisition processes. FAA has adopted many of these recommendations and incorporated them into AMS (see table 9). These implemented recommendations address four main themes:

- Developing a strategy for culture change that relies on successfully integrating the various elements of acquisition, including specific responsibilities and performance measures for all stakeholders, and providing the incentives needed to promote the desired changes.

- Establishing an effective management structure for developing, maintaining, and enforcing the ATC systems architecture to provide an overall plan for the National Airspace System (NAS). This management structure should assign the responsibility and accountability to develop, maintain, and enforce a complete and unified ATC system by ensuring that every project conforms to the overall plan.

- Improving cost and schedule tracking to provide data for estimating the costs and schedules of programs. To estimate the costs and time needed for projects, a historical database that includes cost and schedule estimates, revisions, reasons for revisions, actual cost and schedule information, and relevant contextual information is needed.

- Improving the management of modernization projects, including the use of project reviews, milestones, and baselines, and cost-accounting information to ensure that programs can be adjusted as needed.

The reports identified in table 10 provide recommendations to address problems we and the DOTIG have identified under these four themes.

Table 9: Key Recommendations Made to Improve FAA's Acquisition Processes

Key recommendation	Evidence of policy change	Rationale for change
Aviation Acquisition: A Comprehensive Strategy Is Needed for Cultural Change at FAA August 22, 1996, (GAO/RCED-96-159) FAA should develop a comprehensive strategy for cultural change. This strategy should include specific responsibilities and performance measures for all stakeholders throughout FAA and provide the incentives needed to promote the desired behaviors and to achieve agencywide cultural change.	FAA issued an organizational culture framework in 1997 and is working to implement it.	Over the past 15 years, FAA's ATC modernization projects have experienced substantial cost overruns, lengthy schedule delays, and significant performance shortfalls. We found that FAA's organizational culture has been an underlying cause of the agency's acquisition problems. Its acquisitions were impaired because employees acted in ways that did not reflect a strong commitment to mission focus, accountability, coordination, and adaptability.

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Key recommendation	Evidence of policy change	Rationale for change
Air Traffic Control: Improved Cost Information Needed to Make Billion Dollar Modernization Investment Decisions January 22, 1997, (GAO/AIMD-97-20) Because the success of FAA's investment analysis and decision-making process depends in large measure on the reliability of ATC project cost information, FAA should institutionalize defined processes for estimating ATC projects' costs. At a minimum, these processes should include the following six institutional process requisites, developed for organizations that are building or acquiring software-intensive systems by Carnegie Mellon University's Software Engineering Institute (SEI), an institution recognized for its expertise in software processes. Each of these requisites is described in more detail in this report: • a corporate memory, or historical database(s), which includes cost and schedule estimates, revisions, reasons for revisions, actual cost and schedule information, and relevant descriptive information; • structured approaches for estimating software size and the amount and complexity of existing software that can be reused; • cost models calibrated/tuned to reflect demonstrated accomplishments on past projects; • audit trails that record and explain all values used as cost model inputs; • processes for dealing with externally imposed cost or schedule constraints in order to ensure the integrity of the estimating process; • data collection and feedback processes that foster capturing and correctly interpreting data from work performed.	Chapter 19 of FAA's Pricing Handbook embodies SEI's philosophy, which maintains that developing credible software estimates is a function of how thorough and disciplined an organization's estimating processes are. SEI's six institutional process requisites are designed to ensure that organizations consistently produce reliable cost estimates for software-intensive systems. These requisites are as follows: • a corporate memory, or historical database(s), for cataloging cost estimates, revisions, reasons for revisions, actual cost and schedule information, and other descriptive information, such as any constraints or trends that affect the project; • structured processes for estimating software size and the amount and complexity of existing software that can be reused; • cost models calibrated/tuned to reflect demonstrated accomplishments on similar past projects; • audit trails that record and explain the values used as cost model inputs; • processes for dealing with externally imposed cost or schedule constraints to ensure the integrity of the estimating process; • data collection and feedback processes that foster capturing and correctly interpreting data from work performed.	We found that FAA's ATC modernization program's cost estimating processes do not satisfy recognized estimating requisites, and its cost-accounting practices do not provide for proper accumulation of actual costs. The result is an absence of reliable project cost and financial information that the Congress has legislatively specified and that leading public-sector and private-sector organizations point to as essential to making fully informed investment decisions among competing ATC projects. Not having this information, increases the likelihood of poor ATC investment decisions, not only when a project is initiated but also throughout its life cycle. It also means that Congress does not have reliable cost information to use in making funding decisions about FAA. Such a situation is unacceptable when making small investments, but is especially egregious when making multimillion or billion-dollar investments in mission-critical ATC systems.

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Key recommendation	Evidence of policy change	Rationale for change
FAA should immediately begin disclosing the inherent uncertainty and range of imprecision in all ATC projects' official cost estimates presented to executive oversight agencies or Congress.	Chapter 19 of FAA's Pricing Handbook incorporates our recommendation and refers explicitly to GAO/AIMD-97-20 and the work of other experts. The handbook suggests where to incorporate audit trails, constraint processes, and the inherent uncertainty and range of imprecision in all ATC cost estimates. The handbook advocates that staff qualify early project estimates by disclosing the level of uncertainty associated with them and refining the estimates as the project is completed and the uncertainty eliminated.	
FAA should acquire or develop and implement a managerial cost-accounting capability that will satisfy the requirements of Statement of Federal Financial Accounting Standards no. 4 (SFFAS 4) Managerial Cost Accounting Concepts and Standards for the Federal Government. This system capability should provide the cost-accounting and financial management information needed by FAA management and those who make investment decisions. Such information should include full life-cycle costs, which include the costs of resources consumed by a project that directly or indirectly contribute to the output and the costs of identifiable supporting services provided by other organizations within the reporting entity.	The Department of Transportation is in the process of meeting key objectives of the Federal Managers' Financial Integrity Act (FMFIA) of 1982. A key material weakness was FAA's oversight of cost reimbursable contracts. FAA made significant progress in the closeout of past cost reimbursable contracts. To resolve this material weakness, FAA needs to complete the close out of old contracts and increase the use of cost incurred audits. Additionally, FAA needs to ensure that appropriate audits are obtained for all active contracts. These steps will help reduce the likelihood of cost overruns or improper payments for unallowable costs.	
FAA should report its lack of a cost-accounting capability for its ATC modernization as a material internal control weakness in the Department's fiscal year 1996 Federal Managers' Financial Integrity Act (FMFIA) report and in subsequent annual FMFIA reports until the problem is corrected.		
FAA should report to the Secretary of Transportation and FAA's authorizing and appropriation committees on its progress in implementing these recommendations as part of its fiscal year 1999 budget submission.		

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Key recommendation	Evidence of policy change	Rationale for change
Air Traffic Control: Complete and Enforced Architecture Needed for FAA Systems Modernization February 3,1997, (GAO/AIMD-97-30) FAA should ensure that a complete ATC systems architecture is developed and enforced expeditiously before deciding on the architectural characteristics of a replacement for the Host Computer System. FAA should also take the following steps to establish an effective management structure for developing, maintaining, and enforcing the complete ATC systems architecture: • Assign the responsibility and accountability needed to develop, maintain, and enforce a complete ATC systems architecture to a single FAA organizational entity.	AMS states the National Air Space (NAS) Configuration Control Board shall approve changes to NAS technical documentation, and shall ensure the traceability of requirements from the NAS level to the system and subsystem level. This responsibility begins with the approval of the technical architecture by the Joint Resources Council at the investment decision and continues throughout the life of the program.	FAA lacks a complete system architecture, or overall blueprint, to guide and constrain the development and maintenance of the many interrelated systems that make up its ATC infrastructure. To its credit, FAA is developing one of the two principal components of a complete systems architecture, namely, the "logical" description of FAA's current and future concept of ATC operations as well as descriptions of the ATC business functions to be performed, the associated systems to be used, and the information flows among systems. However, FAA is not developing, nor does it have plans to develop, the second essential component—the ATC-wide "technical" descriptions that define all required information technology (IT) and telecommunications standards and critical ATC systems' technical characteristics. We also found that an architecture is the centerpiece of sound systems development and maintenance; FAA is developing a logical architecture component for ATC modernization and evolution; FAA lacks a technical architectural component to guide and constrain ATC modernization and evolution; without a technical ATC architecture, costly system incompatibilities have resulted and will continue; and FAA lacks an effective management structure for developing and enforcing an ATC systems architecture.
• Provide this single entity with the resources, expertise, and budgetary and/or organizational authority needed to fulfill its architectural responsibilities.	AMS states that the Joint Resources Council approves FAA budget submissions for Research, Engineering and Development (RE&D) and Facilities and Equipment (F&E) appropriations, participates in the development of FAA budget submissions for the operations appropriation, and approves the NAS architecture baseline.	
• Direct this single entity to ensure that every ATC project conforms to the architecture unless careful, thorough, and documented analysis supports an exception. Given the importance and the magnitude of the IT initiative at FAA, a management structure similar to the department-level chief information officer (CIO) structure prescribed in the Clinger-Cohen Act should be established for FAA.	AMS states that a configuration control board with an approved charter and operating procedures shall be the official FAA-wide forum used to establish configuration management baselines and to approve or disapprove subsequent changes to those baselines.	

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Key recommendation	Evidence of policy change	Rationale for change
Air Traffic Control: Immature Software Acquisition Processes Increase FAA System Acquisition Risks March 21, 1997, (GAO/AIMD-97-47) Given the importance and the magnitude of IT at FAA, this report reiterates our earlier recommendation calling for the establishment at FAA of a CIO management structure similar to the department-level CIO structure prescribed in the Clinger-Cohen Act of 1996. To improve its ability to acquire software for its ATC modernization, FAA should • assign responsibility for software acquisition process improvement to the agency's CIO; • provide the CIO with the authority needed to implement and enforce ATC modernization software acquisition process improvement; • require the CIO to develop and implement a formal plan for ATC modernization software acquisition process improvement that is based on the software capability evaluation results contained in this report and specifies measurable goals and time frames, prioritizes initiatives, estimates resource requirements, and assigns roles and responsibilities; • allocate adequate resources to ensure that planned initiatives are implemented and enforced; and • require that, before being approved, every ATC modernization acquisition project have software acquisition processes that satisfy at least Software Acquisition Capability Maturity Model (SA-CMM) level 2.	FAA states that the CIO: • serves as the principal adviser to the Administrator, Deputy Administrator, and FAA offices on information management and technology across the agency. As the agency's senior management official, serves as the spokesperson on IT matters before Congress, other agencies, and the public; • leads and directs agencywide strategic planning for IT; • oversees IT investments to ensure optimization across all agency groups and the full range of cost trade-offs; • creates and maintains an IT strategy to guide research, development, maintenance, and sharing of information systems, applications, data, and other resources across the lines of business and throughout the agency; • leads the establishment of world-class software and information systems engineering methodologies including Capability Maturity Models, and applies them to agency systems, operations, and processes to provide continuous improvement of IT performance; and • leads and directs agencywide efforts on information systems security, ensuring that standards and policies are in place to provide security for the critical information architecture of the agency.	To accommodate forecasted growth in air traffic and replace aging equipment, FAA embarked on an ambitious ATC modernization program in 1981. FAA estimated that it would spend about $20 billion to replace and modernize software-intensive ATC systems between 1982 and 2003. Our work over the years has chronicled many FAA failures in meeting ATC projects' cost, schedule, and performance goals, largely because of software-related problems. As a result of these failures as well as the tremendous cost, complexity, and mission criticality of FAA's ATC modernization program, we designated the program as a high-risk IT initiative in our 1995 and 1997 report series on high-risk programs. Software quality is governed largely by the quality of the processes involved in developing or acquiring, and maintaining it. SEI has developed models and methods that define and determine organizations' software process maturity. Together, they provide a logical framework for baselining an organization's current process capabilities (i.e., strengths and weaknesses) and providing a structured plan for incremental rocess improvement. We found that • FAA's ATC modernization software acquisitions processes are immature and • FAA's approach for improving AT modernization software acquisition processes is not effective.

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Key recommendation	Evidence of policy change	Rationale for change
Air Traffic Control: FAA's Modernization Investment Management Approach Could Be Strengthened, April 30, 1999, (GAO/RCED/AIMD-99-88) FAA should implement a comprehensive investment management approach through AMS that includes the following actions: • Establish a complete portfolio of investments—including existing systems funded by the operations budget account as well as projects funded by the facilities and equipment account—and require the Joint Resources Council to periodically review the baseline status and merits of each of these investments throughout their entire life cycle. As part of this portfolio, cost baselines for operating and maintaining all projects should be developed, and this information should be included in the agency's financial plan for its investments and in its annual budget request to Congress.	FAA's AMS states that five decisions are always made at the corporate level by the Joint Resources Council: the mission need decision, the investment decision, the decision to approve a change to an acquisition program baseline, approval of the RE&D and F&E budget submissions, and approval of the NAS Architecture baseline. The selection of a solution to satisfy a mission need, the investment of resources into a fully funded program, and the possible need to cancel other programs to accommodate a new program make the investment decision the most important in the life-cycle management process.	Over the past 17 years, FAA's modernization projects have experienced substantial cost overruns, lengthy delays, and significant performance shortfalls. Because of FAA's contention that some of its modernization problems were caused by federal acquisition regulations, the Congress enacted legislation in November 1995 that exempted the agency from most federal procurement laws and regulations and directed FAA to develop a new acquisition management system. In response, FAA implemented AMS on April 1, 1996. AMS provides high-level acquisition policy and guidance for selecting and controlling investments throughout all phases of the acquisition life cycle. GAO found that: • FAA's AMS is designed to provide a discipline, structured process for selecting and controlling investments; • Lack of oversight of the operations portion of projects prevents FAA from managing investments as a complete portfolio; • Weaknesses in selection, control, and evaluation phases limit FAA's effectiveness in managing its portfolio.
• Improve the selection process by (1) establishing clearly defined procedures for validating each project's cost, schedule, benefit, performance, and risk information and (2) requiring documentation of the results of the validation procedures applied to each project.	• FAA's AMS states that the investment analysis team develops an initial acquisition program baseline (i.e., performance, cost, schedule, benefits, and risk) for each alternative solution offering superior value and benefit to FAA and its customers. Service organization members of the investment analysis team lead the development of cost and schedule baselines using FAA's work breakdown structure and other applicable standards.	

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Key recommendation	Evidence of policy change	Rationale for change
• Strengthen control over investments by (1) revising the acquisition program baseline requirements to include project risks and to add milestones for project reviews during the operations phase and (2) ensuring that project officials fully track and document estimated versus actual results for all the elements (i.e., cost, schedule, benefit, performance, and risk) contained in the baseline documentation.	• AMS states that the acquisition program baseline should include cost, schedule, performance, benefits, and risk information. It also should include all events that are key to satisfying mission need, providing intended operational capability, and accruing benefits, as well as events crucial to interrelated programs or NAS systems. Once an estimate has been completed and a project started, FAA establishes reporting and performance measures to compare estimated and actual costs, schedules, and performance.	
• Initiate post implementation evaluations for projects within 3 to 12 months of deployment or cancellation to compare the completed projects' cost, schedule, performance, and mission improvement outcomes with the original estimates.	• FAA published a methodology for conducting such evaluations *entitled An Approach for Developing a Standard Method for Conducting Post-Implementation Reviews*, Report #2001-13, June 6, 2001.	
• Incorporate key information from the selection process (e.g., mission need statements, cost-benefit analyses, and risk assessments) into FAA's management information system for investments.		
Major Management Challenges and Program Risks, Department of Transportation January 2001, (GAO-01-253) FAA should develop a comprehensive plan that would include established checkpoints at which the agency would determine, among other things, whether users' needs have changed and whether other technologies have matured and could better meet users' needs and the agency's requirements for satellite navigation. FAA should also have an external organization evaluate its progress at established checkpoints and include the results of this evaluation in its request for future funding of the navigation system.	FAA has appointed an independent board—consisting of external experts in satellite navigation, safety certification, and radio spectrum—that reports directly to the FAA Administrator. The board is tasked with reviewing the soundness of the panel's recommendations and with revalidating the future path for WAAS. However, given the past problems in developing this system and the long-term effort that is still required, we believe that continued oversight by an independent group of experts is warranted. It is not clear whether the current independent board will fulfill this role. We will continue to evaluate FAA's progress on this and other system acquisition efforts.	DOT's management of its major acquisitions and assets needs improvement in several areas. FAA and the U.S. Coast Guard are undertaking costly, long-term programs to modernize and replace aging equipment. Over the past 19 years, FAA's multibillion-dollar ATC modernization program has experienced cost overruns, delays, and performance shortfalls of large proportions. FAA is making progress in addressing some of our recommendations, but its reform efforts are not complete, and major projects continue to face cost, schedule, and performance problems. Because of its size, complexity, cost, and problem-plagued past, we designated FAA's IT program as a high-risk IT initiative in 1995.

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Key recommendation	Evidence of policy change	Rationale for change
Status of FAA's Major Acquisitions DOT/OIG, AV-2003-045, June 26, 2003 Update the cost, schedule, and performance baselines for many of FAA's major acquisition, including STARS, ITWS, LAAS, and WAAS at a minimum. Develop—and use—performance goals for assessing progress with its major acquisitions. This should involve holding staff and contractors accountable for keeping projects within cost and schedule, as appropriate.	FAA officials generally agreed with the analysis and recommendations in this report. FAA is implementing this recommendation. It updated the baseline of STARS in April 2004 and updated the baselines of ITWS and WAAS in May 2004. The LAAS program was deferred because of budget cuts.	FAA has made progress with a number of acquisitions, including Free Flight Phase 1 and new information exchange systems that link FAA and airline operations centers. However, other modernization programs have experienced cost, schedule, and performance problems. Problems with acquisition efforts have serious consequences because they result in costly interim systems, reduce the number of units procured, postpone benefits, or "crowd out" other modernization projects.
Status Report on FAA's Operational Evolution Plan DOT/OIG, AV-2003-048, July 23, 2003 Develop realistic cost estimates, and link the Operational Evolution Plan (OEP) with FAA's budget in order to set priorities for what can be accomplished in the short term. Determine—in concert with the aviation community—how to move forward (and at what pace) with systems that require airspace users to purchase and install new technologies. Determine and maximize the benefits associated with airspace design changes, new procedures, and capabilities currently onboard aircraft to enhance system capacity.	FAA officials generally agreed with the analysis and recommendations in this report. FAA is currently updating the OEP, which includes design changes to the National Airspace to, for example, enhance capacity.	The OEP is an important effort because it will shape FAA and industry investments over the next decade. However, much has changed since the OEP was introduced. The demand for air travel has declined, major network carriers are in financial distress, and Aviation Trust Fund revenues have declined sharply. The Inspector General found that fundamental assumptions about the OEP, such as the cost, schedule, and benefits of key efforts as well as the ability of airspace users to pay for and equip with new technologies in the near term, are no longer valid and need to be revised.

Source: GAO analysis.

Status of the Seven ATC Modernization Acquisitions That GAO Reviewed

Standard Terminal Automation Replacement System (STARS)

Source: FAA.

Purpose and Status

STARS is a joint FAA and Department of Defense (DOD) program. It will replace aging legacy terminal FAA and DOD automation systems with terminal ATC systems. Civil and military air traffic controllers across the nation are using STARS to direct aircraft near major airports.

In June 2003, FAA commissioned STARS for use at the Philadelphia International Airport in Pennsylvania. Currently, STARS is fully operational at 24 FAA terminal radar control facilities and 17 DOD facilities. Under the ATO's new business model of breaking large and complex programs into smaller phases to control cost and schedule, STARS is a candidate for further deployment to about 120 FAA and DOD operational facilities. In May 2004, FAA changed STARS's cost and schedule estimates for the third time and estimates that it will cost $1.46 billion to deploy STARS at 50 operational facilities.

Contractor: Raytheon.

STARS Display Monitor

Baseline Changes to STARS Scope, Schedule and Cost

Date	Number of FAA facilities receiving STARS	Projected date for first deployment	Projected date for last deployment	Estimated cost (F&E)[a]
February 1996	172	1998	2005	$0.94 billion
October 1999	188	2002	2008	$1.4 billion
March 2002	73	2002	2005	$1.33 billion
April 2004	50	2003	2008	$1.46 billion
Total change	- 122	+ 5 years	+ 3 years	+$0.52 billion

Source: GAO's presentation of FAA data.

[a] FAA's Facilities and Equipment (F&E) account funds capital projects.

Risks and Challenges

Certification issues – FAA also experienced problems in certifying STARS, in part because of aggressive scheduling. FAA's approach to certifying STARS was oriented to rapid deployment to meet critical needs. To meet these needs, FAA compressed its original 32-month development and testing schedule into 25 months. This compressed schedule left only limited time for human factor evaluations and not enough time for computer human interface issues and involvement of controllers and maintenance technicians.

1

Airport Surveillance Radar Model–11 (ASR-11)

Purpose and Status

ASR-11 will provide high-quality digital data to terminal controllers in terminal environments. It will also provide a more reliable replacement for aging analog radars like ASR-7 and ASR-8; it will also provide digitized radar data for the new automation systems such as STARS. In addition, ASR-11 will provide six levels of weather information, a significant improvement over the current two levels. The ASR-11 program is a joint program with DOD—that is, DOD is managing the program to joint specifications, and FAA will provide DOD with the funds to procure 112 units. ASR-11 is a nondevelopmental item.

The in-service decision was made in 2003, and the radar is being deployed to 108 sites. The ASR-11 program is scheduled to be rebaselined for cost and schedule in fiscal year 2005.

Contractor: Raytheon.

ASR-11 Scope, Schedule, and Cost

Date	Number of facilities receiving ASR-11	Projected date for first deployment	Projected date for last deployment	Estimated cost (F&E)
March 2002	112	2000	2005	$743.3 million
July 2004	112	2003	2013	$891.7 million
Total change	0	3 years	8 years	$148.4 million

Source: GAO's presentation of FAA data.

Risks and Challenges

The Capital Investment Plan does not support the service as required in the current Acquisition Program Baseline, which could put the program in jeopardy.

2

Integrated Terminal Weather System (ITWS)

Purpose and Status

ITWS provides automated weather information for use by air traffic controllers and supervisors in airport terminal airspace (60 miles around the airport.) It provides products that require no meteorological interpretation to air traffic controllers, air traffic managers, pilots, and airlines. ITWS provides a comprehensive current weather situation and highly accurate forecasts of expected weather conditions for the next 30 minutes.

Current FAA plans call for the installation of 34 systems that will service various airports. Six systems are operational, and feedback from users is satisfactory. In May 2004, the ATO Executive Council rebaselined the program to include a weather-forecasting capability in the production baseline, a new requirement to provide operational support for the New York prototype, and change the operations and maintenance cost baseline for the program. However, the council did not include additional funding, and therefore, in order to stay within the capital improvement program's (CIP) funding levels, the program has proposed to defer 12 of the planned 34 systems installations.

Contractor: Raytheon.

Baseline Changes to ITWS Scope, Schedule, and Cost

Date	Number of facilities receiving ITWS	Projected date for first deployment	Projected date for last deployment	Estimated cost (F&E)
June 1997	34	Sep 01 – Mar 02	Jan 03 – Jul 03	$276.1 million
August 2001	34	December 2002	May 2004	$282.2 million
May 2004	34	December 2002	2009+	$288.3 million
Total change	0	1+ years	6+ years	$12.2 million

Source: GAO's presentation of FAA data.

Risks and Challenges

Funding issues –The program requested and obtained approval to rebaseline. The baseline is being modified to incorporate the Terminal Convective Weather Forecasting (TCWF) capability into the production baseline. As directed by the ATO Executive Council, responsibility for funding operational support for the New York prototype system is also being added to the baseline. The ATO Executive Council also directed that the cost of the program remain at the current CIP funding levels for fiscal years 2005, 2006, and 2007. In order to stay within the CIP funding levels, the program proposed to defer 12 of the planned 34 systems installations.

Schedule issues – Because of constrained funding, 12 airports will not receive ITWS capabilities until after 2009.

3

Local Area Augmentation System (LAAS)

Purpose and Status
LAAS is a precision approach and landing system that will augment the Global Positioning System (GPS) to broadcast highly accurate information to aircraft on the final phases of a flight. LAAS consists of both ground and avionics components. Ground components include GPS reference receivers, which monitor and track GPS signals; very-high-frequency transmitters for broadcasting the LAAS signal to aircraft; and ground station equipment, which generates precision approach data and is housed at or near an airport. Aircraft will be equipped with avionics to receive LAAS signals. FAA's fiscal year 2005 budget eliminated funding for LAAS, and remaining fiscal year 2004 funds will continue to validate LAAS requirements and address radio frequency interference issues. FAA officials will reconsider national deployment when more research results are completed.

Baseline Changes to LAAS Schedule and Cost

Date	Projected date for first deployment	Projected date for last deployment	Estimated cost (F&E)
January 1998	2002	TBD	$530.1 million
September 1999	2003	TBD	$696.1 million
Total change	1 year		+$166 million

Source: GAO presentation of FAA data.

Risks and Challenges
Cost issues – LAAS cost estimates are not reliable, reflecting inadequate requirements development in the early stages of the program, a lack of understanding of a mission degradation issue, incomplete software development, and an unrealistic development schedule. Schedule issues – The LAAS schedule was not realistic. Specifically, FAA lacked an understanding of the integrity requirement and software development, which were the two biggest technological maturity issues facing the LAAS program. Performance Issues – FAA has not resolved the integrity requirement that ensures pilots are alerted in a timely manner when the LAAS signal is not reliable. FAA has not been able to prove that the system is safe during solar storms. An analysis of the effects of solar storms on the LAAS signal's integrity is under way, but an atmospheric monitoring device that could address this issue may not be available until fiscal year 2009.

Next Generation Air/Ground Communications (NEXCOM)

Purpose and Status

The Next Generation Air/Ground Communications (NEXCOM) project is to replace the existing analog ATC communications system with a new digital system that would have greater capabilities. The initial development, of a multimodal digital radio (MDR), is to be followed by the development of aircraft avionics and ground systems. NEXCOM is expected to increase the number of available communications channels, provide simultaneous voice and data transmission between controllers and pilots, and require a digital form of authentication, designed to prevent "phantom controllers" from gaining access to the communications system. FAA plans to deploy 6,000 MDR pairs (a radio pair is one receiver and one transmitter) during the first phase, which will provide voice channels to aircraft in the en route environment.

NEXCOM completed Independent Operational Test and Evaluation assessment of the radio component at the Santa Barbara, California, Remote Center Air/Ground Communications facility, and radios were approved for in-service and national deployment in July 2004. The avionics component's development is scheduled to be completed by 2006. However, proposed funding cuts to FAA's fiscal year 2005 budget required the termination of the ground station development, which would enable communications in the more efficient digital mode.

Contractor: ITT for MDR.

Baseline Changes to NEXCOM Scope, Schedule, and Cost

Date	Number of radio pairs deployed	Date first site Initial Operating Capability	Date of In-Service Decision	Estimated cost (F&E)
May 2000	6,000	July 2002	October 2002	$318.40 million[a]
February 2004	6,000	March 2004	July 2004	$318.40 million
Total change	0	20 months	21 months	$0

Source: GAO presentation of FAA data.

[a]Estimated cost is only for the NEXCOM MDR. The NEXCOM ground station contract was canceled in March 2004 and is being terminated.

Risks and Challenges

5

Schedule issues—FAA planned to base the MDR on a nondevelopmental item (NDI), and the initial schedule allowed only limited development. However, FAA's requirement that communications channels be free of signal interference ("quiet channels") was more demanding than the NDI solution was capable of achieving. As a result, further development was necessary, delaying the initial operational capability and in-service decision by 21 months.

Performance—The NEXCOM radio meets its operational requirement for coverage. However, to achieve this requirement FAA determined that the NEXCOM radios would have to achieve the same power output level (50 watts) that the existing radios produced. The contractor is delivering radios that put out no more than 34 watts per channel. This posed an "unacceptable consequence" and FAA performed additional tests or flights checks and determined that the reduced power would not adversely affect operations and has approved the use of the lower-output radios.

6

Advanced Technologies and Oceanic Procedures (ATOP)

Purpose and Status

The Advanced Technologies and Oceanic Procedures (ATOP) program introduces new controller workstations, data-processing equipment, and software designed to enhance the control and flow of oceanic air traffic to and from the United States. ATOP processes aircraft position updates automatically, whereas currently, oceanic traffic control operations are performed manually and updated via paper flight strips. ATOP is designed to present flight data "electronically" in a format similar to these paper strips.

ATOP completed operational testing at its first site, the Oakland Air Route Traffic Control Center (ARTCC) and achieved initial operational capability (IOC) on June 30, 2004. Currently, ATOP is in limited use for 4 hours a day 5 days a week in one of nine sectors under Oakland's control. Plans to fully transition ATOP to all nine sectors depend upon feedback from the initial trials and sector-by-sector capabilities. Other operational considerations still to be resolved are additional staff needs, ATOP's training schedule, and coordination with North American Aerospace Defense Command on an interface device. FAA is currently in the early phases of installing ATOP at the New York ARTCC and is scheduled to achieve IOC in March 2005. Additional software that will incorporate radar data into ATOP is under development and scheduled to be completed by November 2004. This software is expected to be operational at the final site, the Anchorage ARTCC, in March 2006.

Contractor: Lockheed Martin Transportation and Security Solutions.

Baseline Changes ATOP Scope, Schedule, and Cost

Date	Number of facilities receiving ATOP	Date for first deployment	Date for last deployment site	Estimated cost (F&E)
May 2001 (baseline)	3	June 2004 Oakland ARTCC	March 2006	$548.2 million
July 2004	3	June 2004	March 2006	$548.2 million
Total change	0	None	None	$0

Source: GAO presentation of FAA data.

Risks and Challenges

7

Cost issues—Although the contractor's costs to develop ATOP have grown by approximately $20 million, FAA is not responsible for these cost increases because it has a fixed-price contract arrangement with the contractor.

Schedule issues— ATOP achieved its initial operational capability milestone of June 2004 but a more aggressive development schedule was agreed to with the ATOP contractor to achieve this milestone by April 2003 or 14 months earlier. An ATOP Assessment Team determined that the contractor could not achieve this earlier date due poor requirements development, unrealistic schedule estimates, and inadequate evaluation by the contractor of the software complexity. The development delay has exacerbated the scheduled transition from the current oceanic system to the ATOP and would cost an additional $4 million a year to operate and maintain the old system until ATOP is fully operational. Program officials told us they were not certain when the transition could be achieved because several operational issues needed to be resolved including ATOP operational trials sector by sector, training schedule, and filling new controller positions, and budgetary allocations to support these activities.

8

En Route Automation Modernization (ERAM)

Purpose and Status

The En Route Automation Modernization (ERAM) program will enable air traffic controllers to provide ATC services to users of en route airspace (generally, high-altitude airspace at 10,000 feet or above). Services provided to users include separation, routing, and advisory services needed to meet FAA's mission of providing safe, efficient, and reliable air traffic management. Specifically, ERAM is to replace the hardware and software in the current en route Host computer system, the direct-access radar channel, and associated infrastructure. This replacement will result in the installation of new system en route automation architecture at each air route traffic control center (ARTCC). In concert with other en route programs, ERAM will modernize the en route infrastructure to provide a supportable, open-standards-based system that will be the basis for future capabilities and enhancements. ERAM is to be deployed at 20 ARTCCs in the continental United States.

FAA awarded a letter contract to Lockheed Martin in December 2002. To date, ERAM has not breached any JRC cost or schedule parameters. However, the ERAM program is highly software intensive, requiring the writing of over 1 million lines of software code. In addition, Lockheed Martin is behind schedule because of software design and production control issues that Lockheed expects to resolve. Lockheed Martin officials stated that it does not expect any downstream impact from the current negative schedule variance of about $1 million.

Contractor: Lockheed Martin Transportation and Security Solutions.

Baseline Changes to ERAM Scope, Schedule, and Cost

Date	Number of facilities receiving ERAM	Projected date for first deployment	Projected date for last deployment	Estimated cost (F&E and O&M)
June 2003	20	December 2009	December 2010	$3.649 billion
Total change	None	None	None	None

Source: GAO's presentation of FAA data.
[Need another set of data to determine any change.]

Risks and Challenges

Software Issues – Software development is one of ERAM's major risk items. The ERAM program is a high-risk effort because of its size and the amount of software code – over 1 million lines of software code expected. Lockheed Martin is experiencing cost variances because of software engineering difficulties. According to its cost performance report, software engineering costs are being hampered by lower productivity than originally planned and by software code growth across the program. However, according to FAA officials, these additional software development costs can be easily absorbed within the contractor's management reserve that is currently on the contract.

9

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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)(6). 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 responding manually to questions regarding that submission is estimated at two hours. For SBA employees, 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 Mentor-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.

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for Industrial Base Policy shall submit to the appropriate committees a report on activities undertaken pursuant to this section.

(2) IMPLEMENTATION PLAN FOR 2019 SMALL BUSINESS STRATEGY.—Not later than June 1, 2021, the Secretary of Defense shall submit an implementation plan for the small business strategy required under section 2283 of title 10, United States Code, and dated October 1, 2019, including an identification of specific responsible individuals and organizations, milestones and metrics, and resources to support activities identified in the implementation plan.

(d) SMALL BUSINESS DEFINED.—In this section, the term ''small business'' has the meaning given by the Secretary of Defense, except that such term shall include prime contractors and subcontractors (at any tier).

SEC. 862. TRANSFER OF VERIFICATION OF SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY VETERANS OR SERVICE-DISABLED VETERANS TO THE SMALL BUSINESS ADMINISTRATION.

(a) TRANSFER DATE.—For purposes of this section, the term ''transfer date'' means the date that is 2 years after the date of enactment of this Act.

(b) AMENDMENT TO AND TRANSFER OF VETERAN-OWNED AND SERVICE-DISABLED VETERAN-OWNED BUSINESS DATABASE.—

(1) AMENDMENT OF VETERAN-OWNED AND SERVICE-DISABLED VETERAN-OWNED BUSINESS DATABASE.—Effective on the transfer date, section 8127 of title 38, United States Code, is amended—

(A) in subsection (e), by striking ''the Secretary under subsection (f)'' and inserting ''the Administrator under section 36 of the Small Business Act'';

(B) in subsection (f)—

(i) by striking ''the Secretary'' each place it appears, except in the last place it appears in paragraph (2)(A), and inserting ''the Administrator'';

(ii) in paragraph (1), by striking ''small business concerns owned and controlled by veterans with service-connected disabilities'' and inserting ''small business concerns owned and controlled by service-disabled veterans'';

(iii) in paragraph (2)—

(I) in subparagraph (A)—

(aa) by striking ''to access'' and inserting ''to obtain from the Secretary of Veterans Affairs''; and

(bb) by inserting '', United States Code,'' after ''title 5''; and

(II) by striking subparagraph (B) and inserting the following:

''(B) For purposes of this subsection—

''(i) the Secretary of Veterans Affairs shall—

''(I) verify an individual's status as a veteran or a service-disabled veteran; and

''(II) establish a system to permit the Administrator to access, but not alter, the verification of such status; and

''(ii) the Administrator shall verify—

''(I) the status of a business concern as a small business concern; and

''(II) the ownership and control of such business concern.

''(C) The Administrator may not certify a concern under subsection (b) or section 36A if the Secretary of Veterans Affairs cannot provide the verification described under subparagraph (B)(i)(I).'';

(iv) in paragraph (3), by striking ''such veterans'' and inserting ''a veteran described in paragraph (1)'';

(v) by striking paragraphs (4) and (7);

(vi) by redesignating paragraphs (5) and (6) as paragraphs (4) and (5), respectively, and redesignating paragraph (8) as paragraph (6);

(vii) in paragraph (4), as so redesignated, by striking ''The Secretary'' and inserting ''The Administrator''; and

(viii) in paragraph (6), as so redesignated—

(I) in subparagraph (A)—

(aa) by striking ''verify the status of the concern as a small business concern or the ownership or control of the concern'' and inserting ''certify the status of the concern as a small business concern owned and controlled by veterans (under section 36A) or a small business concern owned and controlled by service-

disabled veterans (under subsection (g) of this section)'';

(bb) by striking ''verification'' and inserting ''certification''; and

(cc) by striking ''the Small Business Administration (as established under section 5(i) of the Small Business Act)'' and inserting ''the Administration (as established under section 5(i))'';

(II) in subparagraph (B)—

(aa) in clause (i)—

(AA) by striking ''small business concern owned and controlled by veterans with service-connected disabilities'' and inserting ''small business concern owned and controlled by service-disabled veterans''; and

(BB) by striking ''of the Small Business Administration''; and

(bb) in clause (ii)—

(AA) by amending subclause (I) to read as follows:

"(I) the Secretary of Veterans Affairs or the Administrator; or"; and

(BB) in subclause (II), by striking "the contracting officer of the Department" and inserting "the applicable contracting officer"; and

(III) by striking subparagraph (C);

(C) by redesignating subsections (k) (relating to limitations on subcontracting) and (l) (relating to definitions) as subsections (l) and (m), respectively;

(D) by inserting after subsection (j) (relating to annual reports) the following new subsection:

"(k) ANNUAL TRANSFER FOR CERTIFICATION COSTS.—For each fiscal year, the Secretary of Veterans Affairs shall reimburse the Administrator in an amount necessary to cover any cost incurred by the Administrator for certifying small business concerns owned and controlled by veterans that do not qualify as small business concerns owned and controlled by service-disabled veterans

for the Secretary for purposes of this section and section 8128 of this title. The Administrator is authorized to accept such reimbursement. The amount of any such reimbursement shall be determined jointly by the Secretary and the Administrator and shall be provided from fees collected by the Secretary under multiple-award schedule contracts. Any disagreement about the amount shall be resolved by the Director of the Office of Management and Budget.''; and

(E) in subsection (m) (relating to definitions), as so redesignated—

(i) by redesignating paragraphs (1), (2), and (3) as paragraphs (2), (3), and (4), respectively; and

(ii) by inserting before paragraph (2), as so redesignated, the following new paragraph:

''(1) The term 'Administrator' means the Administrator of the Small Business Administration.''.

(2) TRANSFER OF REQUIREMENTS RELATING TO DATABASE TO THE SMALL BUSINESS ACT.—Effective on the transfer date, subsection (f) of section 8127 of title 38, United States Code (as amended by paragraph (1)), is transferred to section 36 of the

Small Business Act (15 U.S.C. 657f), and inserted so as to appear after subsection (e).

(3) CONFORMING AMENDMENTS.—The following amendments shall take effect on the transfer date:

(A) SMALL BUSINESS ACT.—Section 3(q)(2)(C)(i)(III) of the Small Business Act (15 U.S.C. 632(q)(2)(C)(i)(III)) is amended by striking ''section 8127(f) of title 38, United States Code'' and inserting ''section 36''.

(B) TITLE 38.—Section 8128 of title 38, United States Code, is amended by striking ''maintained by the Secretary under section 8127(f) of this title'' and inserting ''maintained by the Administrator of the Small Business Administration under section 36 of the Small Business Act''.

(c) ADDITIONAL REQUIREMENTS FOR DATABASE.—

(1) ADMINISTRATOR ACCESS TO DATABASE BEFORE THE TRANSFER DATE.—During the period between the date of the enactment of this Act and the transfer date, the Secretary of Veterans Affairs shall provide the Administrator of the Small Business Administration with access to the contents of the data-

base described under section 8127(f) of title 38, United States Code.

(2) RULE OF CONSTRUCTION.—Nothing in this section or the amendments made by this section may be construed—

(A) as prohibiting the Administrator of the Small Business Administration from combining the contents of the database described under section 8127(f) of title 38, United States Code, with other databases maintained by the Administration; or

(B) as requiring the Administrator to use any system or technology related to the database described under section 8127(f) of title 38, United States Code, on or after the transfer date to comply with the requirement to maintain a database under subsection (f) of section 36 of the Small Business Act (as transferred pursuant to subsection (b)(2) of this section).

(3) RECOGNITION OF THE ISSUANCE OF JOINT REGULATIONS.—The date specified under section 1832(e) of the National Defense Authorization Act for Fiscal Year 2017 (15 U.S.C. 632 note) shall be deemed to be October 1, 2018.

(d) PROCUREMENT PROGRAM FOR SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SERVICE-DISABLED VETERANS.—

(1) PROCUREMENT PROGRAM FOR SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SERVICE-DISABLED VETERANS.—Section 36 of the Small Business Act (15 U.S.C. 657f) is amended—

(A) by redesignating subsection (d) as paragraph (3), adjusting the margin accordingly, and transferring such paragraph to subsection (h) of such section, as added by subparagraph (F) of this paragraph, so as to appear after paragraph (2);

(B) by striking subsection (e);

(C) by redesignating subsections (a), (b), and (c) as subsections (c), (d), and (e) respectively;

(D) by inserting before subsection (c), as so redesignated, the following new subsections:

''(a) CONTRACTING OFFICER DEFINED.—For purposes of this section, the term 'contracting officer' has the meaning given such term in section 2101 of title 41, United States Code.

''(b) CERTIFICATION OF SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SERVICE-DISABLED

VETERANS.—With respect to a procurement program or preference established under this Act that applies to prime contractors, the Administrator shall—

''(1) certify the status of a concern as a small business concern owned and controlled by service-disabled veterans; and

''(2) require the periodic recertification of such status.'';

(E) in subsection (d), as so redesignated, by inserting ''certified under subsection (b)'' before ''if the contracting officer'';

(F) by adding at the end the following new subsections:

''(g) CERTIFICATION REQUIREMENT.—Notwithstanding subsection (c), a contracting officer may only award a sole source contract to a small business concern owned and controlled by service-disabled veterans or a contract on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if such a concern is certified by the Administrator as a small business concern owned and controlled by service-disabled veterans.

''(h) ENFORCEMENT; PENALTIES.—

''(1) VERIFICATION OF ELIGIBILITY.—In carrying out this section, the Administrator shall establish procedures relating to—

''(A) the filing, investigation, and disposition by the Administration of any challenge to the eligibility of a small business concern to receive assistance under this section (including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to the Administration by a small business concern under subsection (b)); and

''(B) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern under subsection (b).

''(2) EXAMINATIONS.—The procedures established under paragraph (1) shall provide for a program of examinations by the Administrator of any small business concern making a certification or providing information to the Administrator under subsection (b), to determine the veracity of any statements or information provided as part of such certification or otherwise provided under subsection (b).

''(i) PROVISION OF DATA.—Upon the request of the Administrator, the head of any Federal department or agency shall promptly provide to the Administrator such information as the Administrator determines to be necessary to carry out subsection (b) or to be able to certify the status of the concern as a small business concern owned and controlled by veterans under section 36A.''; and

(G) in paragraph (3) of subsection (h), as redesignated and transferred by subparagraph (A) of this paragraph, by inserting ''and section 36A'' before the period at the end.

(2) PENALTIES FOR MISREPRESENTATION.—Section 16 of the Small Business Act (15 U.S.C. 645) is amended—

(A) in subsection (d)(1)—

(i) in the matter preceding subparagraph (A)—

(I) by striking the comma that immediately follows another comma; and

(II) by striking '', a 'small'' and inserting '', a 'small business concern owned and controlled by service-disabled veterans', a 'small business con-

cern owned and controlled by veterans', a 'small''; and

(ii) in subparagraph (A), by striking ''9, 15, or 31'' and inserting ''8, 9, 15, 31, 36, or 36A''; and

(B) in subsection (e)—

(i) by striking the comma that immediately follows another comma; and

(ii) by striking '', a 'small'' and inserting '', a 'small business concern owned and controlled by service-disabled veterans', a 'small business concern owned and controlled by veterans', a 'small''.

(e) CERTIFICATION FOR SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY VETERANS.—The Small Business Act (15 U.S.C. 631 et seq.) is amended by inserting after section 36 the following new section:

''SEC. 36A. CERTIFICATION OF SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY VETERANS.

''(a) IN GENERAL.—With respect to the program established under section 8127 of title 38, United States Code, the Administrator shall—

''(1) certify the status of a concern as a small business concern owned and controlled by veterans; and

''(2) require the periodic recertification of such status.

''(b) ENFORCEMENT; PENALTIES.—

''(1) VERIFICATION OF ELIGIBILITY.—In carrying out this section, the Administrator shall establish procedures relating to—

''(A) the filing, investigation, and disposition by the Administration of any challenge to the eligibility of a small business concern to receive assistance under section 36 (including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to the Administration by a small business concern under subsection (a)); and

''(B) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern under subsection (a).

''(2) EXAMINATION OF APPLICANTS.—The procedures established under paragraph (1) shall provide for a program of examinations by the Administrator of any small business concern making a certification or providing information to the Administrator under subsection (a), to determine the verac-

ity of any statements or information provided as part of such certification or otherwise provided under subsection (a).''.

(f) STATUS OF SELF-CERTIFIED SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SERVICE-DISABLED VETERANS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, any small business concern (as defined under section 3 of the Small Business Act (15 U.S.C. 632)) that self-certified as a small business concern owned and controlled by service-disabled veterans (as defined in section 36 of such Act (15 U.S.C. 657f)) shall—

(A) if the concern files a certification application with the Administrator of the Small Business Administration before the end of the 1-year period beginning on the transfer date, maintain such self-certification until the Administrator makes a determination with respect to such certification; and

(B) if the concern does not file such a certification application before the end of the 1-year period beginning on the transfer date, lose, at the end of such 1-year period, any self-certification of the concern as a small business

concern owned and controlled by service-disabled veterans.

(2) NON-APPLICABILITY TO DEPARTMENT OF VETERANS AFFAIRS.—Paragraph (1) shall not apply to participation in contracts (including subcontracts) with the Department of Veterans Affairs.

(3) NOTICE.—The Administrator shall notify any small business concern that self-certified as a small business concern owned and controlled by service-disabled veterans about the requirements of this section and the amendments made by this section, including the transfer date, and make such notice publicly available, on the date of the enactment of this Act.

(g) TRANSFER OF THE CENTER FOR VERIFICATION AND EVALUATION OF THE DEPARTMENT OF VETERANS AFFAIRS TO THE SMALL BUSINESS ADMINISTRATION.—

(1) DEFINITION.—In this subsection, the term ''function''—

(A) means any duty, obligation, power, authority, responsibility, right, privilege, activity, or program; and

(B) does not include employees.

(2) ABOLISHMENT.—The Center for Verification and Evaluation of the Department of

Veterans Affairs, as defined under section 74.1 of title 38, Code of Federal Regulations, is abolished effective on the transfer date.

(3) TRANSFER OF FUNCTIONS.—Effective on the transfer date, all functions that, immediately before the transfer date, were functions of the Center for Verification and Evaluation shall be functions of the Small Business Administration.

(4) TRANSFER OF ASSETS.—So much of the property (including contracts for the procurement of property or services) and records used, held, available, or to be made available in connection with a function transferred under this subsection shall be available to the Small Business Administration at such time or times as the President directs for use in connection with the functions transferred.

(5) SAVINGS PROVISIONS.—

(A) CONTINUING EFFECT OF LEGAL DOCUMENTS.—All orders, determinations, rules, regulations, permits, agreements, grants, contracts, certificates, licenses, registrations, privileges, and other administrative actions—

(i) which have been issued, made, granted, or allowed to become effective by the President, any Federal agency or offi-

cial thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred under this subsection; and

(ii) which are in effect on the transfer date, or were final before the transfer date and are to become effective on or after the transfer date,

shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Administrator of the Small Business Administration or other authorized official, a court of competent jurisdiction, or by operation of law.

(B) PROCEEDINGS NOT AFFECTED.—The provisions of this subsection shall not affect any proceedings, including notices of proposed rulemaking, or any application for any license, permit, certificate, or financial assistance pending before the Department of Veterans Affairs on the transfer date, with respect to functions transferred by this subsection but such proceedings and applications shall be continued. Orders shall be issued in such proceedings, ap-

peals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this subsection had not been enacted, and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subparagraph shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this subsection had not been enacted.

(C) SUITS NOT AFFECTED.—The provisions of this subsection shall not affect suits commenced before the transfer date, and in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this subsection had not been enacted.

(D) NONABATEMENT OF ACTIONS.—No suit, action, or other proceeding commenced by or against the Department of Veterans Affairs, or by or against any individual in the official

capacity of such individual as an officer of the Department of Veterans Affairs, shall abate by reason of the enactment of this subsection.

(E) ADMINISTRATIVE ACTIONS RELATING TO PROMULGATION OF REGULATIONS.—Any administrative action relating to the preparation or promulgation of a regulation by the Department of Veterans Affairs relating to a function transferred under this subsection may be continued by the Administrator of the Small Business Administration with the same effect as if this subsection had not been enacted.

(F) EFFECT ON PERSONNEL.—The Secretary of Veterans Affairs shall appoint any employee represented by a labor organization accorded exclusive recognition under section 7111 of title 5, United States Code, that is affected by the transfer of functions under this subsection to a position of a continuing nature for which the employee is qualified, at a grade and compensation not lower than the current grade and compensation of the employee.

(6) REFERENCES.—Any reference in any other Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or per-

taining to a function of the Center for Verification and Evaluation that is transferred under this subsection is deemed, after the transfer date, to refer to the Small Business Administration.

(h) REPORT.—Not later than 1 year after the date of the enactment of this Act, and every 6 months thereafter until the transfer date, the Administrator of the Small Business Administration and Secretary of Veterans Affairs shall jointly submit to the Committee on Appropriations, the Committee on Small Business, and the Committee on Veterans' Affairs of the House of Representatives and the Committee on Appropriations, the Committee on Small Business and Entrepreneurship, and the Committee on Veterans' Affairs of the Senate a report on the planning for the transfer of functions and property required under this section and the amendments made by this section on the transfer date, which shall include—

(1) a discussion of whether and how the verification database and operations of the Center for Verification and Evaluation of the Department of Veterans Affairs will be incorporated into the existing certification database of the Small Business Administration;

(2) projections for the numbers and timing, in terms of fiscal year, of—

(A) already verified concerns that will come up for recertification; and

(B) self-certified concerns that are expected to apply for certification;

(3) an explanation of how outreach to veteran service organizations, the service-disabled veteran-owned and veteran-owned small business community, and other stakeholders will be conducted; and

(4) other pertinent information determined by the Administrator and the Secretary.

SEC. 863. EMPLOYMENT SIZE STANDARD REQUIREMENTS FOR SMALL BUSINESS CONCERNS.

(a) IN GENERAL.—Section 3(a)(2) of the Small Business Act (15 U.S.C. 632(a)(2)) is amended—

(1) in subparagraph (A), by inserting ''and subject to the requirements specified under subparagraph (C)'' after ''paragraph (1)''; and

(2) in subparagraph (C)—

(A) by inserting ''(including the Administration when acting pursuant to subparagraph (A))'' after ''no Federal department or agency''; and

(B) in clause (ii)(I) by striking ''12 months'' and inserting ''24 months''.

U.S. Small Business Administration

FAQs for WOSBs/EDWOSBs

CONSIDERING THE NEW WOSB FEDERAL CONTRACTING PROGRAM REGULATIONS

General Questions

1. **What is the Women-Owned Small Business Federal Contracting Program?**
   a. The Women-Owned Small Business Federal Contracting Program (WOSB Federal Contracting Program) was created to help provide a level playing field for women business owners. When buying goods and services, the federal government limits competition for certain contracts to women-owned small businesses (WOSBs) and economically disadvantaged women-owned small businesses (EDWOSBs) that participate in the U.S. Small Business Administration's (SBA) WOSB Federal Contracting Program. Becoming certified for the WOSB Federal Contracting Program means your business is eligible to compete for WOSB Federal Contracting Program set-aside contracts within eligible industries. These contracts are in industries where women-owned small businesses are underrepresented.

   Some contracts are restricted further to EDWOSBs. The SBA maintains a list of those eligible industries and their NAICS codes.

   The federal government's goal is to award at least 5 percent of all federal contract dollars to women-owned small businesses each year.

   Firms that choose not to participate in SBA's WOSB Federal Contracting Program may continue to identify as a women-owned small business in SAM.gov for the purposes of competing for other contracts. However, they WILL NOT be eligible to pursue federal contracts restricted for SBA-certified WOSBs and/or EDWOSBs.

   To review eligibility requirements for the WOSB Federal Contracting Program, firms can visit the WOSB Ready website.

2. **Why is the certification process for WOSBs and EDWOSBs changing?**
   a. The changes to the certification process will implement Congress' changes to the WOSB Federal Contracting Program, as put forth in the 2015 National Defense Authorization Act (NDAA), with new WOSB Federal Contracting Program regulations intended to enhance program oversight and effectiveness.

3. **When do the changes to the certification process go into effect?**
   a. The new WOSB Federal Contracting Program regulations were published in the Federal Register on May 11, 2020. These final regulations fully detail changes to the certification process.

4. **Will currently certified WOSBs need to recertify?**
   a. Please see the "Currently Certified WOSBs/EDWOSBs" section below or the certification table at sba.gov/wosbready to see if you will need to recertify.

5. **Is SBA going to offer a free certification process?**
   a. Yes. On July 15, 2020, firms can begin submitting applications under SBA's new, FREE online certification process for initial processing. All WOSB Federal Contracting Program participants will be required to create a new account and upload all necessary documents to demonstrate their eligibility in order to compete for WOSB Federal Contracting Program set-aside and sole-source contracts. Further instructions for the new certification process are coming soon. On October 15, 2020, SBA will begin issuing decisions on certification.

6. **Will third-party certification still be an option?**
   a. Yes, small businesses will still be able to utilize an approved Third-Party Certifier (TPC), at a cost, to obtain WOSB or EDWOSB certification.

7. **Will self-certification still be an option?**
   a. Firms must be certified in order to compete for WOSB Federal Contracting Program set-aside contracts. Once the new WOSB Federal Contracting Program regulations go into effect, you will have to either certify through SBA's new, FREE online certification process or through an approved TPC, at a cost. Self-certification will not be an option as of October 15, 2020.

8. **When and how will SBA provide us with more information about the changes to the certification process?**
   a. We will provide regular updates on sba.gov/wosbready and through email and e-newsletter updates.

9. **Whom should I contact with questions about the new certification process?**
   a. You can find resources at sba.gov/wosbready. You also can contact your local SBA regional and district office or Women's Business Center by visiting sba.gov/local-assistance.

10. **Who can qualify as a small business?**
    a. In order to qualify as a WOSB or EDWOSB, a business concern must be a small business as defined in Code of Federal Regulations (CFR) Title 13 part 121 for its primary industry classification. 13 CFR 127.200(a) and 13 CFR 121.105(a)(1) provide that a business concern must be organized for profit in order to meet the definition of a small business.

11. **Does the WOSB Federal Contracting Program have a logo I can use to market my business as a certified women-owned small business?**
    a. No, the SBA currently does not have an approved logo for usage by small businesses for the WOSB or EDWOSB certifications. However, we encourage you to include language in your marketing materials indicating that you are a WOSB-certified business.

12. **Do I need to operate in a particular NAICS code in order to demonstrate that I am a women-owned small business?**
    a. The NAICS codes are not a requirement to demonstrate that you are a women-owned small business. Your company may qualify as a women-owned small business provided that it meets the eligibility requirements. To qualify, one or more women must own and control the business. The ownership must be at least 51 percent and direct and unconditional. Regulations do not require a women-owned small business to primarily operate in an eligible NAICS code. However, if you wish to participate in set-asides for the WOSB Federal Contracting Program, you must offer services in one of the designated NAICS codes authorized for use under the WOSB Federal Contracting Program. If you do not see your NAICS codes designated for WOSB procurements, there might not be any set-aside opportunities for which you can compete at this time.

Currently Certified WOSBs/EDWOSBs

1. **I'm aware that there are upcoming changes to the WOSB Federal Contracting Program in 2020. What will be required of me?**
    a. Please note that the formal certification process for the WOSB Federal Contracting Program will be moving into a platform that will have a similar look and feel as the current certify.sba.gov. The new platform comes with technical enhancements to better manage the processing of WOSB/EDWOSB applications. All WOSB Federal Contracting Program participants will be required to create a new account and upload all necessary documents to demonstrate their eligibility. Please visit the "Application Process" section of this FAQ for further information. Additional guidance on the SBA's WOSB Federal Contracting Program will be available once the new WOSB Federal Contracting Program regulations are published. Please visit our website at sba.gov/wosbready for the most up-to-date information.

2. **I am a TPC-certified WOSB or EDWOSB. Do I need to recertify?**
    a. All firms that are certified through an approved TPC will have to create a new account in the new certification platform and upload their TPC certificate for SBA to complete initial processing. TPC-certified firms must recertify three years after the date of their most recent recertification as a TPC-certified firm.

3. **I am a self-certified WOSB or EDWOSB with active WOSB or EDWOSB set-aside contracts. Do I need to recertify?**
   a. A firm that was eligible as a WOSB or EDWOSB at the time of offer for the contract is considered a WOSB or EDWOSB throughout the life of the contract. For the purposes of contracts (including multiple award contracts) with durations of more than five years (including options), a firm must get certified by SBA or an approved TPC prior to the end of the fifth year of the contract.
   b. **NOTE:** On July 15, 2020, firms can begin submitting applications under the new certification process for initial processing. All WOSB Federal Contracting Program participants will be required to create a new account and upload all necessary documents to demonstrate their eligibility in order to compete for WOSB Federal Contracting Program set-aside and sole-source contracts. Further instructions for the new certification process are coming soon. On October 15, 2020, SBA will begin issuing decisions on certification.

4. **I am a self-certified WOSB or EDWOSB with no active contracts. Do I need to recertify?**
   a. Self-certified firms with no active contracts need to get formally certified by SBA under the updated process to compete for WOSB Federal Contracting Program set-aside contracts.

WOSBs/EDWOSBs Aspiring to Become Certified

1. **Does my status in another certification program (CVE or 8[a]) make me certified for WOSB procurements?**
   a. Evidence of certification through the Department of Veterans Affairs Center for Verification and Evaluation (CVE) or SBA's 8(a) certification, in conjunction with evidence that the applicant meets the additional eligibility requirements of a WOSB or EDWOSB, will be accepted by SBA for WOSB/EDWOSB certification. Going forward, SBA will evaluate the suitability of other potential certifiers, including new TPCs, and other government entity certifiers. Please see the certification table at sba.gov/wosbready for necessary documentation for each program.

2. **Where can I find resources to help me prepare to do business with the federal government?**
   a. Visit sba.gov/local-assistance to connect with entities such as your local SBA office or Women's Business Center that can help you prepare for doing business with the federal government.

U.S. Small Business Administration

Application Process

1. **How can I apply to become self-certified as a WOSB or EDWOSB?**
   a. Currently, the WOSB Federal Contracting Program is a self-certification program with an option to use a TPC at a cost to complete the self-certification. Once the new WOSB Federal Contracting Program regulations are enacted, you will be able to certify through a formal SBA process free of charge. Small businesses can continue to certify through approved TPCs at a cost. Additional guidance on the SBA's new certification process for the WOSB Federal Contracting Program will be available once the new regulations are published.
   b. The current self-certification process will remain available for firms until October 15, 2020, in certify.sba.gov. You can find a checklist and quick start guide to assist you in completing the application on certify.sba.gov.

2. **Once new changes are in effect for the WOSB Federal Contracting Program in 2020, how do I apply to become SBA-certified as a WOSB or EDWOSB?**
   a. The new FREE SBA certification process will transition to a new online platform for program participants that will include many technical improvements. This new platform will be available on July 15, 2020, to begin accepting applications for the SBA certification process. Further guidance on how to apply through this platform will be given when it is complete.
   b. All firms should be aware of the following:
      i. All firms, whether they are self-certified or certified by a TPC, will need to create a new account in the new certification platform.
      ii. Firms certified by a TPC will have to upload their TPC certificate for SBA to complete initial processing.
      iii. Documents in certify.sba.gov will not transfer to the new platform. Firms with documentation in certify.sba.gov should download their documents, make any necessary updates, and prepare to create a new application in the new platform.

3. **Once new changes are in effect for the WOSB Federal Contracting Program in 2020, will other certifications be accepted?**
   a. Yes, certain other certifications will be accepted. You may be required to submit additional information demonstrating evidence of your certification. Currently, the SBA will accept current 8(a) participants, approved TPC certificates, and certifications from the CVE.
      i. **Current 8(a) Program Participants**—Upload most recent annual review letter or 8(a) acceptance letter if the firm is in program year 1.
      ii. **TPC-Certified**—Upload WOSB and/or EDWOSB certificate.
      iii. **CVE**—Upload certificate and supporting documentation (based on the new WOSB Federal Contracting Program regulations).

■ i. Remove "and, if possible and practicable, the original copyright registration number;"
■ ii. Add "or the original copyright registration number" after "the title";
■ iii. Add ", or both, if possible and practicable," after "the work";
■ c. In paragraph (d), add "or by reputable courier service delivered" after "by first class mail sent" and add ", or by means of electronic transmission (such as email) if the grantee expressly consents to accept service in this manner" after "grantee or successor in title".
■ d. In paragraph (e)(1), add "preparing, serving, or seeking to record" after "Harmless errors in" and add "or that do not materially affect, in the Office's discretion, the Office's ability to record the notice" after "whichever applies,";
■ e. In paragraph (e)(2), remove "or registration number";
■ f. In paragraph (f)(1)(ii)(A), remove "will" from the first sentence and add in its place "may", remove "will" from the second sentence and add in its place "may", and add "on or" after "the date of recordation is"; and
■ g. In paragraph (f)(3), remove "all of the elements required for recordation, including the prescribed fee and, if required, the statement of service, have been" and add in its place "the notice of termination is".

Dated: June 1, 2020.

Regan A. Smith,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2020–12038 Filed 6–2–20; 8:45 am]

BILLING CODE 1410–30–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19, 42, and 52

[FAR Case 2019–004, Docket No. FAR–2019–0030, Sequence No. 1]

RIN 9000–AN87

Federal Acquisition Regulation: Good Faith in Small Business Subcontracting

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2017, which requires examples of failure to make good faith efforts to comply with a small business subcontracting plan.

DATES: Interested parties should submit written comments at the address shown below on or before August 3, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–004 to *https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2019–004". Select the link "Comment Now" that corresponds with FAR Case 2019–004. Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2019–004" on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite FAR Case 2019–004 in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at (703)605–2815, or by email at *malissa.jones@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2019–004.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement section 1821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (15 U.S.C 637 note, Pub. L. 114–328). Section 1821 requires the Small Business Administration (SBA) to amend its regulations to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA issued a rule at 84 FR 65647, November 29, 2019, to implement section 1821 of the NDAA for FY 2017. In its rule, SBA amends 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA revised 13 CFR 125.3(c)(1)(iv) to require that prime contractors with commercial subcontracting plans include indirect costs in their subcontracting goals. Other than small business concerns that have a commercial subcontracting plan report on performance through a summary subcontract report (SSR). SBA's regulations currently require that contractors using a commercial subcontracting plan must include indirect costs in their SSRs, but do not require these contractors to include indirect costs in their subcontracting goals, which leads to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

Small business subcontracting plans are required from large prime contractors when a contract is expected to exceed $700,000 ($1.5 million for construction) and has subcontracting possibilities. FAR 19.704 lists the elements of the plan, which include the contractor's goals for subcontracting to small business concerns and a description of the efforts the contractor will make to ensure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts. Failure to make a good faith effort to comply with the plan may result in the assessment of liquidated damages per FAR 52.219–16, Liquidated Damages—Subcontracting Plan.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. Inclusion of Indirect Costs in Commercial Plans

Section 19.704, Subcontracting plan requirements, and the clause at 52.219–9, Small Business Subcontracting Plan, are amended to require that all indirect costs, with certain exceptions, are included in commercial plans and SSRs.

B. Compliance With the Subcontracting Plan

Section 19.705–7, Liquidated damages, is renamed "Compliance with the subcontracting plan" and is reorganized, with paragraph headings

added to make this section easier to read and understand. This section includes examples of a good faith effort, and examples of a failure to make a good faith effort to comply with the subcontracting plan, including SBA's examples at 13 CFR 125.3(d). References to the examples in 19.705–7 are added in other sections in subparts 19.7 and 42.15. A reference to SBA's examples at 13 CFR 125.3(d), now located at FAR 19.705–7, is added in the clause at 52.219–16.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to implement a statutory requirement to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Because section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires subcontracting plans only for acquisitions valued above $700,000 ($1.5 million for construction contracts), the requirements of section 1821 of the NDAA for FY 2017 (15 U.S.C 637 note, Pub. L. 114–328) would not apply to contracts at or below the SAT. The FAR Council intends to apply the requirements of section 1821 to contracts for the acquisition of commercial items. Revisions to the clauses at FAR 52.219–9 and 52.219–16 are proposed by this rule. Discussion of these preliminary determinations is set forth below. The FAR Council will consider public feedback before making a final determination on the scope of the final rule.

A. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of commercial items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans, including commercial plans, to make a good faith effort to comply with the plans. SBA's rule did not exempt the acquisition of commercial items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of commercial items.

B. Applicability to Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of COTS items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans, including commercial plans, to make a good faith effort to comply with the plans. SBA's rule did not exempt the acquisition of COTS items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This proposed rule is not expected to be subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to implement section 1821 of the NDAA for FY 2017 (Pub. L. 114–328). Section 1821 amends the Small Business Act (15 U.S.C 637 note), to require SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with the goals and other elements in small business subcontracting plans. Additionally, SBA clarified in its regulations that large prime contractors with commercial subcontracting plans must

include indirect costs in the commercial subcontracting plan goals.

The objective of this proposed rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations, which provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA has amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA has revised 13 CFR 125.3(c)(1)(iv) to require that large prime contractors with commercial subcontracting plans include indirect costs in the commercial subcontracting plan goals. Large prime contractors that have a commercial subcontracting plan report on performance through a SSR in the Electronic Subcontracting Reporting System (eSRS). SBA's regulations and the FAR currently require that a contractor using a commercial subcontracting plan include indirect costs in its SSR. However, these regulations do not require contractors to include indirect costs in their commercial subcontracting plan goals, which leads to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

This rule may have a positive economic impact on any small business entity that wishes to participate in Federal procurement as a subcontractor. By providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, contracting officers can determine more easily whether large prime contractors have made a good faith effort to comply with their subcontracting plans and hold large prime contractors accountable for failing to make a good faith effort to comply with their subcontracting plans. More diligence in developing and meeting subcontracting goals on the part of large prime contractors could have a positive impact of giving small business concerns more opportunity to subcontract on Federal contracts. Data from the Federal Procurement Data System indicate that in FY 2018 there were 2,397 entities with 15,758 awards that required small business subcontracting plans. According to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), there are 19,596 unique entities who are subcontractors. Approximately 80 percent of the entities registered in the System for Award Management are small entities. Therefore, we estimate that 80 percent (15,677) of the subcontractors in FSRS are small entities. These small entities may benefit from this rule.

This proposed rule will require a large prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals. The benefit of requiring that indirect costs be included in subcontracting goals in commercial subcontracting plans is that it will increase the small business subcontracting goal and thus increase the amount of funds the prime contractor will subcontract to small business concerns, providing more opportunities for subcontract awards to small business concerns.

This proposed rule does not include any new reporting, recordkeeping or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit comments separately and should cite 5 U.S.C. 610 (FAR case 2019–004) in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0007, Subcontracting Plans.

List of Subjects in 48 CFR Parts 19, 42, and 52

Government procurement.

William F. Clark,

Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.

Therefore, for the reasons listed in the preamble, DoD, GSA, and NASA are proposing to amend 48 CFR parts 19, 42, and 52 to read as follows:

■ 1. The authority citation for 48 CFR parts 19, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.704 by—

■ a. Removing from paragraph (a)(6) "subcontracting goals" and adding "subcontracting goals (for commercial plans, see paragraph (d) of this section)" in its place;

■ b. Revising the introductory text of paragraph (d); and

■ c. Removing from paragraph (d)(4) "one SSR" and adding "one SSR that includes all indirect costs, except as described in paragraph (d) of this section," in its place.

The revision reads as follows:

19.704 Subcontracting plan requirements.

* * * * *

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The subcontracting goals established for a commercial plan shall include all indirect costs with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Once a contractor's commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial item. The contractor shall—

* * * * *

19.705–4 [Amended]

■ 3. Amend section 19.705–4 by removing from paragraph (c), in the fourth sentence, "faith effort" and adding "faith effort (see 19.705–7)".

■ 4. Amend section 19.705–6 by revising paragraphs (g)(1), (h), and (i) to read as follows:

19.705–6 Postaward responsibilities of the contracting officer.

* * * * *

(g) * * *

(1) Assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. See 19.705–7(b) for more information on the determination of good faith effort.

* * * * *

(h) Initiate action to assess liquidated damages in accordance with 19.705–7 upon a recommendation by the administrative contracting officer, if one is assigned, or receipt of other reliable evidence to indicate that assessing liquidated damages is warranted.

(i) Take action to enforce the terms of the contract upon receipt of a notice from the contract administration office under 19.706(f).

* * * * *

■ 5. Amend section 19.705–7 by—
■ a. Revising the section heading;
■ b. Adding a paragraph heading to paragraph (a);
■ c. Removing from paragraph (a) "small disadvantaged business" and adding "small disadvantaged business," in its place;
■ d. Revising paragraphs (b), (c), (d), and (e);
■ e. Adding a paragraph heading to the introductory text of paragraph (f);
■ f. Removing paragraph (g); and
■ g. Redesignating paragraph (h) as paragraph (f)(5).

The revisions and additions read as follows:

19.705–7 Compliance with the subcontracting plan.

(a) *General.* * * *

(b) *Determination of good faith effort.* (1) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort (see 19.701). For example, notwithstanding a contractor's diligent effort to identify and solicit offers from any of the small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's subcontracting goals. The contracting officer may consider any of the following, though not all inclusive, to be indicators of a good faith effort:

(i) Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation.

(ii) Conducting market research to identify potential small business subcontractors through all reasonable means, such as searching SAM, posting notices or solicitations on SBA's SUBNet, participating in business matchmaking events, and attending preproposal conferences.

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

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

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

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

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

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

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

(x) Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories.

(xi) Fulfilling all of the requirements of the subcontracting plan.

(2) When considered in the context of the contractor's total effort in accordance with its plan, the contracting officer may consider any of the following, though not all inclusive, to be indicators of a failure to make a good faith effort:

(i) Failure to attempt through market research to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns, through all reasonable means including outreach, industry days, or the use of Federal systems such as SBA's Dynamic Small Business Search or SUBNet systems.

(ii) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan.

(iii) Failure to submit an acceptable ISR, or the SSR, using the eSRS, or as provided in agency regulations, by the report due dates specified in 52.219–9, Small Business Subcontracting Plan.

(iv) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements.

(v) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan.

(vi) Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor;

(vii) Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government;

(viii) Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in 19.704(a)(12).

(ix) Falsifying records of subcontract awards to small business concerns.

(c) *Documentation of good faith effort.* If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to comply with the requirements of its subcontracting plan, which includes meeting its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly.

(d) *Notice of failure to make a good faith effort.* If the contracting officer decides in accordance with paragraph (b) of this section that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice in accordance with 52.219–16, Liquidated Damages—Subcontracting Plan, specifying the material breach, which may be included in the contractor's past performance information, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(e) *Payment of liquidated damages.* (1) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make

a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes. Calculations and procedures shall be in accordance with 52.219–16, Liquidated Damages—Subcontracting Plan.

(2) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal. For calculations for commercial plans see paragraph (f) of this section.

(3) Liquidated damages shall be in addition to any other remedies that the Government may have.

(f) *Commercial plans.* * * *

19.706 [Amended]

■ 6. Amend section 19.706 by removing from paragraph (f) "subcontracting plan" and adding "subcontracting plan (see 19.705–7(b) for more information on the determination of good faith effort)".

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 7. Amend section 42.1501 by redesignating paragraphs (a)(5) thru (a)(7) as paragraphs (a)(6) thru (a)(8) and adding new paragraph (a)(5) to read as follows:

42.1501 General.

(a) * * *

(5) Complying with the requirements of the small business subcontracting plan (see 19.705–7(b));

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(17)(i), (b)(17)(v), and (b)(20) to read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DATE)

* * * * *

(b) * * *

__(17)(i) 52.219–9, Small Business Subcontracting Plan (DATE) (15 U.S.C. 637(d)(4)).

* * * * *

__(v) Alternate IV (DATE) of 52.219–9.

* * * * *

__(20) 52.219–16, Liquidated Damages—Subcontracting Plan (DATE) (15 U.S.C. 637(d)(4)(F)(i)).

* * * * *

■ 9. Amend section 52.219–9 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (d)(2)(i) "subcontracts" and adding "subcontracts, including all indirect costs except as described in paragraph (g) of this clause," in its place;

■ c. Adding a new fifth sentence to paragraph (g);

■ d. Amending alternate IV by revising the date of the clause and paragraph (d)(2)(i).

The revisions and additions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (DATE)

* * * * *

(g) * * * A Contractor authorized to use a commercial subcontracting plan shall include in its subcontracting goals and in its SSR all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. * * *

* * * * *

Alternate IV (DATE). * * *

(d) * * *

(2) * * *

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan, including all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions;

* * * * *

■ 10. Amend 52.219–16 by revising the date of the clause and removing from paragraph (b) "plan, established" and adding "plan (see 19.705–7), established" in its place.

The revision reads as follows:

52.219–16 Liquidated Damages—Subcontracting Plan.

* * * * *

Liquidated Damages—Subcontracting Plan (DATE)

* * * * *

[FR Doc. 2020–10511 Filed 6–2–20; 8:45 am]

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As of: January 9, 2021 2:51 AM Z

United States v. Strock

United States Court of Appeals for the Second Circuit

September 24, 2020, Argued; December 3, 2020, Decided

Docket No. 19-4331

Reporter
2020 U.S. App. LEXIS 37734 *; 982 F.3d 51

UNITED STATES OF AMERICA, Appellant, - v. - LEE STROCK, CYNTHIA ANN GOLDE, STROCK CONTRACTING, INC., Defendants-Appellees, KENNETH CARTER, Defendant.

Prior History: The United States of America appeals from an order of the United States District Court for the Western District of New York (Geraci, C.J.) dismissing its claims under the False Claims Act ("FCA"), *31 U.S.C. § 3729 et seq.* **[*1]** , and federal common law against defendants-appellees Lee Strock, Cynthia Golde, and Strock Contracting, Inc ("SCI"). In particular, the government challenges the district court's conclusion that the complaint failed to state a claim under the FCA because it did not adequately allege that the purported misrepresentations—that Strock's business qualified as a service-disabled veteran-owned small business ("SDVOSB")—were material to the government's decision to pay that business under contracts reserved for SDVOSBs. The government also challenges the district court's conclusion that the complaint failed to allege defendants-appellees' knowledge of materiality, as well as its dismissal of the common law claims.

We conclude that the district court's finding with respect to materiality was erroneous because it was premised on too restrictive a conception of the FCA materiality inquiry set out in *Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016)*. Further, we find that the district court's conclusion that the complaint failed to allege defendants-appellees' **[*2]** knowledge was erroneous as to Lee Strock, and potentially as to SCI, but not as to Cynthia Golde. Finally, we conclude that the district court should not have dismissed the common law claims on jurisdictional grounds because it had original jurisdiction over these claims under *28 U.S.C. § 1345*. Accordingly, we AFFIRM in part, REVERSE in part, and VACATE in part the district court's dismissal of the complaint.

United States v. Strock, 2019 U.S. Dist. LEXIS 163290, 2019 WL 4640687 (W.D.N.Y., Sept. 23, 2019)

Core Terms

contracts, allegations, district court, noncompliance, government's decision, misrepresentation, defendants', veteran, bids, award a contract, first instance, service-disabled, compliance, cases, eligibility, fraudulent inducement, complaint alleges, motion to dismiss, post hoc, fraudulent, post-award, falsity, actual knowledge, knowingly, allegation of the complaint, reckless disregard, express condition, common law claim, ultimate payment, refuse to pay

Case Summary

Overview

HOLDINGS: [1]-In dismissing the government's FCA action brought under *31 U.S.C.S. § 3729(a)(1)(A)-(B)*, the district court's finding as to materiality was erroneous as it relied on an unduly restrictive understanding of the FCA materiality analysis set out in Escobar; [2]-The district court's conclusion that the complaint failed to allege knowledge was erroneous as to defendant business owner because the complaint adequately alleged that the owner acted in reckless disregard of whether the service-disabled veteran-owned small business (SDVOSB)-status requirement was material to the government's decision to pay that business under contracts reserved for SDVOSBs and that the owner had motive and opportunity to commit fraud; [3]-The FCA claims against defendant employee were properly dismissed because the complaint did not adequately plead her knowledge with the required particularity.

Outcome
Judgment affirmed in part, reversed in part, vacated in part and remanded.

LexisNexis® Headnotes

Public Contracts Law > Bids & Formation > Competitive Proposals

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > Disabled-Owned Businesses

Public Contracts Law > Business Aids & Assistance > Small Businesses

Public Contracts Law > Business Aids & Assistance > Source Preference

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > Minority-Owned Businesses

HN1[ ] **Bids & Formation, Competitive Proposals**

Several statutory provisions authorize awarding government contracts to service-disabled veteran-owned small businesses. *15 U.S.C.S. § 657f(a)* and *(b)* permit contracts to be awarded to service-disabled veteran-owned small businesses either on a sole-source basis or based on competition limited to service-disabled veteran-owned small businesses. *15 U.S.C.S. § 644(g)(1)(A)(ii)* establishes a government-wide goal that at least three percent of all contracts awarded during the fiscal year go to service-disabled veteran-owned small businesses. *38 U.S.C.S. § 8127* establishes a similar program specifically for contracts issued by the Department of Veterans Affairs.

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > Disabled-Owned Businesses

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN2[] Disabled, Disadvantaged, Minority & Women-Owned Businesses, Disabled-Owned Businesses

A service-disabled veteran-owned small business must be majority-owned by, and its management and daily operations must be controlled by, one or more service-disabled veterans. 15 U.S.C.S. § 632(q)(2)(A); 38 U.S.C.S. § 8127(k)(3). To be controlled by a service-disabled veteran means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans. 13 C.F.R. § 125.13(a).

Public Contracts Law > Bids & Formation > Competency of Parties

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > Disabled-Owned Businesses

Public Contracts Law > Business Aids & Assistance > Small Businesses

Public Contracts Law > Business Aids & Assistance > Source Preference

Public Contracts Law > Bids & Formation > Competitive Proposals

HN3[] Bids & Formation, Competency of Parties

At the time that a service-disabled veteran-owned small business concern submits its offer to perform government contracting work, it must represent to the contracting officer that it is a service-disabled veteran-owned small business. 48 C.F.R. § 19.1403(b). Where contracts have been set aside for service-disabled veteran-owned small businesses, offers received from concerns that are not service-disabled veteran-owned small businesses shall not be considered, and any award resulting from this solicitation will be made to an service-disabled veteran-owned small businesses. 48 C.F.R. § 52.219-27(b)(1), (c)(1)-(2).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Inferences & Presumptions > Inferences

HN4[] Standards of Review, De Novo Review

The appellate court reviews the district court's grant of defendants' Rule 12(b)(6) motion to dismiss de novo, accepting all factual claims in the complaint as true and drawing all reasonable inferences in the plaintiff's favor.

Business & Corporate Compliance > ... > False Claims Act > Remedies > Civil Penalties

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

Governments > Federal Government > Claims By & Against

HN5[] False Claims Act, Civil Penalties

The False Claims Act imposes liability on a person who either knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval, or who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. *31 U.S.C.S. § 3729(a)(1)(A)-(B)*. Knowingly means that a person (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information. *§ 3729(b)(1)(A)*. It requires no proof of specific intent to defraud. *§ 3729(b)(1)(B)*. Material means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. *§ 3729(b)(4)*. The government must plead its claims with plausibility and particularity under *Federal Rules of Civil Procedure 8* and *9(b)* by, for instance, pleading facts to support allegations of materiality.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

HN6 **Federal Government, Claims By & Against**

To be actionable under the False Claims Act, a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision.

Governments > Federal Government > Claims By & Against

HN7 **Federal Government, Claims By & Against**

The False Claims Act's materiality standard is demanding and looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation rather than superficial designations. Thus, a misrepresentation is not necessarily material because the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Nor is the Government's decision to expressly identify a provision as a condition of payment automatically dispositive, although it is relevant.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

HN8 **Federal Government, Claims By & Against**

Determining materiality under the False Claims Act requires an inquiry into at least the following factors: Proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated and has signaled no change in position, that is strong evidence that the requirements are not material. In addition, courts inquire into whether or not the noncompliance is minor or insubstantial.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

HN9 **Federal Government, Claims By & Against**

Under the fraudulent inducement theory, False Claims Act liability attaches not because a defendant has submitted any claim for payment that is literally false, but instead because the contract under which payment is made is procured by fraud.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Intentional Fraud

HN10 **Fraud & Misrepresentation, Intentional Fraud**

The fraudulent inducement theory is based on the notion that fraud does not spend itself with the execution of the contract, but instead taints every claim subsequently brought under the contract, rendering these claims actionably false.

Governments > Federal Government > Claims By & Against

HN11 **Federal Government, Claims By & Against**

In rejecting the view that a contractual, statutory, or regulatory provision is material only where it is expressly designated a condition of payment, and similarly rejecting the view that a provision is necessarily material where the Government would be entitled to refuse payment were it aware of the violation, Escobar eschews a materiality analysis that prioritizes the government's claims about how it would treat a requirement over how the government actually treats a requirement upon discovering a violation. Specifically, Escobar identifies as the primary example of such actual treatment the government's reaction to noncompliance when a claim for ultimate payment is made, whether it be refusal to pay claims in the mine run of cases, payment of a particular claim despite the government's actual knowledge that conditions of payment have been violated, or regular payment of a particular type of claim despite the government's knowledge of program violations. Accordingly, the government's conduct after claims arise under a contract, not merely at the time of contract award, is highly relevant to Escobar's materiality analysis.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Intentional Fraud

HN12 **Fraud & Misrepresentation, Intentional Fraud**

The fraudulent inducement theory recognizes that the government's decision to enter a contract in some sense undergirds any decision to ultimately pay claims arising under the contract.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

HN13 **Federal Government, Claims By & Against**

False Claims Act liability attaches where a defendant's misrepresentations impact government decisions about eligibility, and by extension, that False Claims Act materiality analysis can encompass a misrepresentation's impact on the government's decision to do business with a defendant in the first instance. Escobar taught that materiality

cannot rest on a single fact or occurrence as always determinative" such that consideration of both points of decision is entirely appropriate.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Intentional Fraud

Governments > Federal Government > Claims By & Against

HN14 **Fraud & Misrepresentation, Intentional Fraud**

At least in fraudulent inducement cases, the government's payment decision under Escobar encompasses both its decision to award a contract and its ultimate decision to pay under that contract.

Governments > Federal Government > Claims By & Against

HN15 **Federal Government, Claims By & Against**

The first factor that Escobar identifies as relevant to the False Claims Act's materiality standard is whether the government expressly identified a provision as a condition of payment.

Governments > Federal Government > Claims By & Against

HN16 **Federal Government, Claims By & Against**

Escobar faults a theory of materiality under the False Claims Act that places too much emphasis on whether a provision is an express condition of ultimate payment in part because such emphasis would preclude a finding of materiality in cases where a defendant misrepresented compliance with a condition of eligibility to even participate in a federal program. In other words, where a misrepresentation relates to a condition of eligibility, examining only the express conditions of ultimate payment will obscure the true materiality of a requirement.

Governments > Federal Government > Claims By & Against

HN17 **Federal Government, Claims By & Against**

The second factor of the False Claims Act's materiality standard concerns the government's response to noncompliance with the relevant contractual, statutory, or regulatory provision. Escobar directs examination of the government's reaction to noncompliance both in the mine run of cases, as well as in the particular case at issue.

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN18 **Adjudicative Facts, Verifiable Facts**

In considering a motion to dismiss for failure to state a claim, the district court is normally required to look only to the allegations on the face of the complaint. The court may consider documents that are attached to the complaint, incorporated in it by reference, integral to the complaint, or the proper subject of judicial notice.

Governments > Courts > Court Records

HN19[] Courts, Court Records

A document is integral when the complaint relies heavily upon the document's terms and effect.

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > Disabled-Owned Businesses

Public Contracts Law > Business Aids & Assistance > Small Businesses

HN20[] Disabled, Disadvantaged, Minority & Women-Owned Businesses, Disabled-Owned Businesses

Unlike mid-contract refusals to pay, engaging in post hoc enforcement does not require the government to risk delay of a project. Instead, the government needs risk only the cost of litigation, a risk that is mitigated by an opportunity to recoup the cost of a completed project. Thus, while purely post hoc enforcement actions can carry some weight in a materiality analysis, they are less probative than allegations that the government actually refuses to make payments once it determines that the service-disabled veteran-owned small business condition has been violated.

Evidence > Inferences & Presumptions > Inferences

HN21[] Inferences & Presumptions, Inferences

On a motion to dismiss, the court must draw all reasonable inferences in the plaintiff's favor.

Governments > Federal Government > Claims By & Against

HN22[] Federal Government, Claims By & Against

Under the final factor of the False Claims Act's materiality standard, the court examines whether the defendants' alleged noncompliance was substantial.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

HN23[] Federal Government, Claims By & Against

To find False Claims Act liability, it is not enough for the defendants to have presented a materially false claim; they must have done so knowingly, *31 U.S.C.S. § 3729(a)(1)(A)-(B)*, meaning with actual knowledge of the information, in deliberate ignorance of the truth or falsity of the information, or in reckless disregard of the truth or falsity of the information *§ 3729(b)(1)(A)*. In other words, the government must allege that the defendants knowingly violated a requirement that the defendants know is material to the Government's payment decision.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

HN24 **Federal Government, Claims By & Against**

Claims under the False Claims Act are subject to the particularity requirement of *Fed. R. Civ. P. 9(b)*. *Rule 9(b)* permits knowledge to be averred generally, but plaintiffs, including the government, still must plead the factual basis which gives rise to a strong inference of fraudulent intent. The requisite strong inference of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. The complaint must plead facts supporting scienter as to each defendant.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN25 **Preservation for Review, Requirements**

The appellate court generally will not review an issue the district court did not decide.

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REETUPARNA DUTTA, ESQ. (David A. Short, on the brief), Hodgson Russ LLP, Buffalo, NY for Defendant-Appellee Cynthia Ann Golde.

Judges: Before: CALABRESI, KATZMANN, and CARNEY, Circuit Judges.

Opinion by: KATZMANN

Opinion

KATZMANN, *Circuit Judge*:

This case calls upon us to address the materiality inquiry under the *False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq.*, in light of *Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016)*.

Veteran Enterprises Company, Inc. ("VECO") was putatively owned by Terry Anderson, a service-disabled veteran. VECO applied for and received millions **[*3]** of dollars of federal government contracts that are reserved for small businesses owned by service-disabled veterans (known in this context as "service-disabled veteran-owned small businesses" or "SDVOSBs"). According to the government, however, Anderson's ownership was illusory, and he never controlled or managed VECO. In fact, the government alleges, the company was controlled by defendant-appellee Lee Strock, who set up VECO as a front to funnel contract work to his company, defendant-appellee Strock Contracting, Inc. ("Strock Contracting" or "SCI"). The government filed suit under the FCA and federal common law against Strock, SCI, and Cynthia Golde, an employee of both VECO and SCI.

The United States District Court for the Western District of New York (Geraci, *C.J.*) granted defendants' motion to dismiss the government's amended complaint, concluding that the government had not adequately pleaded that the alleged misrepresentation—that VECO qualified as an SDVOSB—was material to the government's decision to make payments under the awarded contracts or that defendants knew of this materiality. Further, the district court dismissed the common law claims on jurisdictional grounds. **[*4]** Because we find that the district court's conclusion as to materiality relied on an unduly restrictive understanding of the FCA materiality analysis set out in *Escobar*, and that the complaint adequately alleges Strock's knowledge, we reverse in part. Additionally, we vacate the district court's dismissal insofar as it relied on these errors to dismiss the claims against SCI. Finally, we vacate the dismissal of the common law claims.

BACKGROUND

HN1[↑] Several statutory provisions authorize awarding government contracts to SDVOSBs. *15 U.S.C. § 657f(a)* and *(b)* permit contracts to be awarded to SDVOSBs either on a sole-source basis or based on competition limited to SDVOSBs. *15 U.S.C. § 644(g)(1)(A)(ii)* establishes a "[g]overnmentwide goal" that at least three percent of all contracts awarded during the fiscal year go to SDVOSBs. *38 U.S.C. § 8127* establishes a similar program specifically for contracts issued by the Department of Veterans Affairs ("VA").

HN2[↑] As relevant to this appeal, a SDVOSB must be majority-owned by, and its management and daily operations must be controlled by, one or more service-disabled veterans. *15 U.S.C. § 632(q)(2)(A)*; *38 U.S.C. § 8127(k)(3)*.[1] To be "controlled" by a service-disabled veteran "means that both the long-term decision[] making and the day-to-day management and administration **[*5]** of the business operations must be conducted by one or more service-disabled veterans." *13 C.F.R. § 125.13(a)*.

HN3[↑] "At the time that a service-disabled veteran-owned small business concern submits its offer" to perform government contracting work, "it must represent to the contracting officer that it is a [SDVOSB]." *48 C.F.R. § 19.1403(b)*. Where contracts "have been set aside for" SDVOSBs, "[o]ffers received from concerns that are not [SDVOSBs] shall not be considered," and "[a]ny award resulting from this solicitation will be made to a[n] [SDVOSB]." *48 C.F.R § 52.219-27(b)(1)*, *(c)(1)-(2)*; *see also* *48 C.F.R. § 852.219-10(b)(1)-(2)*.

Defendant Lee Strock is the owner of defendant Strock Contracting.[2] In 2006, Strock met defendant Terry Anderson, a service-disabled veteran. The two formed Veteran Enterprises Company, Inc. ("VECO"), with Anderson as president and 51% owner, Strock as vice-president and 30% owner, and Ken Carter as secretary and 19% owner.[3] VECO subsequently applied for and received SDVOSB recognition from the VA. Between 2008 and

[1] Prior to 2016, and throughout the time period during which the contracts at issue in this case were awarded, *section 8127* had its own definition of SDVOSB instead of incorporating *section 632*'s. *See* *38 U.S.C. § 8127(l) (2016)*. The definitions, however, are indistinguishable for purposes of this appeal.

[2] As this appeal is from a motion to dismiss, all facts are drawn from the government's Amended Complaint, which is the operative pleading.

2013, VECO was awarded over $21 million in SDVOSB-reserved contracts from the VA, the Army, and the Air Force.

According to the government, however, VECO's SDVOSB status was a sham. After another company owned by Strock lost its eligibility for a Small Business **[*6]** Administration contracting program, Strock "decided to recruit a service-disabled veteran," Anderson, "to head a company in order that Lee Strock and Strock Contracting could earn profits on federal contracts from the VA and other federal agencies that were set aside for SDVOSBs." Joint App'x 21 ¶ 30. But Anderson's leadership of VECO existed only on paper. Strock, not Anderson, controlled the day-to-day operations at VECO. Strock decided which contracts VECO would bid on; Anderson was not involved. Anderson was not given access to payroll records. He made no decisions about hiring or firing. He would "occasionally" attend meetings and perform inspections, but he did little else. *Id.* at 25-26 ¶¶ 63-64. Strock owned the building that VECO "leased" as office space, and Anderson did not even have a key to the office; defendant Cynthia Golde (or another employee) had to let him in. Nor did Anderson have access to the company email account, which nonetheless displayed his name as the sender. Although he was nominally the president, he was not the highest-paid employee; and although he was purportedly the majority shareholder, he was paid less than 5% of VECO's profits. VECO also made several "questionable" **[*7]** payments to Strock Contracting, totaling several hundred thousand dollars. *Id.* at 31 ¶ 102. The government claims that, had it known that VECO was not a bona fide SDVOSB, it would either not have awarded the contracts or would have terminated them.

The government filed suit, asserting violations of the *False Claims Act*, as well as common law fraud, unjust enrichment, and payment by mistake. The district court granted the defendants' motion to dismiss. The court concluded that the government had not pleaded with the particularity required by *Federal Rule of Civil Procedure 9(b)* that any of the individual defendants knew that VECO did not qualify as an SDVOSB, or knew that such a designation would be material to the government's decision to pay VECO. The district court further held that the complaint did not adequately plead that any misrepresentation was material for FCA purposes, reasoning that "a misrepresentation is not necessarily material to the Government's *payment decision* just because the Government would not have awarded the contract but for the misrepresentation." *Id.* at 74.[4] The district court then "decline[d] to exercise jurisdiction over the Government's common law claims." *Id.* at 75. This appeal followed.

DISCUSSION

I. Standard of Review [*8]

HN4[↑] "We review the district court's grant of defendants' *Rule 12(b)(6)* motion to dismiss *de novo*, accepting all factual claims in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *United States v. Wells Fargo & Co., 943 F.3d 588, 594 (2d Cir. 2019)*.[5]

II. The False Claims Act Counts

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[3] Mr. Carter was initially named as a defendant, but he was dismissed from this appeal after he passed away. *See* No. 19-4331, Dkt. No. 30.

[4] The district court also held that the complaint did not adequately plead a conspiracy under the *False Claims Act*. The government does not challenge this aspect of the court's ruling on appeal.

[5] Unless otherwise indicated, case quotations omit all internal quotation marks, citations, footnotes, and alterations.

A. Legal Standard

HN5[↑] The *False Claims Act* imposes liability, as relevant here, on a person who either "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." *31 U.S.C. § 3729(a)(1)(A)-(B)*. "Knowingly" means that a person "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." *Id. § 3729(b)(1)(A)*. It "require[s] no proof of specific intent to defraud." *Id. § 3729(b)(1)(B)*. "Material" means "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Id. § 3729(b)(4)*. The government must "plead [its] claims with plausibility and particularity under *Federal Rules of Civil Procedure 8* and *9(b)* by, for instance, pleading facts to support allegations of materiality." *Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2004 n.6, 195 L. Ed. 2d 348 (2016)*.

B. Materiality

We turn first to **[*9]** whether the government sufficiently alleges that defendants' misrepresentations about VECO's SDVOSB status were material. ***HN6***[↑] To be actionable under the FCA, "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision." *Id. at 1996*. The Supreme Court recently clarified this materiality requirement in *Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016)*. ***HN7***[↑] In *Escobar*, the Court explained that the FCA's "materiality standard is demanding," *id. at 2003*, and "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation," *id. at 2002*, rather than superficial designations. Thus, a misrepresentation is not necessarily material because "the Government would have the option to decline to pay if it knew of the defendant's noncompliance." *Id. at 2003*. Nor is "the Government's decision to expressly identify a provision as a condition of payment . . . automatically dispositive," although it is "relevant." *Id.* Rather, ***HN8***[↑] determining materiality requires an inquiry into at least the following factors:

> [P]roof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine **[*10]** run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 2003-04; *see also Bishop v. Wells Fargo & Co., 870 F.3d 104, 107 (2d Cir. 2017)* (per curiam). In addition, we inquire into whether or not the "noncompliance is minor or insubstantial." *Escobar, 136 S. Ct. at 2003*.

Each party argues that *Escobar* requires resolving the question of whether defendants' alleged misrepresentations were "material to the Government's payment decision" in its favor. *Escobar, 136 S. Ct. at 1996*. Central to this dispute is not, however, any disagreement over *Escobar*'s definition of the term "material," but instead its definition of the term "payment decision." *Id. at 1996*. Underlying the government's argument is its assumption that the primarily relevant "payment decision" was the government's decision to award VECO contracts in the first instance. Underlying **[*11]** defendants' claim is the assumption that the only relevant "payment decision" is the government's decision to ultimately pay claims under these contracts.

Because resolving this dispute over the meaning of "payment decision" is thus essential to our materiality analysis in this case, we address this question first. Guided by *Escobar*, and for the reasons that follow, we assign "payment decision" a broader scope than either party would. In this case, the government's "payment decision" comprised both the decision to award contracts in the first instance and the decision to ultimately pay claims under these contracts.

The government's argument that materiality must be assessed primarily with regard to the government's decision to award contracts to VECO is premised on the fact that its legal theory is one of "fraudulent inducement." ***HN9***[⬆] Under this fraudulent inducement theory, FCA liability attaches not because a defendant has submitted any claim for payment that is "literally false," but instead because "the contract under which payment [is] made is procured by fraud." *United States ex rel. Longhi v. United States, 575 F.3d 458, 467-68 (5th Cir. 2009)*; *United States ex rel. Marcus v. Hess, 317 U.S. 537, 543-45, 63 S. Ct. 379, 87 L. Ed. 443 (1943)* (finding that contractors who secured contracts through collusive bidding were liable for claims arising under those contracts **[*12]** under the FCA), *abrogated in part by statute on other grounds.*[6] ***HN10***[⬆] The theory is based on the notion that "fraud d[oes] not spend itself with the execution of the contract," but instead "taint[s]" every claim subsequently brought under the contract, rendering these claims actionably false. *Hess, 317 U.S. at 543*; *see also Longhi, 575 F.3d at 468*. The government argues that because the falsity of the claims in a fraudulent inducement case is imported from the falsity of statements made to obtain the contract in the first instance, "the appropriate focus . . . is on the likely effect of the defendant's fraud on the government's actions *at the time it awarded the contract*, not when the government subsequently paid claims." Appellant's Br. 21. In other words, on the government's view, the primarily relevant "payment decision" is the decision to award the contract, not the decision to ultimately pay a claim under the contract.

Escobar, however, precludes understanding the relevant "payment decision" in this case as so narrowly focused on the government's decision to award contracts. ***HN11***[⬆] In rejecting the view that a contractual, statutory, or regulatory provision is material **[*13]** only where it is "expressly designated a condition of payment," *136 S. Ct. at 2001*, and similarly rejecting the view that a provision is necessarily material where "the Government would be entitled to refuse payment were it aware of the violation," *id. at 2004*, *Escobar* eschews a materiality analysis that prioritizes the government's claims about how it would treat a requirement over how the government actually treats a requirement upon discovering a violation. Specifically, *Escobar* identifies as the primary example of such actual treatment the government's reaction to noncompliance when a claim for ultimate payment is made—whether it be "refus[al] to pay claims in the mine run of cases," "pay[ment of] a particular claim" despite the government's actual knowledge that conditions of payment have been violated, or "regular[] pay[ment of] a particular type of claim" despite the government's knowledge of program violations. *Id. at 2003*. Accordingly, the government's conduct after claims arise under a contract, not merely at the time of contract award, is highly relevant to *Escobar*'s materiality analysis. The government's position is thus unpersuasive.

The defendants' suggestion that the relevant "payment decision" excludes the **[*14]** government's initial decision to award a contract, however, is no better. As noted above, this approach makes little sense in a fraudulent inducement case, where a defendant's alleged misrepresentations at the time the government awarded the contract are what render any subsequent claim under that contract fraudulent at all. ***HN12***[⬆] This theory of fraud recognizes that the government's decision to enter a contract in some sense undergirds any decision to ultimately pay claims arising under the contract. *See Hess, 317 U.S. at 543* (finding contractors' misrepresentation that they satisfied a non-collusive bidding requirement material because "[t]he government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive"). As a result, other circuits addressing FCA fraudulent inducement claims have assessed materiality at least partly with regard to the government's decision to enter a relationship with a defendant in the first instance. *See, e.g.*, *United States v. Luce, 873 F.3d 999, 1008-09 (7th Cir. 2017)* (considering as part of its materiality analysis that a defendant's misrepresentation concerned a "threshold eligibility requirement that, by extension, was tied to *every*" claim); *United States ex rel. Miller v. Weston Educ., Inc., 840 F.3d 494, 504 (8th Cir. 2016)* (focusing materiality **[*15]** analysis on

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[6] *See also, e.g.*, *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc., 393 F.3d 1321, 1326, 364 U.S. App. D.C. 250 (D.C. Cir. 2005)*; *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787-88 (4th Cir. 1999)*. We implicitly approved the fraudulent inducement theory in *United States ex rel. Feldman v. van Gorp, 697 F.3d 78, 91 (2d Cir. 2012)* ("If the government made payment based on a false statement, then that is enough for liability in an FCA case, regardless of whether that false statement comes at the beginning of a contractual relationship or later."). We did so even before *Feldman, in United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94, 114-15 (2d Cir. 2010)*, *rev'd on other grounds*, *563 U.S. 401, 131 S. Ct. 1885, 179 L. Ed. 2d 825 (2011)*, when we held that the relator had stated an FCA claim by alleging that the defendant submitted false certifications with bids and thereby won a government contract.

whether a misrepresentation "influenced the government's decision to enter into its relationship with" the defendant).

More importantly, *Escobar* itself supports understanding the government's "payment decision" to include the government's initial decision to enter a contract in fraudulent inducement cases. *Escobar* rejected the notion that FCA liability is limited to instances in which a defendant violates an express condition of payment in part because such a rule would "undercut[]" the FCA by imposing no liability for "misrepresenting compliance with a condition of eligibility to even participate in a federal program when submitting a claim." *136 S. Ct. at 2002*. **HN13**[] This language strongly suggests that FCA liability attaches where a defendant's misrepresentations impact government decisions about eligibility, and by extension, that FCA materiality analysis can encompass a misrepresentation's impact on the government's decision to do business with a defendant in the first instance. This conclusion in no way contradicts *Escobar*'s focus at other points on the government's ultimate payment decision; *Escobar* taught that "materiality cannot rest on a single fact or occurrence as always determinative" **[*16]** such that consideration of both points of decision is entirely appropriate. *Id. at 2001*; *see also id. at 2003* (explaining that "proof of materiality can include, but is not necessarily limited to," the factors explicitly listed in *Escobar*). Accordingly, we reject the defendants' suggestion that the "payment decision" relevant to our materiality analysis does not include the government's decision to award VECO contracts in the first instance.

HN14[] In sum, we find that, at least in fraudulent inducement cases, the government's "payment decision" under *Escobar* encompasses both its decision to award a contract and its ultimate decision to pay under that contract. We thus assess whether the complaint sufficiently pleads materiality under the *Escobar* factors with a view to both aspects of the government's decision.

1. Whether the Requirement Was an Express Condition of Payment

HN15[] The first factor that *Escobar* identifies as relevant to materiality is whether the government "expressly identif[ied] a provision as a condition of payment." *Id. at 2003*. The district court concluded that this factor weighed against a finding of materiality here because the government "d[id] not allege that it expressly conditioned payment to VECO on VECO's **[*17]** compliance with SDVOSB contracting requirements." Joint App'x 69. While the district court was correct—as the government concedes—that SDVOSB compliance was not an express condition of ultimate payment under any government contract with the defendants, the district court erred by concluding that this fact was dispositive with regard to this first factor.

Because, as explained above, materiality must also be assessed with regard to the government's decision to award contracts to VECO in the first instance, the analysis of the first *Escobar* factor must also include the complaint's allegations that the government expressly named SDVOSB compliance as a condition of any contract award. Indeed, **HN16**[] *Escobar* faults a theory of materiality that places too much emphasis on whether a provision is an express condition of ultimate payment in part because such emphasis would preclude a finding of materiality in cases where a defendant "misrepresent[ed] compliance with a condition of eligibility to even participate in a federal program." *136 S. Ct. at 2002*. In other words, where a misrepresentation relates to a condition of eligibility, examining only the express conditions of ultimate payment will obscure the true materiality **[*18]** of a requirement. Because the government alleges that it expressly designated SDVOSB compliance a condition of contract eligibility, we thus find that this factor weighs in favor of a finding of materiality.

2. The Government's Response to Similar Misrepresentations

HN17[] The next factor concerns the government's response to noncompliance with the relevant contractual, statutory, or regulatory provision. *Escobar* directs examination of the government's reaction to noncompliance both "in the mine run of cases," as well as in the "particular" case at issue. *Id. at 2003*. We turn first to the adequacy of the complaint's allegations regarding the government's response to noncompliance after it has already awarded a contract ("post-award" conduct), and then turn to examine the government's response to noncompliance before it has awarded a contract ("pre-award" conduct).

While we agree with the district court's ultimate conclusion that the complaint's allegations about the government's post-award conduct do not strongly support a finding of materiality, our reasoning differs from that of the district

court. The complaint's primary allegation about the government's generalized post-award conduct consists of its **[*19]** claim, based on a number of Office of Inspector General reports, that "the Government has regularly prosecuted . . . parties that fraudulently obtain SDVOSB set-aside contracts." Joint App'x 46 ¶ 150. The district court discounted these allegations because defendants "cite evidence"—specifically, a 2009 Government Accountability Office ("GAO") report—suggesting that enforcement is sporadic, and because the examples of enforcement the government identified were "not all . . . FCA cases." *Id.* at 69. Neither reason is persuasive.

First, the district court's reliance on the GAO report to reach its conclusion was inappropriate. ***HN18***[↑] In considering a motion to dismiss for failure to state a claim, "the district court is normally required to look only to the allegations on the face of the complaint." *Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)*. While the court may consider documents that "are attached to the complaint," "incorporated in it by reference," "integral" to the complaint, or the proper subject of judicial notice, *id.*, none of these exceptions justifies the district court's reliance on the GAO report here. First, the GAO report was neither attached to the complaint nor incorporated by reference. Second, the GAO report was not "integral" **[*20]** to the complaint. ***HN19***[↑] As defendants acknowledge, a document is "integral" when the complaint "relies heavily upon [the document's] terms and effect." *DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010)*. Here, the complaint does not rely on the GAO report at all, so it is not "integral." Third, while the district court could have taken judicial notice of the GAO report, it should only have "do[ne] so in order to determine *what* statements [it] contained . . . *not for the truth of the matters asserted*" therein. *Roth, 489 F.3d at 509*. The district court's consideration of the GAO Report as evidence of the government's spotty post-award enforcement record was thus inappropriate in ruling on the motion to dismiss.

The district court's second justification for discounting the government's allegations that it "has regularly prosecuted, both criminally and civilly, parties that fraudulently obtain SDVOSB set-aside contracts," Joint App'x 46 ¶ 150, is unpersuasive for a different reason. The district court suggested that this allegation was not probative of materiality because "not all of" the cases the government cited in support of it "appear to be FCA cases." *Id.* at 69. The district court, however, provided no basis for the proposition that post hoc enforcement efforts, to **[*21]** the extent they are probative of materiality at all, must be from the FCA context. More importantly, the district court's focus on what kinds of post hoc enforcement actions are relevant to materiality obscures the more fundamental question of whether post hoc enforcement actions are relevant to FCA materiality analysis at all. This question was not directly addressed by *Escobar*, which focused on whether the government "consistently refuses to pay claims," not whether the government later pursues damages or criminal prosecution. *136 S. Ct. at 2003*.

Nonetheless, *Escobar* indirectly indicates that allegations of post hoc prosecutions or other enforcement actions do not carry the same probative weight as allegations of nonpayment. *Escobar* emphasized that "[t]he materiality standard is demanding," and that the government may not manufacture materiality by alleging it had an option not to pay after the fact. *Id.* Allowing the government to rely on post hoc enforcement efforts to satisfy the materiality requirement would allow the government to engage in just such materiality manufacturing, and at relatively low cost. ***HN20***[↑] Unlike mid-contract refusals to pay, engaging in post hoc enforcement does not require the **[*22]** government to risk delay of a project. Instead, the government needs risk only the cost of litigation, a risk that is mitigated by an opportunity to recoup the cost of a completed project. Thus, while purely post hoc enforcement actions can carry some weight in a materiality analysis, they are less probative than allegations that the government actually refuses to make payments once it determines that the SDVOSB condition has been violated. The government's allegations that it prosecutes those who fraudulently obtain SDVOSB set-aside contracts thus are at best only neutral with regard to a finding of materiality, particularly in light of the complaint's failure to allege even a single instance in which the government actually refused to pay a claim or terminated an existing contract based on a false SDVOSB representation.

The complaint's allegations about the post-award actions the government took in response to the defendants' particular instances of alleged noncompliance are no more indicative of materiality. Significantly, the complaint makes no allegation that the government refused to pay VECO, suspended its contracts, or debarred it from bidding on future contracts. Instead, the **[*23]** complaint alleges that the contracting officers *might* have taken steps to cease payments, terminate the contracts, or both had they learned that VECO was not a bona fide SDVOSB. Some of these allegations amount to no more than the suggestion "that the Government would have the option to decline

to pay if it knew of the defendant's noncompliance," and are thus not "sufficient for a finding of materiality." *Escobar, 136 S. Ct. at 2003*. While other allegations are less conditional and allege what the government "would have" done had it learned of the noncompliance, such inherently self-serving and unverifiable claims alone cannot be sufficient to demonstrate materiality. Thus, the complaint's allegations about the government's post-award behavior provide only weak support for a finding of materiality.

The government's allegations about its pre-award response to noncompliance, however, add some support to its allegations of materiality. ***HN21***[↑] Although the government does not specifically allege that it does not award contracts to entities it knows not to be SDVOSBs, the complaint as a whole supports such an inference. *See Wells Fargo & Co., 943 F.3d at 594* (noting that we must "draw[] all reasonable inferences in the plaintiff's favor"). The complaint **[*24]** outlines the numerous steps the government takes to ensure an applicant is an SDVOSB before awarding a contract and it identifies multiple contracting officers or specialists who allegedly would not have awarded contracts to VECO had they been aware it was not an SDVOSB. Taken together, these allegations lead to a reasonable inference that, in general, the government does not award contracts to companies that it knows not to have complied with SDVOSB requirements. This suggests that defendants' misrepresentations were material to the government's decision to enter the contract in the first instance.

Given the government's allegations that it was not aware of VECO's noncompliance, analyzing the government's response to known noncompliance in this particular case is not particularly enlightening. Strock nonetheless contends that this analysis weighs against materiality because there is evidence that the government awarded VECO contracts despite actual knowledge that VECO was not in compliance with program requirements. The only record citation Strock offers in support of this contention, however, is a claim made upon information and belief in an attorney affidavit that the defendants **[*25]** filed in support of the motion to dismiss. We once again decline Strock's invitation to consider a document that is not attached to, incorporated by, or integral to the complaint, and find that this factor has no bearing on the materiality analysis at the motion to dismiss stage of the proceedings.

In sum, the government's alleged post-award conduct in response to noncompliance provides at most weak support for materiality with regard to the government's decision to ultimately pay under the relevant contracts. The government's pre-award conduct, however, better supports materiality with regard to the government's decision to award the relevant contracts. Given both decisions are part of the government's "payment decision," these considerations taken together indicate that this factor supports materiality, if weakly.

3. Whether Noncompliance Was Minor or Insubstantial

HN22[↑] Finally, we examine whether the defendants' alleged noncompliance was substantial. *Escobar, 136 S. Ct. at 2003*. The district court held that this factor weighed against materiality because the complaint failed to allege that noncompliance with the SDVOSB condition was substantial as to the government's "payment decision," even though it might have **[*26]** been substantial with respect to the government's decision to award the contract. As previously established, however, this reasoning relies on an unduly narrow understanding of the scope of the relevant "payment decision." The complaint plausibly alleges that defendants' SDVOSB-status violation was substantial, whether viewed in light of the government's decision to award the relevant contracts or ultimately pay out under those contracts.

The government alleges that performance by an SDVOSB is at the very heart of the SDVOSB statutory and regulatory regime: "increas[ing] contracting opportunities for small business concerns owned and controlled by . . . veterans with service connected disabilities." Joint App'x 17 ¶ 17 (quoting *38 U.S.C. § 8127(a)(1)*). Further it alleges that defendants, by misrepresenting their SDVOSB status, "undercut th[is] express congressional purpose" "[b]y diverting contracts and benefits . . . intended for service-disabled veterans towards an ineligible company." *Id.* at 13 ¶ 3. These allegations, accepted as true, indicate that VECO's noncompliance was substantial from the very inception of its contracts with the government through their completion.

The defendants' attempt to minimize their **[*27]** alleged noncompliance by recasting the relevant contracts as aimed at the construction of government buildings alone is unpersuasive. First, the defendants' characterizations cannot, at the motion to dismiss stage, displace the government's well-pleaded allegations about the contracts'

purpose or the allegations that the defendants' noncompliance deprived the government of "the intended benefits of a SDVOSB receiving and performing federal contracts." *Id.* Second, the complaint's characterizations of the contracts' purpose are eminently plausible in light of Congress's own statements about the purpose of the SDVOSB statutory and regulatory regime. *See* 38 U.S.C. § 8127(a)(1). The substantiality factor thus weighs strongly in favor of materiality.

In sum, we find that two factors—the express nature of the eligibility condition and the substantiality of the defendants' alleged noncompliance—weigh firmly in favor of materiality, while the third—the government's response to noncompliance in this and other cases—only weakly supports materiality. This is enough to find that the government has plausibly alleged materiality.

C. Knowledge

HN23[] To find FCA liability, it is not enough for the defendants to have presented a **[*28]** materially false claim; they must have done so "knowingly," *see* 31 U.S.C. § 3729(a)(1)(A)-(B), meaning with "actual knowledge of the information, "in deliberate ignorance of the truth or falsity of the information," or "in reckless disregard of the truth or falsity of the information" *Id.* § 3729(b)(1)(A). In other words, the government must allege that the defendants "knowingly violated a requirement that the defendant[s] know[] is material to the Government's payment decision." *Escobar, 136 S. Ct. at 1996*.

HN24[] Claims under the FCA are subject to the particularity requirement of *Federal Rule of Civil Procedure 9(b)*. *Id. at 2004 n.6*.[7] "*Rule 9(b)* permits knowledge to be averred generally," but plaintiffs, including the government, still must "plead the factual basis which gives rise to a strong inference of fraudulent intent." *O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991)*. "The requisite strong inference of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290-91 (2d Cir. 2006)*. The complaint must plead facts supporting scienter as to each defendant. *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 695 (2d Cir. 2009)*. We address each defendant in turn.

1. Lee Strock

The district court acknowledged that the complaint alleges that Strock "decided to establish an SDVOSB **[*29]** to obtain set-aside contracts," "recruited Anderson as the 'figurehead' president," and "direct[ed]" VECO employees to submit false certifications and false claims. Joint App'x 64-65. And the court further acknowledged that facts alleged by the government "could support an inference that Strock knew that VECO did not qualify as an SDVOSB, such as that Strock gave Anderson a 51% share in VECO (the minimum required for veteran ownership), set up email addresses in Anderson's name to be managed by other employees, and established VECO for his and Strock Contracting's profit." *Id.* at 65. But the court concluded that the complaint nevertheless failed to adequately allege that Strock knew that VECO's SDVOSB status was material to the government.

We respectfully disagree. At a minimum, the complaint adequately alleges that Strock acted in reckless disregard of whether the SDVOSB-status requirement was material. First, the complaint alleges "strong circumstantial evidence of . . . recklessness" as to materiality. *Lerner, 459 F.3d at 291*. The complaint alleges that all the contract solicitations at issue prominently advised that only bids from SDVOSBs would be considered and that firms wishing to bid on such contracts must **[*30]** certify their SDVOSB status. Moreover, the complaint alleges that Strock undertook elaborate steps to make it appear that VECO was in fact in compliance with SDVOSB requirements,

[7] Strock argues that the complaint's general failure to comply with *Rule 9(b)* offers an independent ground for dismissal. But none of the purported deficiencies cited by Strock was sufficient to deprive him of the requisite "fair notice" of the government's claim, and they thus do not warrant dismissal. *United States ex rel. Chorches v. Am. Med. Response, Inc., 865 F.3d 71, 86 (2d Cir. 2017)*.

such as recruiting Terry Anderson, giving Anderson the minimum share required for veteran ownership, and setting up email addresses in Anderson's name to be managed by other employees. This is strong circumstantial evidence that Strock acted in reckless disregard of whether VECO's SDVOSB status was material to the government's decision to both award and pay out under SDVOSB contracts.

Moreover, the complaint adequately alleges that Strock had "motive and opportunity to commit fraud." *Lerner, 459 F.3d at 290*. As to motive, the complaint alleges that Strock set up VECO as an SDVOSB to replace the federal contracting opportunities he lost after Strock Contracting graduated out of the Small Business Administration contracting program. As to opportunity, the government alleges that Strock owned the building that VECO "leased" as office space and VECO made several "questionable" payments to Strock Contracting, totaling several hundred thousand dollars. In other words, Strock stood to benefit directly from VECO's success, and had the wherewithal **[*31]** to do so. Thus, the government has plausibly alleged at least that Strock acted in reckless disregard of the materiality of the SDVOSB compliance. The government has therefore met its burden with regard to Strock's knowledge.

2. Cynthia Golde

We agree with the district court, however, that the complaint does not sufficiently allege that Golde individually knew that VECO did not qualify as an SDVOSB. Some of the allegations against Golde are not indicative of such knowledge because they do not specify whether Golde was actually involved. Other allegations relate to behavior too mundane to support an inference of knowing falsity.

Further, while the complaint alleges that Golde presented bids for SDVOSB set-aside contracts and made requests for payment under such contracts, the complaint does not specify which bids were made by Golde or which representations were contained in those bids. We thus cannot infer from these allegations that Golde knowingly submitted false bids. This point is illustrated by the only invoice that the complaint specifically alleges that Golde submitted. That invoice appears to have simply included a certification that "the contract was performed in accordance with **[*32]** the specifications, terms and conditions of the contract." Joint App'x 34 ¶ 113. Such a boilerplate certification, which may not have even mentioned the SDVOSB requirement, is not likely to have alerted Golde to any noncompliance. Without any allegations about whether other documents submitted by Golde contained more explicit misrepresentations, the complaint's general allegations that Golde submitted bids or requests for payment are insufficient to allege knowledge.

A few of the allegations against Golde are slightly more suggestive of knowledge. For example, Golde was allegedly employed simultaneously by VECO and Strock Enterprises (a company related to SCI and VECO), and she discussed moving employees between the two. This could be taken as evidence that Golde was aware that VECO was just a front aimed to provide Strock access to SDVOSB contracts. But absent more specific allegations of what Golde knew of Strock's plans, this is too speculative to support a claim for fraud under *Rule 9(b)*. Similarly, the allegation that Golde "knew that Lee Strock controlled the day-to-day and long-term business operations of VECO," Joint App'x 28 ¶ 82, might support the inference that Golde knew VECO was **[*33]** not a bona fide SDVOSB. That inference, however, relies on the assumption—not supported elsewhere in the complaint—that Golde knew that SDVOSB certification requires that the veteran not only own but also control the business in question.

Absent more information about which bids Golde submitted, or the content of those bids, the complaint does not adequately plead knowledge as to Golde with the particularity required under *Rule 9(b)*. And, unlike Strock, none of the allegations establish either "motive and opportunity to commit fraud" or "strong circumstantial evidence of conscious misbehavior or recklessness." *Lerner, 459 F.3d at 290-91*. We therefore affirm the district court's dismissal of the claims against Golde.

D. Remaining Claims

In addition to the FCA claims against Strock and Golde, the district court also dismissed the complaint's FCA claim against Strock Contracting as well as its common law claims against all defendants. The district court's reasons for doing so were erroneous. First, the district court dismissed the FCA claim against Strock Contracting, which was based on a theory of vicarious liability, because it found that the complaint did not state a claim against the individual defendants. As explained, **[*34]** however, the complaint adequately states a claim against Strock.[8]

Second, the district court dismissed the government's common law claims on the ground that it could decline to exercise supplemental jurisdiction over them. However, as the government argues, and as the defendants apparently concede, the district court had original jurisdiction over these claims under *28 U.S.C. § 1345* ("[T]he district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . .").

The defendants urge that there are nonetheless alternative grounds upon which to affirm the district court's judgment as to these claims. ***HN25***[↑] However, "this Court generally will not review an issue the district court did not decide," *Macey v. Carolina Cas. Ins. Co., 674 F.3d 125, 131 (2d Cir. 2012)*, and we find that there is no reason to do so here. Accordingly, we vacate the district court's dismissal of these claims and leave it to the district court on remand to determine in the first instance whether dismissal is appropriate on any of the defendants' proposed alternative grounds.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's dismissal of the FCA counts against Golde and **REVERSE** the dismissal of the FCA counts against Strock. **[*35]** Further, we **VACATE** the dismissal of the FCA counts against Strock Contracting, Inc. and the federal common law claims against all defendants. We **REMAND** the case for the district court to consider the adequacy of the latter claims in the first instance and to conduct additional proceedings consistent with this opinion.

End of Document

[8] We express no view about the potential merit of a theory of vicarious liability, which is not a theory that has yet been adopted in our circuit.

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 124, 125, 126, and 127

RIN 3245–AG75

Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The Small Business Administration (SBA or the Agency) amends its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (WOSBs) and Economically Disadvantaged Women-Owned Small Business Concerns (EDWOSBs) participating in the Procurement Program for Women-Owned Small Business Concerns (the Program). The certification requirement applies only to those businesses wishing to compete for set-aside or sole source contracts under the Program, and to those seeking to be awarded multiple award contracts for pools reserved for WOSBs and EDWOSBs. Once this rule is effective, WOSBs and EDWOSBs that are not certified will not be eligible for contracts under the Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs. For those purposes, contracting officers would be able to accept self-certifications without requiring them to verify any documentation. In this rule, SBA implements the statutory mandate to provide certification, to accept certification from certain identified government entities, and to allow certification by SBA-approved third-party certifiers. As part of the changes necessary to implement a certification program, this final rule amends SBA's regulations with regard to continuing eligibility and program examinations. This rule also adjusts the economic disadvantage thresholds for determining whether an individual qualifies as economically disadvantaged. The new thresholds will be used for assessing the economic disadvantage of applicants to the 8(a) Business Development (BD) Program, as well as applicants seeking EDWOSB status.

DATES: This rule is effective on July 15, 2020, except for the amendments to §§ 127.300, 127.304, 127.305, the addition of § 127.351, and the amendments to §§ 127.400, 127.401, 127.403, 127.405, 127.504, 127.505, 127.603, and 127.604, which are effective on October 15, 2020. The addition of § 127.355 is delayed indefinitely and we will publish a document in the **Federal Register** announcing the effective date.

FOR FURTHER INFORMATION CONTACT: Nikki Burley, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205–6459; *nikki.burley@sba.gov.*

SUPPLEMENTARY INFORMATION: As set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), the Program authorizes Federal contracting officers to restrict competition to eligible WOSBs or EDWOSBs for Federal contracts in certain industries. Section 825 of the National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, 128 Stat. 3292 (December 19, 2014) (2015 NDAA), amended the Small Business Act to grant contracting officers the authority to award sole source awards to WOSBs and EDWOSBs. In addition, section 825 of the 2015 NDAA amended the Small Business Act to create a requirement that a concern be certified as a WOSB or EDWOSB by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the authority of section 8(m) of the Small Business Act. 15 U.S.C. 637(m)(2)(E). SBA believes that certification is also required where an agency establishes a pool of WOSBs or EDWOSBs on a multiple award contract and intends to set-aside or reserve one or more orders for WOSBs or EDWOSBs.

On September 14, 2015, SBA published in the **Federal Register** a final rule to implement the sole source authority for WOSBs and EDWOSBs. 80 FR 55019 (effective October 14, 2015). SBA did not address the certification portion of the 2015 NDAA in that final rule because its implementation could not be accomplished by merely incorporating the statutory language into the regulations and would have delayed the implementation of the sole source authority. SBA notified the public that because it did not want to delay the implementation of the WOSB sole source authority, it would implement the certification requirement through a separate rulemaking.

As part of the process to draft the regulations governing the WOSB/EDWOSB certification program, SBA published an Advance Notice of Proposed Rulemaking in the **Federal Register** on December 18, 2015 (80 FR 78984) and a proposed rule in the **Federal Register** on May 14, 2019 (84 FR 21256). The proposed rule solicited public comments to assist SBA in drafting a final rule to implement a WOSB/EDWOSB certification program. SBA received 898 comments from 307 commenters in response to the proposed rule (Regulations.Gov Docket #SBA–2019–0003). SBA has reviewed all input from interested stakeholders while drafting this rule.

The proposed rule also revised § 124.104(c) to make the economic disadvantage requirements for the 8(a) BD Program consistent with the economic disadvantage requirements for women-owned small businesses seeking EDWOSB status. The proposed change eliminated the distinction in the 8(a) BD Program for initial entry into and continued eligibility for the program.

Economic Disadvantage

Currently, the economic disadvantage criteria for EDWOSBs is $750,000, which is the same as the continuing eligibility threshold for the 8(a) BD program, but higher than the $250,000 initial eligibility threshold for that program. A concern applying for EDWOSB and 8(a) BD status simultaneously could thus be found economically disadvantaged for EDWOSB purposes, but not economically disadvantaged for the 8(a) BD Program. This result would introduce unnecessary confusion and uncertainty into the application and certification processes. To remedy this, this final rule makes economic disadvantage consistent across programs.

SBA commissioned a study to assist the Office of Business Development in defining or establishing criteria for determining what constitutes "economic disadvantage" for purposes of firms applying to the 8(a) BD program. The study concluded that the available data support an economic disadvantage threshold between $375,000 and $1.2 million. This range reflects the complexity of establishing a threshold that considers the ability of disadvantaged business owners to compete in the free enterprise system, as well as those individuals' access to credit and capital. That inherent complexity is evident in the varied economic disadvantage thresholds established by other Federal and state programs. For example, the Disadvantaged Business Enterprise Program (DBE), administered by agencies authorized by the U.S. Department of Transportation (DOT), uses a $1.32 million economic disadvantage threshold. States with similar programs for "minority and

women business enterprises" have economic disadvantage thresholds up to $1.6 million. The study commissioned by SBA did not come to a definitive conclusion on which threshold the Agency should use. One suggestion was to use a $1.1 million "unadjusted" (home and business equity included) personal net worth standard, which would be equal to a $375,000 "adjusted" (home and business equity excluded) standard. The study did not, however, consider differences in economic disadvantage between applying to the 8(a) BD program and continuing in the program once admitted, nor did it consider economic disadvantage in the context of EDWOSB eligibility. Because SBA believes that it is important to have the same economic disadvantage criteria for the 8(a) BD program as for the EDWOSB program to avoid confusion and inconsistency between the programs, SBA considered applying a $375,000 net worth standard to both the 8(a) BD and EDWOSB programs. SBA requested comments on whether the $375,000 net worth standard or the $750,000 net worth standard should be used for the EDWOSB and 8(a) BD and Programs.

In response, SBA received 146 comments that supported $750,000 as the appropriate economic disadvantage threshold. Of these, a substantial number explicitly expressed support for changing the regulations to make the economic disadvantage threshold consistent between programs, while the rest expressed support more broadly for maintaining EDWOSB's economic disadvantage threshold of $750,000. SBA did not receive any comments supporting a common $375,000 net worth standard for the EDWOSB and 8(a) BD programs. SBA also received four comments that offered alternative methods to establish an economic threshold. One argued that the standard should be variable and based on inflation, one thought the standard should be locality-based, and two suggested a tiered system. Three additional commenters opposed an economic disadvantage threshold of $750,000. One recommended an economic disadvantage threshold of $1 million, one opposed having an economic disadvantage threshold at all, and the third merely thought that $750,000 was inappropriate. SBA believes that varying the economic disadvantage threshold depending on fluid external factors such as inflation, or applying different thresholds depending on locality, would introduce too much volatility and confusion into the application process and lead to inconsistency between programs. Increasing the economic disadvantage threshold to $1 million or abolishing economic disadvantage thresholds altogether were not contemplated in the proposed rule and are not under consideration now. Based on the study's conclusion that SBA could set an economic disadvantage threshold between $375,000 and $1.2 million, stakeholders' clear affirmation of a $750,000 economic disadvantage threshold, and the preference for uniform standards across programs, SBA is keeping the EDWOSB economic disadvantage threshold and adjusting the 8(a) BD economic disadvantage thresholds accordingly.

SBA also received comments regarding how economic disadvantage would be assessed going forward. Specifically, commenters asked about whether there is any difference between the EDWOSB and the 8(a) BD regulations governing how retirement accounts are calculated when determining an economically disadvantaged individual's net worth, and if the change in the economic disadvantage threshold will affect that calculation. In light of this feedback, SBA has revised § 124.104(c)(2)(ii) and § 127.203(b)(3) in the final rule to note that retirement accounts will now be excluded from calculations of an economically disadvantaged individual's net worth, irrespective of the individual's age. SBA has previously contemplated this change, believing that it accords with the valuable public policy of incentivizing, rather than punishing, saving for retirement. It also expands the pool of potential EDWOSB and 8(a) BD participants because retirement-age small business owners will no longer be ineligible solely due to their retirement savings. Changing the EDWOSB and 8(a) BD net worth provisions now, in conjunction with the changes to the economic disadvantage threshold for both programs, furthers SBA's long-term aim of promoting regulatory consistency and continuity.

Women-Owned Small Business Certification Program

The 2015 NDAA amended the Small Business Act to require that concerns participating in the Program must be certified by SBA, a Federal agency, a state government, or an approved national certifying entity. In response, SBA proposed amending the regulations in part 127 to remove references to self-certification with respect to the award of WOSB/EDWOSB contracts. The certification requirement applies only to participants wishing to compete for set-aside or sole source contracts under the Program. Once this rule is effective, WOSBs and EDWOSBs that are not certified will not be eligible for contracts under the Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs. The final rule adds a new § 127.200(c) to make clear that a concern may continue to self-certify as a WOSB for goaling purposes. Revised § 127.300 establishes options for small business concerns seeking certification as WOSBs or EDWOSBs: Applying via SBA's free online application, submitting evidence of certification from another approved Government entity, or submitting evidence of certification from an approved third-party certifier.

SBA received over 400 comments on the proposed revisions to § 127.300(a) and (b), which detail the options for certification. Of these, 170 commenters expressed a general sentiment that there should be "a fair and unified set of requirements and application processes for all participants" and "the process of submitting an application . . . should be fully uniform and completed at *certify.sba.gov*." An additional sixteen commenters explicitly supported the proposed processes, and two commenters opposed them.

SBA shares the view that certification requirements must be fair and consistently applied. To ensure this consistency, SBA is the final authority for all of the certification processes. Congress' intent in allowing SBA to delegate certification to other authorized parties was to ensure that the public has access to the broadest range of certification options while at the same time ensuring that consistent Program eligibility requirements are met. There will naturally be differences between each of the processes because they will be administered by different entities, but the foundation for all the processes is SBA's Program eligibility requirements. Each applicant will be providing evidence to SBA that it meets these requirements; the application processes outlined in §§ 127.300–127.305 differ primarily in what kind of documentation demonstrates eligibility.

Based on the comments received, SBA understands that many stakeholders harbor reservations about the fairness and uniformity of the application process. As such, the final rule will clarify in subpart C, "Certification of WOSB or EDWOSB Status," that there is no distinction between "Certification by SBA" and "Certification by Third Party," as written in the proposed rule.

Instead, the regulations will refer to all the provisions covering the different application processes in §§ 127.300–127.305 as "Certification." SBA also removed references to SBA in the headings for §§ 127.301–127.305 so that concerns understand that the regulations apply to all applicants, regardless of how they opt to seek certification. The rules for third-party certifiers, covered extensively in new §§ 127.350–127.356, will be labeled as "Requirements for Third-Party Certifiers." SBA believes this will reaffirm that "Certification" is a unitary process, that all concerns must meet the same eligibility requirements, and that the only difference is in how they can present evidence that they have met those requirements.

SBA received four comments regarding the proposed change to § 127.300(a)(1), which specifies that concerns can apply for WOSB certification from SBA. Three commenters were supportive. The fourth opposed the provision because it believes that concerns should continue to have the option to self-certify. Because the statutory language mandates the methods for certification, SBA has no authority to retain self-certification as an option for concerns seeking to compete for WOSB and EDWOSB set-aside procurements (as noted above, concerns can still self-certify for non-WOSB and non-EDWOSB set-aside procurements, still self-identify as women-owned small businesses, and awards to firms self-identifying as WOSBs may be counted by a procuring agency towards its WOSB goal). SBA adopts the proposed language as final.

SBA received 12 comments that specifically touched on § 127.300(a)(2), which outlines the options for non-SBA, government-entity certification options. The proposed rule stated that a concern could submit evidence that it was a certified participant of the 8(a) BD Program or the DBE Program, or that it was certified as a Veteran-Owned or Service-Disabled Veteran-Owned Small Business by the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE). The Supplementary Information in the proposed rule also contemplated potentially accepting evidence that a concern participated in SBA's HUBZone Program.

The final rule removes reference to the 8(a) BD Program in § 127.300(a)(2) and instead includes it only in § 127.300(b)(2), which details EDWOSB certification. Every current 8(a) BD participant that is 51% owned and controlled by a woman or women is an EDWOSB because economic disadvantage is a component of 8(a) BD eligibility, and all EDWOSBs are WOSBs. As such, including this information in the EDWOSB certification sub-section covers both EDWOSB and WOSB participation.

The final rule also omits reference to the HUBZone Program in that section. While evidence of HUBZone participation would indicate a concern is small, it would not provide any of the other information to demonstrate WOSB/EDWOSB eligibility. Specifically, a firm need not demonstrate that it is owned and controlled by a specific individual in order to be eligible for the HUBZone program. Thus, such a certification does not include a finding by SBA of any ownership and control. The purpose of § 127.300(a)(2) and (b)(2) is to expand the options for concerns to demonstrate Program eligibility as efficiently as possible. A certification option that necessitates submitting documentation of all but one of the elements of Program eligibility does not meaningfully effectuate this purpose. Similarly, the final rule removes DBE certification from the list of options. After discussions with stakeholders, SBA concluded that evidence of DBE certification would not provide the requisite level of certainty that a concern was eligible for the Program. While the DOT DBE regulations refer back to SBA's size regulations at 13 CFR part 121, concerns would still need to provide documentation to confirm they met SBA's distinct requirements for ownership and control by one or more women, or that they met SBA's economic disadvantage criteria if they were seeking EDWOSB certification. As with HUBZone Program participation, evidence of DBE participation would not help small businesses demonstrate eligibility as efficiently and easily as possible while still ensuring the requirements are met. In contrast, the governing regulations for the CVE program (38 CFR 74.2–74.4) refer to SBA's standards for size, socioeconomic status, ownership, and control. Documentation of CVE certification, along with confirmation that the concern was owned and controlled by one or more women, would demonstrate that a concern had met all the eligibility requirements for the Program. To help concerns better understand how to demonstrate their Program eligibility with their CVE certification, the final rule details the application process in § 127.303.

SBA received 188 comments on § 127.300(a)(3), which provides that a concern may submit evidence that it has been certified as an eligible Program participant by a Third-Party Certifier. Of these, 170 stated generally that SBA should have oversight of third-party certifiers and implement standards for certifiers. SBA agrees with these commenters and §§ 127.350–127.356, discussed below, detail requirements for third-party certifiers. These commenters also requested that SBA update *SAM.gov* to reflect that they are certified, including third-party certified. SBA does not oversee *SAM.gov* but will maintain its own internal records that will reflect up-to-date information and that information will be relayed to the General Services Administration, the agency that maintains *SAM.gov*.

Fifteen commenters opposed proposed § 127.300(a)(3) for a wide variety of reasons. One commenter stated that there should not be "required" third-party certification. SBA believes that this commenter misinterpreted the rule. As outlined in the rule, there are several different certification options, and concerns are not required to choose third-party certification. Which way to seek WOSB or EDWOSB certification is a business decision up to discretion of each firm. Three commenters said all certification should be handled by SBA, rather than by third-party certifiers that may have differing standards. In response, SBA notes that Congress specifically enumerated several different certification options in the statutory language, making clear that SBA should not be the sole entity processing certification applications. However, SBA retains responsibility for overseeing the Program eligibility requirements, and these requirements are the standards by which all applicants will be assessed. Certifiers will not be able to impose their own application standards for Program applicants.

Six commenters opposed third-party certification because of the associated fees, which commenters perceived as prohibitively expensive for many small businesses. Both Congress and SBA understand the importance of ensuring certification is available to every eligible concern. As such, Congress authorized several free certification options, and SBA will not distinguish between concerns based on how they were certified. No firm will be required to pay a fee for certification. Again, it is up to each firm seeking WOSB or EDWOSB certification to determine which method of certification makes sense for it. One commenter opposed third-party certification because of the "frequency of certification" associated with third-party certifiers. Currently, third-party-

certified concerns are recertified annually. Under the new regulations, all concerns, whether certified directly by SBA or otherwise, will be required to attest to SBA annually that they remain eligible for the Program and undergo a full program examination every three years. As such, third-party-certified concerns will not face a greater administrative burden than concerns certified via other processes. SBA updated subpart D to discuss the requirements for recertification, and these changes are discussed in greater detail below.

SBA received six comments on § 127.300(b), which discusses how SBA will certify concerns as EDWOSBs. One commenter supported having an array of certification options. Two others requested clarification about how SBA will accept certification from other government entities. SBA has provided additional detail about what applicants must submit in order to demonstrate certification via non-SBA government entity certifiers in § 127.303.

SBA received seven comments related to § 127.300(b)(2), which states that a woman- or women-owned business that is a certified 8(a) BD participant qualifies as an EDWOSB. One commenter said that EDWOSB should be a "sub-set" of the 8(a) BD Program. Another commenter said that EDWOSB certification should automatically confer 8(a) BD certification. There is significant overlap between the eligibility requirements of the two programs, but they are not identical. The most important difference is that a concern can participate in the WOSB Program for as long as it is eligible, whereas participation in the 8(a) BD Program is limited to nine years. Further, the 8(a) BD Program has unique eligibility requirements that do not apply to the WOSB Program. In particular, the 8(a) BD Program requires the principal of a business to be socially disadvantaged in order to qualify for participation, and women as a group are not presumed to be socially disadvantaged. An individual seeking to qualify as socially disadvantaged based on her status as a woman must demonstrate that she personally has suffered discrimination or bias that has adversely affected her entry into or advancement in the business world. Determining whether an individual woman can demonstrate social disadvantage requires fact-specific analysis and cannot be automatically presumed. Thus, EDWOSB qualification does not automatically confer 8(a) BD qualification, even though the converse is true. In addition, the 8(a) BD certification process requires an applicant to demonstrate that it possesses the necessary "potential for success," as defined in the 8(a) BD regulations, and WOSB certification has no corresponding requirement.

Two commenters said that SBA should adjust goaling requirements so that more 8(a) BD awards are apportioned for WOSBs/EDWOSBs. Goaling thresholds are set by Congress and SBA establishes them in a way that seeks to ensure that the statutory goal is met Government-wide. Although SBA has some discretion in the setting of a particular agency's goals, SBA cannot establish goals that do not meet the overall Government-wide statutory goal. SBA is always seeking to enhance small business participation in Federal contracting and will continue to do so. One commenter suggested that the Program should mirror the outreach and public education efforts of the 8(a) BD Program because the contracting community is not aware of or familiar with WOSB and EDWOSB opportunities. SBA hopes that the increased public outreach during the rulemaking process has helped ameliorate this perceived lack of awareness and that the certification application process will further familiarize concerns with Program benefits and responsibilities. SBA adopts the proposed language as final.

One commenter opposed § 127.300(b)(3), specifically asking why veteran-owned small business that are owned and controlled by women could not be automatically certified as WOSBs, but rather had to submit additional information to SBA to be so designated. CVE eligibility is not based on gender and thus evidence of CVE certification would not automatically communicate that an applicant had necessarily satisfied all Program requirements, including 51% ownership and control by a woman or women. A CVE certification demonstrates that a firm is owned and controlled by one or more veterans or service-disabled veterans, but not necessarily by women veterans or women service-disabled veterans. The process for CVE-certified small businesses will be to demonstrate that the individuals certified to own and control the business concern are women and, if they seek EDWOSB status, that they are economically disadvantaged. CVE certification alone would also not demonstrate an applicant's economic disadvantage, which is a necessary component of EDWOSB participation. SBA adopts the proposed language as final.

SBA did not receive any comments on proposed § 127.301, which provides guidance on when concerns should apply for Program certification. As such, SBA adopts it as final in this rule. SBA did, however, receive comments regarding who will be deemed certified as a WOSB or EDWOSB upon this rule becoming effective and, therefore, be immediately eligible to be awarded set-aside and sole source WOSB and EDWOSB contracts. SBA agrees that this is an important issue that should be clarified.

Pursuant to the underlying statutory authority, a concern must be certified as a WOSB or EDWOSB in order to be awarded a WOSB or EDWOSB set-aside or sole-source contract. The change in the regulations implementing that statutory provision does not affect contracts previously awarded through the Program, so a concern that was previously awarded a WOSB or EDWOSB contract may continue to perform that contract and the procuring agency may continue to count the contract towards its WOSB goal. Once this rule is effective, however, a concern performing on a long-term WOSB or EDWOSB contract (*i.e.*, one in excess of five years) must represent that it is a certified WOSB or EDWOSB in order for the award to continue to count towards an agency's WOSB goal. For new WOSB and EDWOSB set-aside contracts, a concern must be able to demonstrate that it has applied for certification before the date it submitted a bid, and that it has not previously sought and been denied certification. For new WOSB or EDWOSB sole-source contracts, a concern must already be certified at the time it seeks to obtain the sole-source contract. In both situations, the concern must be certified prior to award. Concerns that are owned and controlled by one or more women and certified through the 8(a) BD Program, concerns that are third-party certified, and concerns that were subject to a program examination or status protest and received a concomitant positive decision in the three years prior to the rule's effective date will all be considered certified the day the rule is effective. SBA trusts this information will help concerns plan for when and how to apply for certification so that they are ready to compete for new WOSB and EDWOSB set-aside contracts and able to continue working on existing set-aside contracts without interruption.

SBA received one comment on § 127.302, which provides that concerns will apply for certification on *certify.sba.gov* or any successor system. The commenter opposed having an electronic-only application process. SBA believes that an electronic process is the most efficient and timely way to

process the number of applications SBA is expecting once the rule is effective. In today's business environment, SBA believes that every business concern seeking to contract with the Federal Government must have access to a computer and that this is the easiest and best way to transmit and process applications. SBA adopts the proposed language and will remove "from SBA" from the heading in the final rule.

SBA did not receive any comments on § 127.303, which outlines what documentation concerns must submit for certification. Based on questions and feedback received on related sections, SBA has expanded § 127.303 in the final rule. This section now refers to the documentation applicants must submit for each of the certification options detailed in § 127.300(a) and (b). This additional information is intended to help applicants better prepare their applications and will hopefully facilitate a more efficient process.

SBA received two comments on § 127.304, which discusses how SBA will process applications. Both commenters opposed the 90-day timeframe for making determinations after receipt of a completed application. Neither commenter offered an alternative timeframe that would better suit the needs of the small business community. This 90-day processing time aligns with that of the 8(a) BD and HUBZone Programs, and SBA believes that is appropriate for the WOSB Programs as well. As such, SBA adopts the proposed language as final.

SBA received eight comments on §§ 127.305 and 127.306, which dealt with how and when applicants could reapply or seek recertification after being declined or decertified. Five commenters opposed the provisions, two were supportive, and one sought clarification. The commenters in opposition vigorously disagreed with the proposed one-year "cooling-off" period, during which time a concern could not reapply for Program certification. One commenter noted that not being able to appeal or rectify a negative certification decision until a year has passed was "the worst of both worlds." In response to the comments, SBA has amended these provisions. The final rule removes proposed § 127.305 (reconsideration) and moves the language in proposed § 127.306 to that section. The final rule also amends the language in proposed § 127.306 (now § 127.305) to align with the HUBZone Program regulations, which do not have a reconsideration or appeal process and instead allow concerns to remedy their eligibility deficits and reapply after 90 days. In addition to responding to industry concerns, mirroring the HUBZone Program regulations has the added benefit of furthering SBA's aim of promoting consistency between its programs.

Requirements for Third-Party Certifiers

SBA proposed to amend subpart C of part 127 to establish procedures for Third-Party Certification in the context of a required certification program. In § 127.350, SBA proposed that all Third-Party Certifiers must be approved by SBA. Under this rule, an approved third-party certifier need not be a non-profit entity. SBA also clarified that a third-party certifier is a non-governmental entity, in contrast to the governmental certifications (8(a) BD and VA CVE) that SBA will accept for WOSB/EDWOSB certification purposes. The proposed rule also stipulated what concerns must do to be certified by a third-party certifier.

SBA received five comments on revised §§ 127.350–127.356. One commenter said that new third-party certifiers must be "credible." SBA does not have concerns about the credibility of third-party certifiers. The statutory language stipulates that only SBA-approved third-party certifiers are authorized to certify concerns. There are currently four SBA-approved third-party certifiers. In advance of effectuating the final rule, SBA has focused on providing clarity and guidance on the certification process as a whole and not on third-party certifiers specifically, but foresees expanding the list of authorized third-party certifiers in the future. All third-party certifiers participating in the Program are required to abide by both the regulations in part 127, and their agreements with SBA. SBA communicates regularly with third-party certifiers, collects monthly data about the WOSBs and EDWOSBs they work with, and periodically reviews their application processes. This is all intended to ensure that SBA's eligibility requirements are consistently applied. As such, SBA feels confident the third-party certifiers are, and will continue to be, credible partners in the certification process.

Three other commenters sought clarification on different provisions in this section. In response to § 127.353(b), one commenter suggested SBA provide language that third-party certifiers can use to advise applicants that SBA offers a free certification option. SBA agrees that providing that language would be helpful, but including it in the regulations would preclude the Agency from refining the language in response to feedback from applicants once the certification process is underway. SBA will plan to communicate with third-party certifiers in the coming months on what the advisory language should look like. Similarly, another commenter requested additional detail about what information SBA will require in reports from third-party certifiers under § 127.355(a). The proposed language was drafted deliberately to allow for SBA to make determinations about what third-party certifiers will have to submit regularly once the certification program is underway and it becomes clear what type of information would be helpful. A third commenter asked for clarification on the timeline for periodic compliance reviews, which SBA believes is adequately spelled out in § 127.355(b)(1).

Finally, several commenters opposed this section on the grounds that SBA should not allow for-profit entities to certify concerns, that there will be too many discrepancies between third-party certification and certification via other entities, and that "SBA's failure to act appropriately in the budgetary process" deprived the Program of the funds necessary to manage a certification process. On the first point, the authorizing legislation does not limit third-party certifier participation to entities that are non-profit, so going forward, SBA will not require third-party certifiers to maintain non-profit status. In response to the second concern, SBA reiterates that all certifying entities will assess applicants against the same eligibility requirements. The third point, which expressed concern that the certification program was not appropriately funded, was echoed by many commenters. All of these commenters used identical language to urge SBA to, "act immediately to move budgetary (taxpayer) funds from programs that have not been sanctioned by Congress towards the full and effective implementation of this nearly twenty-year-old Congressionally-mandated program and advise Congress of the full budget needed so that SBA may receive the necessary funding to assure this program is well run." SBA appreciates these commenters' sense of urgency about the implementation of the certification program and understands commenters' frustrations. SBA notes, however, that the requirement that a concern must be certified as a WOSB or EDWOSB in order to be awarded a set-aside or sole source contract under the Program was enacted as part of 2015 NDAA. Further, the Agency's ability to spend funds that "have not been sanctioned by Congress" is proscribed by law, and its ability to shift money

between unrelated programs is limited. SBA believes Congress is well-apprised of the scope and breadth of the certification program. The plan continues to be to stand up Program certification by leveraging existing resources.

SBA did not receive specific comments on § 127.354, but in light of the broader concerns expressed about discrepancies between third-party certification and certification by a government entity, the final rule revises the heading of this paragraph to emphasize that SBA will require third-party certifiers to follow detailed, uniform guidance to demonstrate capability to certify concerns.

Proposed § 127.357(a) permitted a concern found to be ineligible by a third-party certifier to request reconsideration and a redetermination. Proposed § 127.357(c) prohibited a declined concern from reapplying for WOSB or EDWOSB certification by SBA or a third-party certifier for a one-year period, and proposed § 127.357(d) prohibited concerns from reapplying through another third-party certifier during that time. In light of the changes to § 127.305, which shortens the reapplication timeframe from one year to 90 days, § 127.357 is omitted in the final rule. As discussed, SBA's aim is to ensure consistency and uniformity between the certification options, both as a policy matter and in response to the 168 commenters who stressed the importance of, "a fair and unified set of requirements and application processes for all participants." Allowing concerns that opt for third-party certification to seek reconsideration if they are declined would privilege them over concerns that apply for certification from SBA or another government entity, because the latter groups will not have a reconsideration option. Removing this proposed section better facilitates alignment between the certification options and is responsive to stakeholders' concerns.

SBA received eight comments on proposed § 127.400, which requires that concerns recertify eligibility every three years. Four commenters supported recertification every three years and four opposed. Of the four commenters opposed, three suggested annual recertification because that is what SBA's other programs require. SBA believes that a helpful comparison is to look at the requirements of the HUBZone Program. Per the HUBZone Program regulations at § 126.500, SBA conducts a program examination and recertification of each HUBZone concern every three years, and concerns are required to represent annually that they continue to meet all program criteria. In contrast, proposed § 127.400 would only have required WOSBs and EDWOSBs to recertify every three years. In an effort to more closely align the WOSB Program regulations with other SBA regulations, and in response to the commenters concerned that recertification every three years is insufficient, the final rule revises § 127.400 to require concerns to annually attest to SBA that they meet the Program requirements, and undergo a full program examination and recertification every three years. SBA added two examples to this section to help illustrate the recertification requirements detailed in the final rule.

Proposed § 127.401 provided that all certified concerns have an affirmative duty to notify SBA of any material changes in writing. SBA did not receive any comments on this section and adopts the proposed language as final.

Proposed § 127.402 addressed the failure of a concern to recertify every three years or to notify SBA of a material change. SBA did not receive any comments on this section. In light of the changes to the rest of this subpart, § 127.402 is omitted in the final rule and the subsequent sections have been renumbered. The information detailed in proposed § 127.402 is included in § 127.405 (formerly § 127.406) in the final rule, which discusses the consequences if SBA is unable to determine a concern's eligibility or determines that a concern is no longer eligible for the Program.

Proposed § 127.403 detailed how SBA would conduct program examinations and specifically how program examinations would change after the certification process is implemented. SBA did not receive any comments on this section. To align with the changes discussed above, SBA has renumbered sections §§ 127.403–127.406. Aside from renumbering, SBA adopts as final the language in proposed § 127.403 (now § 127.402).

Proposed § 127.404 detailed when SBA was authorized to conduct program examinations. SBA did not receive any comments on this section. SBA revised this section in the final rule to reflect that concerns will undergo program examinations every three years in accordance with the recertification process set forth in § 127.400. SBA also renumbered this section to § 127.403 in the final rule. SBA adopts as final the revised and renumbered paragraph.

Proposed § 127.405 authorized SBA to request additional information, in addition to material already submitted, when conducting a program examination. SBA did not receive any comments on this section. SBA renumbered this section to § 127.404 in the final rule. SBA adopts as final the proposed language and renumbered paragraph.

Proposed § 127.406 authorized SBA to decertify concerns that fail to provide or maintain the required certifications or documents. SBA did not receive any comments on this section. This section has been renumbered to § 127.405 in the final rule. SBA also revised this provision in the final rule to more clearly lay out the causes for which SBA can propose decertification, including a failure to follow the recertification processes in § 127.400. Paragraph (a) describes the steps SBA will take to propose decertification and how a concern must respond to a notice of proposed decertification. Paragraph (b) states that SBA's decision on decertification is final and cannot be appealed, and paragraph (c) permits concerns to reapply to the Program after decertification. SBA adopts as final the revised and renumbered paragraph.

The final rule revises § 127.503(h)(2) to confirm that if a concern cannot recertify as a WOSB or EDWOSB by the end of the fifth year of a long-term contract, the procuring agency can no longer count awards made pursuant to that contract as WOSB/EDWOSB awards. SBA's rules have long required recertification of size for contracts with a duration of more than five years. If a concern is unable to recertify its size, the contracting officer could no longer consider awards to that concern towards the procuring agency's small business goals. The Agency's intent in drafting § 127.503(h)(2), and its corresponding paragraphs in §§ 124.1015(f), 125.18(f), and 126.601(i), was to mandate that contracting officers must request that a concern recertify its status on long-term contracts, including Multiple Award Contracts. If a concern were unable to recertify its status as a WOSB, for example, the contracting officer could no longer consider awards to that concern towards the procuring agency's WOSB goals. Procuring agencies understood this was SBA's intent in drafting §§ 124.1015, 125.18(e), 126.601(h), and 127.503(h)(2), and have read them accordingly. The revision to these paragraphs in the final rule confirms that agencies correctly deduced SBA's intent and brings the regulatory text into alignment with already-existing practice, which SBA believes will provide helpful clarity to small businesses and contracting officers.

SBA proposed to remove § 127.505, as the pertinent information in this provision was already detailed in

§ 121.406(b). SBA did not receive any comments on this proposed change and finalizes the deletion in the final rule.

SBA proposed to revise § 127.604(f)(4) to clarify that concerns found to be ineligible would need to reapply, rather than request a reexamination. SBA did not receive any comments on this change and adopts the proposed language as final, except for updating a citation to the appropriate regulation for reapplication procedures (formerly at § 127.306 and now at § 127.305).

Compliance With Executive Orders 12866, 13563, 12988, 13132, and 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?

The U.S. Small Business Administration (SBA) is required by statute to administer the WOSB Federal Contract Program (WOSB Program). The Small Business Act (Act) sets forth the certification criteria for the WOSB Program. Specifically, the Act states that a WOSB or EDWOSB must, "be certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the SBA Administrator, as a small business concern owned and controlled by women." 15 U.S.C. 637(m)(2)(E).

The Federal Acquisition Regulation (FAR) and SBA regulations require that in order to be certified as a WOSB or EDWOSB a small business concern must provide documents supporting its WOSB or EDWOSB status to SBA. *See* 13 CFR 127.300 and FAR 19.1503(b)(3). The specific documents concerns are required to provide are outlined in § 127.303. The Act also states that the SBA is authorized to conduct eligibility examinations of any certified WOSB or EDWOSB, and to handle protests and appeals related to such certifications. 15 U.S.C. 637(m)(5)(A) and (5)(B).

Under the current system, WOSBs and EDWOSBs may be certified by third-party certifiers, or they may essentially self-certify and upload the required documents to *sba.certify.gov*. In order to award a WOSB set-aside or sole source contract, the contracting officer must document that the contracting officer reviewed the concern's certifications and documentation. 13 CFR 127.503(g); FAR 19.1503(b)(3). The lack of required certification, coupled with the requirement that the contracting officer must verify that documents have been uploaded, may contribute to reluctance by procuring agencies to use the program, resulting in the failure to meet the statutory goal of 5% of all prime contract dollars being awarded to WOSBs. In FY 2018, the government-wide WOSB goal of 5% was not met with actual performance at 4.75% ($22.9B). The government has only met the goal once (FY 2015). While the amount of dollars awarded to WOSBs under the set aside program is trending up, they still account for less than 0.016% of dollars awarded to WOSBs. A certification could help entice agencies to set aside more contracts for WOSBs, so that the government can meet the statutory 5% goal.

2. What are the potential benefits and costs of this regulatory action?

The benefit of this regulation is a significant improvement in the confidence of contracting officers to make Federal contract awards to eligible concerns. Under the existing system, the burden of eligibility compliance is placed upon the awarding contracting officer. Contracting officers must review the documentation of the apparent successful offeror on a WOSB or EDWOSB contract. Under this rule, the burden is placed upon SBA and/or third-party certifiers. All that a contracting officer needs to do is to verify that the concern is in fact a certified WOSB or EDWOSB in SAM. A contracting officer would not have to look at any documentation provided by a concern or prepare any internal memorandum memorializing any review. This will encourage more contracting officers to set aside opportunities for WOSB Program participants as the validation process will be controlled by SBA in both SAM and DSBS. Increased procurement awards to WOSB concerns can further close a gap of under-representation of women in industries where in the aggregate WOSB represent 12 percent of all sales in contrast with male-owned businesses that represent 79% of all sales (per SBA Office of Advocacy Issue Brief Number 13, dated May 31, 2017 *https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf*).

Another benefit of this rule is to reduce the cost associated with the time required for completing WOSB certification by replacing the WOSB Program Repository with *Certify.SBA.gov* ("Certify") in the regulation. It is also anticipated that the WOSB certification methodology and likely increased use of WOSB/EDWOSB set asides will likely increase program participation levels. Under the prior WOSB Program Repository, SBA determined that the average time required to complete the process required by the WOSB Program Repository was two hours, whereas the use of Certify requires only one hour. Across an estimated 12,347 firms, the total cost savings is significant, as discussed below. Another potential benefit is the reduction of time and costs to WOSB firms through the reduction of program participation costs. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially.

Based on the calculations below, the total estimated number of respondents (WOSBs and EDWOSBs) for this collection of information varies depending upon the types of certification that a business concern is seeking. For initial certification, the total estimated number of respondents is 9,349. The total number was calculated using the two-year average number of business concerns that have provided information through Certify from March 2016 through February 2018. For annual updates and new certifications, the total number is 12,347. For examinations and protests, the total number is 130.

Type of certification	Number of respondents	Source
Initial certification	9,349	Average annual number of respondents to Certify between March 2016 and February 2018.
New certifications each year	500	Program participation is expected to remain constant after initial year of certification, with 500 new certifications annually.
Annual updates to certification	11,847	Program participation is expected to remain constant after initial year of certification, with a reduction of 500 participants annually through attrition.
Total annual responses	12,347	Annual new certifications plus annual updates.

Each respondent submits one response at the time of initial certification and one at the time of annual update. Estimated burden hours vary depending upon the type of certification that a WOSB or EDWOSB pursues. SBA conducted a survey among a sample of entities that assist WOSBs and EDWOSBs to provide information through Certify. The majority of those surveyed stated that for initial certifications the estimated time for completion is one hour per submission. For annual updates, because of the need to submit little if any additional information, the estimated burden is 0.5 hour per submission. For examinations and protests, the estimated burden is 0.25, which is much lower because firms have already provided the documentation referred to in 13 CFR 127.303 through Certify. It is estimated that the initial certification will involve 9,349 existing participants and 2,998 new respondents in the first year. After the first year, initial certifications are expected for 500 new respondents annually with an additional 11,847 annual certifications for existing participants for a total of 12,347 participants in each succeeding year. The participant level is expected to remain stable at 12,347 participants annually with 500 new respondents and 500 attritions from the program annually. Based on the number of protests and appeals received in years past, 130 respondents are expected to participate in protests and appeals. The respondent's cost of burden hours for a five-year period and average is provided in the following table and detailed below.

COST OF BURDEN HOURS—5 YEAR COST ESTIMATE AND AVERAGE

Year	Initial—existing 1 hour at $164.23 per participant	Initial—new participants 1 hour at $164.23 per participant	Annual updates .5 hour at $164.23 per participant	Protests and appeals .25 hour at $164.23 per participant	Annual totals
Number of Program Participants					
1	9,349	2,998		130	12,477
2		500	11,847	130	12,477
3		500	11,847	130	12,477
4		500	11,847	130	12,477
5		500	11,847	130	12,477
Costs					
1	$1,535,386	$492,362		$5,337	$2,033,085
2		82,115	972,816	5,337	1,060,269
3		82,115	972,816	5,337	1,060,269
4		82,115	972,816	5,337	1,060,269
5		82,115	972,816	5,337	1,060,269
5 Year Total					6,274,161
Annual Cost Avg					1,254,832

Initial certification—transition of existing participants (one-time cost):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 9,349 × 1 hour × $164.23/hour = $1,535,386.

Initial certification—new participants (first year cost):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the costs of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 2998 × 1 hour × $164.23/hour = $492,362.

Initial certification—new participants (cost for each succeeding year after initial year):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 500 × 1 hour × $164.23/hour = $82,115.

Annual update:

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would

be equivalent to a senior manager in an average small business firm).

Total estimated burden: 11,847 × .5 hour × $164.23/hour = $72,816.

Examinations and Protests (each year):

Estimated officer's salary = $164.23/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area, plus an additional 100% to account for the cost of benefits and overhead, which would be equivalent to a senior manager in an average small business firm).

Total estimated burden: 130 × .25 hour × $164.23/hour = $5,337.

Previously, the estimated respondents' cost of burden hours was determined to be $4,066,170 for the initial year of certification and $2,120,538 in subsequent years. By successfully leveraging technology, SBA has reduced the cost of burden hours substantially, from $4,066,170 to $2,033,085 in the initial year of certification, and from $2,120,538 to $1,060,269 in subsequent years. This results in annual savings of $2,033,085 initially and $1,060,269 each year thereafter, with a total five-year savings of $6,274,161 for WOSBs to redirect as revenue generating resources to close the noted revenue disparity with male-owned businesses. SBA believes that there are no additional capital or start-up costs or operation and maintenance costs and purchases of services costs to respondents as a result of this rule because there should be no cost in setting up or maintaining systems to collect the required information. As stated previously, the information requested should be collected and retained in the ordinary course of business.

SBA estimates the cost to the government of implementing the certification program to be $3,126,184 in the initial year of certification, and approximately $2,704,140 annually thereafter. SBA is currently working to enhance its existing information technology infrastructure, Certify, to expand its capacity to support SBA's government contracting certification programs. The cost to develop the WOSB and EDWOSB certification processing systems in Certify is $1,654,000. After the initial improvements, Certify should not require a substantial investment of capital. In FY2020, SBA hired a Program Lead, Team Lead, and two Analysts, and brought on via internal transfer a third Analyst and a Marketing and Outreach specialist. The total cost of bringing onboard the new hires and backfilling the positions left vacant by the internal transfers is $1,472,184 (based on General Schedule 13 Step 1 through General Schedule 15 Step 1, Washington-Baltimore-Northern Virginia area plus 100% to account for the cost of benefits and overhead). In the future, the Program hopes to hire an additional six FTEs to further support Program Operations, the cost of which would be $1,231,956 (based on General Schedule 13 Step 1, Washington-Baltimore-Northern Virginia area plus 100% to account for the cost of benefits and overhead).

3. What are the alternatives to this rule?

This rule is required to implement specific statutory provisions which require promulgation of implementing regulations. One alternative considered would be to rely solely on third-party certifiers to certify WOSBs and EDWOSBs. However, there is a cost to small businesses for third-party certifiers. Firms submit the same documentation to third-party certifiers that would submit to SBA, but third-party certifiers charge on average $380 annually. Consequently, the cost of relying completely on third-party certifiers would be $3,552,620 a year (9,349 initial applicants × $380). If third-party certifiers were used for the anticipated increase to 12,477 annual participants, the cost would be $4,741,260. In addition, SBA maintains that certification for Federal procurement purposes is an inherently governmental function. Consequently, even if SBA utilized third-party certifiers for an initial or preliminary review, SBA or a governmental entity would still have to be involved in reviewing those certifications. In addition, there is an intended benefit of certification. The intent is to increase confidence in the eligibility of firms so that contracting officers and activities utilize the sole source authority. Although trending upwards, the government-wide WOSB goal of 5% was not met with actual performance at 4.75%. In addition, WOSB/EDWOSB set-aside and sole-source awards only accounted for 4.1% of total dollars awarded to WOSBs in FY 2018. The Federal Government has met the statutory WOSB goal of 5% of total dollars awarded to WOSBs only once (FY 2015).

Executive Order 13563

A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, are included above in the Regulatory Impact Analysis under Executive Order 12866. As part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA issued an Advance Notice of Proposed Rulemaking (ANPR) on December 18, 2015. 80 FR 78984. The ANPR solicited public comments to assist SBA in drafting a proposed rule to implement a WOSB/EDWOSB certification program. SBA received 122 comments in response to the ANPR. SBA issued a Proposed Rule in the **Federal Register** on May 14, 2019. 84 FR 21256. The Proposed Rule solicited public comments to assist SBA in drafting a final rule to implement a WOSB/EDWOSB certification program. SBA received 898 comments from 307 commenters in response to the Proposed Rule. SBA has reviewed all the comments while drafting this final rule.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

For the purpose 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13771

This rule is an Executive Order 13771 regulatory action with annualized net costs of $1,514,179 and a net present value of $21,631,135, both in 2016 dollars. Details on the estimated costs of this rule can be found in the rule's economic analysis. Table 1 summarizes the savings and costs of the first three years of implementation, with the savings and costs in Year 3 expected to continue into perpetuity. Table 2 presents the annualized savings in perpetuity using a 7% discount rate, in 2016 dollars.

TABLE 1—SCHEDULE OF COSTS/(SAVINGS) OVER 3 YEAR HORIZON, CURRENT DOLLARS

	Savings	Costs
Year 1	$(2,033,085)	$3,126,184
Year 2	(1,060,269)	2,704,140
Year 3	(1,060,269)	2,704,140

TABLE 2—ANNUALIZED SAVINGS IN PERPETUITY WITH 7% DISCOUNT RATE, 2016 DOLLARS

	Estimate
Annualized Savings	(1,058,441)
Annualized Costs	2,572,621
Annualized Net Costs	1,514,179

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

In carrying out its statutory mandate to provide oversight of certification related to SBA's WOSB Federal Contract Program, SBA is currently approved to collect information from the WOSB applicants or participants through SBA Form 2413, and for EDWOSB applicants or participants, through SBA Form 2414. (OMB Control Number 3245–0374, Certification for the Women-Owned Small Business Federal Contract Program). This collection of information also requires submission or retention of documents that support the applicant's certification. The information collected through Certify includes eligibility documents previously collected in the WOSB Repository, and information collected on SBA Form 2413 (WOSB) and SBA Form 2414 (EDWOSB). SBA revised this information collection in 2018 to establish that the Agency has discontinued these paper forms and will collect the information and supporting documents electronically through Certify, as well as to make minor changes to the requests for information.

As discussed above, this rule will fully implement the statutory requirement for small business concerns to be certified by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set-aside or sole source contract under the WOSB program. As a result of these changes, the rule eliminates the option to self-certify for WOSB/EDWOSB set-aside and sole source contracts, permits applicants to provide their CVE certification, along with documentation that they meet Program eligibility requirements, as a certification option, and clarifies the third-party certification requirements.

The clarifications for authorized Third-party certifiers impose an additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. A summary description of the reporting requirement, description of respondents, and estimate of the annual burden is provided below.

Summary Description of Compliance Information: Third-party certifiers will be required to provide SBA with monthly reports that include the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third-party certifiers are meeting their obligations or information or data that may be useful for improving the program.

Description of and Estimated Number of Respondents: There are four third-party certifiers authorized by SBA to certify WOSB and EDWOSB applicants. The four third-party certifiers will be required to submit reports to SBA monthly, for a total of 48 reports.

Respondents: 4.

Responses per respondent: 12.

Total annual responses: 48.

Preparation hours per response: 0.5 hour.

Total response burden hours: 24 hours.

Cost per hour: $67.78/hour (based on 2018 Median Pay for accountants and auditors, Bureau of Labor Statistics, plus an additional 100% to account for cost of benefits and overhead).

Total estimated annual cost burden: $1,626.72.

SBA will revise the information collection accordingly and resubmit to OMB for review and approval.

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

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines "small entity" to include "small businesses," "small organizations," and "small governmental jurisdictions." This rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect "small organizations" or "small governmental jurisdictions." SBA's contracting 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.

As stated in the regulatory impact analysis, this rule will impact approximately 9,000–12,000 women-owned small businesses. These businesses will have to apply to be certified as WOSBs or EDWOSBs to SBA or third-party certifiers in order to be eligible to be awarded any WOSB or EDWOSB set-aside contract. However, SBA has minimized the impact on WOSBs by accepting certifications already conferred by SBA (through the 8(a) BD Program or a positive determination after a status protest or program examination), VA, and third-party certifiers. The costs to WOSBs for certification should be de minimis, because the required documentation (articles of incorporation, bylaws, stock ledgers or certificates, tax records, etc.) already exists. In addition, this information is already required to be provided either to third-party certifiers, governmental certifying entities, or to SBA through Certify. SBA expects WOSBs to see a reduction in burden because under the prior WOSB Program Repository, SBA determined that the average time required to complete the process required by the WOSB Program Repository was two hours, whereas the use of Certify results requires only one hour due to technological improvements. Thus, the Administrator certifies that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

13 CFR Part 125

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

13 CFR Part 126

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

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR parts 124, 125, 126, and 127 as follows:

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

■ 1. 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), and 644.

■ 2. Amend § 124.104 as follows:
■ a. Remove the first two sentences of paragraph (c)(2) introductory text and add one sentence in their place;
■ b. Revise the first sentence of paragraph (c)(2)(ii);
■ c. Remove the first two sentences of paragraph (c)(3)(i) and add one sentence in their place; and
■ d. Revise the first sentence of paragraph (c)(4).

The additions and revisions read as follows:

§ 124.104 Who is economically disadvantaged?

* * * * *

(c) * * *

(2) * * * The net worth of an individual claiming disadvantage must be less than $750,000. * * *

* * * * *

(ii) Funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth. * * *

* * * * *

(3) * * * (i) SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the three preceding years exceeds $350,000. * * *

* * * * *

(4) * * * An individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds $6 million. * * *

■ 3. Amend § 124.1015 by adding a sentence at the end of paragraph (f)(2) to read as follows:

§ 124.1015 What are the requirements for representing SDB status, and what are the penalties for misrepresentation?

* * * * *

(f) * * *

(2) * * * If the business is unable to recertify its SDB status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 4. 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.

■ 5. Amend § 125.18 by adding a sentence at the end of paragraph (e)(2) to read as follows:

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

* * * * *

(e) * * *

(2) * * * If the business is unable to recertify its SDVO status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals.

* * * * *

PART 126—HUBZONE PROGRAM

■ 6. 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.

■ 7. Amend § 126.619 by adding a sentence at the end of paragraph (b) introductory text to read as follows:

§ 126.619 When must a certified HUBZone small business concern recertify its status for a HUBZone contract?

* * * * *

(b) * * * If the business is unable to recertify its HUBZone status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.

* * * * *

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 8. 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.

■ 9. Amend § 127.200 by adding paragraphs (c) and (d) to read as follows:

§ 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

* * * * *

(c) *WOSB and EDWOSB certifications.* (1) A concern must be certified as a WOSB or EDWOSB pursuant to § 127.300 in order to be awarded a WOSB or EDWOSB set-aside or sole-source contract.

(2) Other women-owned small business concerns that do not seek WOSB or EDWOSB set-aside or sole-source contracts may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs.

(d) *Suspension and debarment.* In order to be eligible for WOSB and EDWOSB certification and to remain certified, the concern and any of its owners must not have an active exclusion in the System for Award Management at the time of application or recertification.

■ 10. Amend § 127.203 by revising the first sentence of paragraph (b)(3) to read as follows:

§ 127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?

* * * * *

(b) * * *

(3) Funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth. * * *

* * * * *

Subpart C—[Amended]

■ 11. Subpart C is amended by adding the undesignated center heading "Certification" above § 127.300.

■ 12. Effective October 15, 2020, § 127.300 is revised to read as follows:

§ 127.300 How is a concern certified as an WOSB or EDWOSB?

(a) *WOSB certification.* (1) A concern may apply to SBA for WOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern may submit evidence to SBA that it is a women-owned and controlled small business that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation as a Service-Disabled Veteran Owned Business or Veteran-Owned Business.

(3) A concern may submit evidence that it has been certified as a WOSB by an approved Third-Party Certifier in accordance with this subpart.

(b) *EDWOSB certification.* (1) A concern may apply to SBA for EDWOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern that is a certified participant in the 8(a) BD Program and owned and controlled by one or more women qualifies as an EDWOSB.

(3) A concern may submit evidence to SBA that it is an economically disadvantaged women-owned and controlled small business that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation as a Service-Disabled Veteran Owned Business or Veteran-Owned Business.

(4) A concern may submit evidence that it has been certified as an EDWOSB by a Third-Party Certifier under this subpart.

(c) *SBA notification and designation.* If SBA determines that the concern is a qualified WOSB or EDWOSB, it will issue a letter of certification and designate the concern as a certified WOSB or EDWOSB on the Dynamic Small Business Search (DSBS) system, or successor system.

■ 13. Sections 127.301 through 127.303 are revised to read as follows:

Sec.

* * * * *

127.301 When may a concern apply for certification?

127.302 Where can a concern apply for certification?

127.303 What must a concern submit for certification?

* * * * *

§ 127.301 When may a concern apply for certification?

A concern may apply for WOSB or EDWOSB certification and submit the required information whenever it can represent that it meets the eligibility requirements, subject to the restrictions of § 127.306. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

§ 127.302 Where can a concern apply for certification?

A concern seeking certification as a WOSB or EDWOSB may apply to SBA for certification via *https://certify.sba.gov* or any successor system. Certification pages must be validated electronically or signed by a person authorized to represent the concern.

§ 127.303 What must a concern submit for certification?

(a)(1) *SBA certification.* (i) To be certified by SBA as a WOSB or EDWOSB, a concern must provide documents and information demonstrating that it meets the requirements set forth in part 127, subpart B. SBA maintains a list of the minimum required documents that can be found at *https://certify.sba.gov* or any successor system. A concern may submit additional documents and information to support its eligibility. The required documents must be provided to SBA during the application process electronically. This may include, but is not limited to, corporate records, business and personal financial records, including copies of signed Federal personal and business tax returns, and individual and business bank statements.

(ii) A concern that is certified by the 8(a) BD Program and is owned and controlled by one or more women may use documentation of its most recent annual review, or documentation of its 8(a) acceptance if it has not yet had an annual review, in support of its application for certification.

(iii) A concern that is certified through a program examination or status protest may use the positive determination from SBA as evidence for certification.

(2) *CVE certification.* (i) To be certified as a WOSB, a concern that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation may submit documentation of its most recent certification, along with documentation confirming that it is owned and controlled by one or more women, in support of its application for certification.

(ii) To be certified as an EDWOSB, a concern that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation may submit documentation of its most recent certification, along with documentation confirming that it is owned and controlled by one or more women who are economically disadvantaged in accordance with § 127.203(b)(3), in support of its application for certification.

(3) *Third-Party Certifier certification.* A concern that is certified by a Third-Party Certifier must provide a current, valid certification from an entity designated as an SBA-approved certifier.

(b) In addition to the minimum required documents, SBA may request additional information from applicants in order to verify eligibility.

(c) After submitting the required documentation, an applicant must notify SBA of any changes that could affect its eligibility.

(d) If a concern was decertified or previously denied certification, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 127.401, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

■ 14. Effective October 15, 2020, §§ 127.304 and 127.305 are revised to read as follows:

§ 127.304 How is an application for certification processed?

(a) The SBA's Director of Government Contracting (D/GC) or designee is authorized to approve or decline applications for certification. SBA must receive all required information and supporting documents before it will begin processing a concern's application. SBA will not process incomplete applications. SBA will advise each applicant within 15 calendar days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will make its determination within ninety (90) calendar days after receipt of a complete package, whenever practicable.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the

missing information would adversely affect the business concern's eligibility or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until the time the D/GC issues a decision. The decision will be based on the facts contained in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstances occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/GC may propose decertification for any EDWOSB or WOSB that fails to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) If SBA approves the application, SBA will send a written notice to the concern and update *https://certify.sba.gov* or any successor system, and update DSBS and the System for Award Management (or any successor systems) to indicate the concern has been certified by SBA as a WOSB and/or EDWOSB.

(g) A decision to deny eligibility must be in writing and state the specific reasons for denial.

(h) SBA will send a copy of the decision letter to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail address provided to have been received by the applicant concern.

(i) The decision of the D/GC to decline certification is the final agency decision. The concern can reapply for certification after ninety (90) days, as set forth in § 127.305.

§ 127.305 May declined or decertified concerns seek recertification at a later date?

(a) A concern that SBA or a third-party certifier has declined or that SBA has decertified may seek certification after ninety (90) days from the date of decline or decertification if it believes that it has overcome all of the reasons for decline or decertification and is currently eligible. A concern that has been declined may seek certification by any of the certification options listed in § 127.300.

(b) A concern found to be ineligible during a WOSB/EDWOSB status protest or program examination is precluded from applying for certification for ninety (90) days from the date of the final agency decision (the D/GC's decision if no appeal is filed or the decision of SBA's Office of Hearings and Appeals (OHA) where an appeal is filed pursuant to § 127.605).

■ 15. An undesignated center heading and § 127.350 are added to subpart C to read as follows:

Requirements for Third-Party Certifiers

§ 127. 350 What is a third-party certifier?

A third-party certifier is a non-governmental entity that SBA has authorized to certify that an applicant concern is eligible for the WOSB or EDWOSB contracting program. A third-party certifier may be a for-profit or non-profit entity. The list of SBA-approved third-party certifiers may be found on SBA's website at *sba.gov.*

■ 16. Effective October 15, 2020, § 127.351 is added to subpart C to read as follows:

§ 127.351 What third-party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?

In order for SBA to accept a third-party certification that a concern qualifies as a WOSB or EDWOSB, the concern must have a current, valid certification from an entity designated as an SBA-approved certifier. The third-party certification must be submitted to SBA through *https://certify.sba.gov* or a successor system.

■ 17. Sections 127.352 through 127.356 are added to subpart C to read as follows:

Subpart C—Certification of EDWOSB or WOSB Status

* * * * *

Sec.

§ 127.352 What is the process for becoming a third-party certifier?

SBA will periodically hold open solicitations. All entities that believe they meet the criteria to act as a third-party certifier will be free to respond to the solicitation.

§ 127.353 May third-party certifiers charge a fee?

(a) Third-party certifiers may charge a reasonable fee, but must notify applicants first, in writing, that SBA offers certification for free.

(b) The method of notification and the language that will be used for this notification must be approved by SBA. The third-party certifier may not change its method or the language without SBA approval.

§ 127.354 What requirements must a third-party certifier follow to demonstrate capability to certify concerns?

(a) All third-party certifiers must enter into written agreements with SBA. This agreement will detail the requirements that the third-party certifier must meet. SBA may terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same program eligibility requirements as set forth in subpart B of this part or if, upon review, SBA determines that the third-party certifier has demonstrated a pattern of certifying concerns that SBA later determines to be ineligible for certification.

(b) Third-party certifiers' certification process must comply with SBA-approved certification standards and track the WOSB or EDWOSB eligibility requirements set forth in subpart B of this part.

(c) In order for SBA to enter into an agreement with a third-party certifier, the entity must establish the following:

(1) It will render fair and impartial WOSB/EDWOSB Federal Contract Program eligibility determinations;

(2) It will provide the approved applicant a valid certificate for entering into the SBA electronic platform, and will retain documents used to determine eligibility for a period of six (6) years to support SBA's responsibility to conduct a status protest, eligibility examination, agency investigation, or audit of the third party determinations;

(3) Its certification process will require applicant concerns to register in SAM (or any successor system) and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as a WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under the SBA size standard corresponding to the concern's primary industry, as defined in § 121.107 of this part;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(4) It will not decline to accept a concern's application for WOSB/EDWOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, marital or family status, or political affiliation.

§ 127.355 How will SBA ensure that approved third-party certifiers are meeting the requirements?

(a) SBA will require third-party certifiers to submit monthly reports to SBA. These reports will contain information including the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third-party certifiers are meeting their obligations or information or data that may be useful for improving the program.

(b) SBA will conduct periodic compliance reviews of third-party certifiers and their underlying certification determinations to ensure that they are properly applying SBA's WOSB/EDWOSB requirements and certifying concerns in accordance with those requirements.

(1) SBA will conduct a full compliance review on every third-party certifier at least once every three years.

(2) At the conclusion of each compliance review, SBA will provide the third-party certifier with a written report detailing SBA's findings with regard to the third-party certifier's compliance with SBA's requirements. The report will include recommendations for possible improvements, and detailed explanations for any deficiencies identified by SBA.

(c) If SBA determines that a third-party certifier is not properly applying SBA's eligibility requirements, SBA may revoke the approval of that third-party certifier.

§ 127.356 How does a concern obtain certification from an approved certifier?

(a) A concern that seeks WOSB or EDWOSB certification from an SBA-approved third-party certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier.

(b) The concern must register in the System for Award Management (SAM), or any successor system.

(c) The approved certifier must ensure that all documents used to determine that a concern is approved for certification are uploaded in *https://certify.sba.gov* or any successor system.

■ 18. Effective October 15, 2020, §§ 127.400 and 127.401 are revised to read as follows:

§ 127.400 How does a concern maintain its WOSB or EDWOSB certification?

(a) Any concern seeking to remain a certified WOSB or EDWOSB must annually represent to SBA that it continues to meet all WOSB/EDWOSB eligibility criteria.

(1) Except as provided in paragraph (b) of this section, unless SBA has reason to question the concern's representation of its continued eligibility, SBA will accept the representation without requiring the certified WOSB or EDWOSB to submit any supporting information or documentation.

(2) The concern's recertification must be submitted within 30 days of the anniversary date of its original certification. The date of certification is the date specified in the concern's certification letter. If the concern fails to recertify, SBA may propose the concern for decertification pursuant to § 127.405.

(b) Any concern seeking to remain a certified WOSB or EDWOSB must undergo a program examination and recertify its continued eligibility to SBA every three years.

(1) SBA or a third-party certifier will conduct a program examination three years after the concern's initial WOSB or EDWOSB certification (whether by SBA or a third-party certifier) or three years after the date of the concern's last program examination, whichever date is later.

(i) *Example 1.* Concern A is certified by SBA to be eligible for the WOSB program on July 20, 2021. Concern A must recertify its eligibility to SBA between June 20, 2022 and July 19, 2022. Concern A will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2023. Concern A must recertify its eligibility to SBA between June 20, 2023 and July 19, 2023. Concern A will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2024. Concern A must recertify its eligibility to SBA between June 20, 2024 and July 19, 2024. Because three years have elapsed since its application and original certification, SBA will conduct a program examination of Concern A at that time. In addition to its representation that it continues to be an eligible WOSB, Concern A must provide additional information as requested by SBA to demonstrate that it continues to meet all the eligibility requirements of the WOSB Program.

(ii) *Example 2.* Concern B is certified by a third-party certifier to be eligible for the WOSB program on September 27, 2021. Concern B must recertify its eligibility to SBA between August 28, 2022 and September 26, 2022. Concern B will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2023. On March 31, 2023, Concern B is awarded a WOSB set-aside contract. Subsequently, Concern B's status as an eligible WOSB is protested. On June 28, 2023, Concern B receives a positive determination from SBA confirming that it is an eligible WOSB. Concern B's new certification date is June 28, 2023. Concern B must recertify its eligibility to SBA between May 29, 2024 and June 27, 2024. Concern B will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through June 27, 2025. Concern B must recertify its eligibility to SBA between May 29, 2025 and June 27, 2025. Concern B will continue to be a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) until June 27, 2026. Concern B must recertify its eligibility to SBA between May 29, 2026 and June 27, 2025. Because three years have elapsed since its certification date of June 28, 2022, Concern B must seek a program examination, by SBA or a third-party certifier, between May 29, 2025 and June 27, 2026. In addition to its representation that it continues to be an eligible WOSB, Concern B must provide additional information as requested by SBA or a third-party certifier to demonstrate that it continues to meet all the eligibility requirements of the WOSB Program.

(2) The concern must either request a program examination from SBA or notify SBA that it has requested a program examination by a third-party certifier no later than 30 days prior to its certification anniversary. Failure to do so will result in the concern being decertified.

§ 127.401 What are a WOSB's and EDWOSB's ongoing obligations to SBA?

Once certified, a WOSB or EDWOSB must notify SBA of any material changes that could affect its eligibility within 30 calendar days of any such change. Material change includes, but is not limited to, a change in the ownership, business structure, or

management. The notification must be in writing and must be uploaded into the concern's profile with SBA. The method for notifying SBA can be found on *https://certify.sba.gov.* A concern's failure to notify SBA of such a material change may result in decertification and removal from SAM and DSBS (or any successor system) as a designated certified WOSB/EDWOSB concern. In addition, SBA may seek the imposition of penalties under § 127.700.

■ 19. Section 127.402 is revised to read as follows:

§ 127.402 What is a program examination, who will conduct it, and what will SBA examine?

(a) A program examination is an investigation by SBA officials or authorized third-party certifier that verifies the accuracy of any certification of a concern issued in connection with the concern's WOSB or EDWOSB status. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application for certification, its most recent recertification, or its certification in connection with a WOSB or EDWOSB contract.

(b) Examiners may review any information related to the concern's eligibility requirements. SBA may also conduct site visits.

(c) It is the responsibility of program participants to ensure the information provided to SBA is kept up to date and is accurate. SBA considers all required information and documents material to a concern's eligibility and assumes that all information and documentation submitted are up to date and accurate unless SBA has information that indicates otherwise.

■ 20. Effective October 15, 2020, § 127.403 is revised to read as follows:

§ 127.403 When will SBA conduct program examinations?

(a) SBA may conduct a program examination at any time after the concern submits its application, during the processing of the application, and at any time while the concern is a certified WOSB or EDWOSB.

(b) SBA will conduct program examinations periodically as part of the recertification process set forth in § 127.400.

■ 21. Section 127.404 is revised to read as follows:

§ 127.404 May SBA require additional information from a WOSB or EDWOSB during a program examination?

At the discretion of the D/GC, SBA has the right to require that a WOSB or EDWOSB submit additional information at any time during the program examination. SBA may draw an adverse inference from the failure of a concern to cooperate with a program examination or provide requested information.

■ 22. Effective October 15, 2020, § 127.405 is revised to read as follows:

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

If SBA believes that a concern does not meet the program eligibility requirements, the concern fails to recertify in accordance with the requirements in § 127.400, or the concern has failed to notify SBA of a material change, SBA will propose the concern for decertification from the program.

(a) *Proposed decertification.* The D/GC or designee will notify the concern in writing that it has been proposed for decertification. This notice will state the reasons why SBA has proposed decertification, and that the WOSB or EDWOSB must respond to each of the reasons set forth.

(1) The WOSB or EDWOSB must respond in writing to a proposed decertification within 20 calendar days from the date of the proposed decertification.

(2) If the initial certification was done by a third-party certifier, SBA will also notify the third-party certifier of the proposed decertification in writing.

(b) *Decertification.* The D/GC or designee will consider the reasons for proposed decertification and the concern's response before making a written decision whether to decertify. The D/GC may draw an adverse inference where a concern fails to cooperate with SBA or provide the information requested. The D/GC's decision is the final agency decision.

(c) *Reapplication.* A concern decertified pursuant to this section may reapply to the program pursuant to § 127.305.

■ 23. Amend § 127.503 by adding a sentence at the end of paragraph (h)(2) to read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?

* * * * *

(h) * * *

(2) * * * If the business is unable to recertify its WOSB/EDWOSB status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

* * * * *

■ 24. Effective October 15, 2020, amend § 127.504 by revising paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (c) and (d) respectively, and adding a new paragraph (b).

The revision and addition read as follows:

§ 127.504 What additional requirements must a concern satisfy to submit an offer on an EDWOSB or WOSB requirement?

(a) 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) 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.

* * * * *

§ 127.505 [Removed and Reserved]

■ 25. Effective October 15, 2020, remove and reserve § 127.505.

§ 127.603 [Amended]

■ 26. Effective October 15, 2020, amend § 127.603 by removing the next to last sentence in paragraph (d).

■ 27. Effective October 15, 2020, amend § 127.604 by revising paragraph (f)(4) to read as follows:

§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

* * * * *

(f) * * *

(4) A concern that has been found to be ineligible will be decertified from the program and may not submit an offer as a WOSB or EDWOSB on another procurement until it is recertified. A concern may be recertified by reapplying to the program pursuant to § 127.305.

Jovita Carranza,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0827; Product Identifier 2019–SW–014–AD; Amendment 39–21120; AD 2020–10–02]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters (Type Certificate Previously Held by Eurocopter France) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2011–12–07 for Eurocopter France (now Airbus Helicopters) Model SA–365C, SA–365C1, SA–365C2, SA–365N, SA–365N1, AS–365N2, AS 365 N3, and SA–366G1 helicopters. AD 2011–12–07 required repetitively inspecting the adhesive bead between the bushings and the Starflex star (Starflex) arms and the Starflex arm ends. This new AD retains the requirements of AD 2011–12–07 while omitting helicopters with an improved Starflex installed from the applicability. This AD was prompted by the development of the improved Starflex by Airbus Helicopters. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD is effective June 15, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of June 15, 2020.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0827.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* in Docket No. FAA–2019–0827; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The street address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to remove AD 2011–12–07, Amendment 39–16714 (76 FR 35346, June 17, 2011) ("AD 2011–12–07") and add a new AD. AD 2011–12–07 applied to Eurocopter France (now Airbus Helicopters) Model SA–365C, SA–365C1, SA–365C2, SA–365N, SA–365N1, AS–365N2, AS 365 N3, and SA–366G1 helicopters and required a repetitive inspection of the adhesive bead between the bushing and the Starflex arm for a crack, a gap, or loss of the adhesive bead and the Starflex arm ends for delamination. AD 2011–12–07 was prompted by three cases of deterioration of a Starflex arm end. In two of these cases, the deterioration caused high amplitude vibrations in flight, compelling the pilot to make a precautionary landing.

The NPRM published in the **Federal Register** on November 1, 2019 (84 FR 58638). The NPRM proposed to retain the requirements of AD 2011–12–07 but omit helicopters with an improved Starflex installed from the applicability.

The NPRM was prompted by EASA AD No. 2008–0165R1, dated June 30, 2017 (EASA AD 2008–0165R1), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for Airbus Helicopters Model SA 365 N, SA 365 N1, AS 365 N2, AS 365 N3, SA 365 C, SA 365 C1, SA 365 C2, SA 365 C3 and SA 366 G1 helicopters, except helicopters with MOD 0762C37 installed in production. EASA advises that the Airbus Helicopters Starflex manufactured with improved materials make the 10-hour repetitive inspections specified in the original issue of its AD, EASA AD No. 2008–0165, dated August 28, 2008 (EASA AD 2008–0165), unnecessary. EASA AD 2008–0165R1 retains the repetitive inspections from EASA AD 2008–0165 but does not apply to helicopters with the new Starflex installed.

Comments

The FAA gave the public the opportunity to participate in developing this AD, but did not receive any comments on the NPRM.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Differences Between This AD and the EASA AD

The EASA AD uses the word "check," whereas this AD uses the word "inspect" instead. In some ADs, the FAA uses the word "check" to designate specific actions that may be performed by the owner/operator (pilot). An